



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

Appeal Number: PA/11792/2016

THE IMMIGRATION ACTS

Heard at Field House

On 25 April 2017 and 6 July 2017

**Decision & Reasons
Promulgated
On 10 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

**LSL
(ANONYMITY DIRECTION MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel

For the Respondent: Mr D Clarke, Home Office Presenting Officer (25 April 2017)

Mr T Melvin, Home Office Presenting Officer (6 July 2017)

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing her appeal against the respondent's decision of 12 October 2016 refusing her application for asylum and humanitarian protection.

Background

2. The appellant is a citizen of Malaysia born on [] 1969. At the beginning of his submissions Mr Briddock indicated that the appellant identifies as a male and preferred to be referred to by the male pronoun and accordingly I have done so in this decision, although I have not amended the passages cited from the decision of the First-tier Tribunal. He first came to the UK on 19 August 2003 with entry clearance as a visitor. After his leave expired, he overstayed. In 2008 he made an application for an EEA residence card which was rejected. In February 2016 he made an application for leave to remain on the basis of his long residence but was subsequently notified that his application was invalid. On 14 April 2016 the appellant claimed asylum. His claim was based on a fear of persecution as a lesbian. The respondent accepted that the appellant's nationality and identity were as claimed and that he had demonstrated a genuine and subjective fear of returning to Malaysia because of his sexual identity. However, it was the respondent's view that the appellant had never attracted any interest from the authorities and it was considered possible for an LGBT person to live in Malaysia with a reasonable degree of openness not dissimilar to how he had conducted himself in both Malaysia and the UK in the past (para 57 of the decision letter).
3. The respondent considered the test set out in HJ (Iran) and HT (Cameroon) v Secretary of State [2010] UKSC 31 but found that an openly gay person would not face persecution because of their sexuality. Although the objective information showed that homosexuality was illegal in Malaysia, there was no evidence of recent prosecutions and it appeared that, when brought, they tended to relate to political considerations. The objective information also showed that there was a vibrant and flourishing gay scene in Malaysia and no evidence of recent prosecutions for homosexual activity. For these reasons it was not accepted that the appellant had a well-founded fear of persecution and the respondent found that it was reasonable for him to return to Malaysia and relocate within Kuala Lumpur to avoid problems with his family and to continue his life there.

The Hearing Before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal the appellant gave oral evidence adopting his witness statement dated 21 November 2016 where he set out the basis for his claim and at para 50 said that he did not want to live as a woman but as a man. He had stopped associating himself as a woman and has been living as a transgender man in the UK.
5. At the hearing Mr Briddock asked the appellant what he meant by saying that he was a transgender man and he replied "physically I am a woman but mentally speaking I feel that I am a man" and when asked whether he was happy with the way he is and whether he wanted to change anything,

he replied “I am quite satisfied with what I can do currently – I can dress like a man”. On this issue the judge said at [32]:

“A self description as a ‘transgender man’ is likely to mean different things to different people, and Mr Briddock sensibly asked the appellant to expand on what that meant to her during her examination-in-chief. I took it from her response to his questions that her expression of this at the present time was to dress as a man, and indeed this has been a consistent theme in her witness evidence, from describing herself as a ‘tomboy’ as a child. I take it, therefore, that the primary relevance of this to my decision is that she wishes to (and does) dress as a man. I accept that this is her wish and her expression of her self description as a transgender man, and it is on that basis that I shall consider whether she is at risk both as a lesbian and as a transgender man.”

6. The judge then referred to the country materials at [33]-[39] and at [40] he said it was apparent from this information that:

- (i) Same-sex sexual activities are against the law in Malaysia, although actual prosecutions appear to be very rare.
- (ii) ‘Cross-dressing’ is at least to some extent against the law in Malaysia, although again actual incidents of prosecution do not seem to be common.
- (iii) That criminalisation provides a background against which politicians will occasionally engage in rhetoric directed against LGBT people in Malaysia. Similar sentiments will be expressed in society, including occasional harassment, against LGBT people in Malaysia.
- (v) The difficulties are typically greater for those from Muslim societies in Malaysia (which would not include the appellant).
- (vi) There is no legal recourse for LGBT people who have been discriminated against.”

7. The judge accepted that the appellant would be returning to Malaysia as a lesbian who dresses as a man. He said that the country materials he had considered suggested to him that the appellant would face discrimination on return but such that it reached the level of persecution. He referred to the nature of persecution as discussed by Lord Hope at [10]-[16] of HJ (Iran) and in LH and IP (Gay men: risk) Sri Lanka CG [2015] UKUT 73. The judge concluded at [43] that the appellant would be at real risk of discrimination on return to Malaysia but not such as to amount to persecution under the Refugee Convention and his appeal against the respondent’s decision on her asylum claim must be dismissed. The judge went on to consider article 8 and para 276ADE of HC 395 as amended but found that the appellant could not meet the requirement of showing that there would be very significant obstacles to his integration into Malaysia and there was no other basis on which article 8 required leave to remain to be granted.

The Grounds and Submissions

8. In the grounds it is argued that the judge had not explained why he found that the treatment the appellant would face in Malaysia would amount to discrimination but not persecution. The reference to HJ (Iran) and LH and IP did not assist with understanding why the judge had found that there was no real risk of persecution. The second ground argues that the judge's finding that the appellant would not face persecution was not open to him on the facts and evidence as accepted. The appellant's evidence, which had not been challenged and was not rejected by the judge, included the fact that he had been subjected to an exorcism ritual due to being boyish which included being beaten and sent to a psychologist, he had not felt able to disclose his sexuality to anyone at all until he left Malaysia for Singapore, when he returned to Malaysia he and his partner kept their relationship a secret as it would not be accepted by their families and they would face serious problems, when the relationship was discovered the appellant and her partner were badly beaten and the appellant had been arrested for being dressed as a man. The grounds argue that the country materials indicated that the appellant would not be able to live openly in Malaysia as a lesbian or as a person who identified as transgender.

Submissions

9. Mr Briddock submitted that the judge had failed to give any adequate reasons for his decision and that the accepted facts should have led to a finding that there was a real risk of persecution. In the respondent's decision, it had been accepted that the appellant had a subjective fear and this was based on his objective experiences. He argued that the judge had failed to take account of those actual experiences when assessing whether the appellant would be at real risk on return. The judge had focused solely, so he submitted, on the objective evidence without taking into account the appellant's particular circumstances.
10. Mr Clarke submitted that there was a clear threshold between discrimination and persecution. Discrimination had to reach a point at which the appellant could not reasonably be expected to tolerate it. The judge had been well aware of the basis of the appellant's claim. The background evidence indicated that there were only three states in Malaysia where it was an offence for a woman to cross-dress as a man. The judge had considered the incidents of prosecution in Malaysia noting that the law had only been resorted to on seven occasions and four of them in relation to the former deputy prime minister and these had been politically motivated. He submitted that the judge was clearly aware that the evidence potentially amounted to persecution but it was for him to assess whether it did. He had looked at the picture as a whole and reached a decision open to him on the evidence.

11. Mr Clarke argued that ground 2 went too far. The factors identified in the grounds did not in themselves entitle the appellant to asylum. He accepted that it was unfortunate that the judge had made no specific findings on those matters, neither had he considered the issue of internal relocation in so far as the appellant might be at risk from her family. However, this was not fatal to the decision, so he argued, as the judge had been entitled to find that the facts did not take the appellant beyond the threshold of persecution.
12. In reply, Mr Briddock submitted that the judge had failed properly to consider [77] to [78] of HJ (Iran). The issue of persecution was a matter of fact to be assessed in the circumstances of each individual appellant. He submitted that the judge had failed to explain in the light of the country material submitted why the appellant would not be facing persecution on return.

Consideration of Whether the First-tier Tribunal Erred in Law

13. I must assess whether the First-tier Tribunal erred in law such that the decision should be set aside. The judge has clearly taken considerable care with this decision and it is with some hesitation that I have come to the view that there is an error of law. In ground 1 it is argued that the judge did not explain why he found that the treatment the appellant would face in Malaysia would amount to discrimination but not persecution. The respondent had accepted that the appellant had a subjective fear of returning and the first issue to be considered was whether that fear was well-founded. Mr Briddock submitted that the appellant's genuine fear was based on his own objective experiences and that the judge's conclusions set out at [40] drawn from the country materials supported his argument that he would be at real risk of persecution on return.
14. I do not accept as argued in ground 2 that the appellant's objective experiences considered in the light of the findings at [40] meant that his claim would necessarily succeed but I do accept the submission that it is not clear that the judge took proper account of what had happened to the appellant at the hands of his family and, subsequently, when the relationship was discovered and, in consequence, the assessment of risk on return has not taken full account of the appellant's individual circumstances. I, therefore, accept that either the judge has left relevant matters out of account by failing to consider the impact of the appellant's experiences on whether his fear of persecution on return is well-founded or he has failed to explain adequately how in the light of those experiences he would not be at risk of persecution on return.
15. I am also satisfied that the judge failed to take proper account of the guidance in HJ (Iran) when assessing whether, if the appellant lived openly in Malaysia that would give rise to a real risk of persecution as opposed to discrimination and, if that risk could be avoided by living discreetly, whether he would do so because of family or social pressures or because

of a fear of persecution. In summary, I am not satisfied that the judge's analysis of the evidence has taken proper account of the appellant's individual circumstances or of the guidance in HJ (Iran) on how he can reasonably be expected to live on return to Malaysia.

16. I am, therefore, satisfied that the decision should be set aside. As Mr Clarke pointed out in his submissions, the judge did not make any specific findings on whether the appellant would be at continuing risk from her family or on internal relocation. For the avoidance of doubt, it will be open to the parties to raise these issues when the decision is re-made.
17. Following further directions the hearing was relisted for the decision to be re-made. Mr Briddock has produced a skeleton argument dated 6 July 2016 and Mr Melvin further written submissions also dated 6 July 2017. Mr Briddock also produced and relied on the UNHCR Guidelines No 9 on claims to refugee status based on sexual orientation and/or gender identity. The hearing proceeded by way of submissions only as there has been no challenge to the First-tier Tribunal judge's findings of primary fact.

Further Submissions

18. Mr Briddock submitted that the respondent had not applied the proper test when assessing whether the appellant had a well-founded fear of persecution in Malaysia. The references in the decision letter to there being a reasonable level of tolerance towards homosexuality within society as well as from the authorities failed to take proper account of the approach set out by the Supreme Court in HJ (Iran). The core issue was whether the appellant would be able to live his life openly and freely in Malaysia without fear of persecution. He submitted that the appellant fell within [33] of UNHCR Guidelines No 9. The evidence accepted by the First-tier Tribunal amounted, so he argued, to past persecution and there was evidence in the country information to show a real risk of persecution for transgender people in Malaysia.
19. The appellant's situation could not be considered in a vacuum but in the context of his previous experiences. He referred to the Human Dignity Trust Report that laws criminalising homosexuality in Malaysia were rarely enforced but transgender individuals were often charged under the Minor Offences Act for "indecent behaviour" and "importuning for immoral purposes" and that the criminalisation laws gave opportunities to some officials to exercise extortion and created a general feeling of uneasiness where an individual's sexual attraction and gender identity was criminalised. The respondent relied on evidence that there was "a thriving gay scene" in Malaysia. Even if there was such a gay scene, that did not indicate, so Mr Briddock argued, that the appellant would be able to live his life openly and freely in all parts of Malaysia, as opposed to just in bars and saunas.

20. Mr Melvin submitted that evidence did not go further than supporting a finding that at its highest the risk to the appellant was from discrimination and not persecution and that any problems in any particular local area could be remedied by moving to Kuala Lumpur where the position for the LGBT community was more relaxed. The appellant had produced very little evidence to support the contention that he had been the victim of past acts of persecution, and whilst there was evidence of intolerance and discrimination, it did not follow that people from the LGBT community were at real risk of persecution. Taking into account the COI report that there was some evidence that the difficulties were greater within the Muslim community which did not apply to the appellant, there was insufficient evidence that the LGBT community as a whole were at risk of persecution.

Country Information

21. The background information before the First-tier Tribunal is summarised in [33]-[39] of the decision. From this information, the judge accepted that same-sex sexual activities were against the law in Malaysia, although actual prosecutions appeared to be very rare. “Cross-dressing” was at least to some extent against the law in Malaysia, although actual incidents of prosecution did not seem to be common. Criminalisation provided a background against which politicians would occasionally engage in rhetoric directed against LGBT people in Malaysia and similar sentiments were expressed by clerics and religious leaders. There was general discrimination in society, including occasional harassment, against LGBT people in Malaysia. The difficulties were typically greater for those from Muslim societies in Malaysia but this did not include the appellant. There was no legal recourse for LGBT people who had been discriminated against.
22. In [50] of his skeleton argument Mr Briddock refers to the Human Dignity Trust Report that:

“According to the United States Human Rights Country Report, the law is rarely enforced. However, transgender individuals were often charged under the Minor Offences Act for ‘indecent behaviour’ and ‘importuning for immoral purposes’.”

In [51] he cites from the International Gay and Lesbian Human Rights Commission Report of 1 September 2015 as follows:

“The Malaysian Government along with Brunei and Singapore, rejected the inclusion of sexual orientation and gender identity in the ASEAN Human Rights Declaration, resulting in the adoption of a regional human rights instrument that intentionally excluded human rights protections for LGBT persons. Within Malaysia Razak’s [the Malaysian Prime Minister] statement fuels discrimination, disrespect and even physical assaults against LGBT people.

During his tenure as Prime Minister, LGBT students have been rounded up and sent to camps for 'conversion' of gay and effeminate boys, the Human Rights Arts and Education Festival Seksuality Merdeka, was shut down and banned in 2011 and religious officers have been shown to repeatedly abuse Mak Nyah (female to male transsexuals and transgender persons).

Malaysia criminalises 'carnal intercourse against the order of nature' (s. 377, Malaysian Penal Code). Several provisions under Malaysia's Sharia laws criminalise gender non-conformity ('male posing as woman' or 'female posing as a man'), lesbianism and sexual relations between men."

23. In a report "Erasing 76 Crimes, 4 July 2016" it is said that:

"In Malaysia, the system causes and reinforces the targeting and discrimination of transpeople. Transpeople are not allowed to change their name, gender and the last digit in their identification card number or in any other legal documents. The Government's refusal to allow transpeople to change details in their identification documents to reflect transpeople's authentic identities makes transpersons vulnerable to stigma, discrimination and violence, including denial of employment opportunities, humiliating experiences when forced to use identification card, and arbitrary arrests among others".

24. I have also been referred to the UNHCR Guidelines No 9 which at [33] reads as follows:

"Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response to an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term."

The Guidance in HJ (Iran)

25. The approach to be followed by the Tribunal when assessing claims by gay men was set out by Lord Roger in HJ (Iran) at [82]. This reads as follows:

"When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the Tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the Tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the Tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living 'discreetly'.

If, on the other hand, the Tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.

If the Tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the Tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

26. Lord Roger indicated at [83] that the same approach must be applied to applications by lesbian women and it must follow that it should be applied in all cases involving sexual orientation and gender identity. It is also important to note as Lord Walker made clear in [98] that the analysis is an individual and fact-specific inquiry. The issue is whether this particular appellant in his particular circumstances would be at real risk of persecution on return to Malaysia.
27. In carrying out that assessment I must take into account what has happened to the appellant before he left Malaysia. In summary, at school he was told that he needed to behave "like a girl" and was sent for counselling. He felt alienated, was not seen as a normal person at school, and experienced derogatory name-calling at school. Due to his boyish behaviour his family believed he was possessed by spirits and he was subjected to exorcism which included being beaten with a cane and being sent to a psychologist. Later, his partner was badly beaten by her own family when the relationship was discovered and her family verbally abused him in front of his family, at which point he was attacked by his father and brother and "literally kicked out of the house". Later he was arrested for "dressing like a male". He was not charged with an offence but the police asked a lot of questions about why he was dressing as he

did and was told that the way he dressed was incorrect and that he was a woman and dressing as a man was not permitted in a Muslim country like Malaysia.

28. The respondent accepted that the appellant would be at risk of discrimination, but found that the evidence did not support a finding that the discrimination would be such as to amount to persecution. This may be the case for some, but I must consider the position of the appellant in his particular circumstances. The appellant's claim was assessed by the respondent on the basis that he was a lesbian (and understandably so as the issue of gender identity does not appear to have been fully formulated at that stage). The issue on the evidence available now is whether the appellant would be at risk of persecution as a transgender man or whether because of his birth assigned gender, he would be perceived to be a lesbian in Malaysia. Following the approach in HJ (Iran), I am satisfied that the appellant is a transgender man who would be perceived as a lesbian by the Malaysian authorities. I must go on to consider whether if the appellant lived openly as such, he would be liable to persecution?.
29. On the issue of discrimination or persecution, I remind myself of [77]-[78] of HJ (Iran) and of the provisions of art 5(1) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 that an act of persecution must be:
- (a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or
 - (b) an accumulation of various measures including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).
30. The country information shows that prosecutions are infrequent under the laws criminalising homosexual behaviour but I accept that there is a real risk of prosecution under the Minor Offences Act. The evidence also satisfies me that the appellant would not be able to live freely and openly as a transgender man. The contrary is suggested by the fact that a number of states have introduced a specific law against cross-dressing and there is no indication of any change of attitude generally or by the authorities in Malaysia which could indicate any increasing tolerance on issues of sexual identity. When this is considered with the evidence about the system in Malaysia causing and reinforcing targeting and discrimination of trans-people by the restrictions identified in "Erasing 76 Crimes 4 July 2016" (see [24] above) and taking into account the appellant's background and his account of the way he was treated when in Malaysia, I am satisfied, at least to the lower standard of proof required in international protection cases that the fact that the appellant would be unable to live freely and openly as a transgender man without being at

real risk of treatment and discrimination sufficiently severe to amount to persecution.

31. The only way the appellant could live openly in Malaysia without a risk of persecution is by acting discreetly and concealing his sexual orientation and gender identity but I am satisfied that his reason for doing so would be because he genuinely feared that otherwise he would be persecuted. For these reasons the evidence satisfies me that the appellant, who was accepted to have a subjective fear of persecution, has shown that his fear is objectively justified.
32. In these circumstances, I need not deal with the alternative claims made under para 276ADE and article 8.

Decision

33. The decision of the First-tier Tribunal disclosed an error of law and has been set aside. I re-make the decision by allowing the appeal on asylum grounds. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter

Date: 7 August 2017

Deputy Upper Tribunal Judge Latter