



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

Appeal Numbers: UI-2023-002511  
[PA/52202/2022]

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On the 10 October 2023**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**PT  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A. Gilbert, Counsel instructed by Milestone solicitors  
For the Respondent: Ms A. Ahmed, Senior Home Office presenting officer

**Heard at Field House on 16 August 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity, because this is a protection claim.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

## **DECISION AND REASONS**

1. The appellant is a citizen of Malaysia, born in 1998. She made an asylum and human rights claim on 5 December 1998. The respondent refused that claim in a decision dated 1 June 2022.
2. The appellant appealed that decision and her appeal came before First-tier Tribunal Judge Hanbury (“the Ftj”) on 24 March 2022, resulting in her appeal being dismissed. Permission to appeal the Ftj’s decision having been granted by a judge of the First-tier Tribunal (“the FtT”), the appeal comes before me.
3. The grounds of appeal in relation to the Ftj’s decision, in summary, contend that he failed to take account of country background evidence (ground 1), failed to consider the appellant’s submissions on internal relocation (ground 2), erred in consideration of whether to admit an unreported decision of the Upper Tribunal (ground 3) and failed to consider the ground of appeal in relation to Article 8 of the ECHR (ground 4). Lastly, in ground 5 it is argued that the Ftj failed overall to consider the appeal with reasonable diligence and care in that there is inaccurate recording of submissions, and there are spelling and other errors in the decision.

### ***The Ftj’s decision***

4. The Ftj summarised the basis of the appellant’s claim, namely that she is a lesbian who fears persecution in her home area. He also noted that the respondent accepted that the appellant is a lesbian but the respondent concluded that the appellant would not be at risk of persecution in her home area, and in the alternative could relocate internally.
5. The Ftj heard evidence from the appellant. He noted in particular that the appellant said in evidence that she was open about being a lesbian and she did not feel that she could be open in Kuala Lumpur or another part of Malaysia because it is strictly Muslim, and that she had been open in the UK.
6. Under the subheading “My Findings” the Ftj considered the application to admit an unreported decision of the Upper Tribunal (“UT”), *SW (Malaysia) v Secretary of State for the Home Department* [UI-2021-001366]. He decided that the decision should not be admitted, having considered the Senior President of Tribunals Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal, dated 13 May 2022.
7. On the substance of the appeal, the Ftj concluded that the appellant’s claim was “at best” opportunistic, having come to the UK on a 6-month tourist visa, having given no indication that she feared persecution in Malaysia, and having realised that she would be able to adopt a more open lifestyle in the UK.

8. He said that he suspected that the appellant did not desire to practise her homosexuality publicly as she had not shown any desire for open involvement in the gay and lesbian scene.
9. He nevertheless concluded at [29] that the appellant would be persecuted or suffer serious harm or ill-treatment in her home area “given the exten[t] of official intolerance of same-sex relationships”, but found that she could relocate to Kuala Lumpur.
10. He gave a number of reasons for coming to that conclusion. In summary, he found that Kuala Lumpur is a cosmopolitan modern city with a thriving “gay scene”; there was insufficient evidence that the gay bars are subject to raids or other adverse interest by the government; there are gay and LGBT groups operating there despite being officially outlawed; there have been legal challenges to discriminatory laws; the appellant is not a Muslim who would be subject to Sharia law but a Buddhist by background and which religion tends to be more tolerant of “such practices”; Kuala Lumpur has a mixed race population of 7.78 million and is a modern, tolerant city. He further found that there was no reason why, as an educated, single, healthy person she would not be able to find employment, and adequate prosperity and freedom to enjoy her sexual freedoms. He also concluded that the appellant had no legitimate expectation that she would be entitled to remain in the UK, and she would be able to adapt to life in her own country.
11. At [30] he concluded that the CPIN (country policy and information note) presents persuasive evidence that Kuala Lumpur is a safe, tolerant, international and open capital. He found that even if he had accepted *SW (Malaysia)* as a persuasive authority, he would have distinguished it.
12. At [31] he found that the appellant had not established to the lower standard that she would have to conceal her true sexuality, and that she simply prefers life in the UK. He accordingly dismissed the appeal on asylum, humanitarian protection and human rights grounds.

### **Submissions**

13. I have summarised the grounds of appeal. The following is a summary of the parties’ submissions. Mr Gilbert relied on the grounds of appeal, but made submissions in relation to ground 3 first (the unreported decision of the UT). Mr Gilbert highlighted [37]-[38] of *SW (Malaysia)*, submitting that the point really was pertinent in terms of the evidence that was before the UT in that case, and bearing in mind the principles on internal relocation established in *Januzi v. Secretary of State for the Home Department & Ors* [2006] UKHL 5.
14. It was submitted that *SW (Malaysia)* considered the same CPIN as considered by the FtJ in this case, and the *Januzi* test was met; the appellant would not be protected in Kuala Lumpur. Although the FtJ did

engage with the argument, he concluded that the CPIN indicated that Kuala Lumpur was a safe, open, relaxed place for lesbians. However, it was submitted that the Ftj failed to make findings that were supported by the evidence before him.

15. As regards ground 1 (failure to take into account country background evidence), Mr Gilbert referred in detail to various paragraphs of the CPIN which, he submitted, illustrated the risk to the appellant on return, and which undermined the Ftj's conclusions at [29] that there was inadequate evidence of raids, adverse government interest or prosecutions, and that there was a "thriving gay scene" in Kuala Lumpur.
16. Mr Gilbert submitted that although it was true that the appellant is not a Muslim and would not be subjected to Sharia law, the persecutory acts go beyond the implementation of Sharia law for Muslims. The evidence showed that the country was overwhelmingly hostile to LGBT persons, with no delineation along religious lines. There was relevant material that the Ftj failed to give reasoned consideration to. Had he done so, the outcome could have been different.
17. Alternatively, even if it could be said that there was no real risk of persecution in Kuala Lumpur, it was not reasonable to expect the appellant to relocate there, as was found in *SW (Malaysia)* and as argued on behalf of the appellant before the Ftj.
18. It was pointed out that the Ftj said at [27] that he 'suspects' that the appellant did not desire to practise her homosexuality publicly as she had not shown any sign of a desire for open involvement in the gay and lesbian scene. However, in the appellant's witness statement in various (identified) paragraphs she refers to four occasions of going out to gay clubs and meeting women who became her partners.
19. As regards Article 8, there were no findings by the Ftj at all. He did not consider the question of whether there would be very significant obstacles to her integration in Malaysia.
20. Ms Ahmed submitted that the Ftj did not ignore the country background evidence adduced on behalf of the appellant. Ms Ahmed also referred in detail to various paragraphs of the CPIN in support of the submission that the Ftj was entitled to come to the conclusions that he did on the evidence. Even if the Ftj had given express consideration to all the paragraphs of the CPIN relied on, that would not have changed the outcome. Even if there was an error in the Ftj's finding that Buddhists are more tolerant, that was immaterial in terms of Kuala Lumpur.
21. Ms Ahmed also submitted that Annex A to the appellant's skeleton argument that was before the Ftj referred to essential reading. Most of the paragraphs referred to in submissions before me were not in that list of essential reading, it was argued.

22. The question of sufficiency of protection in Kuala Lumpur was not raised as an issue before the FtJ. The question was one of reasonableness of relocation.
23. It was submitted that the FtJ had done enough in terms of reasoning. If there was any mistake in his conclusion about the appellant not having been 'open', any such error was not material.
24. In relation to ground 2, it was clear from [28] and the consideration of *Hj (Iran) v Secretary of State for the Home Department* (Rev 1) [2010] UKSC 31 that the FtJ did have the right question in mind. It was submitted that the FtJ applied the correct framework in concluding that the appellant could safely relocate and that it was reasonable to do so.
25. As regards ground 3, the position taken in the respondent's review was that the correct application was not made. Even if the unreported decision of the UT was taken into account it is persuasive but not binding. Ms Ahmed pointed out that the FtJ dealt with the matter in the alternative, at [30], in stating that he would in any event distinguish *SW (Malaysia)*. The grounds of appeal concede that the FtJ was not bound to admit that decision in any event.
26. It was submitted that in relation to ground 4, the Article 8 case was premised on the same basis as the protection claim, as can be seen from [21] of the appellant's skeleton argument that was before the FtJ. Therefore, the failure to consider Article 8 was not material.
27. In his reply, Mr Gilbert reiterated submissions in relation to the background material, in particular in relation to paragraph 2.2.2 of the CPIN and the raid on the Blue Boy nightclub in Kuala Lumpur. It was submitted, for example, that the evidence shows that during raids and arrests both Muslim and non-Muslim transgender people were assaulted.

### **Assessment and Conclusions**

28. It is not necessary to refer to, and resolve, every element of the grounds. Aspects of the grounds rely on assertions about what submissions were made and what was accepted or conceded by one or other party. Some of these assertions are unsupported by reference to any note on behalf of the appellant of what transpired at the hearing, or by any witness statement from counsel who appeared before the FtT.
29. Although some aspects of the grounds are, necessarily, weaker than others, I am satisfied that the grounds overall establish that the FtJ erred in law in his decision such as to require the decision to be set aside.
30. As regards ground 1 and the country background evidence, Ms Ahmed has a point when she submits that the extracts from the CPIN at Annex A to the skeleton argument that was before the FtJ are more limited than those

to which I was referred. In submissions before me wider reference was made to the CPIN, of which the following are but two examples. At 2.5.3 it states that:

“State authorities have been responsible for arrests, violence, detentions, harassment and discrimination towards LGBTI persons with reports of the police physically and sexually assaulting them. However, there is evidence of the authorities prosecuting some of the perpetrators of violence and murders against the LGBTI community, although in many instances the police ruled out hate crime as a motive.”

31. I was also referred to 6.3.2 of the CPIN:

“HRW, reporting in June 2019, stated: ‘Lesbian [...] people in Malaysia face violence from both state authorities and civilian actors.’ “.

32. It is true that there is evidence in the CPIN that presents a perspective of safety and reasonableness of internal relocation for LGBT persons but the Ftj's reasons for concluding that the appellant could relocate to Kuala Lumpur present only one side of the picture. In addition, there is merit in the argument that the appellant being a Buddhist does not mean that she would be insulated from persecution on the basis that she is not subject to Sharia law.

33. In addition, at 2.5.4 of the CPIN it states that:

“In general, the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of the protection of the authorities. However, each case will need to be considered on its facts.”

34. A judge is entitled to his or her view of the evidence but only after an evidently balanced appraisal of that evidence. I am satisfied that the Ftj's assessment of the merits of the appeal is based on an incomplete assessment of the country background evidence.

35. Ground 2's main force, it seems to me, lies in two elements. The first is in terms of its criticism of the Ftj having at [29(viii)] factored into the assessment of the safety or reasonableness of internal relocation that she had “no legitimate expectation that she would be entitled to remain in the UK permanently”. He did go on in the same sentence to state that she could adapt to life in her own country. However, whilst the Ftj was right to say that the appellant could have had no legitimate expectation of staying in the UK permanently, that has no relevance to the safety of internal relocation and not much, if any, relevance to the reasonableness of it. In fact, the subparagraphs of [29] are all expressly said to be reasons as to why the appellant would not be persecuted or suffer serious harm or ill-treatment.

36. The second aspect of ground 2 which is significant is its reference to the FtJ having said at [27] that he “suspects” that the appellant did not desire to practise her homosexuality publicly as she had not shown any sign of a desire for open involvement in the gay and lesbian scene. Although not mentioned in the grounds, but highlighted in submissions before me, the appellant’s witness statement dated 14 March 2023 does clearly contain evidence from the appellant of her involvement in what could be described as ‘the gay scene’. The FtJ at [27] said that the appellant’s desire, or not, to be involved openly in the gay and lesbian scene was relevant to the risk on return and “possibility of internal [location]”. If the FtJ had misunderstood the appellant’s wish to be ‘open’, that inevitably coloured his view of whether the appellant could safely and reasonably relocate.
37. In relation to ground 3 (the unreported decision of the UT), it is true that the FtJ had a discretion as to whether to admit that decision, whether under the Practice Direction of 2018 or 2022, in respect of which, for present purposes, there is no material difference. However, the discretion needs to have been exercised on a correct basis. I am satisfied that there was a formal application to admit the decision of *SW (Malaysia)* in the skeleton argument that was before the FtJ. The skeleton argument at [12]-[16] dealt with this, and [16] expressly requests permission to rely on that decision.
38. In addition, contrary to what the FtJ said at [24], the skeleton argument does comply with the 2022 Practice Direction at paragraph 8.2 in that it does both identify the proposition for which the decision or judgment is to be cited, and certify that the proposition is not to be found in any reported decision or judgment (see [14] and [15] of the skeleton argument).
39. Although the FtJ said at [30] that even if he had admitted the decision he would have distinguished it, on the basis of the evidence in the CPIN, *SW (Malaysia)* itself considered the CPIN (and other background evidence) in relation to similar issues that were before the FtJ in terms of internal relocation. Although every case depends on its own facts, in refusing to admit the unreported decision of the UT the FtJ exercised his discretion on a mistaken basis in terms of compliance with the Practice Direction. In addition, had the FtJ admitted the decision he may have been materially assisted by the UT’s analysis of the issue of internal relocation in that case.
40. In the light of the foregoing, I am satisfied that the FtJ's decision contains errors of law requiring the decision to be set aside.
41. It follows that the complaint in the grounds about the FtJ's Article 8 assessment also succeeds, although on a stand-alone basis that ground is not a strong one. Similarly, in the light of my conclusions in relation to the other grounds, ground 5 does not call for further consideration.

42. Accordingly, I am satisfied that the decision of the FtT involved the making of an error on a point of law. Its decision is set aside.
43. I have considered whether it is appropriate to retain the appeal in the UT for re-making. However, having regard to the Senior President's Practice Statement at paragraph 7.2, I consider that the appropriate course is for the appeal to be remitted to the FtT for a hearing *de novo* in order for fresh findings of fact to be made. There are no significant findings that can be preserved such as would indicate a re-making in the UT.

***Decision***

44. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Hanbury, with no findings of fact preserved.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek

10/10/2023