



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2023-001497

First-tier Tribunal No:  
PA/54998/2021  
LP/00140/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**16<sup>th</sup> December 2024**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**JS**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr T Jebb, instructed by Nelson Singleton Solicitors  
For the Respondent: Ms S Arif, Senior Home Office Presenting Officer

**Heard at Royal Courts of Justice (Belfast) on 20 November 2024**

**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**

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Gillespie promulgated on 28 January 2023, dismissing his appeal against a decision of the Secretary of State made on 1 October 2021 to dismiss his asylum and protection claim.
2. The appellant's case is that he is a gay man and is at risk on return to Ghana on account of his sexuality. It is also part of his case that his brother who is also a gay man was killed when it was discovered by family that they were both gay. The appellant had made a previous claim for asylum which was also refused and his appeal against that was dismissed by First-tier Tribunal Judge Grimes subsequent to a hearing on 12 January 2021.
3. The Secretary of State did not accept that the appellant is gay, and on that basis applying the test in HJ (Iran) v SSHD [2010] UKSC did not accept he was at risk noting that the appellant had failed at the first stage of that test.
4. The judge heard evidence from the appellant and also from Mr Colin Flynn, a statement from whom had been taken into account by the Secretary of State as part of the fresh submissions subsequent to Judge Grimes' decision.
5. The judge also had before him, in addition to Mr Flynn's statement, a statutory declaration from the appellant's brother in Ghana and a report from a psychiatrist.
6. The judge set out Judge Grimes' findings on credibility [4] and directed himself in line with HJ (Iran) [16] as well as in line with Devaseelan [17].
7. Having summarised Mr Flynn's evidence [28], [29] and the statutory declaration, held:-
  - "32. The appellant's latest evidence does not prove he has a well-founded fear of persecution in Ghana. Even if Mr Flynn's sincerely held belief that he is gay is correct, it is not possible to say how he is going to behave as a gay man in Ghana given Judge Grimes' rejection of almost everything, he had said happened to him there, and which is relevant to the third question posed in HJ (Iran). He said in oral evidence that he had not had sexual relations with a man since coming to the United Kingdom, a period of now four years".
8. The appellant sought permission to appeal on the grounds that the judge had erred:
  - (i) in failing to make findings as to Mr Flynn's evidence and as to Mr Flynn's belief that the appellant is gay as claimed;
  - (ii) in concluding that he was unable to say how the appellant would live on return in failing to take into account the appellant had lived as

an openly gay man for his time in the United Kingdom as stated by Mr Flynn.

9. On 8 June 2023 Upper Tribunal Judge Kamara granted permission to appeal.
10. I heard submissions from both representatives. Mr Jebb submitted that the judge had simply failed to make any findings as regards Mr Flynn's evidence and that the finding that, in any event, he would not be at risk was irrational given the failure to factor into account the evidence that the appellant had been living as a gay man and was overly reliant on the previous credibility findings. He submitted that the observations with regard to Mr Flynn's evidence at [28] were not a rational response as Mr Flynn was unable to comment on the appellant's account of what had happened in Ghana; Mr Flynn was only able to comment on matters known to him in Northern Ireland. He pointed out that despite the various negative findings reached by Judge Grimes, she had accepted that he had been involved with the Rainbow Project.
11. Ms Arif submitted that the judge had reached conclusions open to him and gave adequate and sustainable reasons for that.

### **Discussion**

12. I bear in mind that an appellate tribunal should be wary of setting aside a decision by a lower Tribunal. I doing so I apply what was held in in Ullah v SSHD [2024] EWCA Civ 201 at [26]:
13. Further, I bear in mind what was said in Volpi v Volpi [2022] EWCA Civ 464 at [2] and what was held in HA (Iraq) [2022] UKSC 22 at [72].
14. Given that the judge reached his findings in the alternative, that Mr Flynn's evidence was not reliable as to the appellant's sexuality, it follows that he must not have accepted Mr Flynn's evidence on that point or discounted it in light of the other findings. What the judge has not done is explain why he did so. What is set out at [28] of the decision is an analysis of Mr Flynn and the appellant's reaction to Judge Grimes' decision. But the point is that Judge Grimes did not have the evidence of Mr Flynn. As Mr Jebb pointed out, Mr Flynn was not in a position to make any comments about the appellant's account of what had happened in Ghana to which he was not a witness. Further, it is not a sufficient or rational basis on which to discount Mr Flynn's evidence.
15. In reaching a decision, I bear in mind of course that Mr Flynn is not what would usually be described as an expert witness. But, as a person of standing in various LGBTI organisations and having got to know the appellant over a number of years his evidence is something to which weight could be attributed. The judge has not explained why he did not do so or why in any balancing exercise he had discounted it.

16. Whether that is material, depends on the findings that the judge reached in the alternative.
17. The fact that Judge Grimes had reached negative findings regarding the appellant looking at the evidence holistically, without the evidence of Mr Flynn, to reach a conclusion that the appellant is not gay is not a sufficient basis on which it could be argued that the appellant would inevitably form part of the remaining questions in the HJ (Iran) test. That is because Judge Grimes had concluded that the appellant is not gay. Had she concluded that he is gay, the alternative, that he is a gay man, means that that finding would not have been a sustainable basis to reach any further findings and there would have needed to have been a fact-finding exercise, albeit one viewed through the lens that in large parts of his testimony the appellant had not been believed.
18. Accordingly, I am satisfied that the failure to identify what weight was attached to Mr Flynn and whether his testimony was believed or not was a material error on the part of the judge. As that goes to the core of the appellant's claim, it would be necessary to hear evidence from Mr Flynn again; and, if his evidence is accepted, to reach findings with regard to the other parts of the test set out in HJ (Iran), I am satisfied it would be in all the circumstances of this case in the interests of justice to remit this appeal to the First-tier Tribunal to be heard again afresh by a judge other than Judge Gillespie.

### **Notice of Decision**

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (2) I remit the appeal to the First-tier Tribunal to be heard by a judge other than Judge Gillespie. For the avoidance of doubt, none of the findings of fact are preserved.
- (3) No interpreter will be needed.

Signed

Date: 6 December 2024

Jeremy K H Rintoul  
Judge of the Upper Tribunal