



IAC-FH-CK-V1

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

Appeal Number: AA/09935/2013

THE IMMIGRATION ACTS

Heard at Field House

On 29 October 2014

**Decision & Reasons
Promulgated**

On 17 November 2014

Before

**THE HONOURABLE MR JUSTICE DAVIS
UPPER TRIBUNAL JUDGE ESHUN**

Between

**MS KEN KAH LOW
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Kiai, Counsel instructed by Wilson Solicitors LLP

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The appellant is Ken Kah Low. She is a citizen of Malaysia. She appeals against a decision to remove her to Malaysia. She claimed before the First-tier Tribunal that she was a refugee and entitled to international protection, alternatively that she was entitled to a grant of humanitarian protection by reference to paragraph 339C.

2. The case resulted in the First-tier Tribunal dismissing her appeal and she now appeals with leave of Upper Tribunal Judge Grubb in relation to the First-tier Tribunal's determination.
3. When giving leave Upper Tribunal Judge Grubb said this:

"It is arguable that in applying Section EX.1 in Appendix FM the judge applied the wrong test for 'insurmountable obstacles' by asking himself whether it was 'not possible' for the appellant's partner to live permanently in Malaysia. That is not the correct test."
4. Our preliminary view having read the papers was that the proposition was not merely arguable, it was unanswerable and that the First-tier Tribunal had indeed applied the wrong test. Happily the Secretary of State entirely agrees with that proposition. Today Mr Richards on behalf of the Secretary of State referred us to the response to the grounds of appeal that was lodged as long ago as 7 July which indicates that that part of the decision was the subject of an error of law and cannot stand.
5. Therefore we must set aside that part of the First-tier Tribunal's determination. It will be necessary for the case to be remitted to the First-tier Tribunal to be heard by a different judge in order for the First-tier Tribunal to determine whether the appellant does indeed on the facts of the case satisfy Appendix FM.
6. We do not need to rehearse the facts upon which that assertion is made. The First-tier Tribunal who rehears this case will have to reach its own view as to the facts though it is apparent from what has been said before us that the primary findings of fact as to the appellant's sexual status and other matters will not be in issue.
7. However, what is not conceded by the Secretary of State is that the First-tier Tribunal erred in dismissing the appeal on asylum grounds. It was identified that the asylum claim depended upon demonstrating that there was a risk either of criminal prosecution or persecution because of the appellant's sexual orientation or a risk that she might be harmed by members of her own family and if the latter whether she could avoid such a risk by internal relocation.
8. The appellant before us argues that the reasoning of the First-tier Tribunal was inadequate and that the finding in relation to asylum also should be set aside. The Secretary of State argues that it should not and she argues that it is a discrete issue that we should determine now. To that extent that there is an agreement between the parties.
9. The factual basis on which the risk was asserted in relation to family was a threat by one of the appellant's uncles, an uncle who considered that the appellant's sexuality was a disgrace to the family, that uncle being

somebody with a criminal conviction for threatening somebody with a knife.

10. The First-tier Tribunal first concluded that there was no evidence that this particular uncle would become aware of her presence or indeed would any particular members in her family. The primary finding of the Tribunal was that there was no such risk. If that finding can be maintained then the further arguments of the appellant fall by the wayside since, if there is no risk, issues of relocation and undue hardship in relocating simply do not arise.
11. We are satisfied that the First-tier Tribunal had the material to reach the conclusion that it did in relation to asylum simply on the basis of the absence of risk. We conclude that the finding of the First-tier Tribunal in relation to asylum cannot be impugned and it will stand and therefore any rehearing in the First-tier Tribunal will relate simply to the issue in terms of insurmountable obstacles.
12. We note that there is a potential issue as to where the burden of proof lies in relation to Appendix FM and in particular in relation to insurmountable obstacles. It does not seem to us that it would be helpful for us to offer a view. We are not having to determine the issue given that that issue has been the subject of an agreement as being something that must be redetermined by the First-tier Tribunal. The guidance that there is in existing case law will have to be placed before the First-tier Tribunal. The First-tier Tribunal will take a view on where the burden of proof lies. If it is wrong, there would have to be some further appeal but it is not for us to reach a view on it today.

Signed

Date **29 October 2014**

Mr Justice Davis