



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

Appeal Number: PA/14192/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 3 April 2019**

**Decision & Reasons Promulgated
On 17 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

KKD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Sanders, Counsel, instructed by Milestone Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Malaysia born on 18 June 1992 who appealed to the First-tier Tribunal against a decision of the respondent dated 10 December 2018 to refuse the appellant's protection claim. In a decision, promulgated on 30 January 2019, Judge of the First-tier Tribunal Cary dismissed the appellant's appeal on all grounds.
2. The appellant appeals with permission on the following grounds:
Ground (i): The First-tier Tribunal did not take into account the country information and/or submissions relied upon by the appellant;

Ground (ii): The First-tier Tribunal's reliance on the absence of physical harm/threats/arrest to the appellant when he was in Malaysia led him into error;

Ground (iii): The First-tier Tribunal's findings that the appellant is excluded from the Refugee Convention as he would conceal his sexuality for reasons not connected to persecution is not one which was open to him to find;

Ground (iv) The First-tier Tribunal has failed to take into account the most salient points and/or the appellant's submissions when finding the appellant would not face very significant obstacles to integration in Malaysia.

3. For the reasons set out below I am not satisfied that the appellant's grounds of appeal are made out. The main thrust of the submissions before me related to the judge's consideration of the background material before him. Although Ms Sanders took me through the evidence, including the evidence in the supplementary bundle which was before the First-tier Tribunal, in some considerable detail, I am not satisfied that any material error is disclosed in the judge's approach to that material and I am of the view that the appellant's grounds amount to no more than a disagreement with the weight placed on that material and the conclusions reached by the First-tier Tribunal.
4. The judge, at [5], set out the documents before him including a bundle and a supplementary bundle. The judge further set out that there were final submissions made by both the respondent and the appellant and that Ms Sanders had referred the judge to her detailed skeleton argument and the judge summarised that argument at [9].
5. The judge then went on to correctly direct himself in relation to the relevant legal position and set out the position in **HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31** (at paragraph [15]). The judge also noted, at [16], that the appellant said that he could not live openly in Malaysia and noted the appellant's evidence, including at [20], that he was not a member of any LGBT organisations although he supported them by attending the meetings. The judge went on, from [21] and following, to summarise the background material.
6. The judge noted first of all at [21] that homosexual acts were illegal and that the respondent referred to an article confirming that the "sodomy laws" had only been invoked seven times since 1938 and on four occasions against the former deputy prime minister. The judge went on to note that the appellant does not identify as part of the transgender community who, according to the US State Department Report, can and do face prosecution.
7. Although Ms Sanders sought to suggest that the judge's treatment of the respondent's background materials differed from his consideration of the appellant's background materials, I do not agree. The consideration of the

respondent's material was contained in a single paragraph at [21]. In contrast, the judge refers to the appellant's materials throughout the determination including, as already stated, in summarising the appellant's representative's skeleton argument. At [22] the judge referred to the various reports in the appellant's bundle and refers to excerpts from some of those reports. Again, the judge refers to Ms Sanders' skeleton argument which describes the mistreatment of gay men and other LGBT persons as "endemic" and the judge carefully indicates and notes that Ms Sanders gave specific examples in her skeleton at paragraph 8(a)(i) and provided a key passage index (which Ms Sanders helpfully took me through in detail).

8. The judge noted that there were various reports including that the Malaysian film censorship board will not approve films with what is described as other "inappropriate culture" and that two LGBT activists' portraits were removed from a photography exhibition in August 2018 and that in 2018 two gay women accused of attempting to have sex in a parked car in a state governed by Sharia law were fined and publicly whipped. The judge notes that the appellant acknowledged that the killings carried out in a religious court.
9. The judge went on to take into consideration that the respondent accepted that the appellant would be treated as a gay person in Malaysia and gay people are discriminated against but that it was the respondent's view that the appellant, even as an openly gay man, would not be at risk of persecution, but rather discrimination. The judge again referred and took into consideration Ms Sanders' skeleton argument at [23] and the UNHCR guidelines. The judge correctly directly himself that he had to take into consideration whether any past or future harm to the appellant would be sufficiently serious to amount to persecution and the judge went on to consider at [23] what would amount to persecution. There was no specific challenge to that consideration.
10. At [24] the judge reached the conclusion, and gave reasons for finding, that there was nothing to suggest that gay men are generally at risk of persecution in Malaysia from authorities or others. Although Ms Sanders criticised what she referred to as a sweeping statement the judge went on to explain that finding, including clarifying that there was localised examples of discrimination and harassment by non-state actors particularly in those states where Sharia law operates. It was his finding, which was evidence based and open to him, that there was nothing to suggest that gay men are reasonably likely to be at risk from the authorities or those connected to them if they lived openly. The judge also found that the evidence did not support the assertion that there was not a sufficiency of protection. In reaching that finding the judge took fully into account that the US State Department Report acknowledged that "civilian authorities at times did not maintain effective control over security forces". The judge noted that this only referred to violence against transgender persons and that anyone facing prosecution is presumed innocent until proven guilty. The judge took into consideration that

homosexual acts were illegal but the law is rarely if ever enforced and the laws are described in a Human Rights Watch article which the judge takes into account as an “antiquated relic of British colonialism”. The judge was also of the view that the appellant’s reference to his claim that he would be whipped six times if he was returned to Malaysia and imprisoned for twenty years was a reference to what had happened to the two women which had been referred to earlier. It was the judge’s reasoned conclusion, which could not be said to be irrational and was open to him, that no adequate evidence had been produced to show that there was widespread persecution of members of the gay community.

11. Although the judge took into consideration that the appellant had himself not experienced difficulties/suffered harm there, it is not the case that he reached the conclusions he did, that there was no risk of persecution in Malaysia, due to the appellant’s lack of difficulties there. I am not satisfied that there was any material error in the approach of the Tribunal; the judge was aware of the appellant’s claim, set out in his witness statement, including that he had kept his relationship discreet and that they met in hotel rooms and that they were very careful when they were in public when he was with his then partner N. They pretended they were nothing more than friends.
12. I am satisfied that any arguable error in the consideration of the appellant’s own behaviour in Malaysia is not material given the judge’s careful consideration and evidence-based conclusions that the treatment of gay people in Malaysia does not amount to persecution. I agree with Ms Isherwood’s submissions that the material, including as referred to and highlighted in submissions by Ms Sanders and in the grounds of appeal and the annex relied on in the grounds of appeal, were considered by the First-tier Tribunal and take the appellant’s case no further.
13. It was incorrect to say the judge did not consider the evidence including in relation to censorship which the judge considered at [22]. The judge also at [24] confirmed, that even if the appellant were to live openly in Malaysia, on the basis of the evidence before him would not amount to persecution. The judge took into consideration at [25] that the appellant is Buddhist and the judge had taken into consideration, including at [24], that some of examples of discrimination and harassment by non-state actors was particularly in those states where Sharia law operates. The judge’s conclusions were ones that were properly open to him on the evidence.
14. Although the judge’s findings that the appellant would live discretely on return to Malaysia were criticised, the judge found in the alternative that any difficulties he might encounter living openly would not in any event amount to persecution. There is, therefore, no material error. How and why the appellant might choose to live on return to Malaysia does not come into operation as a consideration as the judge had found on the available evidence, that the appellant would not be at risk of persecution even if he were to live openly as a gay man. Therefore the appellant’s

case founders at the second limb of the **HJ (Iran)** test. Grounds 1 to 3 are not made out.

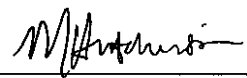
15. In relation to the alleged error in respect of Article 8, Ms Sanders made no submissions other than to rely on the grounds of appeal. The judge again made detailed and closely reasoned findings in relation to Article 8 at [26] and following and it was open for him to find for the reasons he did and on the basis of his findings of fact, that the appellant would not have any significant difficulty in reintegrating into Malaysian society. Although the grounds argue that the judge failed to take into consideration he appellant's sexuality, that is incorrect: at [29] the judge considered that the appellant had had at least one boyfriend in Malaysia and that this relationship had only ended because this individual had 'fancied someone else and he betrayed me'. The judge also considered that the appellant claimed they were not able to express their feelings openly but was not satisfied that this amounted to a very serious obstacle to the appellant's integration in Malaysia. That was a finding open to the judge and he took into consideration, not only that the reason for the relationship ending was nothing to do with the claimed difficulties in Malaysia but also that they were able to maintain a relationship in Malaysia for several years. Ground 4 is not made out.

Notice of Decision

16. The decision of the First-tier Tribunal does not contain an error of law and shall stand. The appellant's appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date: 15 April 2019
Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT FEE AWARD

No fee was paid or payable so no fee award is made.

Signed  Date: 15 April 2019

Deputy Upper Tribunal Judge Hutchinson