Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10658/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 5 April and 12 August 2019 **On 22nd August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

EA (GHANA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Agata Patyna, Counsel instructed by J M Wilson Solicitors
For the Respondent: Mr S. Whitwell (05.04.19) and Mr L. Tarlow (12.08.19), Senior Home Office Presenting Officers

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Obhi sitting at Birmingham on 7 November 2018) dismissing his appeal against the decision of the Secretary of State for the Home Department ("the Department") made on 21 August 2018 to refuse his refugee and human rights claims in which he maintained that he had a well-founded fear of persecution in his home country, having come out in the UK as a bisexual.

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Relevant Background

2. The appellant, whose date of birth is 31 December 1984, arrived in the UK as a student in August 2013, and overstayed from November 2014. He claimed asylum in February 2018.

3. In the RFRL of 21 August 2018, the Department accepted at [39] that the appellant was bisexual, and that he had had gay relationships in the UK. The Department also accepted at [46] that he had a genuine subjective fear on return to Ghana of persecution as a bisexual man and at [53] that he had concealed his sexuality prior to coming to the UK. However, at [47] to [53] the Department advanced the case that gay people in Ghana who live openly as gay are not liable to persecution, but only to discrimination.

The Hearing Before, and the Decision of, the First-tier Tribunal

4. At the hearing before Judge Obhi, both parties were legally represented. The Judge received oral evidence from the appellant and his partner, Matthew James. In his closing submissions on behalf of the Department, the PO submitted that there was a large LGBT community in Accra and Kumasi and people could frequent gay bars there without retribution. Also, the appellant had concealed his sexuality in the UK through choice, so he was likely to conceal it in Ghana.

5. In his subsequent decision, the Judge found that the appellant had not experienced any problems in Ghana *"despite his sexual orientation"*; he had lived discreetly in Ghana and in the UK, and whilst he stated that he would now have to live openly, this was what not what he had done previously; he had not disclosed his sexuality in the UK until claiming asylum; whilst there was a high level of discrimination against the LGBT community in Ghana, there were areas where they lived and had access to social clubs and gatherings. The Judge concluded at [32}:

> "I am therefore satisfied that the appellant will not be at risk of persecution on return to Ghana as it is unlikely that he would live openly, not through fear of being attacked but because he has been discreet even in the UK."

The Application for Permission to Appeal

6. The appellant's solicitors submitted that on a correct interpretation of the evidence he had openly followed a bisexual lifestyle in the UK; and the only reason that he was discreet in Ghana was in response to social pressures and the fear of persecution. The objective evidence confirmed that same-sex activity was illegal in Ghana, and that LGBT people had been arrested and harassed by the police. So, he qualified for asylum under **HJ Iran**.

The Reasons for the Grant of Permission to Appeal

7. On 27 December 2018 First-tier Tribunal Judge Blundell granted permission as it was arguable that the Judge should have reflected on the details given in the witness statement evidence of the appellant and Mr James as to their lifestyle and as to whether these details amounted to the appellant having chosen an open lifestyle in the UK in preference to the discreet lifestyle he previously had; and thus that the finding reached in relation to the fourth stage of the **HJ Iran [2011] 1 AC 596** enquiry was not open to Judge Obhi.

The Rule 24 Response

8. On 17 January 2019, Stefan Kotas of the Specialist Appeals Team served a Rule 24 response opposing the appeal. Given that the appellant had not suffered any persecutory treatment in the past, coupled with the Judge's consideration of the objective material at [27]-[29] which disclosed that there was a gay community in Ghana and the law prohibiting homosexuality did not appear to be enforced, and that there were pockets of the country which were quite liberal – as the Judge held at [31] - the appellant could not demonstrate an objectively well-founded fear of persecutory treatment. Any error of law was therefore immaterial.

The Error of Law Hearing in the Upper Tribunal

9. At the hearing before me to determine whether an error of law was made out, Ms Patyna, who did not appear below, took me through various passages in the evidence in support of the submission that it had not been open to the Judge to find that the appellant had been discreet about his sexuality in the UK. Following the hearing, she sent an email to me and Mr Whitwell in which she highlighted the acknowledgment at [39] of the RFRL of the production by the appellant of several photos of him attending a Gay Pride event.

10. At the hearing Mr Whitwell adopted his colleague's Rule 24 Response, and in response to Ms Patyna's email he conceded that the photographic evidence was capable of undermining the Judge's reasoning.

Reasons for Finding an Error of Law

11. Although this is not a point taken in the permission application, Judge Obhi fell into error by not taking as his starting point the factual concession made in the RFRL that the appellant had concealed his sexuality in Ghana (whereas he had come out as a bisexual in the UK); and that he had a genuine subjective fear of persecution on return to Ghana if he lived there openly as a bisexual. Given this concession, the fourth question in **HJ Iran** could realistically only be answered in one way: a material reason why the appellant would be discreet about his sexuality on return to Ghana would be because, as in the past, he would have a genuine fear of persecution if he did not conceal it.

12. The fact that the appellant had at times been discreet about his sexuality in the UK for reasons clearly unconnected with a fear of persecution did not in itself import that the reasons for the appellant continuing to be discreet on return to Ghana would also be unconnected with a fear of persecution, given the concession made in the RFRL.

13. In addition, the Court of Appeal in **LC (Albania) v SSHD [2017] EWCA Civ 351** at [29] has given the following pertinent guidance:

> "As exemplified by **SW (Jamaica)** (see paragraph 25 above) "behaving with discretion" or "living discreetly" on return does not mean simply avoiding certain overt behaviour by which the characteristic which defines the relevant group might be recognised, or wishing and/or trying to live in such a way as not to be identified or perceived as having that characteristic. Rather, it includes the individual behaving in such a way that he will not in fact be so identified or perceived. Similarly, "living openly" is not restricted to circumstances in which the relevant person exhibits overt behaviour from which it is likely that he will be identified as being gay: it involves the individual behaving in such a way that there is in fact a real risk that he will be identified or perceived as having that characteristic."

14. I consider that much of the evidence about the appellant's lifestyle in the UK, such as him not cohabiting with his current partner, was reasonably characterised by the Judge as evincing a discreet rather than an openly gay lifestyle. However, having regard to the above guidance, I do not consider that the Judge gave adequate reasons for finding in effect that the way in which the appellant had led his life as a bisexual in the UK was no less discreet than the way in which he had led it in Ghana. For example, while his attendance at a Gay Pride event in the UK did not prove he was gay, it was nonetheless a form of overt behaviour from which he was likely to be identified as gay. Similarly, the fact that the appellant had met his current gay partner at a pub, and that they went out to pubs and parks together several times per week, was also indicative of the appellant leading a relatively open gay lifestyle here in contradistinction to his former highly discreet lifestyle in Ghana, where (as accepted in the RFRL) out of a fear of persecution he had completely abstained from seeking out or openly socialising with male sexual partners.

15. For the above reasons, an error of law is made out in the terms identified by Judge Blundell when granting permission. Given the concession made in the RFRL and the undisputed evidence which showed that the appellant had, on analysis, recently led an open bisexual lifestyle in the UK in comparison to that which he had previously led in Ghana, it was not open to the Judge to find that the appellant's fear of persecution would not be a material reason for the appellant being discreet about his sexuality on return.

16. The Judge's erroneous approach to answering the fourth question in **HJ Iran** is only material if the second question falls to be answered in favour of the appellant. The Judge's findings at [28] point in this direction, while his findings at [31] indicate the contrary. However, his conclusion at [32] is

squarely based on an answer to the fourth question, and not on a clear answer to the second question.

17. I do not consider that it is obvious from the background material that the second question should be answered in favour of the Department (as contended in the Rule 24 Response) nor is it obvious that it should be answered in favour of the appellant (as contended by Ms Patyna). So, the Judge's failure to make a clear finding on this crucial issue constitutes a further material error.

18. The upshot is that the decision of the First-tier Tribunal is vitiated by a material error of law, such that it must be set aside and remade.

19. I consider that this is an appropriate case for retention by the Upper Tribunal, as the only remaining live issue arising under the protection claim is how the second question in the **HJ Iran** enquiry should be answered. If it should be answered in the appellant's favour, then, given the concession in the RFRL discussed earlier, it would follow from that concession, and also from the undisputed evidence deployed before the First-tier Tribunal, that a material reason for the appellant being discreet about his sexuality on return would be a well-founded fear of persecution if he lived openly as a bisexual.

Discussion and Findings on Remaking

20. As envisaged by the directions I made at the error of law hearing, the resumed hearing on 12 August 2019 to remake the decision proceeded by way of submissions only.

21. The relevant material before me comprises the documentary evidence that was relied on before the First-tier Tribunal, and the following additional material filed by the appellant's solicitors for the resumed hearing: (a) an expert report from Dr Mattia Fumanti, Senior Lecturer in Social Anthropology at the University of St Andrews, in which she opines that, based on his knowledge of Ghana, there is a real risk that the appellant could face persecution on the ground of his sexuality and the Ghanaian police would not be able to offer sufficient protection against such a threat; (b) an article dated 20 May 2019 headed "*Returnee attacked at beach for having gay relations with jailed colleague in US*"; and (c) an article dated 13 January 2019 headed "*Men suspected of being gay robbed, stripped and blackmailed in Ghana*", which is cited by Dr Fumanti in her report.

22. In the latter article, the author, a LGBTI advocate at a human rights organisation in Ghana called "*Human Rights Defender Ghana*", reports that on 5 January a group of gay men were lured via social media to a suburb of Accra where they were allegedly robbed of their phones, money and other valuables. In addition, they were stripped, videoed and photographed. The assailants forced the victims to kiss and caress while they took videos and photos of them, and later posted the videos on social

media. The victims reported the incident to the police who had arrested two of the perpetrators.

23. The author also refers to an earlier incident in September 2018 when a mob of young people in Tafo seized two lesbians allegedly having fun in their own bedroom and tried lynching them, “*but luckily a police patrol team managed to save them.*”

24. The author comments that homophobes have continued their aggravated attacks on people they believed to be gay or lesbian in Ghana; and that the phenomenon of lawless attacks on perceived LGBTI persons has taken a new twist as such people continue to face widespread violence.

25. The above article, which was carried in “*Gay Star News*” is illustrative of the conundrum identified by Judge Obhi in his decision at [28] where he said: “*There is some contradiction in the reports as to whether an individual will be at risk or not.*” For the article tends to undermine the proposition that there is no effective protection for openly gay people afforded by the Ghanaian police, and it does not in itself prove that the risk of violence or ill-treatment from non-state agents is of such severity and frequency as to disclose a general risk of persecution for openly gay people. On the other hand, the article also shows that openly gay people are as vulnerable to crime and exploitation in Accra as they are in more socially conservative parts of the country.

26. In the CPIN on “Ghana: Sexual orientation and gender identity”, version 1.0, dated February 2016, the following is stated at 2.3.11: “*There is, however, limited information of how openly LGBT people are treated by the state and society generally in Ghana, although there is evidence of the LGBT community existing. Same-sex activities are criminalised, prosecutions are rare, and very few charges abroad, whilst societal intolerance is widespread. However, in general the level of discrimination and abuse faced by LGBT persons is not such that it would reach the level of being persecutory or otherwise inhuman or degrading treatment.*”

27. This is reiterated in the Policy Summary at 3.1.1, where it is said that, “*although LGBT persons face intolerance and discrimination, in general the level of intolerance and discrimination is not such that it would reach the level of being persecutory or otherwise inhuman or degrading treatment. However, an asylum claim for an LGBT person may succeed if it can be demonstrated that they face an accumulation of measures which are sufficiently serious by their nature and repetition that they constitute persecution.*”

28. The CPIN also draws a distinction between different parts of the country in terms of the level of hostility faced by openly gay people. At paragraph 2.5.2, it is said that where LGBT people encounter hostility from non-state actors they may be able to avoid this by moving elsewhere in Ghana, but only if the risk is not present there and it is not unduly harsh to expect them to do so. Taking into account their personal circumstances, decision

makers must explore whether a person could relocate to those parts of Ghana that are more tolerant towards LGBT persons, such as parts of Accra and Kumasi.

29. On the topic of where there is a gay scene or community in Ghana, the CPIN at 7.2 contains a response from the Australian Refugee Review Tribunal in 2010 which stated that there are some gay-friendly bars, restaurants and other meeting places in Accra. These venues do not publicly advertise their gay or gay-friendly status. In a Ghana web article dated August 2014, it was observed that Ghana had been known as the African country with the most registered homosexual hopefuls seeking expatriate partners. However, the FCO's travel advice for UK nationals, not Ghanaians, dated August 2015, observed that although there was a small gay community, there was no "*scene".*

30. In summary, the respondent's policy as of February 2016 was that incidents of violence against gay people in Ghana were infrequent and/or they were geographically localised such that there was not in general a risk of persecution throughout the country for individuals who are openly gay. This is also the position taken in the RFRL.

31. However, a significant theme in the evidence relied on by the appellant is that violence against LGBT people in Ghana "*has been getting steadily worse",* as stated in an article in the Independent on 8 January 2018 headed *"Ghana: Campaigners demand decriminalisation of homosexuality after spike in anti-LGBT violence".* Dr Fumanti's opinion is that a hostile attitude towards LGBT people has increased in recent years with the increased prominence of religious leaders denouncing homosexuality. In addition, a Human Rights Watch report of 8 January 2018 highlighted the fact that in February 2017 the Speaker of the Ghanaian Parliament referred to homosexuality as an abomination and called for stricter laws against same-sex conduct. As a result of this hardening of attitudes towards gay people, Dr Fumanti's opinion is that the level of homophobia and the number of attacks against LGBT persons in Ghana "*makes the country very unsafe for a man that wants to live his bisexuality openly."*

32. Neither in Dr Fumanti's report or elsewhere is there a quantitative analysis of the number of reported incidents of violence against gay people since February 2016 (the date of publication of the CPIN) as against earlier years, such as to demonstrate clearly that violence against gay people is getting steadily worse to the point such that it can be said that being openly gay anywhere in Ghana gives rise to a real risk of persecutory harm. But as was pointed out by Ms Patyna in her closing submissions, Mr Tarlow did not challenge Dr Fumanti's credentials or seek to persuade me that her opinion was based on flawed evidence, but he simply relied on the RFRL. Despite the RFRL being issued on 21 August 2018, the background evidence relied upon in the RFRL all pre-dates the CPIN of February 2016.

33. Recent FCO advice fortifies the appellant's case. In the FCO advice of December 2017, travellers to Ghana are warned that there is *"a zero*

tolerance towards lesbian, gay, bisexual and transgender people in Ghana" and that *"Anti LGBT rhetoric/hate speech by religious leaders and government officials and a local media that tends to sensationalise homosexuality can incite homophobia against the LGBT community"*. The FCO also reiterates its earlier advice of 2015 that there is no LGBT scene in Ghana.

34. Accordingly, having considered the evidence in the round and the arguments presented by both parties, I find that the appellant has made out his case to the lower standard of proof. There are substantial grounds for believing that if he lived openly as a gay or bisexual man in his former home area of Accra, or anywhere else in Ghana, he would face a real risk of persecution.

35. The appellant would not live openly as a gay or bisexual man in Ghana, and a material reason for him doing so would be a well-founded fear of persecution. Accordingly, the appellant qualifies for recognition as a refugee.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision substituted:

The appellant's appeal is allowed on asylum grounds.

Direction Regarding Anonymity

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.

Signed Date 15 August 2019

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have allowed this appeal on remaking, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make no fee award as the appellant needed to bring forward evidence by way of appeal in order to succeed in his appeal.

Signed Date 15 August 2019

Deputy Upper Tribunal Judge Monson