Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13184/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 4 May 2017	**On 10 May 2017**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CHANDRAPRASAD GURUNG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Kotas, Senior Home Office Presenting Officer
For the Respondent: Mr Jacobs, Counsel instructed by Fisher Jones Greenwood Solicitors

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 14 October 2016 of First-tier Tribunal Judge Herbert OBE which allowed the appeal against deportation of Mr Gurung on Article 8 ECHR grounds.

2. For the purposes of this decision I refer to the Secretary of State as the respondent and to Mr Gurung as the appellant, reflecting their positions before the First-tier Tribunal.

3. The background to this matter is that Mr Gurung has been a soldier in the British Army for many years. He came to the UK in 2001 in that capacity and went on a number of foreign tours with the army. On 18 April 2008 he married another Nepalese national. On 27 April 2009 the appellant's wife came to the UK. On 19 August 2010 the appellant and his wife had a son, Ryson. The appellant's wife and son are both now British nationals. On 7 March 2013 the appellant was subject to a court martial and was convicted of counts of theft and fraud. He was sentenced to one year's detention at a Military Corrective Training Centre. He was also reduced in rank and dismissed from army service.

4. On 27 November 2015 the respondent made a decision to deport the appellant as his behaviour was found not to be conducive to the public good. The index offences were within military proceedings and not "criminal" in the usual legal sense, hence the respondent made the decision to deport on conducive grounds under Section 5 of the Immigration Act 1971 and not under the automatic deportation provisions in s.32 of the UK Borders Act 2007. The appellant appealed against the decision to deport on Article 8 grounds and on 4 October 2016 the appeal came before Judge Herbert.

5. Judge Herbert allowed the appeal under paragraphs 399(a) and 399(b) of the Immigration Rules. He found that it would be unduly harsh for the appellant's son if the appellant were to be deported. He found that it would be unduly harsh for the appellant's partner, also a British citizen, if the appellant were to be deported.

6. It was conceded at the hearing before me that the decision relating to the partner was erroneous as the judge failed to take into account the fact that little weight could be placed on the relationship where it had been formed whilst the appellant was here without leave and precariously. At the same time, it was also conceded by the respondent that this could not be a material error here where the decision really turned on the circumstances of the appellant's son. Ground four of the appeal was not pursued further as a result.

7. The first ground of appeal was that in the assessment of the deportation of the appellant being unduly harsh for his son, the judge failed to have a proper regard for the public interest. This ground alleges that "the only real mention of the public interest in the judge's findings appears at [45]". This ground goes on to indicate that in the view of the Secretary of State the judge minimised the severity of the offending by referring three times to the appellant having repaid the money concerned in the index offence. The Secretary of State also objected to the judge's reference at [45] to the appellant's sentence being "limited" to twelve months which the Secretary of State maintains indicates that the judge did not view the offence as

serious. The respondent also considered that when assessing the public interest the judge appeared to "largely ignore the sentencing remarks in his findings" and preferred the positive evidence of the appellant's former commanding officer.

8. This ground is wholly unarguable. The First-tier Tribunal Judge set out the respondent's case at [9] to [26]. In paragraphs [10], [12], [14] and [24] the judge set out the respondent's view of the public interest. The public interest is referred to again at [26]. At [39] the judge cites the provisions of paragraph 398 of the Immigration Rules which set out to the public interest in the deportation of the Secretary of State. At paragraph [44] the judge refers to the case of **MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 8617**, quoting a passage that considers the provision of Section 117C of the Nationality, Immigration and Asylum Act 2002 that "the more serious the offence committed by a foreign national criminal the greater is the public interest in deportation of the criminal".

9. As the grounds indicate, the judge went on at [45] to refer again to the public interest not requiring deportation if Exception 2 under Section 117C(5) was met. It is therefore simply not the case that the judge referred to the public interest only at [45]. He set out at numerous points the proper role of the public interest in his assessment.

10. It is also unarguable that the judge minimised the severity of the offending. At [10] the judge set out the sentencing remarks from the court martial and in the first line indicates his awareness that the sentencing panel found that the appellant had committed "a particularly serious offence". At [37] the judge says this, in the first paragraph of his findings:

> "It is also clear that this was a serious set of offences and a clear breach of trust in a position that this former corporal had with the recruits for which he was responsible".

11. The reference in [45] to the sentence being "limited" is entirely in line with the provisions of s.117C(1) which requires the Tribunal to assess the degree of seriousness of an offence. It is not my view that this comment can in any way be read as the judge minimising the offence one which he clearly characterises within his decision as being "serious", as above. The comments of the appellant's commanding officer which are commented on by the judge at [43] were part of the evidence before the judge which he was entitled to take into account and no error arises in that regard.

12. The second ground of appeal maintained that although the judge referred at [44] to the correct approach to the "unduly harsh" provisions this was not reflected in his decision. The grounds also argued that where the judge set out at [40] to [42] his view of the difficulties for the appellant's son, referring to his situation being "unduly harsh" if the appellant left the UK, this came before any consideration of the public interest and showed

that the judge had already made up his mind without taking into account the public interest.

13. Again, this ground is not arguable. As above, the judge set out the correct test from legislation in paragraphs [39] and [40] confirming his understanding that the deportation of the appellant was "conducive to the public good and in the public interest" because of his offence and only then went on to consider the situation of the child. The consideration of whether the appellant's deportation would be unduly harsh for his son was set out in [40] to [45]. To suggest that they are made without proper account of the public interest ignores the numerous correct self-directions considered above and is really a challenge only to the ordering of the paragraphs in this part of the decision. As above, almost his first comment in his findings on the factual situation here is that it was "clear that this was a serious set of offences and a clear breach of trust". The respondent's challenge is really one of perversity rather than legal misdirection. Given the materials before the judge, including a psychologist's report and the evidence of the appellant and his wife on the difficulties for the child if the appellant were to be deported, it was manifestly open to him to reach a decision in the applicant's favour here, notwithstanding the fixity of the public interest in deportation.

14. The third ground maintains that the judge "augmented" the findings of the psychologist who interviewed the family who stated that the appellant's son would be "very traumatised" rather than the appellant's deportation having a "devastating" effect on the child as set out at 40 of the decision. This challenge is one of semantics and is without force. The judge does not misquote or mistake the psychologist's report in stating that the appellant's removal would be devastating where it is characterised by the psychologist as very traumatising. The appellant and his wife also gave evidence which was not challenged that the son was strongly attached to his father who was a very regular and important presence in his life. The grounds referred to the judge falling into error in relying on the psychologist's comments on the child situation in Nepal but this cannot be material where the decision is made on the basis of the child remaining in the UK and the appellant being removed, any comments on the child situation in Nepal therefore being immaterial. The grounds also argue that the situation here was harsh but not "unduly harsh" and that the consequences for the child were those that arise in the normal course of deportation. As above, the judge here had a report from a psychologist indicating a higher level of difficulty for this child and also the evidence of the parents which he was also entitled to take into account. These assessments are made on the particular circumstances of each case and it is rarely of assistance to refer to other cases with different facts.

15. I have dealt with the fourth ground of appeal above which related to the finding on the appellant's partner which the respondent accepts cannot be a material point here.

16. For all of those reasons I concluded that the decision here does not disclose a material error on a point of law.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed:  Dated: 9 May 2017
Upper Tribunal Judge Pitt