

President of the Tribunal agreed for the reasons set out in his decision of 4 June 2002, a copy of which is attached. It was not, however, possible to list the appeal which required a face-to-face hearing until December 2021. In the interim, it was proposed by the appellant's representatives that this should be a country guidance case but a decision was taken that this would not be appropriate.

The Appellant's Case

2. The appellant is a gay Malaysian man of Chinese ethnicity who fears persecution on return to Malaysia on account of his sexuality. He is also in a relationship with a British citizen and that it would be a breach of his article 8 rights to require him to leave the United Kingdom as he and his partner could not live together in Malaysia as there would be insurmountable obstacles as he would not be able to do so lawfully and because there would be serious difficulties in them living together openly.

The Respondent's Case

3. The respondent accepts that the appellant is a gay man but does not accept that the situation he would face on return to Malaysia amounts to persecution. Similarly, it is not accepted that requiring him to go there would be a breach of his and his partner's Article 8 rights.

The Hearing

4. I heard evidence from the appellant as well as submissions from both representatives. In addition, I had before me a consolidated bundle prepared by the appellant's solicitors and a skeleton argument from Mr McTaggart.
5. The appellant's partner did not attend to give evidence.
6. The appellant gave evidence in Cantonese with the assistance of a court interpreter. He adopted his witness statement, explaining that his partner had had an argument on Wednesday night (that is two days ago). He was not happy about the court proceedings taking too long, did not want to go to court and had left the house. He had tried to contact him but he had not replied, he was still waiting to hear from him that morning but he had not appeared. He confirmed that the house that they both lived in was owned outright by his partner and that he had no idea when he might come back.
7. In cross-examination the appellant said he had tried to contact his partner and he was sure he would return at some point as the house was his. He had asked friends where his partner was but they had not told him and perhaps they had not wanted to tell him. He said that he did have some friends who could confirm the nature of his relationship with his partner but had not asked them to do so.

8. The appellant said that he was not sure if he had a religion and that if it was it was probably Buddhism. He confirmed he had been brought up on Sarawak, that the area was ethnically diverse but more Malaysian than Chinese. He said he was not aware of the laws applying to Muslim Malays and Chinese, nor had he been penalised for doing anything that was anti-Muslim.
9. He said he had tried to talk to his mother in August that year as he was trying to explain to her about his relationship with his partner. He had tried to call but she did not pick up. He said she had suspected he was gay but did not accept this, nor had she asked him about it.
10. The appellant said that he knew some lesbians when he was growing up but not gay men. They had not been open about their sexuality, it was only after time she found out. He had told them that he was gay and when some friends found out they distanced themselves from him.
11. The appellant said he had not had any gay partners in Malaysia and although there was somebody he had fancied, he was straight.
12. The appellant said he had been to Kuala Lumpur and although he had heard about the gay scene there and had tried to find out about it, he could not find it. He says although he had travelled to Singapore he had not gone to any gay clubs there as he had not had time, his reason for travelling being just to deliver things and then leave straightaway. He said that he does go to gay clubs in the United Kingdom and he also goes to straight pubs.
13. He said that he and his partner had discussed getting married but that the partner's family disapproved as he was the only man in the family and that, especially for people who are Chinese, they would not accept a gay son as they need to have sons. He said his partner's family were based partly in the UK and partly in Hong Kong. He confirmed that they were constrained by his cultural norms to prevent them marrying, these constraints including the inability to marry.
14. He said that he did not hide about his relationship with his partner in the Chinese community but that people would know. He said that was because they are together all the time which is why people would know they are in a relationship. Whether they held hands on the street and they did openly display affection depended on the circumstances such as when they felt comfortable to do so in, for example, a gay bar but not always in someone's house unless they knew that he and his partner were in a relationship, but if they did not know the people so well then they would not openly display affection to each other. He said that he would not openly display affection in non-gay bars, he was respectful to other people who might not accept it but even in a normal relationship you do not show so much in a public place.

15. The appellant said that he and his partner live alone apart from their two dogs and that it was uncommon for two men to live together as friends in Malaysia. He was not sure what the situation would be if, for example, it was university friends in a large house.
16. The appellant said that he had not been subjected to any abuse by the police in Malaysia due to his sexuality but he knew that it would happen and so he avoided trouble.
17. The appellant said that he had never had a heterosexual relationship but had brought girls home to introduce to his mother as she was a very traditional woman who did not accept gay people and really rejected them. He knew that as he had asked hypothetically when he was about 20 what she would do if he were gay and she said he would have to leave and not come back. He said that she knew he and his partner were good friends but had not prior to August known the truth of the relationship.
18. The appellant confirmed he had not been back to Malaysia since 2007 and that he would like to go back but it would be OK if he did not tell people he was gay. He said he would not have to tell people and would just want to visit his mother and come back.
19. In re-examination the appellant said that he would fear abuse by the police if living in Malaysia now as there is a lot of discrimination against gay people.

Submissions

20. Ms Cunha submitted, relying on YD (Algeria) [2020] EWCA Civ 1683 that the appellant might face discrimination but that this did not constitute persecution. She submitted although there were penalties exacted on gay men in Malaysia, these were rare and the information suggested it is carried out against Muslims by the Sharia police. She accepted that the Chinese minority was conservative but there was no equivalent in enforcing those views to the Sharia police. She submitted that the appellant was quite willing to restrict himself in different situations shown by his acceptance that he would demonstrate emotion in gay pubs but not otherwise, that this may be the results of his own cultural background. This was not because he was afraid of persecution but it was part of who he is and how he expresses his sexuality.
21. Ms Cunha submitted that the appellant would not be at risk in Kuala Lumpur as it was not part of who he is to be open about his sexuality and thus he would not be prevented from behaving as he would as a result of the punitive law.
22. Ms Cunha accepted that the appellant was not a dishonest witness and on the contrary had been very honest about things. She asked me to note that there are gay clubs in Kuala Lumpur, in the past there had been a raid

and arrest, and some were sent to rehabilitation, but there was no evidence of prosecution.

23. Ms Cunha submitted relying on the supplementary bundle that the gay scene was still in existence in Kuala Lumpur and there is no suggestion that if the appellant were harassed he would not get state police protection, that there was little evidence of non-Muslims being targeted by the Sharia police, that the appellant did not publicly express affection and he was not likely to be adversely targeted by the police as he lives fairly discreetly which is how he is.
24. Turning to Article 8 Ms Cunha submitted that it was implausible that the partner would not attend to give evidence if he thought that his life partner would not be able to stay in the United Kingdom.
25. Mr McTaggart relied on his skeleton argument submitting that the appellant feared violence on return there and could not live in an open relationship as he had done in the United Kingdom in Malaysia and he would have to hide this for cultural reasons and also for legal reasons.
26. He submitted that there was a family life still in existence and thus there would be a breach of Article 8 were the appellant to be removed.

The Law

27. The correct approach to determining whether a gay person is at risk of persecution is set out in HJ (Iran) v SSHD [\[2010\] UKSC 31](#). At [82] Lord Rodger said this:

"When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a

fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

28. Lord Hope set out the approach described by Lord Rodger in his own words, by reference to a staged approach, at [35]. These stages can in the context of this case be summarised as:
- (a) Is the appellant gay, or would he be treated as gay by potential persecutors in St Malaysia? if yes
 - (b) What would the appellant do if he is returned to Malaysia ? Will he conceal aspects of his sexuality? if yes
 - (c) Why will he do so? If it is because he fears that otherwise he will be persecuted, then
 - (d) It is necessary to consider whether his fear of persecution is well-founded. This requires an assessment of whether men who are perceived to be gay or gay men living openly in Malaysia are liable to or face a real risk of persecution.
29. It is accepted that the appellant is gay. Whether and to what extent he has an openly gay life in the UK is partly in issue as are his wishes on return to Malaysia
30. Although the country background evidence mostly refers to LGBT individuals, the only factual scenario before me relates to gay men. Although there may be an overlap between the factors affecting other minorities, neither party invited me to consider anything other than the experiences of gay men.
31. The burden is upon the appellant to establish there is a real risk of persecution. In AA v SSHD [\[2006\] UKAIT 00061](#), the AIT had to consider a risk said to arise not because of individual circumstances of the particular appellant but because of the belonging to or perception of belonging to a particular class of persons. The AIT held that in such circumstances, the appellant needs to show " only that there is a consistent pattern of such mistreatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does". That approach was upheld by the Court of Appeal in AA (Zimbabwe) v SSHD [\[2007\] EWCA Civ 149](#):

"The issue is whether the evidence establishes a real risk. The Appellant does not need to show a certainty or probability that all failed asylum seekers returned involuntarily will face serious ill-treatment upon return. He needs to show only that there is a consistent pattern of such mistreatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does."

32. Lord Hope summarised the test to be met in order for there to be persecution in HJ (Iran).

"12. The Convention does not define "persecution". But it has been recognised that it is a strong word: *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, para 7, per Lord Bingham. Referring to the dictionary definitions which accord with common usage, Lord Bingham said that it indicates the infliction of death, torture or penalties for adherence to a belief or opinion, with a view to the repression or extirpation of it. Article 9(1)(a) of the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees ("the Qualification Directive") states that acts of persecution must

"(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, para 40, McHugh and Kirby JJ said:

"Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

33. To constitute persecution, the harm feared must be state sponsored or state condoned; family or social disapproval in which the state has no part lies outside its protection. The Convention provides surrogate protection, which is activated only upon the failure of state protection. The failure of state protection is central to the whole system: Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 495. The question is whether the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals ..."
34. It is worth repeating Lord Hope's reminder in HJ (Iran) that the surrogate protection of the Refugee Convention is only activated upon the failure of state protection - see Horvath v Home Secretary [2001] 1 AC 489, bearing in mind that in DK v SSHD [2006] EWCA Civ 682 the Court of Appeal highlighted that the issue is not merely whether the authorities are willing to provide protection, but whether they are capable of providing the particular individual with adequate protection.

35. I must consider whether persecution extends to the whole of the country and if it does not whether the appellant can be reasonably expected to relocate to another part of the country - see SSHD v AH (Sudan) and others [2007] UKHL 49.
36. In addition, and in the specific context of this appeal, I note from X, Y and Z [2013] EUECJ C-119/12 to C-201/12 that considering legislation which criminalises homosexual acts [55] that if a term of imprisonment which sanctions homosexual acts is actually applied in the country of origin, then that must be regarded as punishment which is disproportionate or discriminatory and thus constitutes an act of persecution. It is of note also in that case that at [71] it is said that an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution. And also at [76]:
- when assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.
37. This case has not been designated as country guidance although it was suggested that it should be so treated. No specific expert evidence been produced and I have been provided with background material which is perhaps less extensive than would have been produced in a country guidance case.
38. As submitted by Mr McTaggart, I have adopted the approach taken in **TK** but I bear in mind that the situation for gay men in Malaysia may well be significantly different from that in St Lucia or for that matter in Algeria (see **YD**).
39. It is accepted that the appellant is gay.
40. Having considered the appellant's evidence, I consider that he would conceal aspects of his sexuality on return to Malaysia. I am satisfied that he would not discuss his sexuality except perhaps with a few close friends and it is not something that he is likely to reveal to an employer, nor given his experience with his mother, is he likely to reveal it to his wider family.
41. Ms Cunha submitted that the appellant would conceal aspects of his sexuality as that is how he is; in effect, that he behaves discreetly.
42. The appellant was candid in giving evidence that he would not openly display affection by which it can be inferred touching or holding hands with his partner in, for example, a straight pub or in the house of friends he did not know well. He would, however, do so in a gay bar or a gay club, both of which he was happy to attend or in the company of friends he knew well.
43. The question of how one behaves and whether that is "discreet" or open is nuanced. The extent to which displays of affection between heterosexual

people or LGBT people depends on context. What will be generally acceptable in a club may be different from a pub or a café or in the street, and even that may vary between a small town and, for example, parts of London, Manchester or Brighton. Similarly, how one behaves in another person's house will depend very much on how well they are known. What is acceptable in one culture may not be acceptable in another. In a conservative society like much of Malaysia, physical displays of affection even between married couples would be frowned upon.

44. But there are other ways in which sexuality may have to be concealed. An individual may have to make no mention of it in the workplace and it may be difficult to associate with other gay people, let alone with a partner. Equally, in a society where heterosexuality and marriage is very much seen as the norm, questions may arise why someone is not married. Questions may be asked; and suspicions aroused. I accept, as the appellant said, it is uncommon for two men to live together in Malaysia if not related and that would be particularly difficult if, for example, with a one bedroom property. It may also be necessary to conceal one's sexual orientation from friends and colleagues unless they are close friends. That is the appellant's experience and it may be necessary to conceal it from family. The appellant's evidence of the breakdown of the relationship between him and his mother is indicative of that.
45. Taking the appellant's evidence into the round, I found him to be a candid, honest and compelling witness. I am satisfied on the lower standard by what the appellant has said that he would need to conceal that he is gay and that this is at least in part out of a fear of harm primarily from the authorities rather than violence from family or other members of the public. Unlike, for example, Algeria or St Lucia there is little direct evidence in Malaysia of people being subjected to violence at the hands of family rather than being ostracised or of there being active homophobic incidents.
46. Thus, in terms of the framework adopted above at [28], I am satisfied that the appellant fulfils the requirements of points (a) (b) and (c), and so I turn next to whether his fear is well founded.

The position of gay men in Malaysia

47. Malaysia is a federal constitutional monarchy. Certain matters are devolved to the individual states and in addition to the Penal Code which applies federally, there are in addition laws on lesbian, gay and bisexual issues which are governed by Sharia law which is applicable to Muslims across Malaysia although not to non-Muslims. (See "Country Policy and Information Note Malaysia: Sexual orientation and gender identity or expression" ("CPIN") at [2.4.3]). It appears also from the Australian Department of Foreign Affairs ("DFAT") Report of November 2019 that prosecutions in relation to same-sex activities have not been common and when they have occurred in recent years they have been in

relation to state-based Sharia legislation rather than federal law. (CPIN 2.4.5).

48. In respect of the Penal Code it is evident that the physical manifestation of the appellant's sexuality is prohibited by law not just in terms of intercourse which does not prima facie apply only to gay people given the very wide offence of "outrages on decency" provided for in Section 377D of the Penal Code.
49. It is accepted that there are relatively few prosecutions for same-sex activity under the federal law. One well-known case is that of the Deputy Prime Minister Anwar Ibrahim who was convicted of sodomy in 1999 and 201 which is better seen in a wider political context rather than an enforcement against a gay man.
50. It appears that there have been raids on gay clubs in Malaysia. The raid on the Blue Boy Club in Kuala Lumpur in August 2018 resulted in the detention of twenty individuals who had entered into counselling for "illicit behaviour" and/or "rehabilitation". There is limited detail as to how often raids occurs and it is unclear the extent to which the raid on the Blue Boy Club was a "one-off" given there is no challenge to the respondent's assertion that the club appears still to be in operation, some three years later. It is also implicit in the material that there is more than one gay club, the Blue Boy Club being only the best known.
51. It is evident also that the interaction between the Sharia law and federal criminal law is complex as shown by the article from 29 March 2021 in which the Supreme Court of Malaysia found that it was not open to the state of Selangor to enforce an Islamic ban against intercourse against the order of nature when that was already a crime under civil law. The challenge arose from one of eleven men arrested on suspicion of attempting gay sex during a raid on a private residence. The Amnesty International press release from 18 November 2019 gives more detail on the issue in which it transpires that there was a sting operation carried out by the authorities. I note in passing that Selangor state surrounds the federal territory of Kuala Lumpur, the capital.
52. There is no anti-discrimination law based on sexual orientation or gender identity, nor is there any provision in law for a same-sex marriage or civil partnership. Same-sex couples are unable under the law to adopt children, nor is there any mention of same-sex partners being admitted under the immigration laws.
53. There is effective unanimity in the material provided to me from Human Rights Watch and Amnesty International as well as the CPIN that there is widespread discrimination against lesbian, gay and bisexual people. There are frequently government statements and there is an apparent government position which is manifestly not in favour of LGBT lifestyle and it is of note that a government minister suggested that the motivation in raiding the Blue Boy Club had been to "mitigate the LGBT culture from

spreading into our society". There appears also to be a policy of "helping" LGB people to change their sexual orientation, and it is of note also that lesbian and gay people are banned from appearing on television or other media. There are also indicators that LGBT issues are seen or described as being promoted by western countries and not in keeping with Malaysian culture and values.

54. It is also evident from the CPIN Report that the authorities have promoted "so-called rehabilitation or re-education programmes aimed at changing sexual orientation or gender identity also known as conversion therapy". (4.8.7). It appears that people have been forced to undertake these programmes. Whilst that is not a prison sentence, it is difficult to construe that it is anything other than overt persecution.
55. With regard to how society in Malaysia views lesbian, gay and bisexual people, a research on attitude survey in 2014 stated 88% of respondents in Malaysia believe that homosexuality was morally unacceptable, only four considered it would be morally acceptable and a further 6% that it was not a moral issue. There are indications also that intolerance has grown and has been exacerbated over the past few decades by the use of stigmatising rhetoric from politicians, public officials and religious leaders. It appears also that online abuse is common and there is a strong social taboo against LGBT issues particularly amongst Muslims.
56. That said, the extent to which people face discrimination directly varies. At [5.2.2] the CPIN provides:

The DFAT report which is based on a range of sources including in-country reporting, also stated:

‘The level and frequency of discrimination faced by members of the LGBTI community differs according to their socio-economic status, religion, geographic location and degree of openness. Well-educated urban LGBTI individuals of high socio-economic status are less likely to have to hide their sexuality within their family and social circles than are poorer individuals in rural areas. Sources report society is generally more permissive of people who identify as LGBTI in Kuala Lumpur than they are in East Coast peninsular Malaysia or Sarawak and Sabah. ‘DFAT assesses that LGBTI individuals face a moderate risk of... societal discrimination, which may include being subjected to exclusion from ...employment opportunities, and/or familial or societal violence.’¹¹²

57. In addition, the authorities have undertaken efforts to restrict LGBT activities online, that many members of the community hide their identity to avoid harassment, familial ostracisation and/or violence. Reports of violence by family members towards LGBT individuals are common, society will generally place the blame for such violence on the individual provoking it [6.1]. There are, I accept, few details of violence against gay men although I accept the material in the CPIN 6.2.1 indicated that this may well be the tip of an iceberg as people do not wish to report this. Given the extent of the rhetoric against LGBT issues and the dangers

inherent in somebody explaining what had happened and thereby confirming their own sexual orientation to the police that is unsurprising.

58. As against that, there are indicators that LGBT groups do exist in Malaysia. A number of them are listed in the CPIN at 8.2.10.
59. A factor which perhaps sets Malaysia apart from other countries in which homosexuality is criminalised, is the existence of a gay community or scene including bars and clubs. See CPIN at 8.3.1:

According to travel website Travel Gay Asia, aimed at gay travellers:

‘There has been an increasing number of gay venues in KL [Kuala Lumpur] as a result of the city’s internationalisation. The scene is discreet, and venues changes quite often because homosexuality is still illegal.

‘In addition to a handful of gay businesses, there are some “straight” Bars & Clubs that host “gay-friendly nights”. These venues would not identify themselves as being “gay” but offer nights (usually Friday or Saturday) that attract a large number of gay customers.

60. Having considered all the background evidence, I come to the following conclusions:
 - (i) The material provided shows that the federal law against intercourse against nature and similar activities is rarely enforced. That is not the case with regards the use of Sharia law which appears to have been used on several occasions recently and in the case in Selangor systematically. There is a possibility that some of the crimes are not reported but the fact that same-sex relations are criminalised and the law has been used against Muslims in particular adds an aggravating dimension to the prevalent homophobic attitudes of society and the government but there is insufficient evidence to show that openly gay men face prosecution, although some may be coerced into undergoing conversion therapy. There is, however, evidence that those who are Muslim are more at risk of this treatment.
 - (ii) There is little or no evidence of widespread violence against gay men and it is of note that a relatively small gay scene is able to operate in Kuala Lumpur and perhaps also but catering to an expatriate or tourist community, in Penang. There is no evidence drawn to my attention that there are attacks on the sort of venues described at [69] above.
 - (iii) It does, however, appear that there are a number of openly gay men in Malaysia but this community appears very much to be confined to Kuala Lumpur and to be confined to certain industries such as high tech or westernised media/entertainment. There is a contrast between people in that position and the less educated or living outside Kuala Lumpur.

- (iv) Whilst there are mentions of violence against gay men, there is little detail of this. There is, for example, no evidence drawn to my attention of specific murders of gay people who were killed on account of their sexuality. I accept that there are in the material, accounts of people being attacked on account of their sexuality, and being subjected to violence, but the accounts are lacking in any detail, or specifics such as when where and who was involved. That said, I accept that there is a real fear of violence and also ostracism in a conservative and family oriented society.
 - (v) The evidence available supports an absence of sufficiency of protection against violence towards gay men, given the attitude of the state made clear in its pronouncements, nor is there any other entity to which complaint could be made and this must be seen in the context of a society where there is overt discrimination against lesbian, gay, bisexual people and significant government rhetoric to that effect, endorsing conversion therapy.
 - (vi) There appears to be a small but active and open gay community in Kuala Lumpur. It is of note that the Blue Boy Club continues to be in operation despite the raid and it is said to be one of a number of gay bars/clubs.
 - (vii) There is little or no evidence before me regarding the scene in Kuala Lumpur, how it operates, whether people in Kuala Lumpur are able to live together or to be open about their sexuality beyond certain circles and in a limited way, nor is it clear to me who can have access to such circles.
 - (viii) It is evident that the situation varies across the country significantly, with targeted raids against Muslims in particular.
 - (ix) There is a significant degree of anti-LGBT rhetoric which emanates from all levels of government. That rhetoric is, however, in contrast to the toleration of a small gay scene in Kuala Lumpur.
 - (x) Whilst I might be persuaded that the accumulation of various measures against gay men in Malaysia including violations of their human rights is sufficiently severe to affect open gay men in a manner that constitutes persecution in that they have in effect to deny the core of their being, I am not satisfied that there necessarily remains a real risk of persecution for openly gay men residing in Kuala Lumpur.
61. What then, is the position of this appellant? He will be returning to a country he left in 2007, and having lived openly as a gay man, and in long term relationship with another man, for a significant period.
62. I accept that the appellant would have to hide his sexuality and he fears having to do that having lived openly in the United Kingdom. I accept that

as he says at paragraph 19 of his witness statement that he would be rejected and it is instructive that his fears are that he would have to hide his sexuality [20] and that he might be physically attacked and that he “might also face punishment by the state”. The latter does, however, seem far less likely given he is not a Muslim.

63. The appellant has provided limited reasons for why he cannot go to live in Kuala Lumpur. I accept he has not lived there, and I accept that when he did visit, he was not able to find any gay club or venue. But that was at least 14 years ago. There is now evidence of groups he could contact, details of places he could visit. He has not explained why he would not be able to live in Kuala Lumpur, let alone why doing so would be unduly harsh.
64. Whilst I accept it would be very difficult for the appellant now to readjust to life in Malaysia, for example in Kuala Lumpur having lived openly and being able to conduct a relationship openly in the United Kingdom having lived here for fourteen years, I am not satisfied that this is sufficiently serious to amount to persecution and I therefore dismiss his appeal on that ground.

Article 8

65. The appellant’s partner did not attend to give evidence. I do, however, accept given the candour of the appellant’s evidence that the relationship was genuine and substantive, and I find that they were living together up until a row two days before the hearing. I find that the partner left the home temporarily, given he owns it.
66. That the partner left does not necessarily mean that the relationship is over although I do accept that failing to give evidence on behalf of one’s partner in something as important as this appeal may call into question whether the relationship is subsisting.
67. I have considered whether it is implausible that the appellant’s partner would not have attended if the relationship was subsisting. I do, however, bear in mind that this process has been drawn out over some three years. I accept also the evidence that partner’s family cannot accept that he is gay and are determined that he will have a son, for cultural reasons. I am, however, satisfied that certainly prior to the appellant’s partner not attending to give evidence, that there is nothing to suggest that this was anything other than a loving and stable relationship. There is ample detail of their life together and clear evidence that they maintain a bank account together. I accept that the partner owns the house outright and that this is nothing other than a genuine and subsisting relationship.
68. People in genuine and loving relationships do sometimes do things they regret, even serious things like not attending an appeal. But I note in this case that the appellant’s partner left their home which he owned; he did not ask the appellant to leave.

69. Taking that into account, and viewing the evidence as a whole, I am persuaded that, on the balance of probabilities, any breakdown was temporary and that the relationship was and is genuine and subsisting.
70. The appellant cannot meet the requirements of Appendix FM as he does not have leave. Other than that, and the absence of documents to satisfy Appendix FM -SE, I am for the reasons set out below satisfied the remainder of the immigration rules.
71. I am satisfied on the basis of the material before me, and that on the balance of probabilities, it would not be possible for the appellant's partner to go to live in Malaysia. There is no basis on which he could do so as a British citizen as there is no provision for same-sex partners to be resident in Malaysia with Malaysian citizens. Further, all that would be possible would be visits and that would on the basis of the material provided to me regarding the possibility of entry into Malaysia is not possible at present given that British passport holders are not entitled to enter Malaysia at all. How long that situation will continue I do not know.
72. Further, there are other obstacles to the relationship continuing. There is the societal discrimination against gay people which although I accept does not amount necessarily to persecution it would make it extremely difficult if not impossible for the couple to continue living in anything like the way that they had in the United Kingdom.
73. In short and given that this is not the kind of relationship that could be maintained by telephone and video calls, I am satisfied that there are insurmountable obstacles to the relationship being continued outside the United Kingdom and that accordingly I am satisfied that EX.1 and EX.2 of Appendix FM had been met. On that basis, and given the findings with respect to the remainder of the Immigration Rules, As he meets the requirements of the immigration rules pertaining to his human rights application, his human rights appeal is allowed (applying TZ (Pakistan) [2018] EWCA Civ 1109.
74. Further, and in any event, having had regard to Section 117B of the 2002 Act, even attaching significant weight to the need to maintain immigration control, and that the appellant's English is limited and his family life was developed while he had not leave, I find that there would, on the particular facts of this case, in light of my findings with respect to EX.1 and EX. 2 be very compelling reasons why removal would be disproportionate.
75. Accordingly, I allow the appeal on Article 8 grounds.

Notice of Decision

1. The decision of the First-tier tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by dismissing it on asylum and humanitarian protection grounds.
3. I allow the appeal on human rights grounds.
4. An anonymity direction is made.

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.

Signed

Date 25 January 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul