



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

Appeal Number: PA/04014/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 3 April 2018**

**Decision & Reasons  
Promulgated  
On 23 October 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**SD  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Bandegani of Counsel instructed by Duncan Lewis & Co.

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Aziz promulgated on 24 August 2017 dismissing the Appellant's appeal against a decision of the Respondent dated 11 April 2017 refusing asylum in the UK.
2. The Appellant is a citizen of Sri Lanka born on 18 September 1985. She is married to 'H'.

3. The Appellant and her husband made joint applications for entry clearance on 27 January 2011: the Appellant applied as a Tier 4 (General) student, and her husband applied as her dependant. Entry clearance was granted; the Appellant arrived in the UK on 24 February 2011. An application for further leave to remain as a student was made on 30 October 2014. The application was refused.
4. On 27 November 2014 H claimed asylum; the Appellant was included in the application as H's dependant. H's asylum application was refused on 15 May 2016. H appealed to the IAC (ref AA/09833/2015): his appeal was heard on 5 May 2016; the Appellant gave evidence in support of H's appeal. H's appeal was dismissed by First-tier Tribunal Judge Duff in a decision promulgated on 10 May 2016. Subsequent applications for permission to appeal to the Upper Tribunal were refused.
5. On 13 October 2016 the Appellant claimed asylum.
6. The basis of the Appellant's claim for protection is briefly and helpfully summarised at paragraphs 11-16 of the Respondent's 'reasons for refusal' letter ('RFRL') dated 11 April 2017. The Appellant claimed to have been detained and questioned by the CID in Sri Lanka for 2 days regarding her husband's involvement with the LTTE. Her release was obtained pursuant to an agreement to pay money after her release; the agreement had been made through the Appellant's father-in-law (H's father). However, notwithstanding the agreement, once released the Appellant did not make the agreed payment because, she claims, she was afraid that she would be detained again. By this time the Appellant had already applied for a visa to come to the UK to study and so she stayed at a friend's house from 18 February 2011 until she flew to the UK with her husband on 24 February 2011. It was also said that the Appellant had attended a protest in London regarding disappearances in Sri Lanka for about an hour.
7. During her asylum interview on 24 March 2017 the Appellant referred to having been assaulted during her detention: she stated she was punched in the face (question 60), and also referred to being punched and grabbed and having a hand put over her mouth (question 78).
8. Subsequently the Appellant claimed to have been sexually assaulted during her detention. This aspect of the claim appears to have been disclosed for the first time during an interview with a Consultant Clinical Psychologist in June 2017: see report, Appellant's bundle before the First-tier Tribunal Tab 14. It is a feature of this disclosure that the Appellant had

not told her husband that she had been sexually assaulted and did not wish him to know now.

9. Irrespective of the nature of the Appellant's claimed ill-treatment, it may be seen that it was the Appellant's case that the events that had befallen her in Sri Lanka – and the potential risk on return – were inextricably linked with the claim of suspicion in respect of H on the part of the authorities in Sri Lanka.
10. Judge Aziz - in my judgement uncontroversially - expressly recognised this: *“The basis of the appellant's claim cannot therefore be divorced from the factual matrix of her husband's claim. The very reason she was detained was in connection with her husband's alleged connections with the LTTE”* (paragraph 77); *“The appellant is reiterating the same factual basis of her husband's claim with the added factor that she was also arrested, detained and tortured by the authorities in their enquiries about links between her husband and the LTTE”* (paragraph 88).
11. In this regard it is to be noted that H's case was, in summary, to this effect: he was an employee of DHL in Sri Lanka; he surmised that in the process of his employment he had possibly handled contraband or otherwise directed goods to the LTTE at a time when prohibitions were in place; on 21 July 2010 he was abducted from outside a nightclub and held for 4 – 5 days during which he was interrogated about links to the LTTE and raped; he subsequently escaped; he returned home and resumed his employment; however he then received calls and letters from the CID who also came looking for him on one occasion before he left Sri Lanka.
12. H's application for asylum was refused for reasons set out in a RFRL dated 14 May 2015 (included in Annex I of the Respondent's bundle before the First-tier Tribunal herein). As noted above, H's appeal to the IAC was dismissed on all grounds.
13. Judge Duff heard evidence from H and also from the Appellant herein. H's account was found to be false:  
  
*“Having considered all of the matters raised, the evidence both orally and in writing and the documents I am satisfied that this appellant has failed to discharge the burden upon him, to the lower standard, of establishing that he is a refugee or entitled to other international protection. I am satisfied that this appellant's claim is false and designed to attempt to gain status in the UK following the rejection of the application further leave to remain by the appellant and his wife on 30 October 2014”* (paragraph 24).

Necessarily such a finding involved a rejection of the testimony of the Appellant herein, as well as that of H.

14. Further to this, and of even greater significance in the context of the current proceedings, no reference was made at any stage of H's application or appeal that his wife - the Appellant herein - was ever arrested.
15. In this context it is to be noted that there was every chance for H to raise any issues in respect of his wife in the course of his asylum interview (which is reproduced at Annex I of the Respondent's bundle herein). It may be seen from question 74 *et seq.* of the interview that H was asked about any adverse interest shown by the authorities following his abduction; whilst he made reference to a visit to the house on one occasion by the CID (question 89) nothing is mentioned of his wife being arrested. When asked at the conclusion of the interview if there were any other reasons he wished to remain in the UK (question 99) he made reference to his wife in the context of continuing her studies in the UK, but did not make any reference to any difficulties that she might have experienced in Sri Lanka or might face on return.
16. H applied for permission to appeal to the Upper Tribunal. I note that it is apparent that there was a change of representative after the First-tier Tribunal hearing, but no complaint was raised in the challenge to the decision of Judge Duff as to the conduct of the previous representatives in presentation of H's appeal to the First-tier Tribunal. Upper Tribunal Judge Kopieczek commented that Judge Duff had given "*several reasons for rejecting the credibility of the appellant's claim. His reasons are clear and comprehensive and do not reveal any arguable error of law*".
17. In considering the Appellant's application for protection the Respondent had regard to the fact and circumstances of H's appeal and the decisions in **Devaseelan (Second Appeals - ECHR - Extra-territorial effect) Sri Lanka\* [2002] UKIAT 00702** and **TK (Consideration of Prior Determination - Directions) Georgia [2004] UKIAT 00149**: see RFRL at paragraphs 26 and 27 , where relevant extracts are helpfully set out.
18. At paragraph 40 of the RFRL the decision-maker, cross-referencing the Appellant's asylum interview record, made the following comments:  
  
*"In the AIR you were asked why your husband didn't mention your arrest in his asylum interview (AIR Q103-Q105). Your reason for your husband not mentioning your arrest in his Asylum interview was that maybe he*

*didn't want to expose me. ... Your reasons for your husband not mentioning your arrest in his asylum claim are not reasonable as this was a big event which affected both of your lives and therefore should have been disclosed during your husband's asylum claim."*

19. For completeness I set out the relevant exchanges from the Appellant's asylum interview:

*"Q103: Why didn't your husband mention your arrest in his asylum claim?  
A: I'm not sure why he didn't mention it.*

*Q104: Can you give a reasonable explanation why he wouldn't mention a big incident like you being arrested and detained by the Sri Lankan CID?  
A: Maybe he didn't want to expose me.*

*Q105: Surely with it being a part of his claim that you were arrested he would mention it in his interview?  
A: He only mentioned what happened to him during the interview because we were doing it separately."*

20. In my judgement it is manifestly the case that the Appellant's answers here do not offer anything by way of explanation for the supposed omissions of H in his interview. Far less do they offer anything by way of explanation for the claimed circumstance of the Appellant's arrest and interrogation by the CID in connection with H's activities not featuring in either his or her testimony in H's appeal.
21. In these circumstances - and for other reasons set out in the RFRL the Respondent rejected the Appellant's claim for protection.
22. The Appellant appealed to the IAC.
23. The Appellant's appeal was dismissed for reasons set out in the Decision of Judge Aziz.
24. The Appellant sought permission to appeal to the Upper Tribunal which was refused in the first instance by Designated First-tier Tribunal Judge McCarthy on 7 November 2017. However, permission to Appeal was subsequently granted by Upper Tribunal Judge Freeman on 11 January 2018 - essentially on the basis that it was considered arguable that Judge Aziz had not set out adequate reasoning for on the one hand accepting that the Appellant had been the victim of sexual trauma, but on the other

hand not accepting that such trauma had arisen in the circumstances claimed.

25. The appeal before First-tier Tribunal Judge Aziz took place over two days (11 July and 2 August 2017). Judge Aziz treated both the Appellant and her husband as vulnerable witnesses (see paragraphs 32, 54 and 74).
26. Judge Aziz set out at paragraphs 39–41 what the Appellant had to say about the omission of her claimed detention from the evidence before the First-tier Tribunal in her husband’s appeal; the Judge also set out what the Appellant had to say about the failure to relate her sexual assault during her own asylum interview (paragraphs 42–44). The Judge also set out H’s testimony before him in respect of his own omission of his wife’s arrest during the course of his asylum claim (paragraph 58).
27. Further to these particular matters the Judge set out in considerable detail over a number of pages the background to the appeal under sub-headings ‘Immigration history’, ‘The appellant’s case...’, ‘The respondent’s case’, and ‘Evidence’, before setting out a section headed ‘The Law’. Against this context the Judge then set out over a further seven pages and approximately 30 paragraphs ‘Findings of Fact’.
28. As noted above the Judge identified the link to H’s claim (paragraph 77); he then referred to **Devaseelan** (paragraph 78), before going on to consider aspects of Judge Duff’s decision (paragraph 79–87). At paragraph 88 the Judge identified that the Appellant was “*reiterating the same factual basis of her husband’s claim with the added factor that she was also arrested, detained and tortured by the authorities in their enquiries about the links between her husband and the LTTE*”, before setting out the submissions made on the Appellant’s behalf.
29. The Judge then stated the following at paragraphs 89 and 90:

*“89. What I am prepared to accept is that the appellant has been the victim of extreme sexual trauma. Having heard from her it was very clear from the manner in which she gave evidence that she continues to be enormously affected by what has happened to her. The question for the Tribunal is whether sexual trauma occurred in the circumstances detailed by the appellant.*

*90. Having considered the matter at length, I am not persuaded that the sexual trauma which the appellant has suffered in the historical past occurred in the circumstances in which she says.”*

30. Necessarily it is the supposed tension between these two paragraphs – paragraph 89 and paragraph 90 – which lie at the heart of the grant of permission to appeal.
31. In my judgement I do not consider that there is inevitably any tension between the notion of accepting that a witness or appellant has a history of sexual trauma but rejecting the claimed circumstance of the trauma. Accordingly what is at the crux of the challenge is whether the Judge has adequately reasoned his finding that the sexual assault suffered by the Appellant did not take place in the claimed context of a detention consequent upon enquiries being made into the activities of her husband on suspicion of involvement with the LTTE.
32. It seems to me that Judge Aziz set out with adequate clarity why he was “*prepared to accept*” the fact of the Appellant having been the victim of a sexual assault. Crucially, it also seems to me that Judge Aziz has set out with adequate clarity, and sustainably, why he did not accept that any such event occurred as claimed, i.e. whilst the Appellant was detained in February 2011 in connection with her husband being suspected of links with the LTTE.
33. In the premises I entirely understand and acknowledge that very considerable caution needs to be exercised before rejecting a claim of sexual assault on the basis of late disclosure. It is well understood in this jurisdiction – as elsewhere – that there may be many good reasons for late disclosure of a sexual assault, including such matters as a sense of shame, or an uncertainty in respect of those to whom disclosure might be made. I also take into account that reluctance to disclose such an incident to a partner is also plausible.
34. However, it is to be noted that Judge Aziz does not place any adverse reliance upon the late disclosure of sexual assault *per se*, or the absence of disclosure of sexual assault to the Appellant’s husband. Instead what is particularly damaging to the Appellant’s claim is the failure of both her and her husband to mention the fact of her arrest and detention in the context of her husband’s claim. Although it is said that H is unaware of the sexual assault, it has never been claimed that he was unaware of the fact of the detention, or that the detention had arisen as a consequence of suspicion about his activities. Even if – which is not claimed – it might be said that the Appellant would have been reluctant to mention the detention to the authorities or the Tribunal in the UK because she did not want to discuss what had happened to her during detention, there could have been no reason – on her case – for her husband not to bring to the Respondent’s attention and in turn the Tribunal’s attention in his appeal,

the fact that continuing suspicion in him had been demonstrated by the authorities in the act of arresting and detaining his wife.

35. This is the substance of Judge Aziz's observation at paragraph 98: "*The failure to mention the arrest is a material omission (even if the appellant's husband is ignorant as to what the appellant claims happened to her during her detention)*".
36. Judge Aziz fully engaged with this and the submissions made on the Appellant's behalf. I can identify no error in his analysis.
37. Judge Aziz had regard to Judge Duff's findings (e.g. paragraph 95), and rejected the Appellant's reliance upon previous poor legal representation and the suggestion that she was unfamiliar with the witness statement that she had been required to sign (paragraph 92-94, 96), instead concluding "*it was poor witness testimony that was the main reason for the anomalies*" (paragraph 96).
38. See similarly at paragraphs 98-101, in which the Judge adequately articulates the basis upon which he rejected the Appellant's and H's evidence for the failure to mention her arrest in the previous proceedings. In my judgement the following is of particular note:  
  
*"I found both witnesses to be intelligent and articulate people and it would have been obvious to them both that the appellant's arrest, detention and interrogation just a few days before they fled the country would be a key part of their asylum claim if such an event had indeed occurred. Especially since the appellant alleges that during the detention she was asked questions about her husband's LTTE connections. It is simply not credible that they would not have been forthcoming about this key incident if it had indeed occurred."* (paragraph 101).
39. This was essentially a finding of fact open to the Judge on the evidence, adequately reasoned, and sustainable. It is not vulnerable to being impugned on the basis of an allegation of error of law.
40. Further and in any event it is to be noted that the inability of both the Appellant and H to offer a cogent explanation for the omission of a core event in the context of H's application and appeal was not the only basis of the rejection of the Appellant's claim.



41. In the premises Judge Duff had reached an adverse assessment of the credibility of H's claim, inter-alia, on the basis that elements lacked plausibility, discrepancies in the account, and the conduct in remaining in Sri Lanka for several months after H escaped. Judge Aziz also found that the Appellant's account of the circumstances of her release from detention lacked credibility (paragraph 102), and accorded adverse weight to the delay in claiming asylum (paragraph 103).
42. In my judgement nothing in the written grounds of appeal, the issue identified in the grant of permission to appeal, or the submissions articulated before me, undermine the essential conclusion that there has been no adequate explanation for the sustained omission of a vital element of H's claim during the course of his application and appeal, such that the claim that the Appellant had been arrested and detained was not credible.
43. In his submissions Mr Bandegani to a very great extent sought to lay out the evidence that was before the First-tier Tribunal and argue that it justified a different conclusion, and to submit that in so far as Judge Aziz failed to reach that conclusion he cannot have had proper regard to the evidence. This was essentially to reargue the case. Considerable emphasis was placed on the sensitivities surrounding a sexual assault and the Appellant's continuing reluctance to disclose such a matter even to her husband. However, as identified by Judge Aziz, nothing in such sensitivities offers an explanation for the failure of both the Appellant and H to raise the arrest with the Respondent or the Tribunal at all during the course of his application and appeal. Although the report of the Consultant Clinical Psychologist in June 2017 addressed the reluctance to disclose sexual trauma (e.g. at paragraph 74 of the report), it does not in any part address the failure to refer to the arrest and detention in the earlier proceedings.
44. I do not accept submissions to the effect that the Judge either failed to take into account evidence - in particular supporting medical evidence - or otherwise failed to relate that evidence to the context of the Appellant's claim. On the contrary, it seems to me clear that the Judge did have regard to the medical evidence and did consider it in the context of the specific submissions being advanced on behalf of the Appellant: e.g. see paragraph 88.
45. The Judge accepted that both the Appellant and H were to be treated as vulnerable witnesses. The Tribunal's Presidential Guidance was applicable. The objective of the guidance is to ensure a fair hearing and proper participation: there is no suggestion that the Appellant and her husband were not able adequately and properly to participate in the hearing of the appeal. Whilst it may be that there is no express analysis within the

Decision of how the Appellant's vulnerability might have impacted upon her testimony, I am not remotely persuaded that either her or H's present vulnerability offers some sort of explanation for the crucial omission, somehow overlooked by the Judge notwithstanding his recognition of the witnesses' vulnerability - particularly bearing in mind that it is plain that the Judge did have regard to the clinical findings and diagnosis in the expert report.

46. The grounds of challenge also raise issues under the ECHR on the basis of medical grounds. These were not the subject of the grant of permission to appeal, the reasons for which were confined to the issue of the credibility of the narrative account advanced in support of the claim for protection from persecution.
47. Be that as it may I observe that the First-tier Tribunal Judge addressed such matters at paragraphs 106-109 of his Decision. The Judge essentially concluded that the supporting evidence was not adequately cogent as to what might happen upon return: the clinical psychologist relied upon by the Appellant conceded in her report that she was "*not an expert on the provision of psychological therapy or medical intervention in Sri Lanka*" (FTTJ Decision at paragraph 107); the Judge observed "*the report is silent as to what impact [it] would have upon any deterioration in mental health [if mental health services are accessed immediately upon arrival in Sri Lanka]*"; leading to a conclusion "*I do not find that the report or any of the other pieces of evidence relied upon is cogent enough to persuade the Tribunal that the high threshold in this area is met*".
48. Although before me there was a discussion as to the modification of the 'high threshold' in Article 3 medical cases in light of the decision in **Paposhvili**, it seems to me that this cannot in any way avail the Appellant on the basis of the findings of the First-tier Tribunal Judge. The lack of cogency of the evidence is not in any way remedied by the suggestion that there is now understood to be a modified threshold compared to that previously understood.
49. I find no substance in the challenge to the decision of the First-tier Tribunal.

### **Notice of Decision**

50. The Decision of the First-tier Tribunal contains no error of law and accordingly stands.

51. The Appellant's appeal remains dismissed.

**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 the Appellant or a member of her 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: **17 October 2018**

**Deputy Upper Tribunal Judge I A Lewis**