



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004255

First-tier Tribunal No: PA/54280/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th December 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE T LAWRENCE

Between

AB
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: A Gilbert of counsel, instructed by Milestone Solicitors

For the Respondent: S Walker, Senior Home Office Presenting Officer

Heard at Field House on 5 December 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellantis granted anonymity.

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 appeals against the decision, dated 16 January 2024, of Judge Hamilton of the First-tier Tribunal, who dismissed the appellant's appeal on asylum, humanitarian protection and human rights grounds.

Grounds of Appeal

2. Permission to appeal was granted by Upper Tribunal Judge Neville on the grounds advanced by the Appellant, which may be summarised as follows:
 - 1.1. Ground 1: the judge failed to have regard to background evidence that supported the plausibility of the appellant's claim to have been unaware that gay sexuality is illegal in Malaysia when assessing the credibility of the appellant's claim to fear persecution in Malaysia.
 - 1.2. Ground 2: the judge's assessment of the credibility of the appellant's claimed gay sexuality was irrational in its consideration to photographs submitted by the appellant prior to the decision to refuse his protection claim.
 - 1.3. Ground 3: the judge failed to provide adequate reasons for considering it implausible that the appellant would visit a gay nightclub in the United with a friend while holidaying together from Malaysia at a time when the appellant was concealing his gay sexuality from the friend.
 - 1.4. Ground 4: the judge failed to have regard to a relevant matter, namely a claim made by the appellant in an asylum interview, that he had intended to return to Malaysia when he last arrived in the United Kingdom.
 - 1.5. Ground 5: the judge mistakenly identified an inconsistency between the appellant's claim in the asylum interviews and oral evidence as to whether friends of his from Malaysia had come to be aware of his gay sexuality.
 - 1.6. Ground 6: the judge failed to have regard to the appellant's claim to have a poor standard of spoken English when considering whether there was inconsistency in the appellant's account as to whether or not his Malaysian friends had been aware of his gay sexuality before seeing him with his gay friends when visiting him in the United Kingdom.

Hearing

3. Mr Gilbert and Mr Walker spoke, respectively, for and against the grounds during the hearing.
4. During the hearing, grounds 3 to 6 as summarised above were referred to collectively as ground 3, as they were within the written grounds on which permission was granted. We have found greater clarity in their separation.

Ground 1

5. We are not persuaded that the judge failed to have regard to background evidence that supported the plausibility of the appellant's claim to have been unaware that gay sexuality is illegal in Malaysia when assessing the credibility of the appellant's claim to fear persecution in Malaysia.

6. The judge was aware of the background evidence referred to that prosecutions for gay sexuality are not common in Malaysia, as shown by the judge's comment at para. 45 of the decision that the risk of prosecution for non-Muslims appears to be relatively low, and it is appropriate to assume that they had regard to that evidence when assessing the appellant's credibility.
7. The other background evidence that is referred to relates to the censorship of lesbian, gay and bisexual ('LGB') issues or persons in the media in Malaysia, from the Country Policy and Information Note Country Policy and Information Note entitled 'Sexual Orientation and Gender Identity and Expression', dated June 2020, which was current at the time. There is no indication in the decision or other materials before us that that evidence was drawn to the judge's attention in order to support the argument that is made in the appeal to the Upper Tribunal, and in any event censorship of the subject matter described in the background evidence such as images and reference to LGB individuals does not equate with censorship of reporting of prosecutions nor make it less likely that a member of Malaysian society would be aware that gay sexuality is illegal in that country. If anything, the fact that LGB issues and people are censored would tend to reinforce an understanding that gay sexuality is taboo in that society, and particularly so for a person who is themselves gay, who would therefore be acutely aware that their sexuality is a subject that is not covered by the media.

Ground 2

8. We are not persuaded that the judge's assessment of the credibility of the appellant's claimed gay sexuality reached the threshold for irrationality, which is a very high hurdle, in its consideration to photographs submitted by the appellant prior to the decision to refuse his protection claim.
9. The judge clearly at paragraphs 48 to 49 considered the photographs that had been submitted prior to the decision to refuse the protection claim and the photographs submitted after that decision for the appeal.
10. appellant's . Not least the judge at paragraph 48 identified that the photographs provided to the respondent (i.e. prior to the claim) showed little more than young men having a good time and on being taken to the photographs that was unarguably correct. Further the judge identified that the further photographs provided for the appeal were 'said' to be taken to have been taken at the same time in Heaven but we observed to Mr Gilbert nothing on the photographs identified the location, the date, or the time.
11. The judge correctly directed himself to consider the photographs as part of the evidence as a whole, which included the witness evidence that is addressed by the judge at para. 47 of the decision and reasons and documentary evidence that we were referred to by Mr Gilbert during the hearing, which is mentioned by the judge at their para. 23. There was no challenge to the approach of the judge to that witness evidence.
12. At para. 49, the judge writes that it would be reasonable to expect the appellant to have been able to provide photographs predating his asylum application that showed he was living a gay life lifestyle, having noted the appellant's claim to have been active on the gay scene for a number of years prior to the application. It was submitted by Mr Gilbert that these photographs *did* predate the claim. The judge had this to say

'By the time the appellant claimed asylum, he had been active on the gay scene for a number of years. Given that camera phones are now ubiquitous particularly among young people, it is reasonable to expect the appellant to have been able to provide photographs predating his asylum application that showed he was living a gay life lifestyle. The late provision of this evidence at a time when the appellant's application had already been refused reduces the weight I can give these photographs.'

13. The judge dealt with the bulk of the photographs which were specifically submitted to show a gay lifestyle but found that those submitted *prior* to the claim merely showed young men having a good time. Bearing in mind the photographs were presented to show a particular type of lifestyle it was open to the judge to find they did not and observe that with the advent of mobile phones (noting the years the appellant had been in the UK and his claim that on entry he had visited a gay night club) that it was reasonable to expect material which did what it purported to do - that is show a gay lifestyle. That conclusion was open to the judge.
14. The reference at the start of para 49 to 'more photographs' and which showed the appellant 'embracing, kissing and dancing with men in a gay nightclub' were produced after the refusal and it was open to the judge to find 'this evidence' post dated the refusal and attracted less weight. Taken in the context of para. 49 in its entirety, the reference to photographs showing that the appellant was living a gay life lifestyle clearly refers to photographs such as those provided *after* the refusal. Not least it was also cogently reasoned and as an alternative that 'in any event photographs taken at clubs for gay people can only be given limited weight because one does not have to be gay to attend a club for gay people'. That is unarguably correct. There is no irrationality in the judge's reasoning that photographs taken at clubs for gay people can only be of limited probative value because, as the judge pointed out, one does not have to be gay to attend such a club. There is no contradiction between that reasoning and the concern that the photographs may have been contrived to support an untruthful aspect of the appellant's claim
15. While a different view could rationally have been taken about whether or not the photographs that were said to pre-date the asylum application were suggestive of the appellant having an intimate relationship with another man, there is no irrationality in the judge's assessment that that was not the case.

Ground 3

16. We are not persuaded that the judge failed to provide adequate reasons for considering it implausible that the appellant would visit a gay nightclub in the United Kingdom with a friend while holidaying together from Malaysia at a time when the appellant was concealing his gay sexuality from the friend. We find that to be a rational and adequately reasoned view. We note that the judge gave other reasons for doubting the truth of that aspect of the claim in the relevant para. of the decision and reasons (51(4)). The judge not only reasoned that the appellant's trip to Heaven with a friend not 2/3 weeks after his arrival in the UK in 2012 was inconsistent with the appellant's account of his social withdrawal after becoming aware of his sexuality and his fear of people discovering his sexuality, particularly as he intended to return to Malaysia (with the friend) but also it was 'unlikely that by chance, the appellant's heterosexual Malaysian friend

was curious about the gay scene in Malaysia and keen to visit a club gay people in the UK.'. That reasoning was entirely open to the judge and cogently explained.

Ground 4

17. We are not persuaded that the judge erred by failing to have regard to a claim made by the appellant in an asylum interview that he had intended to return to Malaysia when he last arrived in the United Kingdom.
18. At para. 51(1) the judge noted that in his asylum interview the appellant had said that when he came to the United Kingdom he had not intended to return to Malaysia, but in his oral evidence he said that he had intended to return and only decided not to return after being in the United Kingdom for four months, when he found out that same-sex relationships were illegal in Malaysia. The grounds refer to the second asylum interview, on 21 April 2022, in which the appellant is recorded as saying that he had intended to return to Malaysia (qq. 99-100), but the judge was correct in identifying an inconsistency because the appellant is recorded as stating in the 21 December 2021 asylum interview that he had not had that intention (q. 80). Indeed the appellant categorically responded to the question stating that he had no intention of returning to Malaysia when he entered the United Kingdom. This sharply contrasted with his later interview and oral evidence.

Ground 5

19. We are not persuaded that the judge mistakenly identified an inconsistency between the appellant's claim in the asylum interviews and oral evidence as to whether friends of his from Malaysia had come to be aware of his gay sexuality.
20. The judge identified two inconsistencies in the relevant para. 51(7) of the decision and reasons. The first was between a claim by appellant to have been concerned about concealing his sexuality from his friends in Malaysia contrasting with an initially unequivocal claim that his friends in Malaysia knew about his sexuality. There was such an inconsistency because, as the judge noted, in the screening interview the appellant is recorded as saying that he had friends in Malaysia who were gay and who knew he was gay (q. 4.1). The second inconsistency was said to be between a claim by the appellant to have been concerned about concealing his sexuality from his friends in Malaysia and a claim by him in an asylum interview that his friends from Malaysia who had visited the UK knew about his sexuality. The latter claim is recorded at q. 36 of the 21 December 2021 asylum interview and it is tolerably clear that the former was the concern to conceal his gay sexuality from the friend with whom he visited a gay nightclub while holidaying in the United Kingdom.

Ground 6

21. Finally, we are not persuaded that the judge failed to have regard to the appellant's claim to have a poor standard of spoken English when considering whether there was inconsistency in the appellant's account as to whether or not his Malaysian friends had been aware of his gay sexuality before seeing him with his gay friends when visiting him in the United Kingdom. This refers to the record that the appellant stated in the screening interview that he had friends in Malaysia who were gay and who knew he was gay (q. 4.1).

22. The judge was aware of the claims made by the appellant regarding his proficiency in spoken English, as shown by the judge's comments at paras. 5(5), 25(5), and 51(6) of the decision, and there is no indication the judge failed to have regard to that evidence when assessing the issue in question. It was submitted by Mr Gilbert at the hearing that the judge had not taken into account that the appellant had explained that he had not understood the questions in the asylum interviews. It is clear that the appellant had a validated interpreter in both asylum interviews and confirmed he understood the questions and in his screening interview confirmed that he understood the interpreter and the questions, (and indeed the answer at 4.1 is given in sentences), therefore this challenge is wholly unsustainable.

Conclusion

23. We find no material error of law in Judge Hamilton's decision.

Notice of Decision

24. The decision of the First-tier Tribunal shall stand and the appellant's appeal remains dismissed.

T Lawrence

Judge T Lawrence
Sitting as a Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 December 2024