



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-002447
First-tier Tribunal No:
PA/51743/2021**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 01 November 2023**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**KSY (Malaysia)
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Gilbert, Counsel instructed on behalf of the appellant

For the Respondent: Ms Z. Young, Senior Presenting Officer

Heard at (IAC) on 23 October 2023

**DECISION MADE PURSUANT TO RULE 40 OF THE TRIBUNAL PROCEDURE
(UPPER TRIBUNAL) RULES 2008**

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Kelly (hereinafter referred to as the "FtTJ") who dismissed the appellant's protection and human rights appeal in a decision promulgated on the 25 March 2022.
2. Permission to appeal that decision was sought and on 30 August 2022 permission was granted by UTJ Gill having considered the renewed grounds of challenge dated 25 May 2022.

Anonymity:

3. The FtTJ did make an anonymity order and no grounds were submitted during the hearing for such an order to be discharged. Anonymity is granted because the facts of the appeal involve a protection claim.

Rule 14: 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

4. The appellant is citizen of Malaysia, who appealed to the First-tier Tribunal (“FtT”) against a decision to refuse his protection and human rights claim. His claim was based on his sexual orientation. In a decision promulgated on 25 March 2022, the FtTJ dismissed the appeal. Permission to appeal having been granted, the appeal was listed for hearing. In view of the correspondence sent on behalf of the respondent a request was received for the appeal to be heard remotely. As a result Mr Gilbert, Counsel instructed on behalf of the appellant and the appellant appeared at the hearing by CVP and Ms Young at the Tribunal centre.
5. In correspondence sent shortly before the hearing and as explained at the hearing of the appeal, Ms Young on behalf of the respondent conceded that the decision of the FtTJ involved the making of material errors of law as set out in the appellant’s renewed grounds. It was agreed between the parties that the FtT had materially erred in law in dismissing the appeal on protection and human rights grounds for the reasons set out in the grounds of challenge upon which permission to appeal was granted and upon which Mr Gilbert at the hearing relied upon.
6. In summary, the grounds challenge the assessment of risk made by the FtTJ in the context of the assessment of the appellant’s evidence and also in the context of the country materials provided in the appellant’s bundle. The grounds challenged the assessment set out at paragraph 21 and it is accepted on behalf of the respondent that the FtTJ erred in his assessment of the appellant’s evidence as to how he would live in Malaysia as a gay man and that the finding made by the FtTJ was not supported by the evidence. It is also accepted that the degree of openness was a relevant factor in the assessment of risk (paragraph 5 of the grounds). It is further accepted on behalf of the respondent that the FtTJ did not make clear findings on the assessment of internal relocation, including whether Kuala Lumpur was an area where the appellant would not be at risk. The grounds (paragraph 8) set out the country materials which were relied upon to give a contrary view of the position which were not taken into account, and paragraph 9 referred to the reliance on evidence from one source which was not determinative of risk and thus it is also agreed that the assessment undertaken did not deal with all relevant material when assessing internal relocation. The last ground related to the issue of very significant obstacles to integration (Paragraph 276DE(1)(vi)) as viewed in the context of the country materials.
7. The parties are in agreement that the FtTJ erred in law in his consideration of the issue of risk on return and the issue of internal relocation as set out in the grounds of challenge dated 25 May 2022. Both parties also agree that the points set out in the grounds, taken individually or cumulatively, establish material legal errors in the approach of the FtTJ.
8. In terms of remaking the decision, both parties agree that the findings are flawed on the protection claim so that none of the findings of fact are sustainable. Both parties have invited the Upper Tribunal to set aside the decision and in view of the fact finding and the assessment of the objective material that is necessary on all parts of the claim both submit that the appeal should properly be remitted to the First-tier Tribunal. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of

appeals in this Tribunal and have done so in light of the submissions of the parties. I have considered the issues in the light of the practice statement recited and the recent decision of the Court of Appeal in AEB v SSHD[2022] EWCA Civ 1512 and the decision in Begum [2023] UKUT 46(IAC.) As to the remaking of the decision I am satisfied that in light of the errors of law identified and the fact finding and analysis of the country materials which will be necessary, the appeal falls within paragraphs 7.2 (a) and (b) of the practice statement. I therefore remit the appeal to the First-tier Tribunal for that hearing to take place. The FtT will be best placed to consider the issues arising. It will be for the First-tier tribunal to undertake a holistic assessment of risk in the light of the evidence as a whole, including the material relied upon by the appellant and the respondent and the country materials relevant to the position in Malaysia.

9. Rule 40 of the Tribunal Procedure (Upper Tribunal) rules 2008 allows the Upper Tribunal to give a decision orally at a hearing. Rule 40 (3) states that the Upper Tribunal must provide written reasons with a decision notice to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings. Rule 40 (3) provides exceptions to the rule if the decision is made with the consent of the parties, or the parties have consented to the Upper Tribunal not giving written reasons. In this case the parties consented to a decision without reasons pursuant to Rule 40(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I am satisfied that the parties have given such consent at the hearing.

Decision

10. The decision of the First.-tier Tribunal involved the making of an error on a point of law; the decision is set aside and shall be remitted to the First-tier Tribunal to be heard afresh.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

23 October 2023