IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006004
First-tier Tribunal Nos:
PA/51210/2021
IA/05448/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 April 2023

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

KYL
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M K Gilbert, Counsel instructed by Milestone Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 17 March 2023

Order Regarding Anonymity

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

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. We make this order because the appellant seeks international protection and publicity might put him at risk.

DECISION AND REASONS

1. At the start of the hearing we allowed an application by Ms Galalia Kawla to act as the appellant's litigation friend. The First-tier Tribunal had decided it was necessary to appoint a litigation friend but the appointed person was not

assisting the solicitors and was not cooperating and he was discharged from any further duties.

2. We accept that Ms Galalia is a solicitor who has worked for the appellant's instructing solicitors, Marstone Solicitors, and indeed has played a small part in the preparation of this case at an earlier stage. She is not presently practising law but we are satisfied that her previous experience and her standing as a solicitor show an appreciation of the work that is required and the necessary character to be trusted to do the job. The application was signed by Ms Galalia on 13 March 2023. She confirmed that the document purporting to bear her signature was indeed signed by her. Mr Gilbert explained that the appellant's solicitors could not continue to act for the appellant without the appointment of a litigation friend as he is assessed as being without litigation capacity (see **R(on application of C) v First-tier Tribunal** [2016] EWHC 707 (Admin)). In the circumstances we had no hesitation in making the order sought. Mr Gilbert asked for and was given time to discuss the appeal with the litigation friend. We should make it clear that the application was made before the hearing but it was not convenient to deal with it until the hearing.

3. This is an appeal by a citizen of Malaysia against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent refusing him any kind of international protection or leave to remain on human rights grounds.

4. The respondent refused the application on 1 March 2021 and the appeal was dismissed in a Decision and Reasons promulgated on 3 November 2022. The First-tier Tribunal made two significant findings. It was not satisfied that the appellant is gay and it was not satisfied that the appellant would be at risk of persecution in Malaysia even if he is gay. Both of these findings are challenged in the grounds of appeal and clearly the appellant must succeed on both grounds before he can establish that there is a material error in the decision complained of.

5. We decided to begin by looking at the finding that the appellant would not be at risk in any event. At paragraph 23 the judge said:

> "Even if I were wrong in the above, [finding that the appellant is not gay], I would find that the appellant did not face a real risk of serious harm in Malaysia. This is because though the objective evidence sets out that homosexuality is against the law in Malaysia, the objective evidence shows that the law is rarely enforced."

6. We have considered the reasons for the decision in the respondent's refusal letter.

7. In the summary of the asylum decision the respondent makes clear that it is not accepted that the appellant is gay and that is the reason given for saying it has not been established that he would risk persecution on return to Malaysia. The letter does not indicate if the respondent thinks that gay people generally are at risk or are safe in Malaysia.

8. The appellant prepared a skeleton argument for the First-tier hearing dated 5 May 2022. There the appellant recognised that the appellant had to prove that if he is gay he would face persecution in Malaysia (paragraph 6.3). In the skeleton argument the appellant, by his Counsel, asserted that the background evidence shows that there is an "overwhelming tendency" for gay people to be closeted to

avoid persecution (paragraph 8). It is asserted in the skeleton argument that the appellant asserted that the material gathered in the respondent's CPIN of June 2020 "demonstrates that 'out' gay persons ordinarily face a pervasive threat of serious harm or experience actual serious harm"(paragraph 9). The skeleton argument includes reference to various sources showing that there is considerable social disapproval of gay activity and that there are occasional examples of the law being enforced against people taking part in gay activity. There are police raids and people are sent for rehabilitation. These, and other related, points are outlined in the skeleton argument over a total of fifteen subparagraphs.

9. The papers include a "respondent's review" dated 5 June 2022 and prepared by Mr Richard Main MBE for use at the First-tier Tribunal hearing. There is a section headed "If the A is a gay man, would he in Malaysia face a real risk of serious harm on account of his sexuality without more". There the respondent recognises that the appellant has drawn attention to evidence supporting his claim that gay people can be persecuted in Malaysia but calls for a "holistic approach" and refers to other parts of the CPIN indicating that generally non-Muslims (the appellant is a Buddhist) are not at risk from prosecution or affected by the imposition of Sharia law and that LGB clubs have been able to operate and are generally left alone by the authorities. A long established gay club was raided in August 2018 but there had been no further reports of raids and the club still operates.

10. At paragraph 15 the skeleton argument asserts:

> "Not only does the Respondent not consider the A to be gay or be treated as such, but also considers that living in Kuala Lumpur as a Buddhist man who was open about his sexuality that he would not be liable to a real risk of persecution."

11. The respondent considered that the appellant would have no need to conceal his sexuality.

12. It is quite apparent that the judge's short conclusion is the result of consideration of a mass of evidence, not all of it pointing the same way. However, as the reasons for refusal recognised, following **RT (Zimbabwe and others) v SSHD [2012]** explaining **HG and HT v SSHD [2010] UKSC 31** in a country where gay people can usually exist peacefully, if they are willing to be discrete, it is necessary to investigate if they are willing to be discrete and why they are willing to be discreet. The person who would not want to live discreetly, or who would find social constraints not to be live discreetly incompatible with their wish to express their sexuality then such a person would probably need protection. It is the respondent's case and the First-tier Tribunal Judge was not persuaded that that the appellant is gay and so any effort to determine how he might express his sexuality if he were gay is likely to seem foolish. However we do not agree with the First-tier Tribunal that it can be said with any confidence that the appellant, even if gay, could be returned safely to Malaysia. If he is gay then it is necessary to make findings about how he would wish to live and how he would chose to live.

13. We now turn to the challenge to the finding that the appellant has not shown that he is gay. The appellant's contention that he is gay depended substantially on his own evidence. The First-tier Tribunal considered that evidence but did not believe him.

14. The appellant had produced evidence from a psychologist a Dr Huang who identified the appellant as someone with learning difficulties and, probably, autism. This, it was said, made him a poor historian.

15. The judge noted that it was the respondent's case, set out in the refusal letter of 1 March 2021, that the appellant had not shown that he is gay. The main reason for that was his giving answers that were found to be vague and lacking in detail and there being some inconsistencies in the dates and narratives. The judge noted that it was Dr Huang's conclusion that the appellant had difficulty answering questions as he found them hard to understand and it hard to express himself rather than because he was not telling the truth. The judge was clearly unimpressed with Dr Huang's report. The judge found there were facts that suggested a higher degree of personal competence than Dr Huang's report suggested. The judge pointed out that the appellant had on two occasions made the decision to travel to the United Kingdom and had obtained work in the United Kingdom and claimed to have worked in sales in Malaysia. The judge also criticised Dr Huang for commenting on problems the appellant would face in Malaysia when she did not hold herself out to be a country expert.

16. The judge gave reasons to be unimpressed with Dr Huang's evidence. Paragraph 19 is important. There the judge said:

> "19. Further, though Dr Huang places considerable emphasis on the help that the appellant has had from friends, who she has identified as family friends, there has been no collaborative evidence from friends in this appeal. All there is the record of the screening and substantive asylum interview some of which is obviously incorrect.
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> 20. In addition, the evidence from the screening interview and the asylum interview is cursory, fails to deal with important issues and is extremely vague and insubstantial about the many years he spent in the United Kingdom. Aside from identifying his parents and siblings and where they live there is no information about his family situation in Malaysia. I recognise that the appellant cannot be expected to provide detailed or emotionally complete answers but I would expect to have evidence which has a more detailed explanation about his life on the material issues.
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> 21. Further, half of the responses to the questions asked in the asylum interview correspond to the questions asked, provide a reasonable answer and do not appear to have confused the appellant. However, the answers in the latter half are very different. This may have been for many reasons from tiredness, not understanding the question or not having learnt answers to those sorts of questions. I cannot be satisfied that it was simply difficulties with the questions in all the circumstances and I find it very unsatisfactory that no effort to obtain further evidence has been made to deal with the issues."

17. However, notwithstanding the reservations expressed about Dr Huang's report, the judge did give it considerable weight. In order to understand the judge's reasoning it is important to note the observations at paragraph 14 of the Decision and Reasons where the judge said that, having taken into account Dr Huang's report:

> "I do not taken any adverse inferences about the vague and slightly emotionless responses given by the appellant in his asylum interview. The only evidence about the appellant's claim is his screening interview and his asylum interview".

18. The point is that although the appellant may have perfectly good reasons for not giving a good account of himself in those interviews rather than his being dishonest and deliberately unhelpful, there was little or no other all the evidence brought before the judge to show that the appellant is gay. Evidence that appears to be unreliable does not become persuasive or good evidence by reason of being the result of someone who, on his own case, finds it hard to answer questions. Health or personality conditions may well excuse a person from moral blame but they do not make that person's evidence reliable. The point is echoed at paragraph 21 where the judge said:

> "I find it very unsatisfactory that no effort to obtain further evidence has been made to deal with the issues."

19. The main ground of challenge was the contention that the judge, having indicated that she would not draw adverse inferences from vague answers, did draw adverse inferences from vague answers. The references are to paragraphs 14 and 20 of the Decision and Reasons. We did not regard that as a fair criticism. Whilst the judge does say at paragraph 20 that she recognised that the "appellant cannot be expected to provide detailed or emotionally complex answers" the judge goes on "but I would expect to have evidence which has a more detailed explanation about his life on the material issues." The judge does not say she would have expected that evidence to come from the appellant directly but she was taking into account the absence of evidence of a kind that she could reasonably have expected to have been called. It was the appellant's case that he has a gay partner and that person was not called.

20. This is important. When an appellant cannot give a good account of himself, it is very desirable that the account is established or at least supported by evidence from other sources and that was not done here.

21. The judge's decision was consistent with the evidence that was before her.

22. We do not agree that the judge erred materially in her finding that the appellant had not shown that he is gay and we dismiss the appeal.

Notice of Decision

23. This appeal is dismissed.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 March 2023