



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/02567/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 December 2014

Decision and Reasons Promulgated  
On 17 December 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LACHHUMAN THAPA  
(No Anonymity Direction Made)

Respondent

**Representation:**

For the Appellant: Mr P Nath a Senior Home Office presenting Officer

For the Respondent: Mr S Karim of counsel instructed by Malik Law Chambers

**DETERMINATION AND REASONS**

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Nepal who was born on 29 December 1988 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Colvin ("the FTTJ") who allowed the claimant's appeal against the Secretary of

State's decision of 9 December 2013 to make a deportation order against him under the provisions of section 5 (1) of the Immigration Act 1971.

2. The claimant was granted a settlement Visa to join his parents in the UK on 4 January 2007 and he arrived here on 11 September 2007. Between 23 February 2011 and 28 August 2013 the claimant had 15 convictions covering 27 offences. 23 were for theft or related offences and 4 relating to police, courts and prisons. The last conviction was at East Kent Magistrates Court on 28 August 2013 when the claimant was convicted of theft and sentenced to 42 days imprisonment. He had stolen 18 bars of chocolate valued at £22.19. On 17 September 2013 the appellant was served with notice of his liability to deportation.
3. The Secretary of State's reasons for the decision were that the claimant's deportation was conducive to the public good because he was a persistent offender who showed a particular disregard for the law. It was considered that paragraph 398 (c) of the Immigration Rules applied but 399 (a) and (b) relating to family life did not. Paragraph 399A relating to private life did not apply. There were no exceptional circumstances which would outweigh the public interest in having the claimant deported.
4. The claimant appealed and the FTTJ heard his appeal on 22 September 2014. Both parties were represented. The FTTJ heard evidence from the claimant, his father, his mother a brother and a sister.
5. The Presenting Officer appearing for the Secretary of State accepted that the claimant's father's service with and discharge from the Brigade of Gurkhas put him in the category of the "historic injustice" to Gurkhas. Whilst this was a weighty matter it was submitted that it was outweighed in this case by the claimant being a persistent offender.
6. The FTTJ recorded that most of the facts in the case were agreed. The claimant came to the UK from Nepal for settlement with his family in 2007 when he was 19. His father had been discharged in January 1997 after long service. The claimant's criminal record meant that he was properly described as a persistent offender. The offences mainly related to theft to support his heroin addiction. He had been released from detention three weeks prior to the hearing before the FTTJ.
7. The FTTJ found that the claimant came within the provisions of paragraph 398 (c) of the Rules and was liable to deportation on the grounds that this was conducive to the public good because he was a persistent offender who showed a particular disregard for the law. Paragraph 396 of the Rules applied and there was a presumption that the public interest required his deportation. However, paragraph 399 (a) and (b) relating to family life did not apply to him. Paragraph 399A dealing with private life was not

applicable because he had not been in the UK for at least 20 years and still had ties to Nepal. He could not bring himself within the exceptions in section 117C of the Immigration Act 2014 relating to foreign criminals.

8. In these circumstances the FTTJ said that as the claimant could not bring himself within Article 8 under the Rules the question was whether there were “exceptional circumstances” such that the public interest was outweighed by other factors.
9. The FTTJ found that the claimant had always formed part of his parents’ household both in Nepal and in the UK apart from short period spent in prison. He had not established an independent household and had been financially dependent on his parents and siblings apart from a couple of years during which he worked. He had been addicted to drugs and was probably still in rehabilitation as it was only a few weeks since he had been released from detention. Whilst there were plans for him to go and live with a brother who was thought to have more influence over him this had yet to happen.
10. It was concluded that whilst family life did not normally subsist between parents and adult children the claimant as a 25-year-old who had always lived with his family and remained economically and emotionally dependent on his parents and siblings did have a family life with them.
11. The FTTJ placed considerable weight on the “historic injustice” attached to the family because of the claimant’s father’s service with the Brigade of Gurkhas. Even in the absence of direct evidence that they would have settled here earlier than they did the FTTJ found that had it not been for the historic injustice the family and the claimant would have settled in the UK much earlier. This was not a point considered by the Secretary of State in the refusal letter. It was not a “trump card” but a factor against which the claimant’s criminal behaviour should be weighed.
12. Most of the claimant’s offending arose as a result of his drug addiction. The FTTJ found that whilst there was no professional or expert evidence as to the risk of reoffending using a common sense approach there was a greater chance of the claimant being rehabilitated with his family in this country rather than without them in Nepal. In the summary of her reasoning the FTTJ said; “In the absence of an historic injustice to this family this may well not weigh much in the balance when it comes to the weight to be attached to the public interest in foreign criminals being deported. However, it is precisely because of the historic injustice being in the balance that I have decided on the facts of this case when considered cumulatively that the appellant’s deportation would result in unjustifiably harsh consequences for this family such that it would not be proportionate.” The appeal was allowed Article 8 human rights grounds.

13. The Secretary of State applied for and was granted permission to appeal to the Upper Tribunal. There are two grounds of appeal. Both submit that the FTTJ erred in law. The first argues that there is a material misdirection of law in the assessment of the public interest. There is said to be only one passing reference to this in paragraph 30 and the assessment is unbalanced. The second submits that findings are based on speculation. There was no expert or professional evidence to support the claimant's contentions as to the prospects of rehabilitation. The FTTJ applied "common sense" rather than the law. The view was based on assertions made by members of the family who had previously failed to exercise any control over the claimant during the course of his criminal activities. He was an adult and there had been a failure to take into account Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 principles.
14. I heard submissions from both representatives and reserved my determination.
15. In relation to the first ground of appeal it is not correct to state that there is only one passing reference to the public interest. This is addressed not only in paragraph 30 but in paragraphs 17, 18 and 23. It is clear that the FTTJ had the public interest in mind throughout her reasoning. Whilst it is submitted that the assessment is "woefully unbalanced" neither in the grounds nor in Mr Nath's submissions has it been suggested that there is any particular factor relevant to the public interest which the FTTJ failed to take into account. In reply to my question, Mr Nath said that it was not being suggested that the reasoning was perverse. I find that there is no material misdirection of law in the assessment of the public interest. Looking at the assessment as a whole I find that it is not unbalanced.
16. As to the second ground of appeal, it is common ground that there was no independent or professional evidence before the FTTJ dealing with the risk of reoffending. The FTTJ said as much. I find no merit in the tentative suggestion that the FTTJ should have adjourned for this to be obtained. It is possible that such evidence could have been provided either by those representing the appellant or by the Secretary of State. In the circumstances the FTTJ had to deal with the appeal on the evidence and as it was presented to her, as is made clear in paragraph 29. Understandably, Mr Nath did not press the suggestion that judges should not take a common sense approach. The FTTJ made a proper assessment of the evidence given by the witnesses which took into account inconsistencies about members of the family living in Nepal. It is clear that the FTTJ was aware that the family had not been able to keep the appellant from his offending behaviour in the past but it was open to her to come to the conclusion that as he had been free from drugs for about 13 months whilst

in detention and during the short period since his release there was a greater chance of his being rehabilitated from drugs and therefore his criminal behaviour if he had the support of his immediate family in this country rather than in Nepal where he did not have close relatives.

17. Mr Nath no submissions as to how Kugathas principles had not been followed. These require a careful assessment of the facts and circumstances of each case and on the facts of this case and for the reasons given in paragraphs 25 and 26 I find that it was open to the FTTJ to conclude that the appellant did have a family life with members of his family in this country.
18. I have not been asked to make an anonymity direction and can see no good reason to do so
19. I find that the FTTJ made a balanced assessment of the public interest and the claimant's particular circumstances reaching a conclusion open to her on all the evidence. The grounds are in essence no more than disagreements with conclusions properly reached. There is no error of law. I dismiss the Secretary of State's appeal and uphold the determination.

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Signed

Date 13 December 2014

Upper Tribunal Judge Moulden