



IAC-AH-VP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/14864/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 5 March 2013**

**Determination Promulgated
On 3 April 2013**
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAUSHAD SABOOR

Respondent

Representation:

For the Appellant: S Allan, a Senior Home Office Presenting Officer
For the Respondent: Ms N Manyarara, instructed by Jein Solicitors

DETERMINATION AND REASONS

1. The respondent Naushad Saboor, was born on 26 July 1977 and is a male citizen of Sri Lanka. By a determination promulgated on 7 December 2012 the First-tier

Tribunal allowed on human rights grounds (Article 8 ECHR) the appeal of the respondent against the decision of the Secretary of State dated 19 June 2012 to deport the respondent to Sri Lanka. The respondent had previously claimed asylum in the United Kingdom but his appeal had been dismissed by the Asylum and Immigration Tribunal in a determination promulgated on 5 September 2007 (hereafter referred to as the "AIT Tribunal/determination").

2. There are two grounds of appeal. First, the Secretary of State asserts that the Tribunal had failed to apply the Immigration Rules (including those Rules relating to the application of Article 8 ECHR) but had, instead, simply proceeded to a determination of the appeal on human rights grounds.
3. I find that the Tribunal should have applied the Immigration Rules including those new Rules relating to the operation of Article 8. However, I find that any error of law perpetrated by the Tribunal in failing to consider the appeal under the Rules is not such that I should proceed, on that basis alone, to set aside the determination. I reach that finding because the Tribunal would have been obliged by virtue of Section 6 of the Human Rights Act 1998 to consider whether the decision to deport the respondent infringed his human rights, including his rights under Article 8 ECHR. If the Tribunal had applied the Immigration Rules (as it should) it may have concluded that the respondent should succeed in his appeal under the Rules (in which case consideration of Article 8 ECHR might have been less important) or it would have concluded that the respondent could not succeed under the Rules, in which case it would have proceeded subsequently to determine the appeal under Article 8 ECHR. Given that that Tribunal allowed the appeal on that latter ground, I do not consider any error of law in failing to apply the Immigration Rules should lead me to set aside the decision and remake it.
4. The second ground has more merit. It submitted the Tribunal had not reached sustainable findings in its determination, in particular as to the credibility of the respondent. The issue of the respondent's credibility arose "in the context of the background to his criminal conviction." It is the case that (as recorded in the trial judge's sentencing remarks) the respondent had not sought to explain his violent action which had led to his conviction and imprisonment. As the grounds note, the appellant "is apparently a happily married man and seeking to be granted some form of leave ... The Tribunal speculates that the cause of his actions [leading to his conviction] was a reaction to homophobic comments or behaviour." It is asserted that this finding is without foundation.
5. I have to say that I find parts of the reasoning of the Tribunal and its findings to be problematic. The respondent had been convicted in December 2002 at Snaresbrook Crown Court on two counts of causing grievous bodily harm with intent. He had been sentenced to eight years' imprisonment and he was recommended for deportation by the trial judge. The trial judge (HH Judge Medawar) noted that, "You were convicted on plain evidence of using extreme violence for *no understandable reason or for none that you have been prepared to reveal.*" [my emphasis] It was noted that one of the victims of the respondent "may not recover fully or at all." The

respondent spent four years in prison and has not offended since the time of the index offence. It was noted that the respondent had (somewhat belatedly) “now accepted responsibility for his actions and had expressed contrition.” [53]. The previous panel, considering the respondent’s asylum appeal, had found that the respondent had demonstrated no remorse. The respondent now has a child by a British citizen (Ms Begum) and she is expecting the birth of another child. The respondent looks after their son whilst Ms Begum works.

6. The problems in the reasoning and findings of the Tribunal relate in part to the application of **Devaseelan [2002] UKIAT 00702**. At [51], the Tribunal wrote “We would normally take the panel’s factual findings as our starting point. However, the appellant’s situation has greatly changed since that determination was promulgated. For our purposes, the panel’s findings are of very limited application. However, we adopt two of them. We find that, as at the date of his crimes, the appellant was a homosexual.” At [52], the Tribunal also “endorsed the panel’s findings that there was only a slight risk that the appellant would reoffend (paragraph 51). He was released more than six years ago and has committed no further offence ... His probation officer provided a good reference. We regard it as highly unlikely that he will reoffend.”
7. It is not clear for what reason the Tribunal had decided that it may pick and choose the factual findings of the previous Tribunal. The fact that the “appellant’s situation had greatly changed” since the first determination does not render the panel’s findings, for example as to the respondent’s credibility, irrelevant. It is also not clear why the Tribunal has rejected some of the findings of the previous panel but had chosen to adopt others. Indeed, having adopted the finding of the previous panel that the appellant was a homosexual, the Tribunal went on to conclude that, “over the period August 2007 to September 2008, [the respondent] fell in love with Ms Begum and, as from 17 September 2008, his sexual orientation was transformed from homosexual to firmly heterosexual.” That finding is problematic to say the least. It appears not to be justified by reference to any evidence and the notion that an individual’s sexuality should change at a particular point in time may be difficult to justify in any event. The finding may not have been a problem but for the fact that it is used later in the Tribunal’s determination at [73] where the Tribunal seeks to provide reasons for the respondent’s violent conduct where the respondent himself has (as the trial judge – see above - noted) offered none. The Tribunal wrote, “We are satisfied the appellant has demonstrated contrition. We consider it likely that he was provoked into acting as he did and that his conduct was entirely out of character.” That finding is at odds with the passage earlier in the determination [26] where the Tribunal noted that the respondent had not “suggested that he was provoked” to commit the violent attack. At [27], the Tribunal found that it was “likely the appellant was provoked into making the attack as he did as a result of homophobic comments and/or behaviour.” According to the Tribunal’s findings, the respondent was at that time a homosexual but his sexuality had subsequently “transformed.”
8. I have to say that I find this reasoning to be without proper foundation and the First-tier Tribunal has entered the territory of speculation. The question, however, is

whether if the Tribunal has erred as a consequence of its faulty reasoning, its conclusions and decision should be set aside. In the respondent's favour, there is the fact that both panels have found that the respondent committed an isolated act of violence which was unlikely to be repeated. The previous panel thought that the respondent was at low risk of reoffending and the present Tribunal had the advantage of the fact that some years had elapsed since the respondent was released from prison during which he had committed no further offence. Secondly, it is not disputed that the respondent is married to Ms Begum and that she has a child by him. I certainly consider that this respondent is a man of little credibility, a finding which the present Tribunal should have adopted from the previous panel. However, any finding as to the respondent's credibility would not appear to undermine the Tribunal's findings regarding the strength of his relationship with Ms Begum (which the appellant does not challenge) and the fact that their child is a British citizen. Stripping away the faulty reasoning and findings of the Tribunal, one is left with a respondent who has committed a very serious offence for which he has been imprisoned; who gave no explanation for his offence and has only very belatedly shown contrition; who may well have lied about his sexuality in the past; has not committed a further offence and is probably at low risk of reoffending; who is married to a British citizen by whom he has one and will soon have a further child. Given those facts, the Tribunal's conclusion, that the respondent's family rights as protected by Article 8 ECHR would suffer a disproportionate interference if he were to be removed, would appear to be sustainable. The public interest in the removal of violent criminals is a strong one. However, in the light of the respondent's family ties (and the Article 8 rights of Ms Begum and her child) coupled with the fact that the respondent is unlikely to reoffend the Tribunal's conclusion that the public interest is outweighed in this instance was open to it. For the reasons I have set out above, I find that the errors of approach and reasoning of the First-tier Tribunal ultimately do not undermine its conclusion. It is for that reason that I will dismiss this appeal and decline to set aside and remake the First-tier Tribunal's determination.

DECISION

9. This appeal is dismissed.

Signed

Date 27 March 2013

Upper Tribunal Judge Clive Lane

Approval for Promulgation

Name of Upper Tribunal Judge issuing approval:	Mr C N Lane
Appellant's Name:	Naushad Saboor
Case Number:	IA/14864/2012

Oral determination (please indicate) no

I approve the attached Determination for promulgation

Name: Upper Tribunal Judge Clive Lane

Date: 24 13

Amendments that require further action by Promulgation section:

Change of address:

Rep:

Appellant:

Other Information:

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