



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/04420/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 November 2017

Decision & Reasons Promulgated  
On 14 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SCW

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr S Kotas, Home Office Presenting Officer

For the Respondent: Ms C Robinson, Counsel, instructed by Southwark Law Centre

**DECISION ON ERROR OF LAW**

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Shamash to allow the appeal of the respondent against the refusal by the Secretary of State to grant her application for asylum, humanitarian protection and leave to remain on Article 3 grounds.

2. Permission was granted on the basis that it was arguable that the judge misdirected herself, firstly, in her approach to the appeal by failing to follow the guidelines applicable to further appeals in terms of **Devaseelan** by assessing the previous determinations for errors of law as opposed to considering them as a starting point and going on to consider new evidence. Secondly, it was arguable that the judge's findings in relation to the respondent's sur place activities may have been infected by the judge's assessment of credibility given the arguable failings of the judge to follow **Devaseelan** and, thirdly, in her assessment of the respondent's case on medical grounds.
3. From now on the respondent will be referred to as the applicant for ease of reference. The applicant is a citizen of the DRC born on [ ] 1947. She appealed against the decision of the respondent dated 19 April 2007 to refuse to grant her asylum.
4. This case has a long and protracted history. The applicant first claimed asylum when she entered the United Kingdom in February 2008. In a decision dated 18 June 2008 Immigration Judge Edwards refused her appeal. The applicant appealed against this decision and made applications for High Court reviews on 1 August 2008 and 10 November 2008. Her appeal rights were deemed exhausted on 10 November 2008. She submitted further representations on 27 November 2008 which were refused on 5 October 2009. She made further representations on 23 October 2010 which were refused on 20 February 2015. Following this she made further representations on 27 March 2015, which were refused on 15 June 2015. A further appeal was heard and dismissed by Judge Povey on 15 February 2016 based on fresh medical evidence. The basis for this appeal was the fresh evidence from Professor Seddon going to the credibility of the account that the appellant gave at her first hearing in 2008, and further evidence of the applicant's sur place activities. Further representations were lodged on 12 December 2016.
5. Judge Shamash said at paragraph 3 that at the beginning of the hearing, it was agreed that the findings of fact which formed the basis for the credibility findings in the determination of Judge Edwards were the starting point, **Devaseelan (Second Appeals, ECHR, Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702**. However, where there was evidence which undermined the factual basis of the credibility findings, that evidence could properly be taken into account.
6. There are two strands to the applicant's application. The first strand was based on the past persecution she suffered in the DRC. The first strand formed the basis of her first appeal before Judge Edwards and was based on arrests in the DRC as a result of her membership of the MLC. The applicant claimed that she was an MLC activist. She was arrested for the first time on 27 July 2006, just prior to the Presidential election, when she attended an MLC rally in support of Jean-Pierre Bemba at the Tata Raphaël Stadium. During that rally, police and demonstrators clashed and she was arrested with others and held in custody for four days.

7. The second incident occurred on 25 August 2006 when she claims that six soldiers entered her home and raped her in front of her nephews. Although they stole her television and radio, they did not search the house. Following the rape she was held in custody for two weeks. She was released on 9 September 2006. The third arrest occurred shortly after Christmas in 2006 when she claims that she was arrested by four men in civilian clothing who questioned her about her membership of the MLC. Her house was searched, pro- Bemba material was found and she was arrested. She was detained until February 2008 and during her detention, she was tortured and systematically raped. She was released on 7 February 2008 when a guard came to her cell at night and led her out of the prison.
8. The second strand to her application was a sur place claim based on her current profile in the United Kingdom. This claim was raised for the first time before Judge Povey. It related to her activities for the Congolese Support Group, which is an opposition organisation operating in the Diaspora calling for regime change in the DRC. At the appeal before Judge Povey, the applicant adduced medical evidence of posttraumatic stress disorder and of scarring. The medical evidence before Judge Edwards was different – the applicant had diabetes and vaginal infection.
9. Judge Shamash heard evidence from Barbara Gehrels from the Notre Dame Refugee Centre. She had made a diagnosis of PTSD and because of it had referred the applicant to Freedom from Torture for chronic posttraumatic stress counselling. The judge also heard from Mr Tongomo, who is the chairman of the Congolese Support Group.
10. The judge at paragraph 69 under a heading “Finding on Preliminary Issue” stated as follows:

*“I accept that the starting point in a decision where there has been a previous finding of fact is Devaseelan and I start by considering the submissions made at the beginning of the hearing that there was nothing in the report prepared by David Seddon which would be sufficient to set aside the decisions of IJ Edwards and IJ Povey and which would entitle me to make fresh findings of fact based on credibility. Having heard submissions from Mr Eaton and Mr Gilbert and having read David Seddon’s report carefully, and the statements of Mr Tongomo and Ms Gehrels, I consider that there is now evidence which demonstrates that the findings made by IJ Edwards and IJ Povey are inconsistent with background evidence and that I should consider the findings of IJ Edwards and IJ Povey in light of the fresh evidence.”*

11. However, Devaseelan states as follows:

*“37. ... The first Adjudicator’s determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon,*

*and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination."*

12. **Devaseelan** goes on to say:

*"If before the second Adjudicator the appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be relitigated. ..."*

13. I find in light of the submissions made by Mr Kotas that the judge failed to follow the guidelines in **Devaseelan** by assessing the previous determinations for errors of law as opposed to considering them as a starting point. I was not persuaded by Ms Robinson's submission to the contrary.
14. I shall proceed to give instances in the judge's decision where, I find she was conducting an error of law exercise. At [74] the judge said that Judge Edwards' decision dealt with an inconsistency over the date of the applicant's first arrest. The inconsistency arose from a difference in the applicant's account as between her screening interview on the one hand and the AIR and the applicant's oral evidence on the other. Although this was not ordinarily a matter that should be revisited, the judge nevertheless felt it apposite to make a number of observations. She stated: "Neither IJ Edwards nor IJ Povey approached the account given in the screening interview with caution". A further example is at [73] where the judge said that in her view IJ Edwards attached too much weight to the discrepancies between question 1 and 2 of the screening interview and the AIR and all of the applicant's subsequent accounts that had been broadly consistent with the AIR. She went on to say that the judge failed to approach the screening interview in line with the authorities. Again, this is an instance of the judge conducting an error of law exercise. In any event, weight is a matter for a judge and the judge could not have been criticised for placing weight on a matter that was before him.
15. Another example is at [74] where the judge stated that IJ Edwards disregarded all of the evidence which was consistent with the applicant's account and focused on two factors. At [75] the judge stated that it is of significance that IJ Edwards did not at any point mention the rapes that the applicant described in very great detail during her AIR but had simply focused on the theft of the television and radio. In other words, she was saying that IJ Edwards failed to have regard to material issues. At [76] the judge states that taken together with the applicant's claim that she was raped and tortured in custody, the applicant's account was consistent with the background evidence. However, this presupposes that she was raped. The judge ignored the previous judges' rejection of that evidence.

16. At [77] the judge said: “It is regrettable that IJ Povey did not attach any significant weight to the evidence of scarring which was assessed in line with the Istanbul Protocol as highly consistent with the appellant’s account.” However, the judge fails to take into account that the medical evidence before IJ Povey was not challenged. An appeal against IJ Povey’s decision was not successful.
17. The judge said at [81] that IJ Edwards did not once mention that the applicant was raped, but this was wrong. At paragraphs 15(b) and (c) of Judge Edwards’ decision he recorded the applicant’s evidence that she had been raped on 25 August 2006 and was raped repeatedly during her detention close to Christmas 2006. In his decision at paragraph 25 Judge Edwards did not believe the applicant’s account of the rapes.
18. These instances demonstrated that the judge was not applying the Devaseelan principles as held by her. She was criticising the judges’ findings and conducting an error of law exercise in respect of those findings. In so doing, I find that the judge committed a material error of law.
19. I find that the judge also erred in law in her consideration of the medical evidence. She failed to acknowledge that Judge Povey had conducted a full hearing on the medical documents. Judge Povey had before him Dr Moser’s report which addressed the applicant’s psychological and physical issues; at paragraph 54 he considers Professor Katona’s report. The judge’s findings at [80] were findings based on matters that had already been considered by Judge Povey. Judge Povey had given full and cogent reasons for his findings against which the applicant had not successfully appealed. Those findings remained unchallenged. I find that Judge Shamash relitigated all the issues without treating the decisions by IJ Edwards and IJ Povey as the starting point. The only real evidence before Judge Shamash was Professor Seddon’s report. However, in light of the material errors committed by the judge, I find that her decision on that report cannot stand.
20. There is a further error of law that was committed by the judge in her consideration of the medical evidence. The judge made assumptions not supported by evidence that the applicant would face a serious, rapid and irreversible decline in her condition if removed to the DRC which would result in intense suffering and significant decrease in life expectancy. I accept the argument in the grounds that given the lack of evidence to support a programme of ongoing treatment in the UK, or a prognosis in regard to the outcome of her condition, it is a misdirection to conclude that any removal to the DRC would cause such results, given that there has been no indication as to what the applicant can expect if she remains in the UK.
21. That argument was in respect of the judge’s finding at paragraph 87 where she finds that the high threshold in Paposhvili v Belgium (App 41738/10) has been met. I was informed by Mr Kotas that the Tribunal has issued a decision in EA & Ors (Article 3 medical cases - Paposhvili not applicable) Afghanistan [2017] UKUT 445. He said that this case says that Paposhvili has no application in this jurisdiction.

22. Ms Robinson submitted that the Court of Appeal is in January going to hold a hearing on a lead case which raises the **Paposhvili** point. That may be the case but in this instant appeal I find that at [86] and [87] the judge gave cursory and inadequate reasons for concluding that the applicant would suffer serious medical health issues were she to be moved to the DRC.
23. I find that the judge also erred in her assessment of the applicant's *sur place* claim. There was no reference by her to the findings made by Judge Povey as being the starting point. The judge decided the *sur place* claim as if it was being raised before her for the first time.
24. For the above reasons, I find that the judge materially erred in law and that her decision cannot stand.
25. The applicant's appeal is remitted to be reheard by a different judge; not IJ Shamash, IJ Povey or IJ Edwards.

**Notice of Decision**

The applicant's appeal is remitted to Taylor House to be reheard by a different judge.

Signed

Date: 14 December 2017

Deputy Upper Tribunal Judge Eshun