**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/10381/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 21 June 2019**
**Extempore**

**Decision & Reasons Promulgated**
On 02 July 2019

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**M Y L**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**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.**

**Representation:**
For the Appellant: Mr A Briddock, Counsel, instructed by Milstone Solicitors
For the Respondent: Ms S Cunha, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction**

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1. The Appellant challenges the decision of First-tier Tribunal Judge Hussain ("the judge"), promulgated on 16 November 2018, by which he dismissed her appeal against the Respondent's decision of 14 August 2018, which had refused her protection and human rights claims.

2. The Appellant, a Malaysian national, arrived in this country in 2003 and had leave to remain as a student for a certain period of time. The claims leading to the Respondent's decision were made in February 2018. The basis of these claims was that the Appellant is lesbian and would for that reason be at risk on return to her home country.

3. In refusing the protection and human rights claims, the Respondent expressly accepted the Appellant's sexuality and the fact that she had had relationships both in Malaysia and this country. There was also an acceptance that if the Appellant were to live as an openly gay woman in Malaysia she would be at risk of persecution and/or serious harm. The protection claim was refused by the Respondent because it was concluded that she had in the past and would on return live "discreetly" and therefore would not be at risk in light of the guidance set out in HJ (Iran) [2010] 1 WLR 386.

4. At the hearing before the judge, the Respondent's concessions were maintained. At para. 24 the judge set out what he considered to be the core issue in the appeal before him, namely whether or not the Appellant would "choose to live openly" on return to Malaysia. At para. 25 he concludes that she would not live openly and that this would be the case for purely personal and/or social reasons, not as a result of a fear of harm.

5. It is worth setting out para. 25 in full:

> "I have come to the view that the Secretary of State's position is to be preferred. This is because if the appellant apprehended living an openly gay lifestyle in her home country on return, then she would have said so. Instead, she very clearly said that she would live discreetly. That evidence was consistent, firstly with the appellant having maintained a 5 year relationship with her female partner in Malaysia, as well as her reference to it being 'private' matter between her and her partner."

6. At para. 26 the judge in effect finds that the Appellant had embellished her account after her asylum interview in order to give the impression that a reason for her wishing to lead a private lifestyle on return was as a result of the fear of harm if she did not.

## The grounds of appeal and grant of permission

7. The grounds of appeal attack the judge's conclusions squarely on the basis that he misapplied the guidance set out in HJ (Iran). The challenge

included an assertion that the judge had failed to consider relevant evidence given by the Appellant throughout the course of her protection claim.

8. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Kamara on 30 May 2019.

## The hearing

9. At the hearing before me, Ms Cunha very properly acknowledged the difficulties with the judge's decision. In particular, it was the case that the Appellant had stated at numerous stages of her claim that she held a fear of living as a gay woman in Malaysia because of the consequences of doing so. These consequences, she had stated, included harm being done to her. Ms Cunha also quite properly recognised that the judge's failure to have regard to this evidence was material to his assessment of risk under HJ (Iran).

10. In the circumstances I did not need to hear from Mr Briddock.

## Decision on error of law

11. It is quite clear that the judge has materially erred in law. From the very outset of her claim the Appellant stated that she believed that if people found out about her sexuality in Malaysia she would be at risk of harm, in particular from the authorities of that country (see for example question 4.1 of the screening interview). The expression of this fear runs throughout the asylum interview (see for example questions 40–41, 43, 62–64, 80, 94, 96, and 151–153). With respect to the judge, he was entirely wrong to have said that her fear was only expressed *after* the interview.

12. The judge's failure to have regard to this clear and consistent evidence fundamentally undermines his conclusions on the appeal. For these reasons I set his decision aside.

## Remaking the decision

13. Having canvassed the issue with both representatives, and with their agreement, I now go on to remake the decision in this appeal.

14. The Respondent has, from the outset, accepted the Appellant's sexuality and other aspects of her account. That acceptance has been maintained before me. On the evidence as a whole, in particular that to which I have already referred, it is quite clear that the Appellant has held, and still

holds, a genuine fear of the consequences of her living as an openly gay woman in Malaysia.

15. It is true that at certain points in her case she has also expressed her desire to live privately with certain regard to her own personality and the conservative views of some members of the Chinese community in this country. However, in the light of the guidance set out in HJ (Iran) that is in no way fatal to her case. It is clear, and I so find, that the fear of consequences of living openly in Malaysia played at least *a material part* in her assertion that she would not do so if returned to Malaysia.

16. Turning to the issue of risk on return, Ms Cunha, having taken what I consider to be a fair and realistic view of the evidence, has conceded that there would be a risk to this particular Appellant if she returned to Malaysia and lived as an openly gay woman. She referred me to paragraphs 56–58 of the reasons for refusal letter and the country information cited therein. In my view that information does indicate that there would be a risk of persecution and/or serious harm to this Appellant if she were to return to Malaysia and live openly. As I have already found, a material reason for why the Appellant might not live in an open fashion is her fear of the consequences.

17. In light of the above, the Appellant is at risk of persecution and/or serious harm on return to Malaysia on account of her sexuality. She is a refugee and a person whose removal would expose her to Article 3 ill-treatment.

18. For those reasons I allow the Appellant's appeal on protection grounds. To the extent that the same factual matrix applies, I also allow the appeal on human rights grounds.

19. I add the following observations. Although the error of law in this case involved a failure to take account of evidence that had in fact been stated by the Appellant throughout, it is also worth emphasising the importance of applying the guidance set out in para. 82 of HJ (Iran) in full. Evidence from an appellant that they have in the past and/or would on return to their home country live "discreetly" is not an end point to the necessary inquiry into risk. There must always be a further step in order to ensure that any reasons for why they have acted as they did in the past and/or why they would act in a particular way in the future are properly evaluated and clear findings made. In other words, the "why" question must be posed and answered.

20. The importance of asking the "why" question has recently been highlighted by the Court of Appeal in WA (Pakistan) [2019] EWCA Civ 302, a case concerning the risks to Ahmadis who practise their faith in Pakistan in a manner which might attract the attention of the authorities, or who would avoid such behaviour out of fear of the consequences. It was found that the country guidance given by MN and others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 00389 (IAC) failed to

incorporate the “why” question, was therefore misleading and should not be followed (paras. 52-61).

21. Adherence to the binding guidance set out in HJ (Iran) and now re-emphasised by the Court of Appeal in the context of the expression of religious beliefs will go a long way to avoid flawed assessments of risk in cases where an appellant relies on a status covered by any of the reasons under Article 1A(2) of the Refugee Convention.

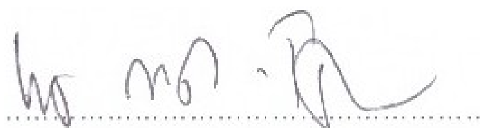
**Anonymity**

22. I continue the anonymity order made by the First-tier Tribunal.

**Notice of Decision**

**The decision of the First-tier Tribunal contains an error of law and I set it aside.**

**I remake the decision by allowing the Appellant’s appeal on the ground that the Respondent’s refusal of her protection claim is contrary to the United Kingdom’s obligations under the Refugee Convention and that the refusal of her human rights claim is unlawful under section 6 of the Human Rights Act 1998.**

Signed  Date: 26 June 2019

Upper Tribunal Judge Norton-Taylor