



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04731/2019

THE IMMIGRATION ACTS

Heard at Field House
On 26 November 2019

Decision & Reasons Promulgated
On 23 December 2019

Before

THE HONOURABLE LORD MATTHEWS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE BLUNDELL

Between

C Y C (MALAYSIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam, David Tang & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Malaysia. His date of birth is either 11 February 1976 or 11 February 1973. It matters not for present purposes. He claims to have travelled from Malaysia on 12 June 2014 by plane, arriving in Paris. He left France either on 27 or 28 June 2014 by train and arrived in the UK. He was encountered by police on 23 August 2016 working illegally in Oxford. He was arrested and detained and claimed asylum on 28 August 2016.
2. On 15 September 2016 he was referred to the National Referral Mechanism (NRM). On 19 September 2016 a positive reasonable grounds decision was made by the NRM and a positive conclusive grounds decision was made on 14 December 2018.

3. His claim for asylum was based on his allegedly having a well-founded fear of persecution in Malaysia on the basis of his membership of a particular social group, in that he was a gay man from Malaysia. He also prayed in aid that he was a male victim of trafficking from Malaysia.
4. His claims were refused in a letter dated 12 April 2019.
5. The Secretary of State accepted his claim that he was trafficked for the purposes of sexual exploitation. However, his claim that he was a gay man was rejected, as were his accounts of the circumstances surrounding his sexuality, including the relationships he had had with others.
6. It was accepted that he had been sexually exploited in the UK. As it happens, the sexual exploitation which the appellant suffered was of a particularly severe nature.
7. At paragraphs 28 to 30 of the Reasons for Refusal Letter (RFRL) the following is stated:

“28. I have considered your claim that you cannot go back to Malaysia as you are at risk of persecution because your (sic) claim to be a gay man from Malaysia.

29. The US State departments Human Rights report 2018 for Malaysia, states the following regarding discrimination and abuse faced by gay men (Section 6).

“Adult same-sex acts are illegal regardless of age or consent. The law states that sodomy and oral sex acts are “carnal intercourse against the order of nature.” While authorities rarely enforced this provision, it was the basis for the controversial case against then-opposition leader Anwar Ibrahim (see section 1.e.). Religious and cultural taboos against same-sex sexual conduct were widespread (see section 2.a.). In August two women in Terengganu State were sentenced by a sharia court to RM3,300 (\$825) in fines and six strokes of the cane each after they were accused of same-sex sexual activity. Authorities caned the women before an audience of approximately 100 persons, marking the first public caning recorded in the state.”

30. It is therefore considered that gay men in Malaysia share an innate, immutable characteristic, and they are perceived and treated as being different by Malay society and the authorities in Malaysia, and gay men from Malaysia are accepted as a PSG.”

The Decision of the FtT

8. The First-tier Tribunal (FtT) rightfully pointed out that the burden was on the appellant to establish, to the lower standard, that if he were to be removed to Malaysia he would face a real risk of persecution, serious harm, and/or ill-treatment. In respect of Article 8 ECHR it was for the appellant to establish that removal would

be a disproportionate interference in his family and private life. If that was established it was then for the respondent to show that any interference would be proportionate.

9. The FtT Judge considered the evidence which was given in the proceedings as well as a substantive asylum interview record. Putting matters shortly, the judge accepted that the appellant was a gay man and for the most part accepted the account of his various relationships and the circumstances in which he realised he was gay. It is not necessary to go into details about all this for the purposes of this appeal.
10. The judge, however, found that there was insufficient evidence before her to suggest that gay men who lived openly were generally at risk of persecution in Malaysia from the authorities or others. She found that there was no satisfactory evidence to show that there was widespread persecution of members of the gay community. While she accepted that the appellant suffered harm at the hands of a particular individual, the father of a person named S, she found that to be localised and there was no evidence that he was still of interest to that individual.
11. Thus she found that the appellant's case foundered at the second limb of the test set out in HJ (Iran) v SSHD [2010] UKSC 31; [2011] AC 596.
12. As far as trafficking is concerned, while the respondent accepted that he had been trafficked, the judge found that the authorities in Malaysia were able to provide him with effective protection and in any event that he had the option of internal relocation should he wish not to go to his home area. The appellant sought permission to appeal, which was refused by a First-tier Tribunal Judge.

Appeal to the Upper Tribunal

13. Permission was sought from the Upper Tribunal on the basis that the First-tier Judge had failed to engage with the original grounds for permission and in particular had failed to engage with paragraphs 5 and 6 of the original grounds. Paragraph 5 contains the following:

“5. The central issue of this appeal is whether the Appellant is gay. If it is accepted that the Appellant is gay, it must then be considered whether the Appellant could return to Malaysia and practise openly as a gay person.”

Reference is then made to the US State Department Report and to paragraph 30 of the refusal letter.

14. The application goes on as follows:

“The US State Departments (sic) Human Rights report 2018 was featured in paragraph 29 of the Respondent's refusal letter dated 12 April 2019. It is compelling objective evidence to demonstrate that people engaged in same sex activities are punished and discriminated. The objective evidence also included was the Guardian article of 22 August 2018 and LGBT rights in Malaysia.”

15. It goes on to say that although the two articles were mentioned in paragraphs 40 and 41 of the FtT's determination, there is no mention of the US State Department Human Rights Report at all. This was said to be a material error of law. The original grounds were incorporated by reference. It is not necessary to rehearse them here.
16. Permission to appeal was granted on the basis that it was arguable, where the appellant's claim to be gay was accepted and he had also been found to be a victim of trafficking, that the approach to the risk on return, including the application of HJ (Iran), and the country evidence on treatment of gay and lesbian individuals in Malaysia was an error.
17. Before us the issue came to be fairly narrowly focussed and centred on the fact that at no point in the determination did the FtT refer to relevant section of the US State Department's Report, as set out at paragraph 29 of the refusal letter.
18. Before the FtT there had been presented a bundle consisting of the following documents:
 - (a) A statement from the appellant;
 - (b) A letter from Migrant Help dated 11 June 2018 confirming that the appellant was being supported by them as a vulnerable potential victim of trafficking and had been since 13 February 2018. The letter indicated that, amongst other things, the appellant had low esteem and suicidal thoughts every day. He had been self-harming by superficially cutting his hand;
 - (c) A medical assessment dated 29 December 2017 by a community psychiatric nurse setting out issues to do with anxiety and depression, amongst other things;
 - (d) An article in the Guardian dated 22 August 2018 and a Wikipedia article on LGBT rights in Malaysia.
19. Paragraphs 28 and 40 of the determination are in the following terms:
 - "28. I have applied the burden and standard of proof to which I have already referred. In coming to my decision, I have considered all the evidence before me. I have looked at all the evidence in the round before making any findings, including my findings on credibility. The appellant's bundle includes an article from www.theguardian.com of August 2018 with the heading "Malaysia accused of state-sponsored homophobia after LGBT crackdown" (pages 18-21) and Wikipedia article regarding LGBT rights in Malaysia, March 2019 (pages 22-28).
 40. I find that the background evidence is woefully lacking in this case. The only background evidence that has been submitted for my consideration has been mentioned above. The Guardian article refers to a small night club in Kuala Lumpur popular with the LGBT community was (sic) raided by the police and government officials. Twenty men were detained and

ordered into counselling for “illicit behaviour” by the Federal Territory Islamic Religious Department of Malaysia. The article also refers to a transwoman brutally beaten on the street in Seremban while seven others watched. It also refers to a Sharia court’s order for a lesbian couple to be caned after they were caught having sex in a car, the first time in years such a punishment had been handed out in Malaysia. It refers to the fact that homosexuality is illegal in Malaysia, a Muslim-majority country and there is no anti-discrimination law encompassing sexual orientation and gender identity.”

Paragraph 41 goes on:

“The Wikipedia article refers to Malaysia retaining its colonial era criminal ban on sodomy (as well as oral sex), broadly defined to include both heterosexual and homosexual acts, with possible punishments including fines, prison sentences of up to 20 years and even corporal punishment. In addition to the secular law, Muslim citizens may also be charged in special Islamic courts.”

20. As indicated, the judge found that there was insufficient evidence to suggest that gay men were generally at risk of persecution in Malaysia from the authorities or others.

Submissions for the Appellant

21. Mr Lam opened his submissions by criticising the judge’s treatment of internal relocation but that point was not developed. It soon became apparent that an alleged discrepancy between paragraphs 47 and 54 was non-existent, the two paragraphs dealing with different things. He referred us to the refusal letter, in particular to paragraphs 29 and 30 and the US State Department Report. That was not mentioned by the judge at all. It was submitted that there was enough evidence to show that homosexual activity was criminal and that the appellant would face persecution if returned.
22. The appellant made it quite clear in his statement in a number of passages that he feared persecution from the government if he lived openly as a gay man. This evidence was not challenged. Under reference to the US State Department Report, the respondent at paragraph 30 of the RFRL accepted that gay people in Malaysia were perceived and treated as being different and they were accepted as a particular social group. The extract from the US State Department Report was short, weighty and compelling as well as being unchallenged. Indeed it was accepted by the respondent.
23. This was not a safe determination.

Submissions for the Respondent

24. In response Mr Melvin relied on the respondent’s Rule 24 notice. He submitted that the judge had fully considered all the evidence put forward to her and was within her rights to find that the background evidence was woefully lacking. Although much had been made of paragraph 29 of the RFRL and the US State Department

Report, it was clear that while there were legal provisions in place, alongside many countries with old laws, authorities rarely enforced them.

25. The Guardian article related to a club raided in election time. For years the club had been left alone and that pointed to a general tolerance until the government was seeking votes.
26. The Wikipedia article had said the same as the respondent said in the RFRL.
27. There was not enough objective background information to show that gay people would be persecuted on return or that the appellant could not relocate.
28. The judge had considered HJ (Iran) and had not misdirected herself. She had considered that there was a localised threat six years ago and the appellant would relocate.

Consideration and Reasons

29. In dealing with the latter point first, it is not clear to us that the judge did deal with relocation in connection with the appellant's homosexuality. She certainly did in relation to the question of trafficking. As it was, having decided that there was no risk of persecution at all in Malaysia on account of his sexuality, there was no need for her to go on to consider the question of relocation in relation to that.
30. It seems to us that the main issue in this case, as was focussed in the argument, is whether or not the FtT fully engaged with the background material.
31. We are inclined to agree with her assessment that it is woefully lacking. Nonetheless she had to engage properly with what was there.
32. Before we move on to this we should point out that at paragraph 46 the judge made the following comments:

"It is pertinent to take into account that the appellant was not harmed by the police when he was detained at the behest of (S's) father. I also take into account the appellant's statement in his interview relating to the police that: "They only discriminate and not respect you if you are gay, but they don't hurt you. If they know you are doing gay activities they won't physically hurt you or do anything unlawful" (Q187). The appellant's evidence is that he went to live in Kuala Lumpur where he lived with a friend and worked as a chef. It is not the appellant's case that he encountered problems from (S's) father or the authorities in Kuala Lumpur."
33. S was one of the men with whom the appellant had a relationship and these passages clearly do not help the appellant's case. They are, however, only part of the case and fell to be considered along with his statement and the whole of the interview in its context. In particular the background information had to be assessed thoroughly and with anxious scrutiny.

34. The synopsis of the Guardian article is incomplete. The article, as we have indicated, is dated 22 August 2018 and, as the FtT says, it narrates that in the early hours of Saturday the police and government officials raided a small nightclub in Kuala Lumpur that was known to be popular with the LGBT community but for years had been relatively left alone by the authorities. Twenty men were detained and ordered into counselling for illicit behaviour. A government minister later released a statement on the motivations behind the raid and said “hopefully this initiative can mitigate the LGBT culture from spreading into our society”. The co-founder of a trans rights group, Justice for Sisters, said “We are under attack in an unprecedented way”. As indicated, a trans woman was brutally beaten on the street in Seremban and in the same week a Sharia court ordered a lesbian couple to be caned. That was the first time in years such a punishment had been handed out in Malaysia. The judge went on to say that it was “a lesson and reminder to not just the two of you but the members of society”.
35. The article went on to say that the general election in May had been celebrated for ushering in a new era, but the new government’s first 100 days in power had been marked by increased discrimination, harassment and violent hate crime against the LGBT community. A spokeswoman for Justice for Sisters said that what she described as “state-sponsored homophobia and transphobia” had heightened the climate of fear and resulted in increased discrimination over the past three months. She went on to say the following:

“We are also seeing a lot of shrinking spaces for LGBT people – offline, online, everywhere. This level of aggression is new and the situation is becoming really alarming. We are hearing a lot of cases of people in the community feeling depressed and suicidal and not feeling safe using public facilities or even going out in public spaces.”

The article goes on as follows:

“The previous government led by Najib Razak was vocally homophobic and used sodomy laws to slander and lock up political opponent Anwar Ibrahim for almost a decade. Now in opposition, politicians including those associated with the Islamic party PAS, have amped up anti-LGBT rhetoric further. It is a tactic aimed at gaining popularity and putting the new government in a difficult political position, forcing them to clarify their stance on an issue seen as a poisoned chalice. Deputy prime minister Wan Azizah has said privately LGBT people should have equal rights so long as they keep their “practice” behind closed doors and do not “glamourise their lifestyle”

Others have been more forthright in their public condemnation. The minister for religious affairs, Mujahid Yusof Rawa, has said the government would “take proactive measures to curb the growing lesbian, gay, bisexual, transgender issues, and help them to return to the right path and lead a normal life”. The deputy minister for public affairs, Dr Lee Boon Chye, stated last week that LGBT people have an “organic disorder”.

The first public victim of the push was Numan Afifi, who is gay and an LGBT rights activist. He was appointed press secretary to the minister of youth and

sports in July but had to step down within days in response to an opposition campaign.

“I always anticipated there would be some backlash to my appointment but I didn’t expect it to happen in the first week, and we weren’t prepared for how fierce it would be,” says Numan. “Trans women are now reporting to us they are being harassed by their employers, some were forced to cut their hair suddenly or dress differently.”

36. It goes on to indicate that in July authorities organised a seminar for 300 school counsellors, teachers and government officials focussing on ways to avert and “cure” LGBT behaviour. In August, the minister for religious affairs ordered the portrait of two prominent LGBT rights activists to be removed from a public art exhibition and also announced that a regulator would be set up to monitor LGBT activity online. The opposition women’s minister said in the previous week that LGBT people should be banned from teaching in nursery schools and a campaign to boycott businesses run by trans people was gaining momentum.
37. It can be seen therefore, that the treatment of the Guardian article is superficial.
38. The same could be said of the treatment of the Wikipedia article. No reference was made, for example, to the information that in March 2019 the tourism minister denied the existence of gay people in Malaysia saying “I don’t think we have anything like that in our country”. It also narrated that when a Women’s Day march was held in Kuala Lumpur in the same month it was condemned by government officials and the political parties of UMNO and PAS.
39. It went on to say that in April 2019 Malaysian authorities were accused of intimidating gay rights activist Numan Afifi by questioning him in a police station about a speech he made in the United Nations Human Rights Council in Geneva in March 2019, this speech pointing out that Malaysia rejected the recommendations of a coalition of twelve Malaysian LGBT organisations on gender identity and sexual orientation.
40. The treatment of these documents is so superficial, as we have endeavoured to point out, that it cannot confidently be said that the First-tier Tribunal applied to the material the sort of anxious scrutiny which is required. We are by no means saying that it had to be accepted but it certainly had to be dealt with.
41. When that is added to the fact that no reference is made to paragraphs 29 and 30 of the RFRL, containing the extract from the US State Department Report and the concession that gay men in Malaysia are perceived and treated as being different by Malay society and the authorities in Malaysia and that they are accepted as a particular social group, we are satisfied that the FtT fell into an error of law in not engaging with all of the background information, such as it was.
42. It follows that the judge erred in resolving the second of the questions posed by Lord Rodger at [82] of *HJ (Iran)*, in that she failed to take material evidence into account in

considering whether gay people who live openly in Malaysia would be liable to persecution there. We therefore set aside the judge's decision on that question.

Decision and Reasons

43. The appeal is allowed to the extent that the determination of the First-tier Tribunal is set aside. The judge's primary findings of fact - particularly those in relation to the appellant's sexual orientation - are preserved. The appeal is remitted to the FtT for fresh consideration of Lord Rodger's second question from [82] of HJ (Iran) and, if necessary, for consideration also of the remaining questions.

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 their 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.

LORD MATTHEWS
Sitting as a Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

Date: 20 December 2019