



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

Appeal Number: PA/13769/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 June 2019**

**Decision & Reasons Promulgated  
On 30 July 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**K.S.Y.  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Briddock of Counsel instructed by Milestone Solicitors  
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Hamilton promulgated on 4 February 2019 dismissing the Appellant's protection appeal against a decision of the Respondent dated 27 November 2018.
2. The Appellant is a citizen of Malaysia. His personal details are a matter of record on file and I do not repeat them here in keeping with the anonymity direction that has already been made in these proceedings and which I continue.

3. The Appellant's protection claim was based on his sexuality. The Respondent in the 'reasons for refusal' letter ('RFRL') dated 27 November 2018 did not accept the Appellant's claim in this regard, and in the alternative concluded that there would not be a risk to him as a gay man in Malaysia.
4. The Appellant appealed to the First-tier Tribunal.
5. The appeal was dismissed for reasons set out in the decision of Judge Hamilton.
6. I am grateful to the helpful discussion that it has been possible to have with the representatives before me today in respect of aspects of the decision of the First-tier Tribunal.
7. In a generally carefully considered and nuanced decision the First-tier Tribunal Judge reached a conclusion rejecting the Appellant's claim in all material respects: *"I regret to say that I cannot rely on anything the Appellant has said about his sexuality or about what happened to him and his circumstances in Malaysia"* (paragraph 74).
8. I make the observation that the Judge has essayed a nuanced consideration of the appeal because almost every step of the analysis in the Decision involves consideration from two perspectives. For example, at paragraph 46:

*"This implausible aspect of the Appellant's account is consistent with an attempt to concoct a scenario that would explain why he took the risk of writing a letter declaring his love for his classmate. I acknowledge an alternative explanation could be that he was just foolish. I take all this into account when considering the evidence as a whole"*.

Similarly, at paragraph 53:

*"I acknowledge that although highly implausible, it could be possible that he did this because he was frightened and in a panic"*.

Such 'dual perspectives' are a significant feature in the Decision.

9. I note that this characteristic of the Decision is challenged in the grounds in support of the application for permission to appeal. In particular it is

pleaded, *“The First-tier Tribunal Judge has found inconsistent evidence to be consistent with a false claim and also consistent evidence to be consistent with a false claim”*.

10. In my judgement, in the abstract this does not identify an offensive approach. Indeed, on an overall consideration of the Decision, it seems to me that the First-tier Tribunal Judge was legitimately edging towards answering the ‘single composite question’ identified in **Karanakaran**, in effect weighing up each aspect of the evidence in turn.

11. However, upon closer scrutiny it is now acknowledged by Ms Jones on behalf of the Secretary of State that there were some clear ambiguities in respect of the analysis of the Judge at paragraphs 50 and 58. Paragraph 50 is in the following terms:

*“In his statement the Appellant claimed that his aunt brought him to the UK but once here he only stayed with her “for a short period and thereafter I left”. However in his oral evidence he said that he left after weeks, then he said months and then he said that it was near the time when his visa expired. I acknowledge this inconsistency could be due to faulty recollection. It is however also consistent with an inability to maintain a fabricated account. I take this all into account when considering the evidence as a whole”*.

12. Upon consideration both of Counsel’s note of evidence and the Judge’s own record of proceedings - which are broadly consistent and similar - it does appear that there is an element of confusion as to whether the Appellant in his oral evidence was referring to the period of time with which he stayed with his aunt, the period of time with which he stayed with a friend of his aunt, or the period of time in which he stayed in Bournemouth. In the circumstances the suggestion that there is an inconsistency in the evidence is not sustainable; accordingly the Judge’s analysis of this as a potentially damaging feature of the overall evidence was in error.

13. Similarly, at paragraph 58 the Judge refers to an exchange in oral evidence regarding the level of contact that the Appellant had had with former acquaintances. It again seems to me that there is an ambiguity as to whether the Appellant was consistently referring to contact with people in Bournemouth, or contact with gay friends that he had known for some time - which was not necessarily an identical group. Accordingly, again, it seems to me that there is substance to the challenge that the Judge’s analysis of this aspect of the oral evidence was to find fault with, and accord adverse weight to, something that was at worst ambiguous. To take such analysis forward as an adverse factor to the overall evaluation

of the Appellant's case was to place adverse reliance on a factor that was essentially neutral.

14. It seems to me that similar observations may be made in respect of paragraph 62: it is not adequately clear that the Appellant's evidence at interview as to working to cover his rent necessarily reflected the (then) current situation rather than being a reference to an earlier time. In this context it also seems to me that the Judge's consideration at paragraph 63 overlooks the fact that the Appellant gave his residential address at the screening interview.
15. Ms Jones accepts that the matters identified above informed the Judge's overall consideration of credibility. This is manifest at paragraph 74:

*"Looking at the evidence overall, applying the lower standard of proof in these cases I find the implausible and inconsistent aspects of the Appellant's evidence set out above, go to the core of his account".*

Ms Jones frankly and realistically acknowledges that the reference to 'implausible and inconsistent aspects' necessarily included those matters at paragraphs 50 and 58.

16. Notwithstanding such acknowledgement, the Respondent has resisted the challenge on the basis of 'materiality'. However, in my judgement such a position encounters the difficulty that the particular errors identified cannot readily be uncoupled from the 'in the round' evaluation undertaken. In the circumstances I find the errors require the decision of the First-tier Tribunal to be set aside.
17. In such circumstances it is common ground before me - and I agree - that the decision in the appeal now requires to be remade before the First-tier Tribunal with all issues at large.

### **Notice of Decision**

18. The decision of the First-tier Tribunal contained material errors of law and is set aside.
19. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Hamilton with all issues at large.

**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 his 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.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: **29 July 2019**

**Deputy Upper Tribunal Judge I A Lewis**