



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number:  
UI-2022-000006 (PA/51822/2020)  
UI-2022-000005 (PA/51821/2020)  
IA/01439/2020 & IA/01915/2020

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 June 2022**

**Decision & Reasons Promulgated  
On 28 February 2023**

**Before**

**Upper Tribunal Judge Sheridan  
His Honour Judge Bird**

**Between**

**(1) TH  
(2) KV**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Mohammed Mohzam (C B Solicitors)

For the Respondent: Mr E Tufan (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

Introduction

1. The appellants are Namibian nationals. They arrived in the United Kingdom on 17 December 2019. TH was 20 years old, KV was 25 years old. On arrival they claimed asylum. Each asserted that they feared persecution in Namibia from TH's older brother and from KV's father because they are gay men. Their application was refused by the respondent on 2 October 2020. She also refused

humanitarian protection and issued removal directions. The appellants appealed to the first tier tribunal. The hearing took place before FTTJ Chana on 29 October 2021. On 21 November 2021 her decision, dismissing the appeal was promulgated.

2. The FTT Judge rejected the appellants' claims and disbelieved that were each gay.
3. This is the appeal against that decision. There are two grounds of appeal: first that the Judge's findings were perverse or irrational and secondly that they were unsafe. Permission was granted by UTJ Smith on 2 February 2022.

## The Judgment under appeal

### Introduction

4. At paragraphs 1 to 3 the Judge sets out the relevant immigration history. At paragraph 2, setting the scene for the appeal, she says this:

*“The appellants arrived in the United Kingdom together on 17 December 2019 and claimed asylum upon arrival which was refused by the respondent.”* (emphasis added).

5. The structure of the judgment, as it deals with the evidence and the findings of fact is as follows: the basis of the claim is set out at paragraphs 13 to 16. In summary, the appellants claim that TH's older brother and KV's father had made threats to kill them and had attacked them directly and by sending groups of men to attack them.

### The evidence

6. The Judge deals with KV's evidence at paragraphs 17 to 26 and with TH's evidence at paragraphs 27 to 34.
7. At paragraph 18 of the judgment, the Judge deals with an important part of KV's oral evidence. He said that that he realised he was gay when he was 20 years old (in 2014). In his asylum interview he had said he found out he was gay in 2018 (when he was 24 years old). He said the information provided in the interview was an error and that he had asked his lawyer to draw the mistake to the attention of the respondent.
8. At paragraph 20 of the judgment, the Judge records KV's evidence under cross-examination that *“after the age of 20 he was attracted to men”*.
9. At paragraphs 35 to 56 the Judge deals with her findings of fact. The Judge concluded (by reference to HJ (Iran) v SSHD and HT (Cameroon) v SSHD [2010] UKSC 31) that the first issue she had to determine was whether the appellants were in fact gay.

### Findings of Fact

10. At paragraph 38 of the judgment, the Judge deals with KV's evidence set out at paragraph 18. She says this:

*“The second appellant's evidence is that he found out that he was gay when he was 20 years of age. However, at question 57 of his asylum interview, he said that he found out he was gay in [2018] which would make him 24 years of age. This inconsistency in his evidence goes to..... the credibility of his claim that he is a homosexual. I also do not find it credible that the appellant would not have realised he was a homosexual until he was well into his adulthood. I do not accept the appellant's explanation that it*

*was a mistake in the interview record. The appellant did not correct his mistake after he said he discovered it when he received the papers*” (emphasis added).

11. At paragraphs 39 to 52 the Judge identifies a number of further and substantial inconsistencies in the evidence of each appellant and refers to instances where she finds the evidence of one or both not to be credible. The appellants make no direct challenge on these findings individually.
12. At paragraph 53 the Judge summarises her conclusion in this way:

*“Considering all of the evidence in the case as a whole, in the round, I find the appellants evidence is not credible in view of the matters to which I have referred. I find that their claim that they are homosexuals is an invention by the appellants and a ploy to remain in this country. I do not accept their accounts .... or their claims to be at risk from anyone. I am not satisfied, even on the lower burden of proof that applies in asylum cases, that the appellant[s] are homosexuals now or that they have ever been homosexuals in the past, or that they [fear] persecution or mistreatment or [have] been threatened by anyone by reason of being homosexuals. I find that the appellants are here for economic reasons and men of no credibility whatsoever.”*

#### Disposition

13. At paragraph 54 the Judge records her conclusion that:

*“... the appellants therefore fall at the first stage of the test set out in **HJ**. I find that the appellants will face no real risk of persecution, serious harm or mistreatment contrary to [their] human rights in Namibia from anyone for any reason”*

14. The Judge deals with sufficiency of protection at paragraph 55.
15. It is clear therefore that at this stage of the judgment, the Judge has dealt with the claim. She has dealt with her conclusions on the evidence at paragraph 53, finding the appellants’ evidence “not credible” and explained the effect of that finding at paragraph 54 .

#### Further comments and final conclusion

16. At paragraph 56 the Judge adds what in my Judgment is akin to a footnote. She says this:

*“I find that these matters referred to above bring the credibility of the appellants into doubt. I must be satisfied that the appellants evidence is credible, consistent and reliable. I do not find them to be credible or truthful and I do not believe their version of events. I find that the appellants [are] not .... genuine asylum seekers but economic migrants and that their asylum claims are nothing more than their last desperate attempts to remain in this country.”* (emphasis added).

17. The Judge’s final conclusion on the asylum claim are expressed at paragraph 57.
18. At paragraph 58 to 61 of the judgment, the Judge deals with the remaining claims (humanitarian protection and articles 2, 3 and 8 of the Human Rights Convention and Immigration Rule 276ADE). She found that article 8 was not engaged but that if it was engaged it was proportionate to remove them. The grounds of appeal raise no criticism of these findings.

## The Grounds of Appeal

### Ground one

19. The first ground is that the Judge's conclusion (at paragraph 56) that the appellants' asylum claims, "are nothing more than their last desperate attempts to remain in this country" is "completely detached from reality" and "gives rise to the possibility that the Judge has misunderstood the [appellants'] case".

### Discussion

20. In our view it is important to see this conclusion in context. It appears in the judgment as an afterthought. It is plain that the asylum claims were not "last-ditch" in the commonly understood sense of those words, namely that they were made late in the day or after a series of unsuccessful attempts. It is clear that the Judge was aware that the claims were made at the earliest possible moment. She sets that point out at paragraph 2 of the judgment.
21. Reading the judgment as a whole we have formed the clear view that the Judge had not misunderstood the appellants' case.
22. In our judgment by using the words "last-ditch" the Judge was simply expressing a view that the application was made out of desperation.
23. If we are wrong, and the Judge was both expressing the view that the asylum application had been made late and that such a view formed part of her decision, we would conclude that the obvious error was not material. As noted in paragraph 11 above, the Judge found there to be several significant inconsistencies in the appellants' accounts. These findings, which have not been challenged, are more than sufficient to support the conclusion reached. Accordingly, even if the Judge erred, the error was immaterial and was not therefore sufficient to warrant our allowing the appeal.
24. For those reasons we dismiss the first ground of appeal.

### Ground two

25. The second ground of appeal focusses on paragraph 38 of the judgment. The Judge's findings that (in effect) KV would have realised that was gay before he was "well into his adulthood" is criticised with some force.
26. The appellants refer to the respondent's Asylum Policy instruction in sexual orientation in asylum claims. It sets out the following:

*"Recognising, understanding and accepting one's own sexual orientation, if it differs from mainstream social expectations, can be a long and/or painful process, and in some instances, may only come in later stages of life. In such cases this must not be seen as undermining the genuineness of an individual's claim. Many claimants may come from cultures which shun any open discussion on sexual orientation, and it should be noted that LGB activity and identity will often be surrounded by taboo, stereotypes and prejudice and be seen as being contrary to the fundamental morals, religious and political values of many societies. Discussing matters such as sexual orientation will for many, in the official context of an asylum interview, be extremely daunting. It is to be expected that some LGB asylum seekers may struggle to talk openly about their sexual orientation. If find it difficult to disclose material information in a coherent or detailed manner." (emphasis added)*

27. On materiality, the appellants suggest that the Judge “*arguably approached [KV’s] claim as to his sexual orientation with a presumption of disbelief. This has arguably tainted the remainder of the findings in respect of sexual orientation*”

### Discussion

28. It is again important to read paragraph 38 of the judgment in context. Paragraph 18 sets the scene. These paragraphs deal with a discrepancy between on the one hand, the evidence KV gave at the hearing (that he realised he was gay at 20: see paragraphs 18 and 20 of the Judgment) and on the other, the responses given in his asylum interview (that he found out he was gay in 2018 when he was 24).
29. The Judge found this inconsistency went to KV’s credibility. It was in the context of this inconsistency that the Judge refused to accept that KV “*would not have realised he was a homosexual until he was well into his adulthood.*” Having rejected his explanation that the asylum interview questions were wrongly recorded, she found that what KV had said in the asylum interview was not credible.
30. The guidance cited by the appellants does not assist them. The Judge did not reject KV’s evidence on the basis that he discovered he was gay late in life, she rejected it on the bases set out in her judgment.
31. If we are wrong, and the guidance does apply and the finding was one that the Judge was not entitled to make, the Judge’s error was not in any event material for the same reason that the error identified in ground 1 would not be material: see paragraph 23 above.
32. The appellants’ submission that the Judge (arguably) approached the claim with a presumption of disbelief is in our view not made out. Arguability, whilst a sufficient threshold for permission is clearly not enough for the appeal to succeed. The grounds advanced in support of permission have not been amended. It is in our view clear from the judgment that the Judge did not approach the claim from a presumption of disbelief.

### Conclusion

33. For the reasons we have set out, the appeal is dismissed.

Signed

Date

His Honour Judge Bird