



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006732
First-tier Tribunal Nos:
PA/52595/2021
IA/09698/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

The Secretary of State for the Home Department

Appellant

and

Ms Leong Yean Chu
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr N Wain, Senior Home Office Presenting Officer

For the Respondent: Mr H Malik of Counsel, instructed by Riverside Legal Services Limited T/A MSR Solicitors

Heard at Field House on 12 September 2024

DECISION AND REASONS

Introduction

1. The appellant is the Secretary of State, and the respondent is Ms Leong Yean Chu. However, I refer to the parties as they were before the First-tier Tribunal where the appellant was Ms Leong Yean Chu, who is a citizen of Malaysia, born on 11 December 1970. The appellant applied for asylum, which was refused by the Secretary of State in a letter dated 14 May 2021. Her appeal against that decision was allowed, on human rights Article 8 grounds only (and dismissed under protection grounds) by First-tier Tribunal Judge J Bartlett ('the judge') on 17 October 2022 after a hearing on 7 October 2022.
2. Permission to appeal was granted by Judge of the First-tier Tribunal Chohan on 5 December 2022 on the basis that the grounds argue that the judge erred in allowing the appeal on the basis that there would be very significant obstacles to integration; the judge concluded that the appellant would not face persecution in

respect of her homosexuality, however the judge concluded she would face very significant obstacles. Whilst the judge considered the CPIN Report (Malaysia: Sexual orientation and gender identity or expression June 2020), Judge Chohan found that it may be open to argument the judge gave insufficient consideration and reasons for allowing the appeal under paragraph 276ADE(1)(vi).

3. The matter came before me to determine whether the First-tier Tribunal had erred in law and if so, whether any such error was material and thus whether the decision should be set aside.

Submissions - Error of Law

4. In the grounds of appeal and in oral submissions by Mr Wain it is argued in short summary for the Secretary of State as follows. It was submitted that the First-tier Tribunal had made a material error of law in the material misdirection and failure to give reasons. The Tribunal found at paragraph [24]:

“I have given consideration to paragraph 297ADE(1)(vi) of the immigration rules and I conclude that the appellant would face very significant obstacles to reintegration into Malaysia. The very significant obstacles arise from societal attitudes to lesbians which amount to discrimination. I have referred above to the respondent’s CPIN and the discriminatory societal attitudes towards lesbians in the community that it identifies. The CPIN also refers to a lack of acceptance of lesbians in mainstream Malaysia. Whilst the claimant is not of a particularly low socio-economic status, there was no evidence before me that she is of a high socio-economic status, she is not particularly urban and therefore she does not possess that which would allow her to be able to open about her sexuality and to be immune from a censorious and discriminatory society”.

5. The respondent submitted that ‘there are districts where Sharia law applies, it will be difficult in both society and with the authorities, but that this is not every area, so internal relocation applies for this appellant’.
6. It was submitted that the judge had assessed that the appellant could or would face difficulty reintegrating due to discrimination, however, Kuala Lumpur has an LGBT community, with reference made to [8.3] of the CPIN. Sexual orientation and gender identity or expression, with reference made to for example “The queer scene in Kuala Lumpur is thriving”. It was submitted that this had not been considered at all by the judge, when the judge decided that the appellant could not integrate due to societal discrimination.
7. In failing to consider this, it was submitted that the Tribunal had erred in law. In addition, the respondent submitted that the current CPIN, which the judge relied on, showed that homosexuality is illegal. This only applies in areas which have Sharia law, and the respondent submitted that there was a lot of confusion about what this means for non-Muslims. There had only been one reported case where the law was actually used, and the sentence appeared to have been highly criticised. In addition, it appeared that the couple who were arrested were having sex in their car. It was submitted that this was distinguishable from the appellant’s circumstances and that **HJ (Iran)** does not envisage freedom of expression encompassing outraging public decency.

8. It was further submitted that there was no indication of how the appellant chooses to express her sexuality at the moment, whereas she said she is in a committed relationship but the respondent questioned what that looked like societally with no evidence that how she behaves currently would in any way identify her as a lesbian. Although the appellant stated she would wish to live openly as a lesbian woman, the only evidence that she does so was attendance at gay events, with no requirement to be gay and which she would be able to continue to do in Kuala Lumpur in the gay community.
9. The respondent's grounds also indicated that the Tribunal had failed to consider that the appellant could connect to the gay community in Kuala Lumpur on return and had the judge done so he may not have found that she could not reintegrate. The respondent noted that the appellant's previous urban/non-urban lifestyle is irrelevant. She has lived in Dulwich in South London since 2019 and can be considered to be used to city life.
10. Mr Wain expanded on these submissions, submitting that the judge's findings at [24] were contrary to their earlier findings at [19]. At [22] the judge found in the context of the appellant's protection appeal, that the appellant could relocate to establish herself in Kuala Lumpur and such finding had not been cross-appealed or challenged and that is the starting point.
11. Mr Wain submitted it was not clear what the judge's reasoning was as to why the appellant would have difficulty in integrating in Kuala Lumpur given that the judge had found that she could relocate and establish there in the context of the asylum appeal. Mr Wain relied on 2.4.4 of the CPIN which indicated that laws in relation to LGB issues are frequently devolved to Sharia law which applies to Muslims across all 13 states and 3 federal territories. 2.4.4 also provides that Sharia law does not apply to non-Muslims although they can be affected by the decisions made in a sharia court but are generally not at risk from prosecution or affected by the imposition of Sharia law.
12. Mr Wain relied in particular on 2.4.35 - 2.4.36 at page 11 of the CPIN. This recognises that whilst there are some difficulties in some areas there are a number of LGB friendly venues in Kuala Lumpur. Part of the evidence including in interview with an openly gay individual stating that the queer scene is thriving in KL. Mr Wain also relied on 2.4.36 which indicated that the level of frequency of discrimination depends on the level of economic level of an appellant and Mr Wain agreed that the judge did try to engage with this. However, it was submitted that this refers to areas outside of KL and does not apply to this appellant as the judge found it was not unreasonable for her to relocate to KL and the judge's two findings did not match up and the judge had failed to give adequate reasons. Mr Wain reminded that the significant obstacles test was a high one, relying on **Kamara [2016] EWCA Civ 813** .
13. The appellant must show that she cannot participate in day-to-day society whereas the background evidence is in stark contrast to this.
14. Although there was no Rule 24 response, in oral submissions Mr Malik for Ms Chu submitted that there was no contradiction in the judge's findings. It was clear that the judge found that there was insufficient evidence to make a finding of persecution and in that element that the appellant had not met the threshold. However, the judge's findings were not mutually exclusive, and Mr Malik made reference to paragraphs [24] and [29] and [19]. At paragraph [19] the judge had

found that although it was not accepted that there was persecution the judge did find there was discrimination and that it was against the law to be a lesbian. However, that was not sufficient to reach the level for a finding of persecution.

15. Mr Malik submitted that the judge clearly had in mind the correct test, which was integration. Due to societal attitudes she would be discriminated against, with the background country information which the judge considered showing that there was a lack of acceptance of lesbians. The appellant would not be allowed to be open and would face discrimination and would not be able to live as she does in the UK, with the appellant currently living with her partner in the UK.
16. Mr Malik submitted that the judge was referencing the CPIN and looking at 4.6.1 with the authorities failing to accept any recommendation made by the UN Universal Periodic Reviews with regard to sexual orientation and gender identity, citing religious belief and 'moral consensus'. At 3.3.2 there was discussion of fatwas. At 3.3.1 of the CPIN it indicated that there was no legal recognition of same-sex relationships and no laws for same-sex couples to adopt children. At 4.6.4 it was indicated that the government had put out a series of mixed messages on where it stands with regard to the rights of LGBT people. Mr Malik submitted the judge had taken all the background evidence into account in finding that it would hinder the appellant's ability to reintegrate into society.
17. Mr Malik went on to submit that the CPIN detailed that there was discrimination and bullying including at workplaces and this was a key point that the judge mentioned at paragraph [24] in referencing the CPIN. It was a matter for the judge what weight was attached to the evidence and the judge was aware of the relevant Immigration Rules and that **Kamara** requires a broad, evaluative judgment. Mr Malik stated that the judge had taken into consideration that the appellant could live in Kuala Lumpur but considered that she would be unable to reintegrate. The judge's finding on appellant's ability to relocate to Kuala Lumpur was specifically in the context of not accepting that her husband could pursue her.
18. Mr Malik submitted that the fact that there may be a clubbing scene in Kuala Lumpur does not mean, having taken the broad evaluative judgment that the judge did, that the appellant could reintegrate.
19. Paragraph 4.9.2 of the CPIN indicates that the LGBT population are demonised. Mr Malik emphasised that just because there may be the odd clubbing scene it does not mean in terms of overall day-to-day activities that the appellant can carry these out without being discriminated against, which is what the judge found. Due to her sexuality the appellant would have difficulty including in relocating to Kuala Lumpur and the judge had made positive findings on the appellant's sexuality.
20. Mr Malik submitted that what the judge said was correct in terms of the appellant not being particularly urban and therefore her status, including that her socioeconomic status was not particularly high, would hinder her ability to reintegrate.
21. In reply, Mr Wain noted that Mr Malik relied on a point in paragraph [24] where the judge found that the appellant did not possess the factors that would enable her to integrate. The difficulty with that finding, is that the judge's findings at

[21] that the appellant could live openly as a lesbian woman. Mr Malik reiterated that at [22] the judge specifically made these findings in relation to the appellant's fear of persecution, including her difficulties with her husband.

22. Mr Wain submitted that the judge had found that the appellant could live without persecution. Mr Wain conceded that the Secretary of State's submission was not that the findings were perverse; it was not the Secretary of State's case that no LGBT appellant could succeed in showing that there were very significant obstacles to integration. However, he submitted that there were inadequate reasons for finding that this appellant could not integrate. Although Mr Wain conceded that different tests were applicable when considering a protection claim vis-a-vis a private life claim, he contended that the judge's findings were nevertheless, contradictory.

Conclusion: Error of Law

23. I have reminded myself of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ in **Volpi & Anor v Volpi [2022] EWCA Civ 464** at [2] as follows:

- "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
- ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
- iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
- iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
- v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
- vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

24. At paragraph [65] of **Volpi** the Court of Appeal observed as follows:

"65. This appeal demonstrates many features of appeals against findings of fact:

i) It seeks to retry the case afresh.
ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").

iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.

iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.

v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings."

23. In the earlier case of Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]: the Court of Appeal similarly advised appropriate judicial restraint in the approach to first instance decisions:

"i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
ii. The trial is not a dress rehearsal. It is the first and last night of the show.
iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

25. The judge's reasoning for allowing the appeal is set out, including in summary at [24]. Although this is brief, it is adequate. The judge had regard to the whole 'sea' of evidence and these findings must be considered in light of the judge's findings elsewhere in the decision which speak to the discrimination in Malaysia and the difficulties experienced by the LGBT community.

26. The judge relied on the respondent's CPIN and the discriminatory attitudes towards lesbians in the community that this report identifies, which the judge had considered earlier in her decision, including at paragraph [18].

27. A fair and holistic reading of the judge's decision discloses that the judge had the relevant tests in mind when considering whether the appellant would face very significant obstacles to reintegration into Malaysia. The Court of Appeal guidance in **Kamara** clarified that when considering "integration" a broad evaluative judgment should be made, as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

28. The judge made her findings in the context of having found the appellant's evidence that she is a lesbian to be credible. The judge accepted at [20] that the appellant's husband, when he found out she was gay, had assaulted her and kept her prisoner for several days. The judge identified at [17] that there was one case in 2018 of two young women accused of lesbian acts being caned in court and that this is the only criminal conviction identified in respect of lesbians. The judge noted that it was not disputed that homosexuality is against the law in Malaysia.
29. The judge went on to note, at [18] that the CPIN identified that a large percentage of the Malaysian population believed that homosexuality is morally wrong and that there are discriminatory societal attitudes towards lesbians
- 'which has been exacerbated over the past few decades by the use of stigmatising rhetoric by politicians, public officials and religious leaders'.
30. The judge concluded that there was insufficient evidence that the difficulties and discrimination that the judge accepted the appellant would face reached the level of significant and pervasive discrimination necessary for persecution to arise. The judge did not accept that the appellant's estranged husband would have the interest or means to pursue the appellant. The judge acknowledged that the appellant also feared her mother but again did not accept that she would be in a position to harm the appellant on return. The judge noted at [21] that the **HJ (Iran)** principles did not assist the appellant as the judge had found that the difficulties the appellant would face would not amount to persecution. In terms of the **Januzi [2006] UKHL 5** test, the judge reached alternative findings that the appellant could 'establish itself in Kuala Lumpur'.
31. Although Mr Wain submitted the judge's findings were contradictory, he conceded that the judge was looking at different tests. The test in **Januzi** involves considering whether relocation is reasonable, meaning not unduly harsh. Mr Wain indicated that there was no rationality challenge and that it was accepted therefore that there were cases where relocation was not unduly harsh in terms of consideration of the appellant's protection claim, but where an Article 8 private life argument could succeed.
32. The question therefore is whether the judge gave adequate reasons for reaching that distinction, that despite accepting that relocation would not be 'unduly harsh', in terms of Article 8, she would face very significant obstacles to reintegration.
33. It is evident that in reaching that broad evaluative judgement, that in essence the appellant, who the judge accepted had been absent from Malaysia for (at the date of hearing) 16 years, would not be enough of an insider, in terms of reintegrating, the judge was also taking into account the length of the appellant's absence from Malaysia and the appellant's estrangement from both her husband and her mother (who in any event the judge accepted lives in Hong Kong). The judge at [18] had expressly accepted that discriminatory societal attitudes towards lesbians had been exacerbated 'over the past few decades'. The judge clearly had in mind that general deterioration in conditions for lesbians, including since the appellant left Malaysia a decade and a half earlier.
34. It is in this broader context that the judge reached findings at [24] in terms of the lack of acceptance of lesbians. The judge quoted extensively from the CPIN.

The fact that there was one instance with an individual referring to the 'queer scene' as thriving in Kuala Lumpur did not detract from the judge's overall evaluative judgement of the difficulties this appellant would face, with the same individual quoted in the CPIN acknowledging that 'the situation for everyday gay Malaysians was regressing'.

35. The judge took into consideration the lack of acceptance of lesbians in mainstream Malaysia and that whilst the appellant was not of a particularly low socioeconomic status, the judge found and there was no challenge to those findings, that there was no evidence that she was of a high socioeconomic status. The judge found that the appellant was not particularly urban and therefore did not possess the factors which would allow her to be open about her sexuality and to be immune to a censorious and discriminatory society. The judge in reaching these findings had placed reliance on 2.4.36 of the CPIN which indicated that the level and frequency of discrimination and violence faced by members of the LGB community 'differs according to their socio-economic status, religion, geographic location and degree of openness'. The CPIN notes that LGB persons who come from poorer rural areas are more likely to have to hide their sexuality within their social groups than those from urban areas who are well educated and of a high socio-economic status. The CPIN also notes that society is more tolerant to LGBT people in Kuala Lumpur.
36. Whilst the judge was assessing the appellant's ability to reintegrate in Malaysia in general including in 'more tolerant' Kuala Lumpur, it was open to the judge to draw the implicit distinction between no undue harshness in the context of alternative findings that the appellant could safely relocate from her village to avoid difficulties with her husband, and the judge's reasoned conclusion that this particular appellant did not possess the factors that would allow her to be able to be 'open about her sexuality and to be immune from a censorious and discriminatory society' in terms of her private life.
37. The judge was finding, in essence, that the cumulative factors in this appellant's case, considered in the context of the background country information, indicated that she would not have a realistic opportunity to be accepted in Malaysia, or to be able to operate on a day-to-day basis in that society in order to build up within a reasonable time the variety of human relationships, (and the judge had accepted that the appellant who is now in her fifties, is living in an openly gay relationship in the UK) to give substance to this appellant's private or family life.
38. The judge's adequate findings were open to her.

Decision

39. The decision of the First-tier Tribunal does not contain an error of law and shall stand.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 September 2024

Case No: UI-2022-006732
First-tier Tribunal Nos: PA/52595/2021
IA/09698/2021