Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00215/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Oral Determination**
On 28 July 2014	**Promulgated**
	On 6 August 2014

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MISS SABRINA HAMIDOVIC

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Claire, Counsel instructed by J M Wilson Solicitors
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bosnia and Herzegovina. She is to be treated as having a date of birth as 25 August 1991. She is therefore 22 years old. She arrived in the United Kingdom in January 2003, aged 11, shortly after her father, brother and aunt arrived. Accordingly she had spent just over half her life in Bosnia and Herzegovina at the time the decision was made; indeed that is still the situation now.

2. The appellant formed a relationship with a person who is settled in the United Kingdom and they married. However the couple are now separated and the father is looking after the couple's three children. There are two girls aged 8 and 5 respectively and a boy aged 7. The panel recorded that the father's immigration status was not clear but it appeared that he had

indefinite leave to remain and had been recognised as a refugee some time before. It is on that basis that I approach this appeal. It would also be consistent with the fact that the two younger children who are aged 7 and 5 respectively are British citizens and it is said that the eldest child aged 8 is entitled to apply to be registered as a British citizen as a result of her father's grant of ILR. I have no reason to doubt that.

3. The appellant made a claim for asylum but what is important for the purposes of this appeal is the decision to make a deportation order against her as a result of her criminal conduct. In paragraph 12 of the determination there are a number of findings dealing with appearances before the Criminal Courts. They number some 25 in all. They begin in August 2003 when the appellant was aged 12 or just under. There then follows a series of offences. During the course of 2003, there were four offences. During the course of 2004 there were another series of appearances. These were all in relation either to shoplifting or theft or failing to surrender to custody or breaches of orders that had previously been made. As a result, there were periods of imprisonment which were recorded by the Tribunal in paragraph 16 of its determination. They numbered seven in all.

4. It is said the panel erred in law by adopting a different position from that which had been taken by the panel which decided the appellant's earlier appeal in March 2008. Reliance is placed on the case of **Devaseelan [2002] UKIAT 00702**. However, a consideration of the appeal that was heard in 2008 reveals that there were very substantial differences between the situation as it then stood and the situation as now appears.

5. In 2008 the appellant's appeal against the respondent's decision of 2007 to make a deportation order against her was heard by Immigration Judge Astle and Mrs E. Hurst JP. In its determination it is apparent that the panel lacked a considerable number of documents. They were without the copies of the determinations of the appellant's previous appeals in August 2003 and May 2005; nor did they have documents in relation to some of the more substantial parts of the claim. In particular, as recorded in paragraph 6, they did not have details of the fourteen convictions. The principal challenge that was made by the appellant then was the decision to make a deportation order upon the appellant when the ultimate destination was Croatia. There was evidence, and it was accepted by the Home Office Presenting Officer who was at one stage invited to withdraw his decision, that Croatia would not accept the appellant. There was indeed a fax from the respondent dated 30 November 2007 that removal was neither possible to Croatia nor Bosnia and Herzegovina.

6. The panel went on to say in paragraph 11,

> "Whilst we are not concerned with the mechanics of implementing the decision, that is quite different from upholding a decision that cannot be implemented."

I am bound to say I do not fully understand what the Tribunal meant by this distinction, except that it appears that the Article 8 claim was allowed solely on the basis that there could not be an effective return to Croatia or Bosnia-Herzegovina. The Tribunal found that, as a result of being subjected to a deportation order, she would be liable to detention if she could not be returned to Croatia or Bosnia and that she would not be able to apply to revoke the order as she would be in-country and she could not apply to enter as the spouse of a person with settled leave. For my part I am not persuaded that any of those grounds amounted to a sustainable reason for finding that she could not legitimately be made the subject of a deportation order or that such an order would automatically violate her human rights. However that is not the issue before me because we are concerned with a radically different position when it was heard by the panel whose decision I am reviewing.

7. On that occasion it was said by the Presenting Officer that he accepted that, at the time of the earlier decision had been made, the appellant could not be removed either to Bosnia or to Croatia but the position was substantially different when it came before the fresh panel. The panel was given information from the respondent that removals were being effected to Bosnia and that negotiations would take place on an individual case basis with a view to effecting removal if a deportation order was made. Accordingly the panel concluded,

> "Whilst it is far from certain that the appellant would be removed, the position now is different to that in 2008 when it was accepted that she could not be removed".

8. It is therefore something of a surprise to read in paragraph 1 of the grounds of appeal that the panel erred in finding that the position was different from the position as it stood in March 2008 and that the case of **Devaseelan** applied. The position was mst certainly different. **Devaseelan** did not apply in any meaningful way.

9. Further, I am bound to say I see little opportunity for the application of **Devaseelan** in circumstances where there has been continuing wrongdoing on the part of the appellant. Were the panel to be bound by the earlier decision then it would mean that this appellant could continue to commit further offences but would always be able to rely upon the decision made in 2008 that her removal was unlawful and should properly govern any future application of the principles relating to deportation. I am quite satisfied that this is legally incorrect. Consequently **Devaseelan** has very little to offer in the circumstances of this case. But in any event there are other substantial differences.

10. The Tribunal properly pointed out in paragraph 26 that in the earlier decision the first panel lacked information about the appellant's full circumstances including her criminal convictions. The second panel came to the sustainable conclusion in paragraph 28 that the changes in the

circumstances of the appellant had significantly affected their assessment of proportionality.

11. The situation in relation to the children is that an attempt was made by the appellant to seek contact. The position faced by the panel, as recorded in paragraph 18, was that there was no means of providing an independent social worker's report because the husband would not allow the social worker to see the children. In other words there was no evidence from any independent source as to where the best interests of the children lay.

12. The panel was obviously taxed by this feature of the case and recorded in paragraph 18:

> "Normally it would be in the children's best interests to live with their mother and their father or to have significant contact with each of them if they were separated."

It then went on to say in paragraph 20 that there had to be a pressing need for it to be a proportionate interference in the relationship between young children and their mother but concluded in the circumstances of this appeal that such interference was proportionate. The panel went on to deal in paragraph 22 with the fact that historically the children had been largely brought up by their grandmother who had provided stability to them. It therefore requires me to look at the relationship that the appellant was able to establish with her children.

13. Paragraph 16 of the determination deals with the periods of time that the appellant has been in prison. It made reference to sentences in 2005, to a three sentences in 2006. There was a reference to imprisonment in 2007, in December 2008, in April 2009 and in October 2010, albeit a suspended sentence, and thereafter sentences in March 2011 and further offending in February 2013. This established that the children had had a highly disruptive relationship with their mother. They were then looked after by their father and there could be no presumption that the children's best interests were served by continuing contact with their mother. Even if there were some advantage in that, there would have to be such an advantage that it would outweigh the need to maintain effective immigration control in relation to an individual who has repeatedly misbehaved.

14. The difficulty as I see the case presented by the appellant is that, as appears in the grounds of appeal, it is said that the detriment to the children of the mother's removal (absent any evidence to the contrary) amounted to a failure to consider the implications of removal thereby vitiating any exercise under Article 8 and s. 55 of the Borders, Citizenship and Immigration Act 2009. In my judgment there is no such thing as a presumption which is provided by either of these provisions. Each case has to be looked at on a case-by-case basis and there was no evidence from the children, or indeed from the independent social worker, as to

where the children's best interests might lie. It is true that there were letters from the children in the appellant's bundle which appeared to be in loving terms addressed to their mother. One would not expect any child between the ages of 8 and 5 to write anything else but that does not mean that this was conclusive evidence or indeed significant evidence of where the children's best interests might lay. There had been no application for contact made by the appellant during the period that she spent in the prison and therefore that did not activate any research on the part of the Family Court as to whether or not the appellant should be permitted contact with the children. The father's refusal to allow a social worker to see the children might be an act of spite but, equally, it might be the concern of a father worried about the disruptive and painful effect of contact on these young children. In these circumstances it was open to the panel to reach the conclusion that they could not be satisfied that removal would violate the appellant's human rights or those of her children or that it was an infringement of the requirements of s. 55.

15. The panel took into account the evidence of telephone contact. That has been drawn to my attention in the course of the hearing this morning. There was evidence in the form of a British Telecom record of 'phone calls at which a particular number ending with the digits -240 indicated that there had been contact made by the appellant to the telephone number of her husband but it is apparent from the call log that the duration of these calls sometimes only lasted for a matter of seconds and rarely lasted for anything in excess of one or two minutes. It seems reasonable to infer that the person who received the call must have been the father since the children are relatively young. He was not prepared to accept a call which would provide meaningful contact between the mother and her children. The telephone log therefore does not provide an insight into the relationship that the appellant had with her children. Accordingly, in paragraph 23 of the determination, the panel reached a sustainable finding that they were not satisfied that the appellant was in a great deal of telephone contact with her children.

16. The panel also looked at the circumstances of the appellant herself and the high risk of re-offending. That is certainly something which was open to the panel to take into account. It is on the basis of those findings that the panel dismissed the appellant's appeal on all grounds.

17. The challenge to the determination is fundamentally that the position has not substantially altered since the determination of March 2008. I emphatically reject that submission. The panel set out very good reasons why the situation had changed. It was clear that in March 2008 the basis upon which a right to remain was considered appropriate was that there could be no removal to Bosnia or Croatia. That situation did not exist when the panel looked at it in 2014. That challenge therefore cannot be sustained.

18. In ground 2 it is said that the judge failed to consider the implications that the children would be unlikely to be taken to visit their mother in Bosnia

and by implication that they would never see her again. In my judgment it was perfectly plain that this was in the mind of the panel. It was never suggested that the family would return together to Bosnia or Herzegovina. It appears to be recorded by the panel in paragraph 4 of the determination that the father had been recognised as a refugee some years before. Accordingly the basis upon which the Tribunal made its decision was that the family would not relocate *en bloc* to Bosnia. This was a case where the panel had to consider the relationship that the appellant had with her children and, more importantly, the relationship that the children had with their mother and whether or not that relationship was of such a character as to prevent the appellant's removal notwithstanding her criminal wrongdoing. In my judgment, sad as it may be, it was perfectly open to the panel to conclude that the balance was in favour of removal.

19. Finally it is said that there is an error in the panel's finding in relation to risk of persecution on return to Bosnia. The appellant is of Roma ethnicity and in paragraphs 7 onwards the panel considered the background information that Roma were subject to ethnic cleansing during the war. It was known that many Roma had left the country. It was not known how many had returned. The vast majority of Roma do not have any documentary evidence and that provides a significant difficulty for them in relation to health insurance, social welfare, employment and education. The panel went on to consider that over 90% of Roma women did not have access to health, social protection or employment and were especially vulnerable to trafficking. That material comes directly from the report found at page 53 of the bundle which is a report by two authors on the Social Impact of Emigration and Rural-Urban Migration in Central and Eastern Europe. At page 55 of the bundle the authors set out a passage showing the particular difficulties that Roma women face. It is this passage that is referred to and summarised by the panel in its determination.

20. The panel cannot be criticised for not having paid attention to the background material but came to the conclusion in paragraph 8 of the determination that there was nothing to show that the difficulties faced by Roma women were so severe as to amount to persecution or Article 3 ill-treatment. The panel paid regard to the UNHCR overview. This material in 2013 did not support a finding that the widespread discrimination which was referred to amounted to persecution. In my judgment, that was the finding which was open to the panel. The report does not go nearly far enough to suggest that there can be no returnees to Bosnia of lone young women. For these reasons I am satisfied that the grounds of appeal do not make out a claim for persecution. Furthermore, I am satisfied that none of the grounds make out an arguable case that the decision violated the human rights of the appellant or her family or rendered the decision to deport the appellant an unlawful one.

DECISION

The panel made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
UPPER TRIBUNAL JUDGE