Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07159/2019

THE IMMIGRATION ACTS

Heard at Bradford via Skype	**Decision & Reasons Promulgated**
On 11 November 2020	**On 08 December 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

PUI LING NG
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Briddock instructed by Milestones Solicitors.
For the Respondent: Mr Melvin Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Beg promulgated on 3 September 2019 in which the Judge dismissed the appellant's appeal against the refusal of her application for international protection and/or leave to remain in the United Kingdom on human rights grounds.
2. Permission to appeal was initially refused by a Designated Judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal, the operative part of the grant being in the following terms:

i. Although the grounds are verbose and read initially as a disagreement with the findings made by the First-tier Tribunal Judge, it is arguable the judge has conflated irrelevant issues in reaching her findings as to whether the appellant is gay and has failed to give adequate reasons for ting (sic) evidence which is directly related to the appellant's claim . It is arguable the judge has imposed her own view on how an individual would behave rather than assess the evidence as a whole in the context of the appellant's personality.

ii. Permission is granted on all grounds although the appellant is expected to refine and particularise the grounds prior to the hearing.

Background

3. A Rule 24 response received from the Secretary of State dated 12 March 2020 asserts:

> 2. The respondent opposes the appellant's appeal. In summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal directed himself appropriately.
>
> 3. The appellant arrived in the UK as a visitor on 22 November 2016. She overstayed and on 14 July 2018 claimed asylum on the basis of her sexuality.
>
> 4. It is evident that Judge Beg has considered all of the evidence presented including oral evidence given by the witnesses. She has made findings based on the evidence and contrary to the assertion in the grounds that she did not, she gave sufficient reasons for finding that the appellant is not a gay woman as claimed. The Judge repeatedly noted the shortcomings of the provided evidence and properly applied section 8 of the 2004 Act in making credibility findings.
>
> 5. It is trite law that a high threshold needs to be reached to succeed on grounds of irrationality. It is submitted that the judges reasoned findings are clearly not tainted by the assertion made in the grounds of appeal. Her findings cannot be categorised as being so unreasonable that no reasonable person acting reasonably could have made them.
>
> 6. The assertion that the learning judge applied her subjective view as to what would or would not have happened is with respect unfounded.
>
> 7. It is submitted that there are no errors of any materiality in the determination.

Error of law

4. The appellant asserts the Judge's decision, whilst at first blush appearing to contain findings that are adequately reasoned, does not. Three grounds are relied upon which are discussed below.
5. I find the Judge has not erred in law by not setting out or recording the evidence given in the decision as there was no need to do so provided

that evidence was considered with the required degree of anxious scrutiny.

6. The Judge had the benefit of not only the documentary evidence but also of seeing and hearing oral evidence being given by the appellant and her witnesses.
7. The Judge noted the basis of the appellant's claim that she is gay and will be at risk on return to Malaysia where same-sex relationships are illegal.
8. The Judge considered relevant cases and the UNHCR Guidelines of International Protection claims based upon sexual identity between [17-21]. No error arises in relation to the same.
9. Ground 1 of the challenge to the decision is based upon an assertion the Judge failed to give reasons for her core findings and/or has failed to take account of relevant evidence.
10. In relation to the reasons challenge, it was noted in MD (Turkey) v SSHD [2017] EWCA Civ 1958 that adequacy meant no more nor less than that. It was not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why she has lost and it is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case there has been an error of approach.
11. In relation to the assertion the Judge failed to consider all the evidence, At paragraph 49 of MA (Somalia) [2010] UKSC 49, it was said that "Where a tribunal has referred to considering all the evidence, a reviewing body should be very slow to conclude that that tribunal overlooked some factor, simply because the factor is not explicitly referred to in the determination concerned".
12. The challenges require an examination of the actual finding made and challenge to the same in the detailed grounds of appeal which, in summary, are as follows:

    a) The Judge found the appellant gave very little evidence either in her oral testimony or in her asylum interview about how and why she became physically attracted to How Sing with whom she had been friends [22]. The appellant asserts the reasoning for this appears at [23] but states this bears no relationship to [22]and that it is not possible to know why the Judge found as she did. It is settled law that a reader of a decision should be able to understand why a judge has found as they have. In this case the decision must be read a whole. The finding in [22] is based upon the evidence specifically referred to in that paragraph. The Judge had the benefit of both written and oral evidence and was able to assess the same and the weight to be given to the evidence.

    b) In relation to [23], the Judge records that when the appellant was asked a question at 58 of her asylum interview to explain a little more about what she meant by 'feeling safe' she was not able to credibly do so, she said "this was the feeling I had when I had my first female friend" [23]. In the same paragraph

the Judge records at question 66, the appellant being asked about her emotions rather than physical acts and stated that it was “a feeling like a couple in love”. In reply to question 69 the appellant claimed the relationship turned from friendship to a romantic one in response to which the Judge finds that given the appellant had a relationship with this person for five years she had provided no credible evidence of their time together. There are no photographs of the places they went together. This is a summary of the weight the Judge gave to the evidence relating to this issue which has not been found to be outside the range of findings reasonably open to the Judge on the evidence. The statement in the grounds this is no more than an assertion is not made out. The finds of a lack of evidence of the five years the appellant allegedly spent in a relationship with this person has not been shown to an irrational finding by reference to evidence given that would prove the contrary, even if the purpose of the interview question was more focused. The Judge was assessing the evidence as a whole.

c) The Judge noted the appellant’s immigration history and the fact she claimed to have entered the UK solely for the purpose of a two-month holiday but overstayed. The appellant stated this was because of the relationship she had formed with another woman named Kiki. The Judge observes that if the appellant was genuinely in fear of return to Malaysia, she would have claimed asylum sooner rather than waiting from the 22 November 2016 date of entry to July 2018. The finding is this damages the appellants credibility pursuant to section 8 Asylum and Immigration (Treatment of Claimants) Act 2004 for which adequate reasons are given. This was not found to be determinative by the Judge but one of a number of elements of concern [24]. The Judge is criticised for not taking into account the appellants explanation for why she did not claim asylum on arrival which is her claim she did not know she could make such a claim for a same sex relationship until 2018. It is not made out the Judge failed to consider the evidence on this point, but this was given by the appellant who the Judge has found lacks credibility. Section 8 of the 2004 Act was introduced to reflect the need for a person to claim asylum when they arrive in the UK or as soon as they think it would be unsafe for them to return to their own country. The appellant has always maintained she is at risk in Malaysia if she lived openly with a same sex partner yet did not claim until two years after entering the UK and only when another named individual made a claim. The high profile given to claims for international protection in the media in the UK and information available with the LGBT community for those at risk makes it implausible that the appellant would not have been aware of the ability to claim if she had a genuine fear of persecution as she claims. The adverse finding pursuant to section 8 has not

been shown to be one not reasonably available to the Judge on the evidence.

d) The Judge found the appellant had claimed asylum because she had been told to do so by a friend Sam and a Ms Yong who herself had claimed asylum in 2018 that she could. This is a finding on the evidence and one available to the Judge. The Judge also finds the reason the appellant claimed asylum was a means of staying in the UK not as a result of a credible fear of persecution. This is the Judges assessment of the evidence given by the witnesses. The weight to be given the evidence was a matter for the Judge [25].

e) The Judge's finding there are no text messages from Kiki Chan is factually correct as the appellant stated in her evidence she had deleted the same whilst also stating she had not deleted photographs of this person. The Judge finds it not credible that the appellant would delete text messages but retain photographs of a person she claims not to want to have any contact with on the basis they were in a relationship that had broken up acrimoniously with a person the appellant claimed was not trustworthy and was controlling. This is not a legal question per se, but a finding based upon the assessment of the factual evidence and the view the Judge formed of the credibility of the claim. It has not been shown to be a finding outside the range of those available to the Judge on the evidence [26]. The appellant challenged this finding asserting the Judge gave no reasons for the same, but a reading disclosed why the Judge found as she did. It is not an irrational conclusion that a person deleting text messages as a result of the deterioration and acrimonious ending of a relationship was unlikely to have kept photographs which would be a visual reminder of the person concerned. This has not been shown to be a finding outside the range of those available to the Judge.

f) The assertion by the Judge the claim made by Ms Yong in her oral evidence that she had met the appellant and Kiki in China Town does not appear in her witness statement is factually correct. The Judge finds that as there is no such mention this witness is not credible [27]. The appellant asserts the Judge was not entitled to reject the entirety of the witness statement on the basis of this one issue. There is also reference in the grounds to replies given in cross examination, but the Judge makes refence to these in [27]. The Judge considered this evidence along with the other material, the main thrust of which is to refer to the appellants alleged relationship with Kiki. Evidence relating the witnesses own situation, the right of a gay woman to live openly and not to be forced to live discreetly in Malaysia is not disputed and should not have been found to lack credibility, but such issues are not material to the first issue which is whether the appellant had

established she is a gay woman at all, HJ (Iran) question 1 refers.

g) The witness Mok Yin Wen was found not to be credible by the Judge. This witness stated she became aware the appellant had arrived in the UK when she telephoned her in 2016 and started living in her house from that time. The basis of the adverse finding is set out at [28] in which the Judge finds the witness was well aware that the appellant was coming to the UK before she arrived and repeatedly stated throughout her evidence that she had invited the appellant to the UK many times when she visited Malaysia once or twice a year. The witness also stated the appellant was in a relationship with Kiki Chan.

h) In relation to the finding at [28] it is important to note [29] in which the Judge refers to the re-examination of this witness. In which the witness stated she was aware of the fact the appellant would come to the UK but did not know the exact time of her arrival. It has not been shown the finding the witness did invite the appellant to come to the UK and that the appellant informed her she was coming here before her arrival is a finding outside the range of those available to the Judge. It is not unreasonable to expect a person visiting another country to have informed her potential host for the visit of the day and approximate time of her arrival. A specific finding at the end of [29] is that the Judge did not find either Ms Wen or the appellant credible on this issue. This is a finding having assessed the weight the Judge thought it appropriate to give to the evidence on this point.

i) At [30] the Judge records the evidence of Ms Wen that she was a close friend of the appellant yet she could not explain why the appellant had not told her she was gay when they met in Malaysia. The appellant stated in her evidence that Ms Wen was in her 50's and that she had no other friends of that age. The Judge finds it surprising that if Ms Wen was only a customer at the appellants shop in Malaysia she would have offered the appellant a home shortly after she arrived in the UK, although this appears to be more of an observation rather than being expressed as a specific finding.

j) At [31] the Judge makes a specific finding that she did not find Ms Weng to be a credible witness in respect of her evidence that she did not know the appellant was coming to the UK before she arrived and did not find credible her evidence the appellant was in a sexual relationship with Kiki Chan. The Judge also observes that despite claiming to be friends she never visited the appellants home and appears to have had no contact with the appellant's mother. This finding is challenged on the basis the Judge given no reasons. I find the finding in relation to the alleged relationship with Kiki Chan was considered together with the other evidence on this point

which resulted in the Judge rejecting the claim as not being credible and for which sufficient reasons are given. The aspect of the challenge in relation to the lack of a home visit or not seeing the appellants mother is of concern as there is inadequate reasoning of the same or reference to cultural norms which would explain the importance of such an omission. I do not find this error, however, material to the overall decision.

k) At [32] the Judge finds the photographs provided are of a group of young women and do not provide cogent evidence of the appellants sexual orientation and that the appellants attendance at gay clubs and on a Gay Pride march are not on their own credible evidence that the appellant is gay [32]. The appellant accepts in her grounds that the photographs and attendance at a Gay Pride march do not prove she is a gay woman but asserts the Judge was required to give further reasons for why the evidence was not credible. There is merit in a submission of Mr Melvin that the appellants grounds are seeking to undermine the findings on the basis the Judge did not give reasons for her reasons for her findings. The Judge did not accept the visual material was sufficient to support the appellants claim. The evidence is as the Judge describes it. Nothing more was required of the Judge on the point.

l) The Judge finds less weight can be attached to a letter from the witness Hui Sin Wong, also known as Sam, as she did not attend the hearing and so could not be cross examined [33]. This finding is not specifically challenged in the grounds.

m) Taking the evidence into account as whole and applying the lower standard of proof, the Judge records that she does not find the appellant is gay and that she came to the UK for a holiday and no longer wants to live in Malaysia [34]. This finding is not specifically challenged in the grounds.

n) The Judge finds the appellant has produced no evidence to prove her relationship with Kiki Chan was a gay relationship at [35] and finds the appellant is not credible at [35]. The Judge is criticised for failing to take into account the appellants claim to have deleted the text messages but if she did, the finding of the Judge is correct. As is the finding for lack of Facebook evidence even though there may be a good reason for the same. This was not however a determinative issue. The adverse credibility finding at [35] related to the appellants claim to have renewed her Facebook account when it was put to her in cross examination that she had been unable to produce any evidence of that relationship, but produced no evidence of any correspondence with Facebook to prove the point.

o) The Judge finds the appellant does not have a well-founded fear of persecution as there was no credible evidence before the Judge that she will be at risk of suffering harm on return

[38]. There is no specific challenge to this although the individual aspect of the grounds clearly indicates the appellants disagreement with the same.

p) The Judge finds the respondent's decision is proportionate when considering Article 8 ECHR [42].

13. The findings are adequate in enabling a reader to understand the reason for the findings made. It is not made out the Judge failed to consider the evidence with the required degree of anxious scrutiny.
14. Ground 2 asserts the Judge made irrational findings. As such the appellant is required to establish that the specific findings mentioned are not based on reason or clear thinking; not reasonable. This has not been made out. Suggesting other alternative findings that the Judge could have made, disagreeing with the weight given to the evidence by the Judge and/or the findings made, does not establish that are outside the range of those available to the Judge on the evidence, especially in light of the rejection of Ground 1.
15. An example of the lack of merit in the challenge is illustrated by [50] of the grounds where the Judge is said to have made an irrational finding in holding against the appellant that she did not provide correspondence with Facebook relating to her account being hacked and not being able to access it. It is perfectly reasonable for the Judge to have found as she did as this issue was put the appellant in evidence. She claimed she had contacted Facebook about the same but had no evidence to support such a claim. Even if her account had been hacked this would not have prevented contact with Facebook customer services team.
16. Ground 3 asserts the Judge rejected the claim on the basis of what would or would not have happened and not on the toality of the evince.
17. This ground is without merit. The Judge considered the evidence, both written and oral, gave the evidence the weight she thought able, and then made finding as to what was accepted and what was not. The core account that the appellant is a gay woman was not found to be proved for which adequate reasons have been given.
18. In his submissions Mr Briddock also suggested that it appeared to him as if the Judge was building a case against the appellant and rejecting the evidence in a domino effect, but such has not been made out. The Judge assessed the evidence she was asked to consider. The Judge made findings upon the evidence including that which was accepted and that which was not. The effect of the structure of the decision shows that as each aspect of the evidence was considered the problems for the appellant were revealed leading to the appeal being dismissed. This is not the Judge building a case but the Judge properly assessing the material. A number of the challenges are based upon the authors interpretation of the findings as submitted by Mr Melvin.
19. The findings made have not been shown not to be within the range of those reasonable open to the Judge on the evidence. It has not been made out it is appropriate for the Upper Tribunal to interfere any further in this appeal.

Decision

20. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.
Upper Tribunal Judge Hanson

Dated the 1 December 2020