



European Convention on Human Rights (ECHR) - Article 8

This Article states:

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
- 3 For some time now this Article has been much in the news because paragraph 1 has been successfully pleaded by many convicted foreign criminals as a means of preventing deportation. Attention has been focussed recently on two decisions by Mr Justice Blake, President of the Upper Immigration and Asylum Chamber of the Tribunal (referred to hereafter as "the Upper Tribunal"). The case of the appellant *Sanade* is one decided in the Upper Tribunal of which I have so far been unable to find an official report. According to Press reports the appellant was a male nurse who was convicted of indecent assault on a woman patient. After he had served his sentence he contested a deportation order made against him by pleading that he had a wife and children in the UK and therefore deportation would be an interference with his family life. It appears that there was some doubt as to whether his family was in the UK at the time, but those doubts did not prevent his plea from being successful.
- 4 This decision was followed a few days later by a judgment of the Court of Appeal, *Gurung v. Secretary of State for the Home Department* [2012] EWCA Civ 62, which reversed an earlier decision by Mr Justice Blake. The appellant was a young Nepalese who had been allowed to remain in the United Kingdom with his father, a long serving soldier in the Brigade of Gurkhas and who had indefinite leave to remain in the United Kingdom. In April 2008 he and others became involved in a drunken brawl with other young Nepalese men in central London which resulted in one of them being rendered unconscious. The appellant and two others picked up his body and threw him into the Thames, as a result of which he died. The appellant was convicted of manslaughter and disorder and sentenced to three years' imprisonment.
- 5 Section 32 of the United Kingdom Borders Act 2007 provides for the automatic deportation of a foreign criminal who is convicted of one of a set of specified offences, including manslaughter, in the United Kingdom and is sentenced to a period of imprisonment of at least 12 months. Section 32(4) states expressly that "for the purpose of section 3(5)(a) of the Immigration Act 1971 the deportation of a foreign criminal is conducive to the public good." Section 3(5)(a) provides that a person who is not a British citizen is liable to deportation if the Home Secretary deems his deportation to be conducive to the public good. Section 33 of the 2007 Act provides for certain exceptions to the operation of section 32, including any case in which automatic deportation would breach the human rights of the criminal concerned. Gurung as a convicted foreign criminal who had been sentenced to imprisonment for three years for manslaughter was

liable to automatic deportation under section 32. Before the Upper Tribunal the appellant appealed against an order for automatic deportation on the grounds that it would be an interference with his right to a family life under Article 8 and would also be disproportionate in relation to the severity of the crime of which he had been convicted.

6 The Upper Tribunal allowed the appeal for the following reasons:

- (i) It was accepted that the crime was serious "but in our judgment was not of the degree of seriousness that required a severe sentence or a recommendation for deportation"
- (ii) The trial judge had found that the appellant could be expected not to cause future disorder or engage in further criminal activities
- (iii) The nature and seriousness of the offence were not such as to justify interference with family and private life.
- (iv) The appellant was detained under the Immigration Act 1971 but there was nothing to suggest that his conduct would threaten public safety if he was released.
- (v) His family were keen to have him back and support him.
- (vi) All his closest family members were in the United Kingdom. He had no family or social support network in Nepal.

7 The Court of Appeal left no doubt as to their disapproval of this decision in the opening paragraph of their conclusions:

"It seems to us...that there has not been a properly measured approach to the critical question whether the deportation of Mr Gurung would be a proportionate response to his offending. Much of the determination has the appearance of a search for reasons for not deporting him rather than – as in our view it ought to have been – an inquiry into whether, despite the statutory policy of automatic deportation, Article 8 of the Convention would be violated by its implementation."

The appellant had not himself initiated the violence which led to the killing, but he had helped to push an unconscious victim into the river. He was aware of the risk to which the victim was being exposed. The trial judge had described his conduct as "wanton and inexcusable violence". The Court did not regard the lack of a recommendation for deportation by the trial judge as significant, since Section 32(4) of the 2007 Act states that the deportation of a foreign criminal who falls within the provisions of section 32 is conducive to the public good.

8 The Court of Appeal concluded that there had been an error of approach on the part of the Upper Tribunal. The appeal was allowed and the case was remitted to the Upper Tribunal for redetermination on its merits. In theory it is possible for the Upper Tribunal to reconsider the case and come to the same conclusion as before, but from a practical point of view that seems unlikely, in view of the Court's strong disapproval. This is a welcome decision and it is to be hoped that it will influence the lower courts and the Tribunal to be more cautious in allowing appeals against deportation on Article 8 grounds.

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