Upper Tribunal
(Immigration and Asylum Chamber)

RG (Automatic deport – Section 33(2)(a) exception) Nepal [2010] UKUT 273 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 4 May 2010

Before

MR JUSTICE BLAKE, PRESIDENT
SENIOR IMMIGRATION JUDGE ESHUN

Between

RG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Zane Malik, Counsel, instructed by Malik Law Chambers, Solicitors
For the Respondent: Mr J. Parkinson, Home Office Presenting Officer

1. *When considering the automatic deportation provision in s. 32(5) UK Borders Act 2007, and the exemption at s.33(2)(a) relating to the claimant's private and family life (Article 8 ECHR), the Tribunal must give careful consideration to the factors set out at paragraphs 70-73 of Maslov v Austria [2009] INLR 47 ECHR.*

2. *Particular care is required in relation to the consideration of the Article 8 ECHR impact on those who were lawfully resident in the UK at the time when the offence was committed.*

DETERMINATION AND REASONS

Introduction

1. The appellant in this case is a citizen of Nepal born on 7 February 1988. He entered the United Kingdom on 24 February 2005, with a settlement visa showing that he was accompanying a parent. He was granted indefinite leave to remain. The appellant's father had served in the Brigade of Ghurkhas for eighteen years, and in 2005 when discharged on completion of his service had been granted indefinite leave to enter and remain in the UK. The other members of the appellant's immediate family came to the UK a little later and included his mother and his sister who first completed her education here in Nepal before relocating here. The appellant himself had been born in Hong Kong, where the Brigade of Ghurkhas used to have its HQ but only lived in that country for a short period and had returned to Nepal. The appellant's uncle had also been a serving soldier in the brigade of Ghurkhas and has been settled in the UK for longer than the appellant's father. It seems other members of his father's family now reside in Hong Kong. The appellant lived with his parents in the UK and was financially supported by them. He was studying to become an accountant, and his father paid his course fees.

2. On the night of the 12 April 2008 there was an incident at the Temple Pier of London when the appellant was involved in violent disorder with two other young men which ended with the victim, Mr Bishal Gurung, being thrown into the River Thames where he drowned. The victim and all the other participants were themselves Nepalese citizens. The appellant was arrested, charged with serious offences, and tried at the Central Criminal Court.

3. On 29 May 2009 he was convicted of the offences of manslaughter and violent disorder. He was sentenced at the same Court on 10 July 2009 to a total of three years in prison. He was not recommended for deportation. However, he was subject to the regime of automatic deportation pursuant to s. 32(5) of the UK Borders Act 2007.

4. He contended he was exempt from the requirement of automatic deportation because any such measure would breach his convention right, namely his right for family and private life pursuant to Article 8 of the European Convention of Human Rights (see UK Borders Act s. 33(2)(a)). The SSHD did not accept that the appellant was so exempt and issued a deportation notice on 23 October 2009. He appealed that notice to a panel of the AIT. The appeal was heard on 23

December 2009 and a determination dismissing that appeal was promulgated on 5 January 2010.

5. The appellant applied for reconsideration on two grounds. First, that the application of automatic deportation to him for an offence committed in 2008 was incompatible with the Article 7 of the ECHR as it was a retrospective penalty, and second, that the panel failed to properly apply the learning on Article 8 and its particular conclusions in the case. Reconsideration was ordered by SIJ Storey on 28 January 2010 and the matter came before us for determination as an appeal to the Upper Tribunal on 4 May 2010.

Retrospectivity

6. On that day counsel for the appellant applied for an adjournment to enable the Tribunal to have the benefit of the decision of the Court of Appeal on the Article 7 point in the case of AT (Pakistan) and JK (Pakistan) v SSHD [2010] EWCA Civ 567 where the argument had been made on 23 March 2010 and judgment was expected imminently.

7. We refused the application as we did not consider it reasonably likely that deportation would be considered a penalty within the terms of Article 7. In reaching that conclusion we had in mind the judgement of the Grand Chamber of the European Court of Justice in Uner v the Netherlands [2006] ECHR 873, where at paragraph 56 the Court said: -

> "It is moreover of the view that the decision to revoke a resident's permit and to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal law penalty does not constitute a double punishment either for the purposes of Article 4 of protocol 7 or more generally. Contracting States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society – provided, of course that, to the extent those measures interfere with the rights guaranteed by Article 8, para 1 of the Convention, they are necessary in a democratic society and proportionate to the aim pursued. Such administrative measures are to be seen as preventive rather than punitive in nature (see Maaouia v France)."

8. We are further aware that the question of retrospective application of the automatic deportation regime had been considered by Nicol J in Rashid Hussein v SSHD [2009] EWHC 2492 (Admin). We noted that experienced counsel appearing in that case had not sought to argue that Article 7 of the ECHR was engaged although it would have provided an answer to the point at issue. We indicated, however, that in the event that the Court of Appeal came to another decision, the parties could make representations to us as to what the appropriate course might be. We were further influenced in that decision by the knowledge that the appellant remained in immigration detention having served his

sentence and was entitled to know the outcome of his appeal as soon as was reasonably practicable.

9. In the event, on the 26 May 2010, the Court of Appeal dismissed the appeal in AT (Pakistan) [2010] EWCA Civ 567 agreeing with the decision of Nicol J and that of the European Commission in Moustaquim v Belgium 12 October 1989 rejecting the Article 7 case unanimously on the basis that deportation is not an additional penalty but a security measure. We observe that Uner v Netherlands does not appear to have been cited to the Court.

Assessment of family and private life

10. We accordingly proceeded to consider this appeal on the basis of the second ground for reconsideration, namely whether the panel had correctly assessed the appellant's claim to protection under Article 8 ECHR.

11. The AIT panel had heard from the appellant, his sister, his father and his uncle. The tenor of that evidence was that upon settling in the United Kingdom the family home in Nepal had been sold. The appellant had some friends in Nepal from his time there but no longer had any close family resident there. His father's other three brothers were resident in Hong Kong which the appellant could not enter even though he had been born there since he did not comply with the nationality and immigration regulations of that country. He would accordingly be isolated if he returned to Nepal and it would be very difficult for him to establish himself on his own there. His father said:-

> "I cannot leave him alone, my wife and myself need to go with him…. People will treat him very badly because he has been to jail… connection between here and there. Many people from Ghurkhas connection back there also… it was in the newspapers. No-one will give him shelter. I cannot go as I have a mortgage to pay and work. My wife cannot go as she has depression after her own mother's death. She would not be able to cope; it will be a disaster in our lives. We have no extended family."

12. The father was working as a bus-driver, paying the mortgage on his house in the UK, as well as supporting his son financially.

13. The Home Office submission was that:

> "it was not accepted that there was a family life, as there were no issues of dependency beyond the normal ties. It was cheaper for the Appellant to live with his parents whilst he was studying and his parents were assisting him financially, however, he had had part-time work in the past."

It was also submitted that there was very little private life as the appellant had only been in the UK for four years, some of which was following his arrest and detention. It was submitted it was not beyond a degree of hardship for the

whole family to relocate to Nepal. There was no right to choose where a family life should be exercised. Further, even if there was an unreasonable interference, the public interest and proportionality were relevant. The appellant had been convicted of a very serious crime and although he had a previous good character, and the crime was out of character, it was a very serious offence after a prolonged period of violence.

14. The panel reminded itself of the key jurisprudence from the UK courts and the decision of the ECtHR in Maslov v Austria and then considered the first question whether it had been established that there was a family life. They looked in turn at the position of the appellant's mother, father, sister and uncle to see whether there was a situation of dependency other than the normal in respect of an adult child and his family applying the test in Kugathas v SSHD [2003] EWCA Civ 31.

15. It concluded as follows:

> "we are not satisfied after considering all of the evidence available that the Appellant has established a family life with his parents sister or uncle would engage Article 8, given that the Appellant has been in this country for nearly five years we are satisfied that he had however established a private life. There is no doubt in our minds that the decision to remove the Appellant is in accordance with the law and does follow a legitimate aim. If we were incorrect in relation to our decision as to family life being established and in any event, given our finding that a private life has been established, it is necessary to go on to consider whether it is proportionate to remove the Appellant."

16. The panel then considered OH (Serbia) [2008] EWCA Civ 694 where Wilson LJ at paragraph 14 referred to the earlier judgment of the Court of Appeal in N (Kenya) where emphasis was placed on the fact that, irrespective of good character and absence of risk of re-offending, the public policy needs to deter and express society's revulsion of the seriousness of the criminality, went into the public interest side of the balance. Judge LJ (as he then was) had said in N (Kenya) at 83:-

> "The public good and the public interests are wide ranging but undefined concepts. In my judgement, whether expressly referred to a decision later or not, broad issues of social cohesion and public confidence in the administration system by which control is exercised over non-British citizens who enter and remain in the UK are engaged. They include an element of deterrents to non-British citizens who are already here, even if they are genuine refugees, and those minded to come so as to ensure that they clearly understand that whatever the circumstances, one of the consequences of serious crime may well be deportation. The SSHD has a primary responsibility for this system. His decisions are of public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgement. Provided he is satisfied that he would exercise the discretion differently to the SSHD he must say so. Nevertheless in every case he

should at least address the SSHD's prime responsibility for the public interest and the public good and the impact that these matters will probably have had on the exercise of his discretion "

17. The panel noted that HHJ Pontius, the trial judge at the Central Criminal Court had made the following observations:-

> "You were all young men with previous exemplary behaviour with no violence in your background. You all come from thoroughly respectable families and decent upbringings. You acted in a way which was wholly out of character… all of which can be said for the victim of your drunken aggression. It was an entirely unjustifiable, unprovoked and senseless episode and he paid with his life. Upon the evidence and by the jury's verdict based upon it, it is clear that none of you intended he should suffer serious harm, but still less that he should die… the jury's verdict make it plain that you were involved… in picking up the victim and throwing his near insensible body into the river but at that time you intended no specific harm. You must have been well aware, however, despite your own drunken state that there was a real risk that he would be hurt as a result of such reckless behaviour… you were involved in a violent attack following a chase from the boat… wholly defenceless… he was quickly brought to the ground… entirely incapable of any kind of retaliation, not only because of his state but also because of the sheer force of numbers. It was only a matter of good fortune that at that stage he did not suffer serious injuries… this was wanton and inexcusable violence in public and thus undoubtedly deserving of punishment which serves an important deterrent purpose. I bear in mind that none of you carried, still less used, a weapon. I have no doubt that all three of you now feel genuine remorse and indeed, shame, not only for your behaviour but also for the distress which you have caused your own families. It is a credit to them they came to Court to give you their support, although their own shame, which your appalling behaviour made obvious, despite their outward appearance of commendably calm dignity and respect for the Court. I would expect nothing less from any Ghurkha's family. I have concluded that so far as you are all concerned, there is virtually no risk of further serious harm to the public at your hands, and thus is not a case where a sentence of imprisonment for the public protection is required. You are all intelligent young men who have always worked hard to achieve academic distinctions and you are all ambitious to put those achievements to good use in your careers. This is very much to your credit. For the reasons I have set out this is a case where despite the undoubted gravity of the attack and while in no way diminishing the seriousness of his needless death, I can treat you all with a justifiable degree of leniency, confident that none of you will find yourself in a court again."

18. The panel noted that they had no information that would lead to a different conclusion as to the trial judge's assessment that there was virtually no risk of further serious harm to the public. Nevertheless it concluded that that was only one factor to be taken into account. But they also needed to take into account the need to deter foreign nationals from committing serious crimes. The panel accepted that there is likely to be some societal discrimination against the appellant in Nepal as a result of his conviction and the evidence that was before them as to the nature of the Ghurkha community there and the publicity given

to his conviction. They were not satisfied that this would result in a serious risk of harm to the appellant. They further noted:-

> "We are satisfied after considering all of the evidence that there are strong family ties between the appellant, his mother, his father, sister and uncle. Undoubtedly the Appellant will be better off in this country and as indicated above we accept that he may suffer some societal discrimination as a result of his criminal conviction."

They gave weight to the fact that the appellant is a young adult who had spent the majority of his formative years in Nepal and who could receive financial assistance and communication from his family in this country. After taking into account all the factors and giving due deference to the public interest criteria they came to the conclusion that the appellant's removal would not be disproportionate to the Respondent's legitimate aim of the prevention of crime and the control of immigration did not prejudice the family and private life of the appellant in a manner sufficiently serious to amount to a breach of a fundamental right protected by Article 8:

> "We do not accept that the Appellant has shown in his particular circumstances his case falls within that small minority of cases envisaged in Huang [2007] UKHL 11. The appeal was dismissed."

Did the Panel make an error of law in their assessment of Article 8?

19. Mr Malik submitted that the panel had erred in failing to recognise that the strong family ties that existed between the appellant, his parents, sibling and uncle constituted family life for the purpose of Article 8. His principal complaint was that the panel had compartmentalised the family life between the various members rather than seeing it as a whole. He further submitted that having discounted those links as family life, the panel when it went on to consider private life, essentially only looked at the period of residence that the appellant had in the United Kingdom rather than the quality of the relationships with his parents as an aspect of private life to which considerable weight should be attached.

20. In our judgement there is substance in these submissions. This was a case of a young man who had always formed part of his parents' household both in Nepal and the UK and had never established an independent household of his own. Although he was of the age of eighteen he was still financially dependent upon his father as a student. He was still a young man. He had been involved with other young men in some disorder where it seems alcohol had played a role, and tragic consequences, unintended by the appellant had followed that made the offending particularly serious. His father concluded that the appellant needed guidance and looking after. That would seem to be a sensible paternal response to these events. We are aware that as a serving Ghurkha soldier the father would only have long leave to return to Nepal at irregular periods during

his service and doubtless would have hoped to seen more of his son now that he had completed his military service and all the family had relocated to the UK. The concern of the families of those involved in this violence was obvious and is reflected in the remarks of the highly experienced trial judge, who was well able to assess the situation during the course of the criminal trial.

21. It is difficult to see why those unbroken links and continuing concern by the family for the welfare of the son does not constitute family life. The panel gave effect to the Home Office reliance on the case of Kugathas v SSHD. In that case the link relied upon was between a mother and her thirty-three year–old son and Sedley LJ observed that would not necessarily require the protection of Article 8 without evidence of further elements of dependency.

22. Since the hearing of 4 May, the decision in the case of the SSHD v HK (Turkey) [2010] EWCA Civ 583 has come to our attention. That was a case where the SSHD sought to appeal a decision by the AIT allowing an appeal against a deportation decision made against a twenty-two year-old student of Turkey who had been convicted of an offence of wounding with intent to cause grievous bodily harm as part of a gang response to an earlier incident where a friend of the Appellant's had been killed. The AIT found that family life was engaged and the Secretary of State appealed on the basis that this was not a correct application of the principle in Kugathas. Mr Sachdeva appearing for the SSHD cited the relevant passages in that case. Sir Scott Baker, giving the judgment to the Court of Appeal, rejected that submission in the following terms:

> "16. In my judgement Mr Sachdeva is seeking to read more into these passages than is warranted. Normal emotional ties will exist between an adult child and his parent or other members of his family regardless of proximity and where they live. Scrutinising the relevant facts, as one is obliged to do, it is apparent that the respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had a family life whilst he was growing up and I could not regard it as suddenly cut off when he reached his majority."

23. We drew the attention of the parties to this decision and invited observations both on this paragraph and paragraph [28] that we consider below. In due course we received written submissions from both parties for which we are grateful. Mr Parkinson invited us to conclude that this decision had no impact on the AIT's assessment and that the critical issue was whether there was family life still in existence at the date of the appeal.

24. We cannot agree with the first of these submissions. It appears to us the observations at [16] are directly relevant to the present case and the AIT were misled by the Home Office's reliance in Kugathas into reaching the conclusion that they did on the question of whether family life existed between the appellant, his parents and siblings. We conclude that the family life that the

appellant enjoyed with his family in this country from 2005 was not suddenly cut off when he reached the age of 18 and his personal circumstances had not otherwise materially changed. We further conclude he still enjoyed family life here when he committed this offence at the age of 20 and when this case came before the panel of the AIT when he was 21.

25. Moreover, even if family links after the age of eighteen between a child and his parents, who remains part of the same household, is still to be seen as an aspect of private life as the European Court of Human Rights appeared to have thought in the case of AW Khan v United Kingdom (Application no. 47486/06) 12 January 2010, at paragraph 32, nevertheless this was an aspect of private life to which particular respect is due and carried particular weight. Our analysis of the panel's judgement suggests that it was the fact of the five years' residence that constituted the private life that they put into the balance against the public interest in deporting people who have been found guilty of serious offences. No particularly striking ties had been formed by the appellant independent of those with his family during that comparatively short period of residence here. He had not married, or formed a family of his own.

26. It is clear that respect for family or private life does not normally require the admission of over-age children who have lived independently abroad, nor in a deportation case will the continuing family links of an independent adult of themselves, prevent removal on the basis of a disproportionate interference with the right of respect for that family life.

27. However, the essence of the present case appears to be one of family that have strong mutual links and that have always lived together and who expected to continue to live together in the UK upon completion of the father's military service, the uncle having completed that service and relocated to the UK some years earlier. The appellant's offending occurred before he had either built up a substantial independent private life for himself in this country or had set up an independent household but he was still a dependent member of his family's household.

28. We therefore conclude that substantial respect was due to those links by way of family life or private life different in kind from the mere number of years of residence here. The decision of the panel to the contrary was accordingly an error of law. In our judgment it is a material error because where the fundamental task is a balance of proportionality between the right of respect for family and private life on the one hand, and the public interest in deportation on the other, a failure to give weight to a factor in favour of the appellant to which weight ought to be attached, is likely to materially affect the overall balance. We accordingly set-aside the decision and we propose to remake it for ourselves

Remaking of the decision

29. The material facts are not in dispute, and have been fully recorded by the panel. Credibility is not an issue. The panel indicated it did not accept the father's evidence that he would return to Nepal to accompany his son if he were deported there as he felt he could not leave him alone, we see no basis for rejecting that as genuine evidence of the dilemma that confronts a parent in these circumstances. Although twenty, the son had got himself into difficulties and was clearly in need of guidance and support. It would be unreasonable to expect the father and the family to relocate en bloc to Nepal where they had sold their home, in order to make their future life in the UK, simply because of the appellant's criminal conduct.

30. There was family and private life which required respect and deportation would interfere with the way that private and family life had been led in the past and with the respect that was due to it.

31. It is then necessary to assess the strength of the public interest in justifying an interference with such right of respect as is proportionate in all the circumstances. There is no doubt that deportation is a measure of prevention that can promote a legitimate aim for public safety, the prevention of disorder or crime, the protection of the rights and freedoms of others albeit that general deterrence and an expression of public revulsion are not themselves identified as legitimate aims to justify interferences with family life under Article 8(2).

32. The decision in N (Kenya) v SSHD [2004] EWCA Civ 1094 concerned an appellant sentenced to fourteen years imprisonment for offences of abduction, threats to kill, three counts of rape and false imprisonment. The adjudicator had allowed the appeal exercising his discretionary judgement under the then Immigration Rules and the Court of Appeal upheld the Tribunal in its conclusion that he was wrong to have done so. OH (Serbia) [2008] EWCA Civ 694 concerned a youth who was guilty of wounding with intent to cause grievous bodily harm and was sentenced to four years' custody and four years' extended licence period; the question was whether the Judge had erred in law in exercising discretion under the deportation rules.

33. Doubtless very serious offences such as drug-dealing, use of deadly weapons, sexual violence, and related criminality can well be marked out by deportation decisions designed to supplement society's abhorrence of such conduct and protect the public from others committing such crimes by the principle of deterrent.

34. The principal offence for which this appellant had been convicted was manslaughter. Causing the death of another human being is an offence that leaves a legacy of suffering for those who have lost family members. But manslaughter, as has often been recognised, is an offence that can range in seriousness, reflecting the appropriate penalty that can vary from a community penalty, or even a conditional discharge at one end of the scale to life

imprisonment at the other. Here, as the trial judge's sentencing remarks make plain, there was no premeditation, there was no weapon carried or used, there was no intent to cause really serious bodily harm, and the appellant on the evidence recorded by the judge in his detailed sentencing remarks, had not instigated the act which caused death, namely throwing the deceased into the Thames. Despite Mr Parkinson's submissions to the contrary we do not consider that these features were sufficiently identified and weighed in the balance by the AIT.

35. In HK (Turkey) (above) the Court of Appeal further observed:

> "28. Among serious offences, there are of course degrees of seriousness. The best indication of the gravity of the particular offence will ordinarily, it seems to me, be found in the Judge's sentencing remarks and the sentence passed, the starting point of course being the actual offence itself, in this case one under section 18 of the Offences Against the Person Act 1861. In my judgment tribunals, and indeed the Secretary of State, should be careful not to make findings or draw inferences that are inconsistent with anything said by the judge who presided over the trial. In this case the Asylum and Immigration Tribunal rightly directed itself at paragraph 43 in the passage I have set out that the Secretary of State has a duty to deter and to remove foreign nationals who commit serious criminal offences. He was, in my view acting fully in accordance with the law in deciding to deport the respondent. But, it seems to me, when it comes to the proportionality exercise it is necessary to form a view where on the scale of seriousness the respondent's conduct comes so that the Article 8 considerations can properly be balanced against the Rule 364 presumption. In some cases the seriousness of the offence is so overwhelming as to trump all else. This, however, was not a case, serious as it was, where the gravity was such that deportation was virtually inevitable albeit there would have to be compelling reasons to allow the respondent to remain here.
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> 29….Admittedly Rix L.J. said in *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544 paragraph 37 the public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question of the right to re-offend in this country; it extends to deterring and preventing serious crime generally and to upholding abhorrence of such offending. However, it may, depending on the circumstances become relevant in the balancing exercise when one comes to look at Article 8 considerations and consider whether it would be disproportionate to make a deportation order. As Richards L.J. pointed out in *JO (Uganda) & anr v Secretary of State for the Home Department* [2010] EWCA Civ 10, paragraph 29 the actual weight to be placed on the criminal offending must depend on the seriousness of the offence (s) and the other circumstances of the case."

36. In our judgment it is easier to justify a response of deterrence and the expression of revulsion for very serious premeditated offences of the kind we have identified earlier. The present case is significantly different from this class or the offences committed in the case of N (Kenya) or OH (Serbia).

37. Count 1 of the indictment was violent disorder for which the appellant received twelve months' imprisonment, again serious in the sense of any outbreak of disorder on the streets is serious, but again not the kind of premeditated conduct that by itself might be said to make the appellant's continued presence in the UK a detriment exercising judicial discretion.

38. This is a case to which the automatic deportation provisions have applied because a sentence of twelve months' imprisonment was imposed. Deportation is automatic save where a human rights' claim prevented it. Neither the trial judge nor the respondent has decided that deportation is the appropriate course in the public interest in the light of the particular circumstances of this offence. The crime is a serious one inevitably, but in our judgment was not of the degree of seriousness that required a severe sentence or a recommendation for deportation.

39. There is a danger in equating the kind of seriousness of offence needed to justify deportation irrespective of any likelihood of re-offending and the criteria for automatic deportation subject to human rights claims under the Borders Act. Where automatic deportation arises in a case where there is a family and private life to which respect is owed, the task of the Immigration Judge is to carefully assess the factors that are identified in the case of Maslov v Austria 23 June 2008 [2009] INLR 47 where the Grand Chamber of the Court said:

> "70. The court would stress that while the criteria which emerge from its case-law and are spelled out in the *Boultif* and *Üner* judgments are meant to facilitate the application of Art 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Art 8 pursues, as a legitimate aim, the 'prevention of disorder or crime' …, *the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.*
>
> 71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family life of his own, the relevant criteria are:
>
> - the nature and seriousness of the offence committed by the applicant;
>
> - the length of the applicant's stay in the country from which he or she is to be expelled;
>
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> - the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult ….

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, *it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth*, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2001)15 and Rec(2002)4 …."

(words in italics are our emphasis)

40. Bringing together the observations made earlier in this judgment, and addressing these issues we would observe:

i) There was a clear judicial finding by an experienced criminal judge that the appellant could be expected not to cause future disorder or engage in further criminal activities. No material has been identified that might undermine that conclusion, and so the ultimate aim of justification of the interference has not been made out.

ii) The appellant is a young adult who has not yet founded a family life of his own.

iii) The nature and seriousness of the offence are not such as to justify interference with family and private life alone, irrespective of the threat to the public interest that the appellant's future conduct might create.

iv) The appellant has been present in the UK for 5 years. He entered as a child with the expectation of indefinite residence here, but has not lived here from an early age or most of his life as in the case of HK (Turkey) or A.W. Khan v United Kingdom. As the Court of Appeal observe in JO (Uganda) [2010] EWCA Civ 10 this is neither a necessary precondition nor determinative factor and each case must be assessed on its own merits. We observe that where there has been long residence as a child that can outweigh the public interest in deportation in even the most serious kind of offences, such as wounding with intent to cause grievous bodily harm, and dealing in Class A drugs.

v) Two years have lapsed since the commission of the offence. The appellant remains in immigration detention, but nothing suggests that his conduct would threaten public safety if released. His family are concerned for him and would accept him back to support him and his father is anxious that he develops

the self discipline and maturity to prevent conduct that puts him in situations of public disorder in the future.

vi) All the appellants' immediate and closest family members are in the United Kingdom. He has no house, home, family or social support network to turn to in Nepal.

vii) The appellant's crime was committed at age 20 as a young adult rather than a juvenile. Even for those committing offences over the age of 18, youth remains one of the most powerful mitigating factors in criminal sentencing policy and it is also a considerable factor in the assessment of justification of interference with family and private life in the public interest.

41. We are also troubled by the panel's reference to Lord Bingham's observations in Huang. It was inappropriate in a case of this sort and such translocation of judicial comment made in one context to another is more likely to mislead than assist. It is plain that the question for evaluation in a criminal deportation of someone lawfully resident here is not whether the case is "exceptional" or belongs to "a small minority". The observations in Huang were directed to cases where despite failure to comply with the Immigration Rules admission may be required by Article 8. Here the appellant and his family were all lawfully admitted and no question of primary immigration policy arises.

Conclusions

42. Three years after his entry to the UK the young man was party to an act of disorder with another that had terrible unintended tragic consequences. Deportation has a significant impact upon his relations with his family with whom he expected to continue his life in the same jurisdiction when he moved with them as a child from Nepal to the UK. The offence is wholly out of character and the judicial assessment is that he will be unlikely to ever appear before the criminal courts again.

43. The regime of automatic deportation where it has impact upon the family or private life of those lawfully resident here and deserves respect requires a very careful consideration of the seriousness of the offence and the extent to which the deportation can be said to enhance public protection on the one hand and the impact upon private and family life on the other.

44. We conclude on all the evidence in the case that deportation of this young man for this offending with the serious consequences it would have for him and his family is disproportionate. It is therefore not necessary in a democratic society for one of the reasons recognised by Article 8(2). We conclude that that the first exception to automatic deportation applies (s.33(2)(a) Borders Act 2007) and the respondent could not make the deportation order under appeal.

This appeal is allowed.

45. We propose to formally promulgate this decision at an oral hearing when we shall set aside the deportation order. As a consequence we shall also set aside the order of detention pending removal with effect from the date of promulgation subject to any further submissions we receive on that day. This decision has been communicated in draft in advance to enable the representatives to consider what submissions (if any) they wish to make about consequential matters.

Signed

Mr Justice Blake,
President of the Upper Tribunal,
Immigration and Asylum Chamber