IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000083

First-tier Tribunal No:
PA/51353/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14th of January 2025

Before
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between
LL
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr A Gilbert, Counsel, instructed by Milestone Solicitors
For the respondent: Ms S Lecointe, Senior Presenting Officer

Heard at Field House on 2 January 2025

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.

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal against the respondent's refusal of her protection and human rights claims. In summary, those claims were based on the appellant's sexuality and the risks said to flow from this on return to her home country of Malaysia.

2. By a decision promulgated on 29 November 2023, the First-tier Tribunal dismissed the appellant's appeal on all grounds. The judge accepted that the appellant was a lesbian, as had the respondent. Similarly, the appellant's claim engaged the Refugee Convention on the basis that she was a member of a Particular Social Group. The judge found the appellant to be a credible witness and noted her evidence that she would wish to live openly on return to Malaysia (in fact, the appellant had stated that she would have wished to do so, but would not, due to a fear of being persecuted/ill-treated - this has made no difference to my consideration of the case).

3. On appeal, I concluded that the judge had materially erred in law. In summary, this was because:

(a) He failed to apply the lower standard of proof;

(b) He relied on a judgment of the Court of Appeal which was not a factual precedent and had no relevant bearing on the case before him;

(c) He failed to adequately assess evidence relied on by the appellant, in contrast to the assessment section within the CPIN.

4. The judge's favourable credibility findings were preserved.

5. The error of law decision, promulgated on 19 April 2024, is annexed to this re-making decision.

6. A resumed hearing was listed before me on 8 October 2024, but this had to be adjourned because the appellant's consolidated bundle had not been effectively served on the respondent (it had only been filed with the Tribunal the day before the hearing). The relevant Senior Presenting Officer had not had a fair chance to consider certain aspects of that bundle and fairness required an adjournment to be granted.

The issues

7. Important factual matters are no longer in dispute. These are:

(a) The appellant is a lesbian and has had same-sex relationships in Malaysia and since arriving in the United Kingdom in 2016;

(b) The appellant would wish to live openly as a lesbian woman on return to Malaysia (see [5] of the respondent's Response to Directions, dated 2 August 2024. Ms Lecointe confirmed that this concession reflected the respondent's current position);

(c) The appellant is Buddhist.

8. The protection-related legal questions to be determined are therefore:

   (a) Is the appellant at risk on return to her home area (that being the city of Ipoh in Perak State)?

   (b) If she is, would she also be at risk on return to other parts of Malaysia, for example Kuala Lumpur?

   (c) If there is no risk to her in other parts of the country, could she reasonably relocate to Kuala Lumpur (that being the particular destination relied on by the respondent)?

9. Article 8 is also relied on by the appellant and the question to be resolved is whether there would be very significant obstacles to her re-integrating into Malaysian society.

The evidence

10. I have considered relevant materials from the appellant's consolidated bundle, indexed and paginated 1-683. This includes updated country information contained in Part B of the bundle, which was admitted without opposition pursuant to rule 15(2A) of the Tribunal's Procedure Rules.

The hearing

11. The appellant attended the hearing but did not give live evidence.

12. Ms Lecointe relied on the respondent's reasons for refusal letter, the Response to Directions submissions already referred to, and a skeleton argument dated 7 October 2024. She submitted that there was no risk in the appellant's home area of Ipoh, although she acknowledged that this was a more conservative area than Kuala Lumpur. She submitted that the appellant had conducted relationships whilst

previously living in Malaysia, albeit she recognised that these had occurred in the secret. In any event, it was submitted that the appellant could internally relocate to the capital without facing either a risk, undue harshness, or very significant obstacles.

13. It was submitted that the appellant might not be able to do everything in Malaysia that she could do in the United Kingdom and that she might face discrimination, but this would not amount to persecution. Ms Lecointe relied on the following paragraphs in the respondent's July 2024 CPIN: 3.1.1, 3.1.9-3.1.11, 3.1.18, 3.3.3, 5.1.1-5.1.4.

14. Mr Gilbert relied on his updated skeleton argument, which included helpful references to the country information. He submitted that there was a risk in the home area and that this risk extended throughout the country. He referred me to passages in the DFAT report from June 2024, together with passages from the CPIN in support of his arguments that a cumulation of adverse treatment by the state and/or society demonstrated persecution and/or Article 3 ill-treatment, and/or very significant obstacles to reintegration. In essence, he submitted that the latest country information disclosed a bleak picture for the LGBTQ community in Malaysia, specifically those who were "visible" in terms of openly expressing their sexuality.

15. At the end of the hearing I reserved my decision.

Findings and conclusions

16. In making the relevant findings of fact, I have considered the evidence as a whole, but specifically that to which I have been referred by the parties. There is no material dispute as to the essential factual matrix in this case. The core issue relates to the appellant's situation on return to Malaysia, something which I must assess on the lower standard of proof.

The facts

17. The appellant is a lesbian. She in fact would wish to live openly as a lesbian in Malaysia, but has expressed a genuine fear of doing so on account of the risks from either the state or society as a whole. The appellant's same-sex relationship in Malaysia was conducted in secret. The appellant is not a campaigner for same-sex rights.

18. The appellant is a Buddhist.

19. I find that her home area is Ipoh. There was some uncertainty at the hearing as to whether Ipoh was a State of Malaysia, but it is in fact the capital city of the State of Perak. It lies some 120 miles to the north of Kuala Lumpur.

Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, as amended

20. The appellant travelled directly from Malaysia to the United Kingdom, but did not claim asylum until approximately four years after her arrival. The First-tier Tribunal was well-aware of this and found the core aspects of the appellant's account to be credible. Those findings have been preserved. There is nothing further before me which requires any additional adverse consideration of the appellant's credibility pursuant to section 8.

Risk: general points

21. I have taken into account all the passages referred to me by the parties, whether or not they have been specifically mentioned in my assessment, below. The parties themselves know what those references are and what has been said about their relevance to this case.

22. Further, in order to at least attempt conciseness, I will not repeat points made in one part of my assessment when considering another where the effect is the same.

23. The assessment which follows is predicated on the approach set out in HJ (Iran) v SSHD [2010] UKSC 31, with particular reference to the step-by-step test elucidated at [35] and [82]. The factual questions relating to the appellant sexuality and what she would wish to do on return, but for a fear of harm, are not now in dispute.

24. An additional an important point arises from the Supreme Court's judgment, namely the extent of the ability to live openly which is protected by the Refugee Convention. In this regard, I have directed myself to [76]-[78] of Lord Rodger's judgment:

> "76. The New Zealand Refugee Status Appeals Authority observed in *Re GJ* [1998] (1995) INLR 387, 420 that "sexual orientation is **either** an innate or unchangeable characteristic **or** a characteristic so fundamental to identity or human dignity that it ought not be required to be changed" (emphasis in the original). So, starting from that position, the Convention offers protection to gay and lesbian people – and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour - because they are entitled to have the same freedom from fear of persecution as their straight counterparts. No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable. Most significantly, it is unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution: *Atta Fosu v Canada (Minister of Citizenship and Immigration)* 2008 FC 1135, para 17, per Zinn J.
>
> 77. At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of

a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

78. It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 500-501, para 81:

> "Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality"

In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts,

> drinking exotically coloured cocktails and talking about boys with their straight female mates. Mutatis mutandis – and in many cases the adaptations would obviously be great – the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution."

25. These passages are entirely consistent with what Lord Hope said at [15] (referred to in the respondent's Response to Directions).

Risk in home area

26. Ms Lecointe acknowledged that the appellant's home area was more conservative than Kuala Lumpur. That was consistent with the respondent's assessment in the 2024 CPIN: 3.3.3 and 5.1.3.

27. The fact that the appellant had had same-sex relationships whilst in Malaysia is not materially detrimental to her case because these were conducted in secret. My assessment is predicated on her desire to live openly.

28. The Executive Summary of the 2024 CPIN states that:

> "LGBI persons face harassment, arbitrary arrest and detention and police sometimes perpetrate and condone violence against individuals including in custody.
>
> In general, whilst LGBI persons face official discrimination, treatment by state actors is not sufficiently serious by its nature and/or repetition, or by an accumulation of various measures which is sufficiently severe to amount to persecution.
>
> LGBTI persons face discrimination, stigma, threats and violence… depending on their socio economic class, religion, place of residence, and how they present themselves.

> In general, whilst LGBI persons face some societal discrimination this treatment is not sufficiently serious by its nature and/or repetition, or by accumulation of various measures which is sufficiently severe to amount to persecution."

29. I take that into account as representing the respondent's assessment of an conclusion on various country information sources and whether a risk exists.

30. At 3.3.5 of the 2024 CPIN, there is reference to examples of "violence, intimidation, and domestic abuse, in Perak State.

31. Paragraph 8.2.8 of the 2024 CPIN refers to the 2023 USSD report which itself refers to reports that violence against LGBTI people was "common, and that police at times perpetrated and condone such violence, including against individuals in custody."

32. The 2024 DFAT report concludes that members of the members of the LGBT community who live openly face a "moderate" risk of familial and/or societal violence. One sees from the same report that there is a "high risk" of official discrimination relating to, for example, employment opportunities and exclusion from public spaces. The level has apparently risen from "moderate" in 2019. According to evidence in the 2020 and 2024 CPINs, lesbians are "reproached extensively, ignored and discriminated in society" and forced heterosexual marriages are common in more rural areas. Lesbians generally face "harassment". There is widespread censorship, discrimination, and harassment in relation to media activities, including social media platforms.

33. Mr Gilbert referred me to a number of passages within the 2024 DFAT report and the CPINs relating to raids carried out by the authorities on LGBTQ events, indicating a worse situation than that alluded to in the assessment section of the 2024 CPIN. In this regard, it seems to me as though the respondent has placed a good deal of emphasis on the

appellant's ability to attend "clubs". To my mind, this is both limited and somewhat superficial. The ability of a gay person to live openly (in the context of what is said in HJ (Iran)) is not constrained to the attendance at clubs or events. Rather, it is about day-to-day living within society and a "wide spectrum of conduct", which itself necessarily involves being in public as well as in private settings.

34. I take account of the fact that the appellant has not specifically been persecuted or the subject of other harm (actual or threatened) in the past. Therefore, paragraph 339K of the Immigration Rules does not apply.

35. I take account of the fact that the appellant would not be at risk in relation to Sharia law because she is not Muslim.

36. I accept that the risk of formal prosecution by the authorities is very low.

37. The country information clearly demonstrates that the Malaysian authorities would be unwilling to afford adequate protection: 4.1.1-4.1.3 of the CPIN assessment and section 8 in general. Ms Lecointe did not seek to contend otherwise.

38. I do not find the judgment in HL (Malaysia) v SSHD [2012] EWCA Civ 834 to be of any material assistance in this case. As discussed in the error of law decision, it was a judgment upholding a decision of the Upper Tribunal on the facts of that particular case. It did not provide any more general proposition and was certainly not any form of country guidance on the position of LGBTI people in Malaysia.

39. Bringing all of the above together and applying the country information to the particular facts of this case, in the context of the lower standard of proof, I conclude that the appellant would be at risk on return

to her home area of Ipoh by virtue of an accumulation of the following: violence, harassment, discrimination, and degrading treatment by the state; and/or violence, harassment, discrimination, and degrading treatment by non-state actors against which there would be no sufficient protection.

40. This conclusion is based on the appellant hypothetically living as an openly gay woman who be entitled to, for example, express affection towards a partner, but would also entitled to engage in a wider "spectrum of conduct going well beyond conduct designed to attract sexual partners and maintain relationships with them": HJ (Iran), Lord Roger at [78]. I am satisfied that, were the appellant to engage in such conduct, she would be subjected to an amalgam of adverse treatment which, cumulatively, would reach the high threshold of persecution and/or serious harm under Article 3.

Risk elsewhere in Malaysia

41. Aspects of the country information suggest that Kuala Lumpur is a more tolerant environment for the LGBTI community and that city has been the focus of the respondent's case against the appellant. I accept that the capital is, in general terms, less conservative than other areas of the country.

42. Having said that, the great majority of the country information which I have assessed in the previous sub-section of my decision appears to relate to the country as a whole. To the extent that it does, my conclusions on the same evidence applies here in equal fashion.

43. The respondent points to the existence of at least one gay club in Kuala Lumpur which, it is submitted, goes to show that there is an active gay scene. The implication here is that the authorities permit these activities to continue, thereby demonstrating a degree of tolerance. The difficulty with this particular contention is that the country information

demonstrates that there have been more raids on such locations and that some of the bars have had to change location “quite often” because of the risks involved: 2020 and 2024 CPINs. In my view, the reality is somewhat less sanguine that might appear at first glance.

44. Further, and as mentioned earlier, the assessment of risk cannot in any event be founded solely on the ability or otherwise of the appellant to go to any particular club. After all, she may not ever wish to do so, but nonetheless would wish to live as an openly gay woman and go about her daily business without fear of the authorities and/or society in general.

45. Combining the country information, the facts of the case, and the HJ (Iran) test, I conclude that the appellant would be at risk of persecution and/or serious harm under Article 3 in Kuala Lumpur were she to live as an openly gay woman. Her stated fear of living openly in order to avoid such problems does not of course defeat her claim under the Refugee Convention.

Internal relocation

46. If I was wrong in my conclusion on the risk in Kuala Lumpur, I conclude that it would in any event be unduly harsh for the appellant to relocate there.

47. All other things being equal, it is likely that the appellant would be able to find employment and live a reasonable life in the capital. However, all other things are, in my judgment, decidedly not equal. The appellant would either live as an openly gay woman, or would have to conceal that wish (and in effect, her sexuality) in order to avoid problems.

48. If all of the adverse matters to which I previously referred do not reach threshold of persecution and/or serious harm under Article 3, on a cumulative basis they do go to demonstrate significant barriers to the

appellant's ability to live a decent life. In the scenario that she would in fact live openly, the adverse matters would impede her ability to: find employment; access certain services including potentially housing; enter into and maintain openly gay relationships; and live day-to-day without experiencing regular abuse/harassment/prejudice.

49. In the scenario that the appellant would have to conceal her identity, the type of life she would have to endure would be unduly harsh by virtue of the concealment itself.

Article 8: paragraph PL 5.1 of Appendix Private Life to the Immigration Rules

50. Essentially for the reasons already stated, there would be very significant obstacles to the appellant re-integrating into Malaysian society, whether she lived openly or had to conceal her sexuality.

Summary

51. In light of my conclusions, the appellant's appeal must be allowed on Refugee Convention grounds, and in respect of Articles 3 and 8 ECHR.

Anonymity

52. I maintain the anonymity order previously made. This is a protection case and, on the facts, that consideration outweighs the important public interest in open justice.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is allowed on Refugee Convention grounds and under Articles 3 and 8 ECHR.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 2 January 2025

ANNEX: THE ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
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EXTEMPORE DECISION AND REASONS

Introduction

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Richards-Clarke, promulgated on 29 November 2023 following a hearing on the 27 November. By that decision the Judge dismissed the Appellant's appeal against the Respondent's refusals of her protection and human rights claims.

2. The Appellant is a citizen of Malaysia. Her protection and human rights claims were based on her status as a lesbian woman. She asserted that her sexuality would place her at risk on return to Malaysia.

The Judge's decision

3. On appeal, the Judge recorded that the Appellant's sexuality had been accepted and remained uncontroversial. She also recorded the acceptance by the Respondent that the Appellant's case engaged the Refugee Convention for the reason of membership of a particular social group.

4. The core issues on appeal were identified as: (a) whether the Appellant would be at "real risk" of persecution or serious harm on return to Malaysia; (b) and/or whether a return would breach Article 8 rights. At paragraph 8 the Judge recorded the appropriate standard of proof as amounting to a real risk of serious harm, as at the date of hearing, with the burden of proof resting on the Appellant. The standard was then also described as a reasonable degree of likelihood, or alternatively a reasonable chance or a serious possibility. I shall return to that phraseology a little later.

5. Having summarised the evidence the Judge found the Appellant to be a credible witness and recorded that the Appellant's evidence had been that she would live openly as a gay woman on return to Malaysia (it appears to have in fact been the case that the Appellant had stated that she would wish to live openly, but would not do so because of a fear of the consequences – this misapprehension makes no difference to the outcome of the appeal before me).

6. The Judge's analysis of the country information and risk on return is contained in paragraphs 13 to 17. The Judge makes numerous references to the Respondent's CPIN on "Malaysia: sexual orientation and gender identity or expression" version 1.0, published in June 2020. Almost all of those references refer to the Respondent's assessment section of that document, as opposed to the evidence section. Having quoted a number of passages, the Judge then stated that she had had regard to the "relevant case law" of HL (Malaysia v SSHD) [2012] EWCA

Civ 834 and proceeded to quote from a passage of the Court of Appeal's judgment, which itself referred back to the findings of the Upper Tribunal in that case. The Judge confirmed that "on the facts" the Court upheld the Upper Tribunal's decision.

7. At paragraph 17, and having regard to the credible account put forward by the Appellant, the Judge concluded that on her assessment of the "background information" contained in the CPIN and the "relevant case law" a person in the Appellant's situation would not be at risk of persecution either by the Malaysian authorities, nor as a result of wider societal discrimination and/or violence. The Judge was of the view that the Appellant could relocate to, it seems, Kuala Lumpar. The Judge then stated **"**I also find that although the appellant may face some societal disapproval it is unlikely that she would face a real risk of serious harm or persecution in her continuing her current open expression of her sexual orientation." The protection claim was accordingly rejected.

8. Article 8 was dealt with relatively briefly with the Judge concluding that removal would not be disproportionate in all the circumstances.

9. The appeal was accordingly dismissed on all grounds.

The grounds of appeal

10. Five grounds of appeal were put forward. I will address these in turn when setting out my conclusions below. In granting permission, the First-tier Tribunal purported to limit the grant, but above the horizontal line in the notice of decision simply stated that permission had been "granted". In light of Safi, that did not constitute an effective limitation of permission and it was not in dispute that all of the grounds pleaded were live.

The hearing

11. At the hearing before me I received helpful submissions by Mr Gilbert and Mr Tufan, for which I am grateful.

12. I recognise that appropriate judicial restraint must be exercised before interfering with the decision of the First-tier Tribunal when that Tribunal has considered a variety of evidential sources and has undertaken an assessment on relevant matters.

13. Having said that, I am clear that the Judge has committed material errors of law in this particular case.

14. By itself Ground 1, would not have satisfied me that the reference to "unlikely" in paragraph 17 clearly demonstrated a misapplication of the relevant standard of proof. The Judge had previously made reference to the correct standard. Having said that, the wording in paragraph 17 is strange, for want of a better word, and there is a danger that in that crucial passage the Judge had superimposed an erroneous layer to the standard of proof, he wording of the sentence, being that "it is unlikely that [the Appellant] would face a real risk of serious harm or persecution …". Therefore, in isolation this would not be sufficient, but taken in combination with the other matters I conclude that there was an error in respect of the application of the standard of proof.

15. Even if I did not regard that as being an error at all and simply a slip, Ground 2 is clearly made out. On a fair reading of the Judge's decision, particularly at paragraph 16, but importantly also within 17, the Judge had regard to what she described as "relevant case law", that being HL (Malaysia). With respect, it is very difficult to see in what way the judgment of the Court of Appeal in that particular case was relevant to the case before the Judge. HL (Malaysia) was a judgment of the Court of Appeal upholding a decision of the Upper Tribunal, which had clearly been made on its own facts in relation to evidence put forward in 2011/2012. It was not country guidance. It could not have been any form of a factual precedent. It was, as the Judge at the end of paragraph 16 appears to have recognised, a decision "on the facts". That recognition should have led to the Judge simply leaving the judgment out of account. However, she did not do so: she clearly regarded as being relevant to her consideration of the appeal.

16. That reliance on HL (Malaysia) was, in the context of this case, an error of law.

17. In respect of Ground 3, there is some merit in the contention that the Judge failed to have adequately assessed use of the phrase "moderate risk" in one of the reports contained in the CPIN as to the position of gay and lesbian people in Malaysia. On the face of it that passage would appear to have been of real support to the Appellant's case. However, that reference has to be seen in the context of the information as a whole and standing alone I would not deem it to be an error.

18. Having said that, I read it in the context of the next ground, Ground 4, which is of greater significance. It is quite clear that the Judge based her assessment in very large part on sections of the Respondent's assessment within the CPIN document. It has been said on other occasions that this section does not constitute the evidence itself, but

merely an assessment of a variety of evidential sources which is then put forward as guidance to the Respondent's caseworkers: KK and RS (*Sur place* activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC), at paragraph 301. It is important to keep these two sections separate and to assess them accordingly when dealing with any particular case.

19. I am satisfied that the country information listed by Mr Gilbert in his grounds were also put to the Judge, both in writing and oral submissions. Almost exclusively, those references relate to the evidence, as opposed to the Respondent's assessment contained within the CPIN. Having looked at the references for myself prior to the error of law hearing, I am satisfied that they were all relevant to the issue of risk to an individual who would seek to live openly as a gay person in Malaysia. I am satisfied that the Judge failed to address or to provide reasons in respect of all or at least most of these particular passages.

20. It is right that the Judge had stated that she had had regard to all of the evidence. However, important aspects of evidence, which go to the core issues in any given case, do need to be addressed specifically (albeit, potentially only briefly) and here that simply was not the case. I regard that as constituting an error in all the circumstances of the appeal with which the Judge was concerned.

21. Ground 5 relates to the Judge's conclusion on internal relocation and/or reintegration into Malaysian society. Given my conclusions in respect of Ground 4 in particular, I find that Ground 5 is also made out. That is because the Judge was not assessing the question of relocation/reintegration in a proper context, that context being the relevant country information as a whole.

22. In combination, the errors of law I have identified are clearly material to the outcome having regard to the relatively low threshold, see for example Degorce v HMRC [2017] EWCA Civ 1427, and it follows that the Judge decision must be set aside, both in respect of the protection and human rights claims.

23. It is important to reiterate the fact that the Judge found the to be a credible witness. There has been no issue raised by the Respondent in respect of that assessment. In addition, the Respondent himself had previously accepted the fact of the Appellant's sexuality. Although the Judge misapprehended one particular aspect of the Appellant's evidence (whether she would in fact live openly as a gay woman on return to Malaysia, or whether she would wish to do so, but for her fear of persecution - the latter constituting her evidence), this makes no

difference to the assessment of risk in the context of HJ (Iran) v SSHD [2010] UKSC 31. Mr Tufan was right to have acknowledged this.

24. In light of the above, I expressly preserve the Judge's positive credibility findings. In addition, the Respondent has accepted throughout that the Appellant is a member of a particular social group, namely lesbians in Malaysia. Thus, it is common ground that the Refugee Convention is engaged.

25. As matters stand, I can see no particular reason why there needs to be further oral evidence in this case. However, I do not preclude that eventuality.

26. This appeal will be retained in the Upper Tribunal for a resumed hearing in due course, following which the decision will be re-made. In furtherance of this, I issue directions, below.

Notice of Decision

27. The decision of the First-tier Tribunal involve the making of material errors of law and that decision is set aside.

28. The appeal is retained in the Upper Tribunal for a resumed hearing in due course.

Directions to the parties

(1) **No later than 28 days after** this error of law decision is sent out, the Appellant is to file and serve a consolidated bundle of all evidence now relied on;

(2) At the same time, the Appellant is to confirm whether oral evidence will be called at the resumed hearing. If it will, there will need to confirmation that a Cantonese interpreter will be required;

(3) **No later than 42 days after** this error of law decision is sent out, the Respondent may file and serve any additional evidence relied on;

(4) **No later than 10 days before** the resumed hearing, the Appellant shall file and serve a concise skeleton argument addressing the relevant legal issues and evidence relied on. In addition, the skeleton argument must clearly set out the factual matrix relied on in the assessment of risk on return and/or Article 8;

(5) **No later than 5 days before** the resumed hearing, the Respondent shall file and serve a concise skeleton argument addressing the relevant legal issues and evidence relied on. If there is any dispute as to the relevant factual matrix set out in the Appellant's skeleton argument, this must be clearly identified in the Respondent's skeleton argument;

(6) It is intended that the resumed hearing be listed on the first available date after 10 June 2024. Any request for the listing to be in accordance with availability must be made promptly and marked for the urgent attention of Upper Tribunal Judge Norton-Taylor;

(7) A party may apply to vary these directions, copying in the other side.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 3 April 2024