



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/05933/2018

**THE IMMIGRATION ACTS**

Heard at Birmingham CJC  
On 10 January 2020

Decision & Reasons Promulgated  
On 12 February 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

M K  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms Z Harper of Counsel instructed by Duncan Lewis & Co  
Solicitors (Harrow Office)

For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Phull promulgated on 18 July 2019 dismissing the Appellant's appeal on protection grounds.
2. The Appellant is a citizen of Namibia born on 11 October 1991. He arrived in the United Kingdom on 20 February 2018 and applied for asylum on the same date. A screening interview was conducted on 21 February 2018, and a substantive interview on 14 March 2018. At that stage the Appellant advanced his protection claim by reference to a family dispute in respect of inherited property. Subsequent to the asylum interview, further representations were made on his behalf on 21 March 2018

in which an issue in respect of his sexuality was raised. In consequence the Respondent arranged for the Appellant to be re-interviewed on 11 April 2018, and this aspect of the Appellant's case was explored further in the course of that interview.

3. The Appellant claims to be bisexual. He related having had two encounters with men whilst living in Namibia, the first being a relationship of approximately 1-2 years, and the second essentially being a one-off incident following attendance at a friend's wedding. The Appellant also related that at the time of his departure from Namibia he was in a relationship of some two years standing with a woman to whom he was engaged to be married and who was expecting his child.
4. The Appellant's application for protection was refused by the Secretary of State in respect of both aspects of his case - the property dispute and sexuality - for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 24 April 2018.
5. The Appellant appealed to the IAC.
6. The appeal was dismissed for reasons set out in the decision of Judge Phull.
7. The Appellant applied for permission to appeal, which in the first instance was refused by First-tier Tribunal Judge O'Garro on 15 August 2019, but was subsequently granted by Upper Tribunal Judge Kebede on 17 September 2019. The grant of permission to appeal is in material part in these terms:

*"Arguably, as asserted in the first ground, the Judge failed to take into account the evidence of two arguably material witnesses".*
8. One of the witnesses was 'NT', a national of Namibia who had also claimed asylum on the grounds of sexuality and had succeeded in that claim. NT spoke in a witness statement dated 25 March 2019 of having met the Appellant in the United Kingdom and having discussed their respective sexualities. NT attended the hearing before the First-tier Tribunal and gave evidence in support of his witness statement.
9. The other witness referred to in the grounds of appeal and the grant of permission to appeal is The Reverend David Babbington, a priest within the diocese of Lichfield, and a member of the Bishop of Lichfield's consultancy group on LGBT+ issues. He is also a regional ambassador for an inclusive church, and a family pastor for Emmaus

Christian LGBT+ asylum seeker and refugee support group. The Reverend Babbington states in a letter dated 6 June 2019 that he is gay and lives openly as such.

10. The Reverend Babbington offered supporting testimony by way of a five page letter. It contains considerable detail in respect of both the Appellant and wider matters. In part the letter refers to the methodology of evaluating asylum claims from LGBT+ people, and also refers to the church's function and roles in respect of such matters and matters of sexuality generally. More pertinently, the letter also speaks as to the writer's own experience of meeting the Appellant, and his assessment of the Appellant. The Reverend Babbington states in clear terms that he is confident as to the Appellant's claimed sexuality. It is also indicated that the discussions between the Appellant and the writer were in part in the context of exploring reconciliation of faith and sexuality. It seems to me that it may reasonably be inferred that discussing such reconciliation involves a consideration of personal feelings at some depth.
11. The sexuality of the Appellant is of course a starting point in his case and is not inevitably favourably determinative: for example, it would be necessary in due course to give consideration to the guidance in **HJ (Iran)** in respect of lifestyle choices that the Appellant might adopt, and whether such lifestyle choices are influenced by fear of oppression or persecution or for other reasons. Potentially this is particularly pertinent in the instant case given that at the time of the Appellant's departure from Namibia he had been in a longstanding relationship with a woman to whom he was engaged to be married, and he did not report having had any sexual encounters with men during the currency of that relationship.
12. In what is otherwise for the main part a coherent and carefully reasoned decision, it seems to me clear that the First-tier Tribunal Judge has fallen into a significant material error of law in reaching a conclusion that it was "*not credible that he is bisexual*" (paragraph 35) because there is no apparent consideration of, or otherwise reasons for rejecting, the testimony of either of the witnesses identified above. This was significant testimony in respect of a core element of the Appellant's claim. He was entitled to a reasoned analysis of its substance if it, and his claim to be bisexual, were to be rejected.
13. There is a reference at paragraph 6 of the Decision to the fact that NT attended the hearing and gave evidence via the court interpreter relying upon his witness statement. There is a further reference to NT where the Judge sets out the submissions made by the Respondent's Presenting Officer who argued "*The witness does not take the matter any further because he doesn't know about the Appellant's fiancée and child*" (paragraph 12). There is no further reference to the testimony of NT at any point in the Decision. This means that the substance of NT's testimony is not set out

anywhere in the Decision: far less is there any analysis or finding in respect of the testimony.

14. There is a complete failure to make any reference to the evidence of the Reverend Babbington. The passing reference to the fact that the Judge had taken into account the Appellant's bundle of documents (paragraph 5) is not remotely adequate in the context of the facts of this particular case and the nature of the testimony of the Reverend Babbington.
15. Ms Aboni, having had the opportunity of considering the substance of the challenge and having had sight of the witness statement and the Reverend Babbington's letter, acknowledged that she was not in a position to resist the challenge to the First-tier Tribunal's Decision. She also acknowledged that the only appropriate outcome was that the decision of the First-tier Tribunal be set aside and that the Appellant be afforded a further opportunity of putting his case before a different Judge in the First-tier Tribunal.

#### **Notice of Decision**

16. The Decision of the First-tier Tribunal contained material error of law. The decision of the First-tier Tribunal is set aside.
17. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Phull, with all issues at large.

#### **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 him or any member of his 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.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: 8 February 2020

**Deputy Upper Tribunal Judge I A Lewis**