



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/02763/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 September 2018

Decision & Reasons Promulgated  
On 18 September 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

NS  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr R O'Dair, Counsel instructed by Schneider Goldstein Immigration Law

For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born on 17 November 1992 and is a citizen of Uzbekistan.
2. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Grimmett on 10 July 2018 because she concluded there were arguable legal errors in the decision and reasons statement of First-tier Tribunal Judge Raymond that was issued on 4 June 2018. Judge Raymond decided the appellant was not a refugee or otherwise in need of international protection for two reasons. First, because he did not believe the appellant's account and second, because even if her account was true, he did not find it reached the threshold to establish a well-founded fear of persecution in Uzbekistan or to show otherwise a real risk of serious harm as opposed to societal discrimination.

3. Judge Raymond made an anonymity direction when he dismissed the appellant's appeal and is appropriate to continue that direction and I do so by making a similar order under rule 14 of the 2008 Upper Tribunal Procedure Rules. The parties should remember that any disclosure of information likely to identify the appellant is prohibited. For convenience, if necessary, the appellant can be referred to by the letters, NS.
4. The grounds of appeal were settled by Mr O'Dair, who represented the appellant before Judge Raymond and who appears for her in the Upper Tribunal. Mr O'Dair suggested there are four interrelated reasons why the decision of Judge Raymond is not sound. He supplemented the grounds he settled with a skeleton argument and oral submissions, all of which I have taken into consideration.
5. Mr O'Dair argued Judge Raymond did not remain impartial but stepped into the arena by asking the appellant questions on issues not disputed by the respondent. In so doing, Judge Raymond erred by making findings on irrelevant matters and relying on those findings to discredit the appellant's testimony. Mr O'Dair drew my attention to the decision of the Employment Appeal Tribunal, *East of England Ambulance Service Trust v Sanders* [2015] ICR 293 as an example of where courts and tribunals have found that judges must not intervene in a dispute and should not look to find evidence in support of one's party's case or the other's. Mr O'Dair referred to a number of indications in Judge Raymond's decision that show he questioned the appellant directly about issues not taken by the parties, and that he made observations about the appellant's case during the hearing.
6. Before describing the three other grounds of appeal, I mention that prior to the hearing I suggested to Mr O'Dair that the guidance in *Sanders* might not be applicable to the Immigration and Asylum Chambers. He acknowledged that as it was a decision of the Employment Appeal Tribunal, it was not binding on those Chambers but he said it provided general guidance about the conduct of hearings and was a reminder that a hearing should be fair. In answer to my queries, Mr O'Dair indicated he was not familiar with the guidance given by the Upper Tribunal in *MNM (Surendran guidelines for Adjudicators) \* (Kenya)* [2000] UKIAT 00005 and the Supreme Court in *Patel & Ors v Secretary of State for the Home Department* [2013] UKSC 72. The former looked at the role of special adjudicators (the fore runners of First-tier Tribunal Judges assigned to the Immigration and Asylum Chamber) and how they might intervene in appeals. The latter is mentioned because it is a reminder that First-tier Tribunal Judges often have to step in and act as primary decision maker in a range of appeal types.
7. Mr O'Dair (wisely) focused on his argument that Judge Raymond's behaviour in the appeal hearing was unacceptable and led to the proceedings being unfair. He overstepped any semblance of impartiality and took over cross-examination and sought to enhance the Home Office's case.
8. Mr O'Dair turned to his second and third grounds, which he presented as examples of where Judge Raymond's interventions led to unfair proceedings. Mr O'Dair alleged it was wrong for Judge Raymond to infer from the lack of evidence that the appellant had only made her protection claim in October 2016 because she had failed her studies. He

argued that the appellant was not given an opportunity to provide supporting evidence about her academic achievements in the UK and because it was not an issue taken by the respondent (who had that information) it was not appropriate for Judge Raymond to take it himself.

9. Mr O'Dair also alleged it was wrong for Judge Raymond to find the appellant had not been raped simply because she had not sought help from a human rights organisation or others in Uzbekistan to bring the offender to justice. Mr O'Dair argued that Judge Raymond failed to consider why the appellant had failed to disclose her claimed rape, which was disclosed for the first time at the appeal hearing where the judge asked a direct question. The fact the appellant had not been willing to disclose her abuse should have been given appropriate weight, particularly given what is widely known about why people might be reluctant to disclose such ill-treatment. Judge Raymond took no such factors into consideration.
10. The final issue Mr O'Dair raised related to whether Judge Raymond could reasonably infer anything negative about the appellant's credibility from her claim to have come out in Russia as a lesbian whilst not so doing in Uzbekistan. Mr O'Dair argued the findings made by Judge Raymond are perverse and undermine the whole of his conclusions that the appellant was not a reliable witness.
11. Before turning to Ms Fijiwala, I asked Mr O'Dair to deal with Judge Raymond's alternative findings. At [410] and thereafter, Judge Raymond considered what risks the appellant might face on return to Uzbekistan were he to be wrong in his assessment of her account. He concluded that the country information revealed she would face a real risk of discrimination on account of being a lesbian or bisexual, but that the risks to her would not amount to persecution or serious harm.
12. Mr O'Dair admitted his grounds and submissions did not address that situation. He argued that if Judge Raymond's decision shows bias, then irrespective of the alternative conclusions, the appeal should be remitted to ensure the appellant has a fair hearing and so the parties can be confident in the outcome. If Judge Raymond was biased, then there should be serious doubts about his assessment of the background country evidence.
13. Ms Fijiwala admitted there had been no rule 24 response to the appeal but that should not be taken as an indication that the respondent conceded any issues. The respondent opposed the appeal in its entirety.
14. In relation to the first ground, Ms Fijiwala argued that it is clear from the decision and reasons statement that Judge Raymond intervened only to clarify evidence that had been provided. It was good practice for a judge to engage with the evidence to ensure nothing was overlooked. Ms Fijiwala did not see consider any of the questions to be inappropriate or outside the permissible range of enquiry a judge might undertake. Ms Fijiwala added that the proceedings remained fair because the appellant and Mr O'Dair had been able to respond to the points arising.
15. When addressing the "failed student" point, Ms Fijiwala stated that it was open to Judge Raymond to draw negative inferences from the failure of the appellant to provide

evidence of her studies. It was open to Judge Raymond to conclude the appellant did not pass her course because the evidence in the form of the CAS indicated she had not completed her course. When addressing the “rape” point, Ms Fijiwala argued that Mr O’Dair’s arguments were mere disagreement with the judicial findings made. She pointed out that the judge relied on the failure of the appellant to give a credible reason for not seeking redress. Judge Raymond had regard to the background country information and did not take a stereotypical or narrow view of the evidence but looked at it as a whole.

16. With regard to the final ground, Ms Fijiwala said there was nothing to show Judge Raymond’s finding was perverse.
17. Ms Fijiwala also submitted that even if Judge Raymond wrongly assessed the appellant’s credibility, the outcome of the appeal would have been the same because of his alternative findings. There was no direct challenge to his conclusion that any risk the appellant might face – were her account truthful – would be discrimination and not persecution.
18. I reserved my decision, which I now give.
19. I have concluded that the appellant has failed to demonstrate that Judge Raymond was biased in his decision making. In reaching my decision I have had regard to the guidance in *Sivapatham (Appearance of Bias: Sri Lanka)* [2017] UKUT 293. This is a case where the allegation is one of apparent and not actual judicial bias.
20. The appellant’s core argument is that Judge Raymond was biased because he asked questions about issues not taken by the respondent and relied on such issues when assessing the appellant’s credibility. Although I acknowledge that judicial interventions can have the perception of a judge “taking over”, that does not lead to a conclusion that a judge is biased. To establish bias, the appellant must show that such interventions are indicative of a judge who has a closed mind or who has pre-determined the outcome. Mr O’Dair did not present evidence that was the case in this appeal.
21. It is evident from the decision and reasons statement that Mr O’Dair objected to Judge Raymond’s interventions during the hearing but only to the extent that he believed Judge Raymond was stepping into the arena and add new issues to the respondent’s reasons for refusal. But it is also clear to me that Mr O’Dair was not familiar with the ambit of enquiry judges in the Immigration and Asylum Chambers can undertake. If he was, then he would not have relied on case law from the Employment Appeals Tribunal or be unaware of leading cases pertaining to the issue in relation to the Immigration and Asylum Chambers. As Ms Fijiwala submitted, judges are required to make a decision on the entirety of a person’s case, and must have regard to all the evidence in the round.
22. Having examined the decision and reasons statement, I am satisfied the issues taken by Judge Raymond of his own were matters that needed to be examined because they arose from the evidence presented. It was open to Judge Raymond to ask questions on those issues. He would have acted unfairly had he not permitted the parties to respond to his interventions but it is clear from the decision and reasons statement that the

representatives were given opportunities to respond to his queries. In this regard, I take into account Mr O'Dair's admission that he did not seek an adjournment to deal with any of the "new matters" raised by Judge Raymond.

23. I add that Judge Raymond's interventions and comments at most are reflections of preliminary and developing views as to the case before him. A judge is entitled to make such observations; many representatives find them helpful because they give an indication when to move on or where to focus efforts. Such interventions and comments can help advocates ensure that a judge's concerns are addressed. It is evident that Mr O'Dair had this in mind when he responded to a number of the issues identified by Judge Raymond during the hearing.
24. Overall, I conclude that a fair minded and informed observer would not have concerns over the way Judge Raymond conducted the hearing.
25. Having reached this conclusion, I can deal swiftly with the remaining three grounds. The second ground, dealing with the "failed student" point, might have had merit had Mr O'Dair applied for an adjournment below to obtain documentary evidence and such an application been refused. I acknowledge the appellant was not prepared her case on the basis that the judge might want to know more about her immigration and personal history since arriving in the UK. However, given the law, it is a relevant matter.
26. A judge must consider why a protection claim is not made at the earliest opportunity. I am unsurprised, therefore, that Judge Raymond wanted information about the outcome of the appellant's studies. It was open to Mr O'Dair to request an adjournment to obtain documentary evidence. He did not. It was therefore natural for Judge Raymond to apply the burden of proof and make the inference he did. I accept that he could have come to a different conclusion on this issue given the mixed evidence regarding the CAS and whether the appellant had been a good student, but that does not mean his finding is unlawful. I recognise that to come to the opposite conclusion would depend on finding the appellant to be credible in her evidence, which he did not.
27. As to the issue of whether the appellant was raped and whether Judge Raymond could disbelieve her claim based on her failing to seek redress in Uzbekistan, I am satisfied both findings were open to Judge Raymond to make. He assessed all the evidence in the round. It is unclear why the appellant's representatives had not asked the appellant to clarify what had happened to her given that her accounts were vague. It is unsurprising when taking the appellant's case in the round, that Judge Raymond was not satisfied with the appellant's answers and rejected this part of her claim.
28. As to the final ground, I note that Mr O'Dair did not pursue it. I can understand why. An allegation of perverse findings is difficult to sustain and he could not provide evidence that Judge Raymond's finding fell outside what was permissible. I reject this ground.
29. Even though the appeal fails on all the grounds presented, I add that it would nevertheless have failed because the grounds do not establish apparent bias and do not challenge Judge Raymond's assessment of the country situation to which the appellant

would return. Judge Raymond carefully considered the background country information and explains why, even if the appellant has the sexual orientation claimed, would not face serious harm in Uzbekistan.

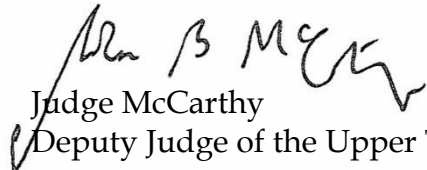
**Notice of Decision**

The appeal is dismissed on all grounds.

**Anonymity order**

I have made an order for anonymity under rule 14 of the 2008 Upper Tribunal Procedure Rules. 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

  
Judge McCarthy  
Deputy Judge of the Upper Tribunal

Date

13 September 2018