



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006533
First-tier Tribunal No: HU/53069/2021
IA/08549/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 February 2024

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Ting Nee Low
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department Respondent

Representation:

For the Appellant: Mr Z Nasim, of Counsel, instructed Legal Rights Partnership.
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 21 June 2023, 17 January 2024 and 29 January 2024

Decision

1. The appellant, a national of Malaysia born on 5 July 1981, appeals against a decision of Judge of the First-tier Tribunal Row (hereafter the “judge”) who, in a decision promulgated on 5 July 2022 following a hearing on 4 July 2022, dismissed her appeal on human rights grounds (Article 8) against a decision of the respondent of 16 June 2021 to refuse her human rights claim of 29 September 2020.
2. The appellant’s human rights claim was based on her medical condition, having been diagnosed with severe obsessive compulsive disorder (OCD) and severe anxiety; her private life established in the United Kingdom since her arrival in the United Kingdom on 19 January 2007 when she was granted leave to enter as a visitor until 19 July 2007; and her family life with her partner, Mr Michael Goldstone, a British citizen (the “sponsor”). The appellant and the sponsor have been in a relationship since 2017 and have lived together since March 2018.
3. On 3 July 2017, the appellant was convicted of offences of managing a brothel and money laundering. She was given a prison sentence of 15 months suspended for 12 months. The suspended sentence was not breached.

Procedural background

4. This appeal was first listed before me for an ‘Error of law’ hearing on 21 June 2023 when I heard submissions from Mr Nasim and Ms Nolan. However, the appeal was then adjourned part-heard because it became clear that it was necessary to obtain the recording of the oral evidence that was given before the judge. This was because the grounds contend inter alia, that the judge had misapprehended the oral evidence; that the judge had mentioned in his decision evidence about the appellant’s criminal conviction that was not given in the written or oral evidence before him which suggested (the grounds contend) that he had conducted his own research about the appellant’s criminal conviction; and that he had suggested at the hearing that he would conduct his own research about one of the medicines (paroxetine) that the appellant had been prescribed.
5. The administrative staff of the Upper Tribunal encountered considerable difficulty in obtaining a copy of the recording of the hearing before the judge in a format that could be played in the Upper Tribunal. I am immensely grateful to the staff for persevering in their efforts. Eventually, a recording was obtained in a format that could be played. Having listened to part of the recording of the oral evidence, it was clear to me that a typed transcript would be necessary to enable the parties and I to follow the proceedings. It was not possible to do so otherwise because the recording could not be played at a sufficiently high volume.
6. The request for a typed transcript of the oral evidence led to some further (unavoidable) delay. Once the transcript was obtained, a case management review hearing (“CMR”) was listed to take place on 17 January 2024 and the ‘Error of law’ hearing on 29 January 2024. At the CMR, some corrections were agreed with the parties and made to the typed transcript.
7. At the CMR, I granted the appellant permission to argue ground 7 (described as the “Additional Ground of appeal” dated 23 June 2023, settled by Mr Nasim).
8. At the CMR, the parties and I also listened to part of the recording of the submissions of the Presenting Officer. This was relevant to ground 1(b) of the appellant’s grounds. It was agreed that the following is a transcript of this part of the recording:

“Presenting Officer:	There’s no objective evidence from the appellant to confirm that she would not have adequate healthcare in Malaysia and access to that.
Judge Row:	Malaysia apparently has very good healthcare (inaudible).
Presenting Officer:	Of course that is a point for you to consider.”
9. At the ‘Error of law’ hearing on 29 January 2024, I heard submissions afresh from the parties, making it clear (in view of the lapse of time) that it was necessary for the hearing to start afresh.
10. At all three hearings, the appellant and the respondent were represented by Mr Nasim and Ms Nolan respectively.
11. The grounds dated 18 July 2022 settled by Mr Tony Muman, of Counsel, are very lengthy. Indeed, they are seven full pages long. Although expressed as six grounds, the reality is that grounds 1, 2 and 3 each advance five grounds; ground 4 advances three grounds; ground 5 advances two grounds; ground 6 advances one ground; and

Mr Nasim's additional ground (ground 7) advanced one ground. This makes a total of twenty-two grounds.

12. Having heard and considered very carefully the judge's decision, the appellant's grounds and the parties' submissions, I have concluded that the judge did materially error of law, for the reasons I give below. I have also decided that I will only deal with those grounds that have persuaded me that the judge materially erred in law, i.e. grounds 1(b), 1(c) and 7. The key one of these is ground 7. I will therefore not comment upon the remaining nineteen grounds or the parties' submissions thereon.

The judge's decision

13. The parts of the judge's decision that are relevant to grounds 1(b), 1(c) and 7 and the parties' submissions thereon are as follows:

"17. ... In 2015 she was convicted of offences of managing brothels between 1 January 2010 and 31 January 2015. **These were in London, Leamington Spa, Nuneaton, Torquay, Nottingham, and Wolverhampton.** She was also convicted of offences of money laundering. She was given a 15 month prison sentence suspended for 12 months. The suspended sentence was not breached.

Medical Conditions

19. These are not in dispute. There is a report from a Consultant Psychologist Dr Sarah Heke dated 8 December 2021 at page 45 in the stitched bundle. The appellant had been diagnosed with severe OCD and severe anxiety. The risk of self-harm was low. The conditions were long-standing from her teenage years. She was to be assessed to see if she was on the autistic spectrum. Her condition had improved since she met the sponsor.
20. The conditions identified by Dr Heke were borne out by the GP records.
21. The appellant said that she was currently seeing a psychiatrist every two months. She was prescribed sertraline and paroxetine for her low mood, propranolol for her anxiety, and quetiapine to help her sleep. There had been no hospital admissions. In short, she was treated by therapy, and prescribed medication, for her conditions.
22. The appellant says that she is unable to cook for fear of leaving the cooker on. She has however worked in the past in a fish-and-chip shop. The most recent medical letter is dated 19 May 2022, AB1 page 141. It is from a consultant psychiatrist engaged in her care. It was said that the appellant was at low risk of self-harm. She had no problems with personal care.
23. Dr Heke said that she did not believe that healthcare provisions in Malaysia would be as good as those in the United Kingdom. She accepted that she had no expertise in that field. The assertion was made without evidence. Nothing has been put before me to indicate that the healthcare available in Malaysia is not as least as good as in the United Kingdom.
24. The appellant's conditions are long-standing. **While significant they do not appear to have restricted her ability to function.** She claims to have trained as a nurse in Malaysia. She was able to come to the United Kingdom, overstay, and support herself here. She has worked in a fish-and-chip shop, **managed brothels all over the country**, laundered money, and has formed relationships, the last being with the sponsor.
27. The refusal letter considered that the suspended sentence justified mandatory disqualification on the grounds of suitability. The respondent's guidance on this matter in Grounds for Refusal - criminality version 2.0 9 November 2021 is that suspended sentences which are not breached are to be regarded as non-custodial sentences. They do not form a mandatory ground for refusal. They may provide grounds for discretionary refusal. I cannot say what the respondent's policy on this is, as the respondent did not

consider this in the refusal letter and no evidence of the policy has been produced. **For those reasons I do not find that the appellant fails on the grounds of suitability.**

30. ... The sponsor is currently employed as a claims assessor. In financial centres such as Kuala Lumpur he is likely to be able to find similar work....
31. **Any medical treatment which the appellant requires can be obtained in Malaysia. ...**
43. The maintenance of effective immigration controls is in the public interest. It is argued that the appellant is bound to succeed in an application for entry clearance as the partner of the sponsor. She speaks English. She would pass an English test. She meets the financial requirements. It would be disproportionate to require her to return to make an application which is bound to succeed.
44. I do not agree with that argument. It is not certain that the appellant would succeed in her application. **Her convictions are for serious matters and the respondent may regard the appellant's conduct as being not conducive to the public good.**
45. **Even if this did not apply, the appellant has been lawfully [sic] and criminally in the United Kingdom since 2007. It is reasonable for the respondent to expect the appellant to obey the laws of the country, to leave the United Kingdom,** and to make the appropriate application, from the appropriate place, providing the required evidence in the required form, and to pay the appropriate fee, to enable a reasoned decision to be made upon her application. Subject to meeting its legal obligations the United Kingdom is under no obligation to allow an alien illegally within its territories to remain there whilst an application is considered.
46. **There are sound reasons to require the appellant to leave to make the application. These are to require her to obey the laws of the land, to discourage others from behaving like her, and to ensure public confidence in the United Kingdom's immigration policies.**
47. It cannot be in the interests of the United Kingdom for people to come here as visitors and then refuse to leave. It would cause chaos. It would cause financial harm to the United Kingdom. It is contrary to good order and governance. This weighs heavily against the appellant in assessing proportionality."

(my emphasis)

Grounds 1(b), 1(c) and 7

14. Ground 7 is that: (i) there was no evidence before the judge relating to the cities in which the appellant had managed brothels and that she had committed the offences between 1 January 2010 and 31 January 2015; (ii) the judge must therefore have conducted his own research and erred by failing to put the information he had obtained to the parties to give them an opportunity to address him on it; and (iii) the information impacted the judge's assessment of other evidence in the appeal; for example, at para 44 of his decision where he said that the "*convictions are for serious matters and the respondent may regard the appellant's conduct as being not conducive to the public good*".
15. At the hearing in January 2024, Mr Nasim submitted that this information that the judge had obtained had led to bias against the appellant. In view of the fact that none of the grounds alleged bias, Mr Nasim retracted his allegation of bias and submitted that the judge had prejudged the appellant's case or judged it without giving the parties an opportunity to comment on information he had obtained.
16. Ground 1(b) is that the judge relied upon his own personal knowledge of healthcare in Malaysia or, in the alternative, did his own research on the issue, when he said at

para 31 that: “(a)ny medical treatment which the appellant requires can be obtained in Malaysia”.

17. The part of the transcript of the oral evidence that relates to ground 1(b) is at page 20 where (in the fifth line from the bottom), the judge said:

“Paroxetine, I don't know the drug but I'm sure going to look it up”

18. Ground 1(c) is that there was no evidence before the judge to support his finding at para 30 that the sponsor is likely to be able to find work similar to his current work as a claims assessor in financial centres such as Kuala Lumpur and therefore the judge had “clearly imported into his decision-making some perception as to life in Malaysia”.

Submissions

19. On ground 7, Ms Nolan accepted that there was no evidence before the judge, i.e. there was nothing in the decision letter or the written or oral evidence, of the appellant having committed the offences between 1 January 2010 and 31 January 2015 or that she had managed brothels in London, Leamington Spa, Nuneaton, Torquay, Nottingham and Wolverhampton.
20. However, Ms Nolan submitted that it was not material that the judge may have conducted his own research on this matter for the following reasons: firstly, because the judge found at para 27 that the appellant did not fail in her application under the Immigration Rules on the ground of suitability; and secondly, because at paras 44-47 the judge gave other reasons why the appellant could be expected to leave the United Kingdom and why an entry clearance application might not be granted; for example, because she had not passed the English language test.
21. In response, Mr Nasim referred me to the appellant's skeleton argument that was before the judge, para 6 of which explained that, as the appellant had been given a suspended sentence which had not been activated, the suitability provisions under S-LTR.1.4 were not triggered pursuant to the respondent's guidance entitled: “*Grounds for refusal – criminality*”, version 2.9 dated 9 November 2021. This explains why the judge found in the appellant's favour on the suitability requirement. He submitted that the judge nevertheless held the appellant's conviction against her, at paras 24 and 44.
22. On ground 1(b), Mr Nasim drew my attention to the fact that the judge had said (at page 20 of the transcript): “*Paroxetine, I don't know the drug but I'm sure going to look it up*”. This comment was made by the judge after he had questioned the appellant at length about her treatment; specifically about the medication she was taking, including paroxetine, and why she was taking paroxetine. Mr Nasim questioned why, having had evidence from the appellant about why she was taking paroxetine, the judge would have said that he was “*sure going to look it up*” if he had not in fact intended to do so. The difficulty in the instant case, in Mr Nasim's submission, is that it is simply not known what evidence the judge considered and that it appears that the judge did not think that there was anything wrong with undertaking his own research. Mr Nasim asked me to consider these matters together with the fact that the judge did not give reasons for his finding at para 31 that “(a)ny medical treatment which the appellant requires can be obtained in Malaysia”:

23. Ms Nolan did not accept that the judge had relied upon his own knowledge of healthcare in Malaysia. She submitted that the judge did give reasons for this finding at para 31 that the appellant could obtain in Malaysia any medical treatment that she requires, given that he dealt with the medical report of Dr. Heke at paras 19-23. At para 23, he dealt specifically with Dr Heke's opinion that she did not believe that healthcare provisions in Malaysia would be as good as those in the United Kingdom.
24. Whilst Ms Nolan accepted that the judge had said at the hearing that he would look up paroxetine, Ms Nolan relied upon the fact that there is nothing in the judge's decision which states or shows that he had researched healthcare in Malaysia or that, in deciding the availability of healthcare provision in Malaysia, he took into account anything other than the appellant's evidence. Ms Nolan submitted that it was therefore not relevant that the judge had said at the hearing that he would look up paroxetine.
25. Neither Mr Nasim nor Ms Nolan addressed me specifically on ground 1 (c) although it is clear that Mr Nasim relied upon ground 1 (c) as lodged.

ASSESSMENT

26. Ground 7 is weighty. Ground 1(b) is also of some weight. Ground 1(c) is not of any material weight, in itself. However, when grounds 1(b) and 1(c) are taken together with ground 7, ground 7 gains even more weight.
27. The underlying issue raised by all three of these grounds, taken together, is whether the appellant has had a fair hearing. I am satisfied that she has not, for reasons which I will now give.
28. Ms Nolan accepted that the information at para 17 of the judge's decision, that the appellant was convicted of offences of managing brothels between 1 January 2010 and 31 January 2015 in the cities/towns listed at para 17, was not in any of the evidence before the judge. Her submission that this was not material because the judge had resolved the suitability issue in the appellant's favour and then given other reasons at paras 44-47 for his conclusion that the appellant can be expected to leave the United Kingdom, is misconceived. It ignores the underlying issue, whether the appellant has had a fair hearing.
29. In any event, the information at para 17 of the judge's decision is potentially one that is capable of carrying significant weight in any proportionality assessment. In the instant case, it is impossible to avoid the conclusion that it materially affected the judge's consideration of the appellant's medical condition when he took into account, inter alia, that she had managed brothels all over the country.
30. In relation to ground 1(b), the issue is not whether the judge had adequately engaged with the medical report of Dr Heke and whether there is anything in the judge's decision which states that he had researched healthcare in Malaysia. The real point is whether the fact that the judge said that he would "*sure look it up*" notwithstanding that he had questioned the appellant at length about her medication including specifically about paroxetine shows, when added to ground 7, that he did in fact conduct his own research on healthcare provision in Malaysia. I am satisfied that there is a strong possibility that he did, not on the basis of ground 1(b) alone but when considered in conjunction with ground 7 and the following points:

- (i) that the judge appeared to discount (at para 23) the fact that Dr Heke had said that she did not believe that healthcare provision in Malaysia would be as good as those in the United Kingdom; and
- (ii) that he therefore gave no reasons for his positive finding at para 31 that any medical treatment that the appellant requires can be obtained in Malaysia.

31. I reach this conclusion notwithstanding the fact that the judge said at para 23 that nothing had been placed before him to indicate that healthcare provision in Malaysia is not at least as good as in the United Kingdom. No objection could reasonably have been raised had he decided the issue of whether treatment was available to the appellant in Malaysia on this basis. His finding in the final sentence of para 23 cannot explain the finding at para 31 that any medical treatment which the appellant requires can be obtained in Malaysia.
32. Ground 1(c), taken on its own, is very weak. In other words, taken as a challenge to the judge's finding that the sponsor could obtain employment in Malaysia, it is a weak challenge. In any ordinary case, its success would depend on other reasons given for the judge's assessment of proportionality. However, given that it is clear that there was no evidence before the judge to support his finding at para 30 that the sponsor is "*likely to be able to find similar work in Malaysia*", it adds weight to ground 7, that the judge had conducted his own research without giving the parties an opportunity to address him.
33. Stepping back and taking an overall view, I am satisfied that the judge did conduct his own research on matters which materially affected his assessment of the appellant's appeal and his decision to dismiss it. I am therefore satisfied that the appellant has not had a fair hearing. I agree with Mr Nasim that it appears that the judge did not think that there was anything wrong with undertaking his own research and not giving the parties an opportunity to address him on information obtained as a consequence.
34. I am therefore satisfied that para 7.2(a) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal applies. I therefore remit this appeal to the First-tier Tribunal for a fresh hearing.
35. The evidence that the appellant and the sponsor gave at the hearing before the judge can stand. The transcript of the oral evidence given at the hearing before the judge, with the amendments that were agreed with Mr Nasim and Ms Nolan at the case management review hearing on 17 January 2024, will be uploaded to the CE file system. I will instruct the administrative staff of the Upper Tribunal to send to the parties a copy of the transcript with service of this decision. The parties should then upload the transcript to MyHMCTS so that it is available to the judge at the next hearing.
36. **The appellant will be expected to address at the next hearing whether she can reasonably be expected to return to Malaysia in order to make an entry clearance application either with the sponsor accompanying her for all or part of the period of her stay in Malaysia or with the sponsor's financial and emotional support from the United Kingdom. She would also be well-advised to produce medical evidence of the impact of any interruption of any person-to-person treatment that she may be receiving in the United Kingdom.**

- 37. The respondent will be expected to provide evidence of the length of time that it is expected that a decision will be made on such an entry clearance application.**

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. This appeal is remitted to the First-tier Tribunal for a fresh hearing by a judge other than Judge of the First-tier Tribunal Row.

Signed: Upper Tribunal Judge Gill

Date: 12 February 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email