



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/12683/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 May 2018

Decision & Reasons Promulgated  
On 8 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

HA (GHANA)  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M Moriarty, Counsel instructed by Duncan Lewis & Co, Sols  
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Robertson sitting at Birmingham on 3 January 2018) dismissing her appeal against the decision of the respondent to refuse to recognise her as a refugee on the grounds of her claimed sexual orientation. Judge Robertson found her evidence as to her sexual orientation consistent and persuasive, but she did not consider that the appellant had a well-founded fear of persecution in Ghana.

### **The Reasons for the Grant of Permission to Appeal**

2. On 5 March 2015 First-tier Tribunal Judge Pedro granted permission to appeal for the following reasons:
  2. The grounds assert, in essence, that the judge having accepted the appellant's credibility and claimed sexual orientation failed to consider evidence material to risk on return and the reasons why the appellant may decide to live discreetly upon return, thereby failing to correctly apply the principles set out in **HJ (Iran)** [2010] UKSC 31.
  3. The grounds raise arguable errors of law capable of affecting the outcome.

### **The Hearing in the Upper Tribunal**

3. At the hearing before me to determine whether an error of law is made out, Mr Moriarty, who did not appear below, developed the case advanced on the grounds of appeal and in the skeleton argument which he had prepared and served in advance of the hearing. In reply, Ms Fijiwala submitted that the Judge had correctly applied **HJ (Iran)**, and no material error of law was made out.

### **Discussion**

4. In **HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department** [2010] UKSC 31, the Supreme Court gave the following guidance at paragraph [82]:

When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the Tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he will be treated as gay by potential persecutors in his country of nationality. If so, that a Tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the Tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living 'discreetly'. If, on the other hand, the Tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so ... If the Tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution

5. The Judge rendered herself vulnerable to an error of law challenge, as she did not set out this guidance at paragraph [23]. Instead, she said that, the appellant having established her sexuality, the next step was the question: *"how each applicant, looked at individually, would conduct himself if returned and how others would react to what he does."* However, before asking herself this third question, the Judge should have directed herself that the second question was whether gay people who lived openly in Ghana would be liable to persecution.

6. Nevertheless, despite not having directed herself correctly at paragraph [23], the Judge addressed this issue at paragraph [24] as follows: *"The appellant has stated that she could not live openly in Ghana as a lesbian. She fears persecution and the absence of police protection. In assessing whether this is well-founded I have considered 'Country Information and Guidance (Ghana): sexual orientation and gender identity'. Whilst this reports that there are some reported cases of mistreatment by police, prosecution or imprisonment for same-sex activity is rare. It does report widespread societal hostility and there have been incidences of violence against LGBT people and discrimination, however it concludes that the level of discrimination and abuse does not reach the level of being persecutory or otherwise inhuman or degrading treatment. Some areas of Ghana appear to be more tolerant such as Accra and Kumasi."*
7. The Judge re-iterated her finding that the appellant did not have a well-founded fear of persecution on return as an openly gay person, at paragraph [27]. Her reasoning was that the Country Guidance did not support a persecutory level of intolerance and discrimination against LGBT people, *"and I find nothing about the appellant's circumstances to suggest she would be at additional risk from either state or non-state actors."*
8. Ground 1 is that this finding at paragraph [27] is irrational. It pleaded that the Judge failed to consider the appellant's personal circumstances in her assessment of whether the appellant would be at risk of persecution on return. Having accepted her account in its entirety at paragraphs [20] and [21], the Judge failed to consider her fear that her family and the local community would beat her to death if she lived openly as a lesbian.
9. I do not consider that the Judge was wrong in law to apply an objective, rather than subjective, test. The issue was not whether the appellant honestly believed that she would suffer persecution if she lived openly as a gay person, but whether such a fear was objectively well-founded.
10. On analysis, the positive credibility finding made earlier by the Judge was confined to an acceptance that she was genuinely gay, as she claimed to be; and, by implication, an acceptance of the appellant's account of events in Ghana prior to her coming to the UK. Part of her account was that at secondary school she had become friends with a girl called P, for whom she had strong feelings. She had kissed her on the lips in public and was bullied by classmates as a result. This affected her grades and her parents found out what she had done. She was beaten by her parents and she promised not to do it again. However, the relationship continued in secret until she left secondary school.
11. It is debatable whether the appellant being beaten by her parents amounted to persecution or *"serious harm"*. However, even if it could have been or should have been characterised as past persecution, there was no reason to suppose that there was going to be a repetition of this behaviour by the parents in the event of the appellant's return to Ghana. For the appellant would not be returning as a 15-year-old girl, who was still subject to her parents' discipline; and the appellant was not proposing to return to her parents' household.

12. Accordingly, the Judge did not err in law in assessing the issue of whether the appellant could live openly in Ghana as a lesbian on the basis that she would be returning as an adult and independent woman.
13. Ground 2 is that the Judge failed to apply the principles established in HJ (Iran). In particular, it is asserted that she failed to recognise that fear of persecution did not have to be the only reason why a person would be forced to live discreetly.
14. On analysis, I consider that this ground is no more than an expression of disagreement with findings that were reasonably open to the Judge for the reasons which she gave.
15. The Judge held at paragraph [26] that it was likely that cultural and religious pressures would influence the appellant's way of life "*more than any fear of persecution*". I accept that it is enough that a material reason for a gay person living discreetly on his or her return would be a fear of persecution which would follow if he or she were to live openly as a gay person. However, it is tolerably clear that the Judge was of the view that a fear of persecution would not be a material reason for the appellant not living as openly in Ghana as a lesbian as she did in the UK.
16. Moreover, even if there is an ambiguity in the Judge's finding at paragraph [26], it is not material as the Judge has elsewhere given adequate reasons for finding that the appellant does not have a well-founded fear of persecution on return; and thus it does not matter whether a material reason for the appellant living discreetly in Ghana as a lesbian would be her subjective, but ill-founded, fear of persecution.
17. Ground 3 is that the Judge erred in law in her findings at paragraph [28] on the issue of the viability of internal relocation. The Judge noted that some areas in Ghana were more tolerant, and she did not consider it to be unreasonable or unduly harsh for the appellant to relocate if necessary. The appellant said that she no longer had contact with any family, but the Judge saw no reason why the friends she had made in the UK could not support her on return. She had established a life for herself in the UK independently, and could do so again on return to Ghana.
18. It is pleaded that the Judge failed to consider (a) that the appellant would be returning to Ghana as a lone female with no family support; or (b) that LGBT persons face discrimination in education and employment; or (c) that the appellant could not relocate to Accra, one of the areas more tolerant of LGBT persons, as her family and the community she feared were based in Accra.
19. I consider that this ground of appeal has no merit. In the light of the Judge's other findings of fact, the appellant could safely and reasonably reside in another part of Accra away from her parents and local community. In any event, the Judge did not specify that relocation should be to Accra, as distinct from another tolerant area in Ghana. It was open to the Judge to find that the friends she had made in the UK could support her on return. The Judge also made a sustainable finding at paragraph [32] that the appellant was in a relationship with Janet, a Ghanaian national, and that it was open to both of them to return to Ghana together.

**Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is 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 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.

Signed

Date 7 June 2018

Deputy Upper Tribunal Judge Monson