Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00085/2015

THE IMMIGRATION ACTS

Heard at Bradford **Decision & Reasons Promulgated**
On 23 June 2016 **On 11 July 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MARCELINE SISANGO
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Hussain, instructed by Freemans Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, Marceline Sisango, is a female citizen of the Democratic Republic of Congo (DRC)

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and was born on 1 January 1982. The appellant entered the United Kingdom on 26 March 2009 with indefinite leave to remain as a refugee having been granted leave under a Refugee Resettlement Programme. She has four daughters with her in the United Kingdom: Z (born 1989), Y (born 2002), A (born 2008) and C (born in 2009). In 2011, the appellant was convicted of assault occasioning actual bodily harm to one of her daughters and common assault on the same daughter over a two year period (2009 – 2011). She received a community order and a six month supervision requirement. On 13 August 2013, the appellant was convicted at Norwich Crown Court on two accounts of cruelty to a child, assaults upon her two elder daughters (between September 2011 – September 2012). She was sentenced to four years' imprisonment. On 22 July 2014, the appellant was notified by the respondent that she intended to cease her refugee status invoking Section 72 of the Nationality, Immigration and Asylum Act 2002. The UNHCR was invited to comment and duly did so. By a decision dated 16 September 2015, the respondent decided to deport the appellant to DRC. The appellant appealed against that decision to the First-tier Tribunal (Judge Landes; Mr Sandall) which, in a decision promulgated on 2 February 2016 allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. There are three grounds of appeal. First, the Secretary of State challenges the Tribunal's findings as regards Section 72 of the 2002 Act. At [34], the Tribunal found that the appellant had not "set out deliberately to cause harm however much she should have realised that was what she was doing". The grounds point out that the appellant had not accepted that she had done anything wrong and further that she had already committed offences of actual bodily harm and common assault against one of her daughters in 2011. The Tribunal had, in effect, gone behind the criminal conviction which they were not entitled to do. Further, the Tribunal had failed to give any proper reasoning for its conclusion that the appellant "poses no real risk of repetition of the same [offences against the children] or a similar offence." The grounds point out that the appellant will be seeking to see the children and may be allowed future contact with them. The appellant last saw the children in July 2015. The children are in long term foster care following a care order made in March 2014. There is currently no written contact between the appellant and the children.

3. I am not satisfied that the Tribunal has gone behind the criminal conviction as asserted in the grounds of appeal. The Tribunal has discussed the motivation of the appellant's offending in the light of the OASys Report which is part of the evidence before it. The Tribunal has, quite properly, sought to use the report and the other evidence to assess the actual risk of the appellant reoffending. The findings which the Tribunal made at [34] are of vital importance because it is these findings which rebut the certificate under Section 72 of the 2002 Act. The Tribunal noted at [29] that a local authority key worker (Ms Barnard) had written an email which was copied in the OASys Report stating that "I agree with probations view that [the appellant] would not be a risk to other children." The Tribunal made the very specific finding (available to it on the evidence) at [34] that the appellant would only "potentially be a risk to the children she lives with and exercises parental authority over and who are old enough to challenge her authority." A risk might also arise if she were on her

own with those children or, if not alone, with someone who shared her views about discipline.

4. Granting permission Judge Gill, found that it was "arguable the panel may have erred in that, in effectively discounting the risk to a section of the community," the Tribunal had ignored the fact that such children were "arguably part of the community." Judge Gill cites the example of convicted perpetrators of domestic violence against their partners as being regarded as posing a risk to women at large (in circumstances where the relationship leading to the conviction had ended). Whilst I note Judge Gill's comments, I am satisfied that the Tribunal has correctly considered Section 72. The Tribunal properly had regard to E*N (Serbia)* [2009] EWCA Civ 630 at [45] where the Court of Appeal held that, "so far as danger and 'danger to the community' is concerned, the danger must be real, but if a person is convicted of a particularly serious crime and there is a real risk of its repetition is likely to constitute a danger to the community." I am satisfied that the Tribunal has considered whether the actual circumstances in which the risk posed by the appellant constitutes a "real" risk as understood in *EN (Serbia)* terms. For the reasons that it has given, the Tribunal was entitled to regard the risk as "limited to specific circumstances." I do not concur with Judge Gill's observation that a risk to the appellant's own children (which is not likely to occur given that they are in care and separated from her and she has no unsupervised access to them) still constitutes a risk to the community at large. I am not satisfied that, in the context of Section 72 and the guidance provided by *EN (Serbia)* the Tribunal has erred in the approach which it has taken. It is therefore entitled to its finding at [34] that:

> We are satisfied in actual risk terms there is no real risk of repetition of the same or a similar offence and we are satisfied therefore that the presumption of the appellant as a danger to the community has been rebutted. This is not to minimise the serious nature of her crime but the provisions are not just based on the serious nature of a crime but also on the actual danger posed by the appellant and the future risk.

5. I consider that to be an accurate and lawful application of the necessary test. It follows that the Tribunal did not err in law in finding that the appellant had rebutted the Section 72 presumption that has constituted a danger to the community. There is no challenge to the Tribunal's findings [28]; the appellant had not rebutted the presumption that she was convicted of a particularly serious crime.

6. The second ground of appeal concerns the cessation of the appellant's refugee status. The Tribunal correctly identified that the burden of proof as regards cessation rested on the respondent [39]. The respondent needs to show that the circumstances in connection with which the appellant had been recognised as a refugee had ceased to exist. The Tribunal was well aware that the appellant appeared to have lied during the Refugee Resettlement Programme and subsequently, notwithstanding her deceitful conduct, the Tribunal observes [42] that "the picture described of the appellant is consistent with the background material and the conditions in the east in particular of the DRC in 1999." The Tribunal found that, notwithstanding the end of

the civil war in the DRC, women in the position of the appellant continued to face risks. At [44], the Tribunal found:

> Given the conflict still ongoing in the appellant's home area [DRC] and the references in the background material to sexual and gender-based violence being used as a weapon of war in the Congo I am not satisfied that so far as the appellant's home area was concerned and the circumstances in which the appellant was recognised as a refugee had ceased to exist. There was still conflict in the appellant's home area. The appellant had been recognised as a refugee (as opposed to being entitled to humanitarian protection) but as a woman given the prevalence of violence against women and girls with impunity throughout the country...she would have been recognised as member of a particular social group and given the notorious use of rape as a weapon of war by both sides of the eastern DRC she would have been at risk of persecution on return.

7. The Tribunal went on to make very detailed findings as to why the appellant could not relocate internally within DRC. The appellant would return on her own to DRC. She had never worked outside her home or family situation and her education was minimal. Her reading and writing of Swahili was "basic" whilst her English was limited. Swahili is not used in the capital of DRC (Kinshasa) where the predominant languages are Lingala and French. The appellant has a disability [47] involving mobility problems in her left leg to which she was receiving treatment before she went to prison in the United Kingdom. The possibility of amputation is a real one. The Tribunal accepted [49] that, coming from a village in the east of DRC, it is possible the appellant had never been to Kinshasa or other large city in DRC and she might be safe from the risks facing her in her home area. The possibility of the appellant being supported from the United Kingdom by her former partner (now living in Australia) was considered by the Tribunal [50] but it was not a real prospect. Support from the appellant's brother who lives in Norwich in a Norwich DRC community is likely to be sporadic [51]. The Tribunal found that the appellant struggled to be in employment or support herself with the limitations which she had including her physical and mobility problems conclude they would be unduly harsh to expect the appellant to relocate to a (relatively safer) city environment in DRC.

8. The second ground of appeal challenges those findings of the Tribunal but, in my opinion, the challenge amounts to nothing more than a disagreement with the detailed findings of the Tribunal which, as I have noted, was supported by reference to relevant evidence. Contrary to what is stated in the grounds, it was not for the appellant to prove that she would be destitute outside her home area of DRC but that it would be unduly harsh to expect to her live outside her home area (see *Januzi* [2006] UKHL 5).

9. I am satisfied therefore, that the Tribunal has given clear and cogent reasons for finding that the appellant was able to rebut the Section 72 presumption. I am satisfied also that the Tribunal has given good reasons for concluding that the respondent had failed to discharge the burden of proof and the appellant would not be at risk in her home area of the DRC whilst it was also entitled to conclude (for the reasons I have given above) it would be unduly harsh to expect the appellant to

relocate within DRC to a large city, such as Kinshasa. In the light of those findings, the Tribunal was correct to conclude that the appellant's removal from the United Kingdom to DRC would breach her rights under the 1951 Refugee Convention.

10. The grounds of appeal also challenge the judge's finding that there was a genuine subsisting relationship between the appellant and her children. Judge Gill, granting permission, appears to have assumed that the Tribunal had allowed the appeal in addition under Article 8 ECHR. However, that is not the case. Despite finding that the best interests of the children would be met by the appellant remaining in the United Kingdom [82] the Tribunal considered the appellant's deportation would be proportionate under Article 8 that there were no very compelling circumstances that outweigh the public interest in her deportation. The question of whether the Tribunal was right or wrong in finding that there was a subsisting relationship between the appellant and the children is, therefore, not relevant. In any event, the challenge contained in the Secretary of State's ground 3 is immaterial given that I have found that the appellant succeeds in her appeal on refugee grounds.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed Date 4 July 2016

Upper Tribunal Judge Clive Lane