



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

Appeal Numbers: UI-2021-001366
PA/52874/2020; LP/00257/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 4 August 2022**

**Decision & Reasons Promulgated
On 24 August 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

**SW (MALAYSIA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A Briddock, Counsel, instructed by Milestone Solicitors
For the Respondent: Mr. E Tufan, Senior Presenting Officer

Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. The appellant appeals a decision of Judge of the First-tier Tribunal Napier ('the Judge'), sent to the parties on 14 September 2021, dismissing her international protection and human rights appeals.
2. The respondent conceded at an earlier CMHR held at Field House on 27 April 2022 that the Judge erred in his consideration of the appellant's human rights (article 8) appeal. The sole issue remaining at the error of law stage is whether the Judge erred in his consideration of the appellant's refugee and human rights (article 3) appeals.

Anonymity Direction

3. The Judge made an anonymity direction, and no request was made by either party for it to be set aside. I consider that it is appropriate that the order be confirmed and I detail it above.

Brief Facts

4. The appellant is a national of Malaysia and is presently aged 35. She is of Chinese ethnicity and is Buddhist.
5. She was in a heterosexual relationship whilst in Malaysia which broke down when she was aged 25. In the aftermath of the relationship coming to an end she became close to a female friend, developing feelings for her. She then identified herself as lesbian and entered a year-long same-sex relationship whilst in Malaysia. The relationship was conducted discreetly. She subsequently had a second, discreet, same-sex relationship in Malaysia.
6. She arrived in the United Kingdom in September 2018 and later claimed asylum, asserting a well-founded fear of persecution arising from her sexual orientation.
7. She states that she was involved in a same-sex relationship conducted openly whilst in the United Kingdom
8. The respondent refused the appellant's application for international protection by a decision dated 3 December 2020. It was not accepted that she was a lesbian. I note that the decision letter is silent as to the issue of whether a real risk of persecution exists in Malaysia if the appellant were to establish to the requisite standard that she is a lesbian.

First-tier Tribunal Decision

9. The appellant's appeal was heard remotely at Newport by means of CVP on 3 September 2020. The appellant attended and gave evidence.
10. The Judge gave detailed consideration as to the appellant's sexuality:

'26. The Appellant's account across her interviews was consistent and I do not regard the Respondent's criticisms of inconsistencies as

being borne out. What internal inconsistencies there are are minor in the overall context of the account. The Appellant's evidence in chief to the Tribunal was detailed and contained a high level of detail and explanation about the Appellant's life in Malaysia, her relationships with men and then with women, and her life with a partner in the United Kingdom. She has submitted photos which she says are her and her partners and from looking at them and the close female friendship they appear to show, they do help corroborate her account.

27. I agree with the Respondent that it was far from satisfactory that no statement has been produced from any of her partners. No good reason has been provided. However, it is not a condition of proving her sexuality that partners must give evidence and I have to consider all the evidence in the round and her account has been consistent and credible enough to prove this aspect to the lower standard.
28. I have weighed anxiously the credibility of the Appellant. She admits that she was removed from the United Kingdom a few years' ago when she was found to be working in breach of her visit visa. She was found by immigration officers in a restaurant with staff accommodation in Warrington, nowhere near where her sister was living. The Respondent has produced her internal CID notes from her detention which record the following:

'She initially showed [redacted] a photograph of a UK driving licence on her phone and gave false details. The driving licence actually belonged to her sister. IO [redacted] had looked at the picture and did not believe it to be the subject. He also observed a photograph of a passport on the phone. He asked the subject who this was and she admitted it was her. She then provided her true details ...

... Prior to any referral notice the owner of the business had already stated she had started work today having produced a driving licence to secure employment.'

29. Her conduct was put to her at the hearing. She accepted she had been working without permission but maintained she only had a copy of her sister's driving licence in case of emergency so people could know who to contact. She said that she had not used it to try and deceive the authorities. The Respondent, rightfully, said the weight that could be placed on the statement of the owner is lessened because he had every motivation to avoid the financial consequences of being found with illegal workers. I have to consider also that the record is double hearsay evidence and this also means I must treat it with caution.
30. Whether or not the Appellant was dishonest is a factor going to her credibility. Sexual orientation claims are inevitably highly dependent on the word of an appellant. Having considered her explanation, it is plausible and I can place limited weight on the contrary account from the business owner for the reasons stated

above. I find the Appellant did not knowingly mislead or deceive the immigration officers when they identified her. However, it is undisputed that she was engaged in work when she was not permitted to do so and I have not heard any evidence which persuades me the Appellant was unaware of the law in this regard. This speaks to the motivations for her conduct whilst in this country and this does damage her credibility to a limited extent.

31. I find also that the Appellant did not claim asylum until she had been in this country for over a year. She said that she decided to stay because, in summary, she liked it here and did not want to return with her father. I infer from her evidence that she consciously made a decision to overstay but did not consider asylum at the point of time she decided to overstay. She said she was unaware of the concept, which is plausible, but equally she has not provided an explanation of how she came to learn of the possibility of seeking international protection.
 32. Weighing these aspects together, I find that her general credibility is damaged and this means I must treat and weigh her evidence with greater circumspection. She is not entitled to the benefit of the doubt. However, personal credibility is one factor I must pay regard to when assessing the Appellant's claim in the round – albeit an important one. Credibility of the claim is a holistic assessment of a number of factors including sufficiency of detail, internal and external consistency and, to a very limited extent in immigration appeals, plausibility.
 33. In this case, I am satisfied that the internal and external consistencies in her account are enough to discharge the standard of proof notwithstanding the limitations on her credibility. I find the Appellant has proved it is reasonably likely that she is a lesbian.'
11. Having concluded that the appellant was truthful as to her sexual orientation, the Judge turned to the issue of risk of persecution upon return to Malaysia. Having identified the tests set out by Lord Rodger in *HJ (Iran) v. Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596, the Judge proceeded to consider the respondent's CPIN "Malaysia: Sexual orientation and gender identity or expression" (Version 1.0) (June 2020). I observe at this point that no express reference was made in the decision as to the objective documentation relied upon by the appellant, nor to the numerous references to these documents running over eight pages of the appellant's skeleton argument dated 1 March 2021.
 12. The Judge concluded:
 - '41. The Appellant said in her interviews that she could not live openly with a female partner in Malaysia and would have to conceal her sexuality. She has never said she fears violence or exceptional repercussions from her family. She has given an account of two female relationships she began and maintained until they broke

down for reasons not connected with discrimination or ill-treatment. She lived and worked in Kuala Lumpur until she chose to return home to her family.

42. It is clear from her evidence that, like many LGBT people, she has struggled with how to tell her family and their reaction. Her sister found out by accident and was angry with her. Her parents do not know although she fears telling them.
43. Overall, having reviewed all the evidence concerning risk on return, I am unpersuaded it is reasonably likely the Appellant would be persecuted as lesbian if returned. She is not a Muslim and not subject to the treatment of the Sharia-based authorities. She does not live in a rural area and there is no particular reason why the Malaysian authorities would have any interest in her. I accept there have been incidents over the years of exceptional treatment of LGBT people or organisations, but they are not cumulatively enough to say that a general state of persecution exists in the country.
44. Even if there was persecution of LGBT people, I still would not find in favour of the Appellant under the third part of the test of **HJ (Iran)**. My overall impression of her evidence is that she chooses to live a discreet life due to the fear of telling her parents and her family she is a lesbian. Her reasons for fearing any state-level persecution are vague and generic, whereas her evidence concerning the difficult relations with her family is more detailed and specific. Coupled with this, I bear in mind my comments earlier about her credibility. I have accepted she is a lesbian but I have also found her credibility is not established and, in the predominant part, this affects her motivations for making the claim. My overall impression of her evidence is she is a person who just wants to remain in the United Kingdom because it is easier to live her life here. Her evidence about fearing persecution as a lesbian in Malaysia, even if lesbians were subject to persecution if known, is insufficient for me to find it is reasonably likely she would have a well-founded fear.
45. Counsel for the Appellant concluded her submissions by saying that **HJ (Iran)** protects the right to be open about your sexuality in what way you wish to and that means a relationship should not have to be conducted in secret. I agree with that submission, but the reality in this case, or certainly the reasonable likelihood, is that the Appellant fears returning to Malaysia not because persecutory treatment of Malaysian society would compel her to keep her relationship secret, but rather she fears returning to her family and having to either tell them the uncomfortable truth or continue living a lie. Where there is no real risk that either of those will lead to persecutory treatment, this cannot found a claim for international protection.
46. For these reasons, I find the Appellant does not have a well-founded fear of persecution if returned to Malaysia. Any claim under Articles 2 and 3 must fail under the same factual matrix.'

13. As to the appellant's article 8 appeal the Judge recorded that counsel attending on behalf of the appellant, Ms. Radford, had confirmed that no appeal was being advanced on this human rights ground. Permission to appeal to this Tribunal was granted in respect of this issue and consequent to considering a witness statement prepared by Ms. Radford and information provided by Mr. Arkless, who represented the respondent before the Judge, the respondent conceded that the Judge erred as to Ms. Radford stating that the appellant not pursuing her article 8 appeal.

Grounds of Appeal

14. The appellant relies upon the remaining grounds of appeal:
- i) The Judge failed to take into account country materials relied upon by the appellant.
 - ii) The Judge's negative credibility findings in relation to the appellant's fear of persecution are not reasoned, or alternatively flawed.
 - iii) The Judge failed to properly consider the appellant's fear of the Malaysian authorities.
15. Judge of the First-tier Tribunal Barker granted permission to appeal to this Tribunal by a decision dated 21 December 2021, observing *inter alia*:
- '4. Similarly, it is arguable that the Judge's credibility findings are not sustainable, given the contradiction in his findings at paragraphs 26 - 33 and his subsequent conclusion.
 5. Furthermore, it is arguable that the Judge failed to properly apply the test set out in HJ (Iran), given the accepted evidence in relation to the Appellant's sexuality.'

Error of Law Decision and Reasons

16. At the outset of my consideration, I take the opportunity to thank both representatives for their very helpful submissions, particularly Mr. Tufan who stepped into the matter on the morning of the hearing.
17. With his usual candour Mr. Tufan readily accepted at the commencement of the hearing that the Judge materially erred in law by failing to expressly consider the objective evidence relied upon by the appellant in respect of risk upon return, and only considering the respondent's CPIN. He accepted that in such circumstances the Judge's conclusions as to risk upon return were fatally flawed and were to be properly set aside. Unsurprisingly Mr. Briddock agreed with such approach.
18. I am satisfied that the Judge materially erred in law by considering risk upon return solely through the prism of the CPIN, and therefore failing to consider the objective evidence relied upon by the appellant in addition to

the detailed observations as to such evidence addressed in counsel's skeleton argument.

19. The decision of the Judge dated 14 September 2021 is set aside, with the finding of the appellant's sexuality at [33] preserved.

Remaking the Decision

20. The parties agreed that the resumed consideration of the appeal could proceed at the hearing on 4 August 2022.
21. It is for the appellant to prove, to the lower standard, that she is at risk on return to Malaysia of serious harm such as would constitute persecution, entitle her to humanitarian protection and/or engage article 3 ECHR. In assessing the evidence of the appellant, I am mindful of the guidance in *KB & AH (credibility-structured approach) Pakistan* [2017] UKUT 00491 (IAC) and that provided by the Court of Appeal in *SB (Sri Lanka) v. Secretary of State for the Home Department* [2019] EWCA Civ 160.
22. In *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All ER 449, [2000] Imm AR 271 the Court of Appeal held that in determining whether there was a serious possibility of persecution, all material considerations should be considered cumulatively, unless there is no serious possibility that the facts are as contended for by the appellant.
23. I observe that the appellant was found to be credible by Judge Napier in respect of her sexual orientation, and there has been no challenge to her having a subjective belief that she will be at risk of persecution if she were to openly display her sexual orientation upon return to Malaysia.
24. As accepted by Mr. Tufan, the question before this Tribunal is whether the appellant can establish objectively that she would be at real risk of persecution consequent to her outwardly displaying her sexual orientation in Malaysia.
25. When considering international protection appeals concerning sexual orientation it is appropriate for this Tribunal to note Lord Rodger's judgment in the matter of *HJ (Iran)*. At [40] Lord Rodger states:

'40. A gay man applies for asylum in this country. The Secretary of State is satisfied, if he returns to his country of nationality and lives openly as a homosexual, the applicant will face a real and continuing prospect of being beaten up, or flogged, or worse. But the Secretary of State is also satisfied that, if he returns, then, because of these dangers of living openly, he will actually carry on any homosexual relationships 'discreetly' and so not come to the notice of any thugs or of the authorities. Is the applicant a 'refugee' for purposes of the United Nations Convention relating to the Status of Refugees 1951 ('the Convention')? The answer is Yes.'

26. Lord Rodger proceeded to identify the approach to be followed by Tribunals, at [82]:

'82. 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.'

27. The starting point for my consideration is that the appellant is truthful as to her sexual orientation. I also accept that she has been honest in her evidence to date that she subjectively fears returning to Malaysia because government officials do not accept homosexuals and engaged in heavy repression of the LGBTQ+ community. I accept that she was discrete as to her same-sex relationship whilst previously living in Kuala Lumpur ("KL"). Such events were not challenged by Mr. Tufan. Observing the photograph evidence relied upon as well as the detail given in her evidence, I accept her evidence that she was in a loving same-sex relationship for a time in this country and that the relationship was conducted openly and publicly.

28. The appellant's home area is outside of KL. It was not contended on behalf of the respondent that the appellant did not possess a well-founded fear of persecution for her sexual orientation in her home area, and such approach was appropriate considering the objective evidence placed before the Tribunal. Instead, the true focus of the hearing concerned whether the appellant could internally relocate to KL. I note that the respondent's decision letter was silent on this issue, and as Mr. Tufan readily accepted the only document that he had available to him upon which the respondent could rely was the June 2020 CPIN Report.
29. When considering whether an internal relocation alternative exists within Malaysia, the question of what is 'reasonable' must be decided by looking at the circumstances: *R v. Secretary of State for the Home Department, ex parte Robinson* [1998] Q.B. 929. In *Januzi v. Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 A.C. 426, at [20] the House of Lords endorsed para. 20 of the UNHCR Guidelines on International Protection of 23 July 2003 as to relocation requiring "from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative".
30. The assessment of reasonableness requires a holistic assessment, involving specific reference to the individual's personal circumstances - including past persecution or fear thereof, their psychological and physical health, their family and social situation, and their capacity for survival: *SC (Jamaica) v. Secretary of State for the Home Department* [2022] UKSC 15, [2022] 1 WLR 3190.
31. The basis of comparison in respect of internal relocation is between the proposed location and an appellant's home area, not with the United Kingdom: *Januzi*.
32. Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight or relocation alternative in their assessment of an individual's claim that a return to the country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision. However, the Strasbourg Court held in *Sufi and Elmi v. United Kingdom* (App. Nos. 8319/07 and 11449/07) (2012) 54 E.H.R.R. 9, at [266], that reliance on such an alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to article 3. Therefore, as a precondition of relying on an internal flight or relocation alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his or her ending up in a part of the country of origin where there is a real risk of ill-treatment.

33. Both Mr. Tufan and Mr. Briddock addressed me upon the CPIN of June 2020. Mr. Tufan accepted that it was the high point of the respondent's case. I have considered the CPIN with care.
34. I note para 2.4.3, which confirms that the Penal Code does not specifically refer to homosexuality but addresses "carnal intercourse against the order of nature". This provision of the Code was accepted by Mr. Tufan to have been interpreted to include sex between women and is punishable with a term of imprisonment of up to twenty years.
35. Mr. Briddock accepted that as the appellant is not a Muslim Sharia law as applied in Malaysia is not applicable to her.
36. Mr. Briddock relied upon para 2.4.7, which addressed the well-known raid upon Malaysia's oldest gay bar in KL, the Blue Boy nightclub, in August 2018 in which twenty men were detained following a raid. The detained persons were ordered to have counselling for 'illicit behaviour'. The bar had operated without incident for 30 years before the raid, and as observed by Mr. Tufan, has not been subject to a subsequent raid. I accept Mr. Briddock's contention that the purpose of the raid was to send a signal to the LGBTQ+ community at a time when rhetoric from high level politicians, including the Deputy Prime Minister, were significant in their antagonism to the community.
37. Upon considering the CPIN, and the objective evidence relied upon by the appellant, I am satisfied that the situation in KL is less repressive than that existing in her home area. However, that does not mean that there is no repression. There has been over several years clear homophobic sentiments expressed by some of the most senior politicians in the country. Sharia courts have imposed sentences including caning upon members of the LGBTQ+ community and these sentences have received political support. The government has, at times, encouraged members of the LGBTQ+ community to engage in conversion therapy, offering up to 4,000 ringgit (approximately £700) for those willing to engage. The evidence is also clear in that LGBTQ+ persons can be sent to rehabilitation centres to undertake gay conversion therapy following arrests and raids. It is difficult when considering the evidence placed before the Tribunal to identify what is fact and what is rhetoric; but it is clear leading politicians have espoused a notion that members of the LGBTQ+ community can be converted into heterosexual members of society. I am satisfied that such observations flow downwards into general society, whether to encourage anti-LGBTQ+ attitudes in some, or resulting in persons shunning members of the community to avoid future problems for themselves from others.
38. Whilst there are a small number of bars in KL where the LGBTQ+ community can outwardly show their orientation, such as in the Blue Boy nightclub in Bukit Bintang and the iBlue bar in Taman Bukit Segar, the at times violent rhetoric accompanied by both the relevant Penal Code and discrimination are such that a member of the LGBTQ+ community may well possess a real, objectively justified concern as to the risks of their not

discreetly engaging in a same-sex relationship. Whilst there may be more tolerance to the LGBTQ+ community in KL the appellant, like many in the community, will be required on a day-to-day basis to consider how each individual police officer or local authority official will consider outward exhibition of her sexual orientation. It may only require one police officer to take the view that an offence is being committed for her to experience real difficulties consequent to her sexual orientation. I am not satisfied that a simple arrest or her being noticed by officials in KL as to her being a lesbian would immediately lead her to have difficulties as extreme as being required to undertake gay conversion therapy. However, I accept that the fear of coming to the attention of the authorities and possibly at some point in time being required to undertake such treatment will prevent the appellant from leading the outward enjoyment of her sexual orientation she would wish to lead. I am satisfied to the requisite standard that the appellant wishes to live her life openly with a same-sex partner, but upon return to KL would feel forced to return to engaging in relationships discretely because of fear of future adverse actions by the Malaysian authorities. I accept that a material reason for her decision to act discretely on her return would be a fear of serious harm which would follow if she were to live openly as a lesbian.

39. I am mindful that I am required to consider the reasonableness of relocation and in those circumstances, I am satisfied that it would be unreasonable to expect the appellant to internally relocate to KL. In the circumstances the appeal is allowed on both Refugee Convention and human rights (article 3) grounds.
40. Having allowed the appeal on refugee grounds, I am not required to consider the appellant's human rights (article 8) appeals.

Decision

41. The decision of the First-tier Tribunal dated 14 September 2021 is set aside for material error of law. The finding of fact as to the appellant's sexuality made at [33] is preserved.
42. The decision is remade. I allow the appeal on:
 - (i) Refugee Convention grounds; and
 - (ii) Human rights (article 3) grounds.
43. The anonymity direction is confirmed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 12 August 2022

TO THE RESPONDENT
FEE AWARD

No fee was paid. Consequently no fee award is made.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 12 August 2022