



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/12135/2018**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at The Royal Courts of Justice      Decision      &      Reasons  
On 8<sup>th</sup> April 2019      Promulgated  
On 8<sup>th</sup> May 2019**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**W C C  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Briddock, instructed by Milestone Solicitors  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Malaysia born in November 1978. She appeals against the decision of First-tier Tribunal Judge Herlihy, dated 12 December 2018, dismissing her protection claim on asylum, humanitarian protection and human rights grounds.
2. Permission to appeal was sought on four grounds.

- (i) The judge's negative credibility findings are mostly based on detail that the judge expected to be contained in the witness statements or evidence that does not exist.
  - (ii) The judge's reasons for rejecting the evidence of the Appellant's ex-partner are perverse.
  - (iii) The judge failed to give adequate reasons for many of her findings.
  - (iv) The judge's negative credibility findings are mostly based on assumptions and/or are perverse and the judge failed to take into account material evidence.
3. Permission to appeal was granted by Upper Tribunal Judge Blum for the following reasons:

"It is arguable that the judge was not rationally entitled to rely on some of the assumptions that appear to underlie her findings identified in ground (iv). For example, simply because one is a lesbian does not mean that one would be involved in lesbian organisations, even if openly living as a lesbian. While the judge's overall conclusions were comprehensive and well-reasoned, and while some of the grounds appear to be little more than disagreements with the judge's conclusions, given the nature of the overall challenge I am persuaded to grant permission on all grounds."

### **Immigration History**

4. The Appellant came to the UK in February 2006 as a working holidaymaker. She applied for leave to remain as a student, which was refused with no right of appeal. On 6 December 2012 she applied for leave to remain as a spouse of a settled person. This was refused on 7 February 2013 with no right of appeal. Permission to apply for judicial review was refused on 4 April 2014. The Appellant remained without leave. On 31 August 2018 she was encountered working illegally, arrested and detained. She claimed asylum on 5 September 2018. Her screening interview took place on 10 September 2018 and her substantive interview was on 24 September 2018.
5. The Appellant claimed asylum on the basis that she had a well-founded fear of persecution in Malaysia on the basis of her membership of a particular social group, namely, she was a lesbian. It was accepted by the Respondent that if the Appellant was homosexual, as she claimed, she would be at risk on return.
6. First-tier Tribunal Judge Herlihy did not find her claim to be a lesbian credible. She rejected the Appellant's evidence on the basis that the Appellant had provided a very limited account of her history of when she became aware of her sexual orientation. There was no supporting evidence from lesbian witnesses except for the witness R, the Appellant's

ex-partner. The Appellant came to the UK to work and was not fleeing persecution. The evidence of the Appellant's witnesses was very brief and she attached little weight to it.

## **Submissions**

7. Mr Briddock accepted that a challenge to credibility was always difficult and the judge had provided a very full and lengthy decision. The Respondent's reasons for rejecting the Appellant's credibility were that the Appellant had delayed in making her asylum claim and she had previously been married to a man. However, at the hearing before the First-tier Tribunal a number of witnesses attended and there was lengthy cross-examination. Further, the judge asked a number of questions, some of which were inquisitive rather than seeking clarification. Mr Briddock submitted that the judge utterly disbelieved the Appellant. He accepted that there were some discrepancies. For example, the witness did not know of the Appellant's marriage, but the Appellant stated that she had told the witness of her marriage. However, the judge basically disbelieved the Appellant, mostly based on evidence which was not in the witness statement or which the Appellant did not expand upon in interview.
8. In addition, the judge was struck by the absence of non-lesbian friends apart from the Appellant's partner. The judge erred in finding that a lack of lesbian friends damaged the Appellant's credibility. The judge's finding suggested that evidence from lesbian friends would have been more probative. The Appellant had lost touch with her lesbian friends and was in detention at the time of the appeal, so it was more difficult to get in touch with them. It was not implausible that she had lost touch and the judge should have taken this into account in assessing credibility.
9. Mr Briddock submitted that there were four witnesses who gave evidence of the Appellant's sexuality. The judge did not say why the Appellant should be involved in LGBT groups, which was the exact point made at paragraph 60 of A B C CJEU C-145/13 to C-150/13:

"As regards, in the first place, assessments based on questioning as to the knowledge on the part of the applicant for asylum concerned of organisations for the protection of the rights of homosexuals and the details of those organisations, such questioning suggests, according to the applicant in the main proceedings in case C-150/13, that the authorities base their assessments on stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of each applicant for asylum."

The judge was not assessing the specific situation of the Appellant but her findings were based on stereotypical notions. The judge failed to explain why the fact that the Appellant had no lesbian friends and was not associated with a lesbian organisation damaged her credibility.

10. At paragraph 53, the judge stated that the witness's knowledge of the Appellant's sexuality seemed to rely on what the Appellant herself had told him. Mr Briddock submitted that the witness had no reason to doubt the Appellant's claim to be lesbian. She told him this in 2007. Further, the witness gave examples of why he believed the Appellant was lesbian. It would be extraordinary for the Appellant to state that she was lesbian in order to make a claim ten years later. Further, the judge asked the witness a strange question, namely, if he had seen the Appellant with men, would he have assumed she was not lesbian? This was a natural assumption and should not be held against the Appellant or the witness. It was irrational for the judge to suggest that just because he was told she was lesbian that is the basis of his belief when in fact the witness stated that the Appellant would make comments on females whom she found attractive. It was not the case that the witness's evidence was based purely on what the Appellant had told him. Further, the witness stated that he had met the Appellant's girlfriend.
11. At paragraph 58 the judge stated: "It would have been more credible if her husband had been unaware of her sexuality and I do not find it very likely that he would have pursued his relationship with her knowing that she was lesbian." The Appellant's evidence was that her husband knew she was homosexual when they married. Since heterosexuals marry others who were not heterosexual it was not incredible that the Appellant's husband would marry someone who was homosexual. The judge speculated on what would be more credible. In this respect the judge was relying on inherent implausibility from the judge's own perspective. It was very dangerous to make assessments of credibility based on inherent implausibility.
12. Mr Briddock submitted that, although the judge could take into account a lack of evidence, in this case there was extensive cross-examination of all the witnesses but the judge found the lack of detail in their witness statements damaged their credibility. This was the fault of the Appellant's representatives not a lack of knowledge on the part of the witnesses. For example, when one witness was asked in cross-examination why he had not mentioned the Appellant's husband in his witness statement he stated that he did not know he had to. The witnesses appeared in court, gave evidence and were cross-examined. It was improper for the judge to attach little weight to their evidence on the basis of a lack of detail in the witness statement.
13. The judge also criticised the Appellant for failing to describe her realisation of her sexuality at paragraph 48. The judge failed to indicate how the Appellant should have expressed herself in this regard. The judge was indicating that the Appellant would have had a process of realisation. This came from the API, which accepts that there are different experiences of sexuality. The judge failed to say why the Appellant should have had a gradual realisation or what she should have realised. In any event, the Appellant indicated that she did have a gradual realisation of her sexuality. There was no need to specify this. What the judge set out at paragraph 48 showed the Appellant's gradual realisation. It was not clear

what the judge thought to be lacking. The judge has not identified the difficulties with the witness's evidence but just says that it is vague. The judge should have given reasons for why the witness was vague. She only indicated the lack of detail in the witness statement.

14. The Appellant's friends and her ex-partner, R, gave evidence. However, the judge rejected the Appellant's evidence. Mr Briddock submitted the judge must, therefore, have concluded that the witnesses were lying. The entirety of the judge's reasons for rejecting R's evidence is contained in paragraph 36:

“(1) It is not credible that the Appellant would not have known R's full name when asked at the interview.

(2) There was a discrepancy as to whether they, when a couple, celebrated their first year's anniversary.”

This was the only consideration of R's evidence and the reasons for rejecting her evidence were woefully deficient. These two reasons did not explain why the judge rejected her account of the relationship as a lie.

15. There was extensive cross-examination and many points of clarification, but there were no reasons for why the judge found that R was not a reliable witness and it was an error of law not to have considered the evidence in the round. The judge rejected R's evidence and should have given better reasons for not believing that she had been in a relationship with the Appellant. The judge had probative evidence and extensive cross-examination. Nothing arises from R's inability to remember how they celebrated the first anniversary. This was a minor discrepancy and not enough to reject her evidence in its entirety.
16. Mr Briddock submitted the judge had failed to give adequate reasons for finding the Appellant's claim to be incredible. This was not a forensic examination, but the judge had generally relied on inherent implausibility and a perception of what she thought the Appellant should have done and her conclusions were generally lacking reasons. Overall, taken cumulatively, the grounds amount to a material error of law.
17. Mr Whitwell submitted that the evidence should be assessed in the round and that is exactly what the judge had done. There was a great deal more in the decision and the judge's reasons were adequate. The judge had not acted contrary to A B C. Although he accepted that the wording at paragraph 49 was clumsy it was clear from the judge's other findings that the judge was aware she should not be stereotypical. For example, the issue of the marriage was considered at paragraph 58, the judge was not approaching this from an adverse position and paragraph 48 should be looked at in the round. The API suggested that the judge should look at the realisation of sexuality. Her finding that it was vague and lacking in detail was open to her and relevant to the assessment of the Appellant's credibility.

18. At paragraph 51 the judge acknowledged the limitation of the witness statements, the evidence of the witnesses and, in particular, that the Appellant did not know her partner's surname when interviewed. The Appellant's credibility should be assessed against the background of significant delay, two further applications for student leave after having arrived in the UK as a working holidaymaker and two applications for judicial review. It was therefore surprising that the Appellant had not made an asylum claim earlier than she did. The judge's finding, at paragraph 60, that she was struck by the fact that the Appellant has been unable to say when her fear of return to Malaysia manifested itself was a relevant consideration.
19. The Appellant's circumstances and what the Appellant declared to the authorities, combined with the evidence of the witnesses, was such that the judge was entitled to find that the Appellant was not lesbian. Cumulatively and in the round, the grounds were not sufficient to establish an error of law.
20. In response, Mr Briddock submitted that the judge's view, however progressive, was irrelevant. It was not possible to remedy the difficulties in the judge's finding that there was no objective evidence from lesbians. The major findings were not properly made. Paragraph 49 was more than clumsy. The judge was imposing a test of sexuality on the Appellant. The judge may be purporting to say that there was a lack of evidence and no other evidence but she had not given proper reasons for that conclusion. When looking at the Appellant's case the judge's findings lacked an explanation for why her account was vague. The Appellant had explained her realisation of her sexuality. The fact that she could not remember her partner's surname in interview and her claim was very late was very circumstantial and did not go to the heart of the claim.
21. Mr Briddock submitted the judge dismissed the Appellant's evidence on insubstantial points. The fact that one of her witnesses did not know about her husband (paragraph 44) demonstrated that the question was unclear and it was not apparent what the witness understood from the judge's question. There was no discrepancy and no reason for disbelieving the witnesses. The judge's findings were not open to her on the evidence. The Appellant had brought the best evidence, namely that of her ex-partner, and her ex-partner's evidence had been totally rejected on one minor point. There was not a single point when the Appellant realised she would be at harm in Malaysia. Her fear of persecution had arisen when she realised she could not live openly as a gay person in Malaysia.

## **Discussion and Conclusions**

22. The judge set out the oral evidence of the Appellant and her three witnesses. It is apparent from that record of the evidence that the Appellant's claim is vague and lacking in detail. Although Mr Briddock refers to extensive cross-examination to supplement any lack of evidence in the witness statements the witnesses' knowledge of the Appellant's relationships and sexuality was limited. The judge assessed the evidence

of the Appellant and her witnesses in the round and found, overall, that it was vague and lacking in credibility. That is clear on the face of the recorded evidence. There was no need for the judge to give any further reasons. A vague account is one which is lacking in detail and that point is adequately made out in the decision.

23. The judge rejected the Appellant's evidence of her sexuality for several reasons:
  - (a) The Appellant's account was vague and lacking in detail;
  - (b) The Appellant could not remember the surname of her partner with whom she claimed to have had relationship for one year in the UK;
  - (c) The delay in claiming asylum;
  - (d) The Appellant had been married and made applications to remain on the basis of that marriage.
  - (e) The Appellant challenged the refusal of those applications through legal proceedings, but did not claim asylum until 2018.
24. It is apparent from the judge's decision that the lack of detail in the Appellant's account, judged against the background of delay and numerous applications, is such that the judge was entitled to reject the Appellant's claim to be lesbian. The judge does deal with the evidence of each of the witnesses and, in essence, finds that although they claim to be longstanding friends they had little knowledge of the Appellant's life and relationships such that their evidence that she was lesbian attracted little weight. Whilst I accept Mr Briddock's submission that there would be no reason for the witnesses not to believe the Appellant's claim to be lesbian, the judge has to look at all the evidence in the round and she did so. Overall, there was a lack of evidence from the Appellant and her witnesses to support her claim to be lesbian.
25. The judge did not find that the Appellant had to produce evidence from lesbian friends or lesbian organisations. She found that the lack of such evidence damaged the Appellant's credibility, not because the Appellant should be a member of those organisations and should have lesbian friends, but given the lack of evidence from the witnesses and the Appellant of her homosexuality, there was no other evidence from either lesbian friends or lesbian organisations to support the Appellant's account. It was not the case the judge found that evidence from lesbian organisations or other lesbians would have been more probative than the witnesses produced. The Appellant's account was rejected on the basis that it was vague, lacking in detail and unsupported. The judge's rejection of the Appellant's claim to be homosexual was open to the judge on the evidence before her and she gave adequate reasons for coming to that conclusion.
26. The judge was entitled to find that there was insufficient evidence of the Appellant's homosexuality. She was lacking in credibility because her account was vague and lacking in detail and the Appellant had failed to provide details which she should have been able to provide if her account was true. The judge was entitled to attach little weight to the evidence of

the Appellant's witnesses. It was not incumbent on the judge to make a finding that the witnesses were in fact lying. The judge found that, considering the length of their claimed relationship with the Appellant, their evidence was significantly lacking in detail such that little weight could be placed on their evidence as to her sexuality.

27. Although the Appellant had called her ex-partner to give evidence, the judge attached little weight to such evidence because it was lacking in detail and there were significant discrepancies as to whether the couple celebrated their first year's anniversary. This was not circumstantial. It was relevant evidence which the judge was entitled to take into account. On reading the decision as a whole, the judge gave adequate reasons for her findings and she did not require corroboration in the form of evidence from lesbian friends or membership of lesbian organisations. The judge was merely pointing out that such evidence did not exist and the evidence of the Appellant and her witnesses was insufficient to support a finding that the Appellant was homosexual.
28. Accordingly, I find that there was no error of law in the judge's decision of 12 December 2018 and I dismiss the Appellant's appeal.

### **Notice of Decision**

### **Appeal dismissed**

### **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 her or any member of her 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.

Signed

**J Frances**

Upper Tribunal Judge Frances

Date: 3 May 2019

### **TO THE RESPONDENT** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

**J Frances**



Upper Tribunal Judge Frances

Date: 3 May 2019