Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00840/2012

THE IMMIGRATION ACTS

Heard at Field House
On 11 September 2013

Determination Promulgated
On 24th September 2013

Before

UPPER TRIBUNAL JUDGE WARR

Between

ROCHELLE TIFFANY BENNETT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss G Kiai of Counsel, instructed by Luqmani Thompson & Partners, Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica born on 21 September 1987. She arrived in this country at the age 14 on a visit visa in the year 2009. She applied for indefinite leave to remain in 2002 but this application was refused in 2003. She made a further application seeking leave as the family member of her aunt on 16 February 2005 but that application was not considered until 17 October 2012.

2. Meanwhile on 22 October 2010 the appellant was convicted of harassment and blackmail and sentenced to eighteen months' imprisonment. At the time of her sentence she was four months pregnant and her daughter, Maddison, was born on 12 April 2011. Maddison was removed from her care at birth and placed into foster care because of threats being made against the unborn child prior to delivery. On 16 May 2011 Maddison was placed in the care of the appellant's aunt. On 15 August 2012 it was determined by the Family Court that the appellant's aunt and her husband should be appointed as special guardians for Maddison. On 16 October 2012 the appellant had a second child, Kingston, and on 29 March 2013 the appellant's aunt and uncle were appointed special guardians of Kingston.

3. When sentencing the appellant for the offences of harassment and blackmail, the judge noted that the appellant had been given the opportunity to be assessed by a psychiatrist but had declined the opportunity. The appellant's barrister had made it quite clear that she wished to be dealt with without delay and were the judge to adjourn the case further she would again not cooperate and would not agree to be interviewed by a psychiatrist. The offences, the judge stated, were directed against the 60 year old mother of her ex-boyfriend. The threats included threats to burn her house down. There were long and abusive phone calls made to her demanding money. She maintained a campaign of threats and intimidation against her. She had a devastating affect on her victim's life. The judge noted the appellant was aged 23 and had convictions but only for assaulting a police officer and for disorderly behaviour. A credit was given for the plea of guilty. The sentences were imposed to run concurrently.

4. In the light of her conviction the Secretary of State decided to deport the appellant under Section 32(5) of the UK Borders Act 2007, the appellant having been sentenced to a period of imprisonment of at least twelve months. The Secretary of State's decision was dated 16 October 2012 and it turns out that the appellant's second child was born on that date.

5. The appellant appealed against the decision and her hearing came before a panel on 29 May 2013. The panel was invited to adjourn matters, remitting the case to the Secretary of State to consider the issue in the light of the fact that the appellant had had a second child born and the Secretary of State should consider the best interests of the appellant's second child. The panel declined to do this and distinguished the case of Tinizaray v Secretary of State [2011] EWHC Admin 1850. The Tribunal noted

all the relevant information concerning the best interests of the second child had been placed before it. The panel was in as good a position as the Secretary of State to discharge the statutory obligations under Section 55. A refusal to remit the matter to the respondent would not prevent the just disposal of the appeal and if anything the best interests of the two minor children dictate that the appeal be dealt with expeditiously.

6. The panel heard oral evidence from the appellant as well as evidence from the appellant's cousins and her aunt. The panel set out a summary of the oral and documentary evidence in paragraphs 13 to 17 of the determination. Having reminded itself of the need to consider the best interests of the children it summarised the expert evidence in paragraphs 21 to 23 of its determination as follows:

> "21. We find it convenient, to begin our consideration of the best interests of the children, by providing the following summary of the expert evidence that guided the Family Court in concluding that it would be in the best interests of the children that the not be reunited with the appellant and that the appellant's aunt and uncle be appointed as their special guardians.
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> (i) In his report of 29 April 2013 Dr Dale states that
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> Appellant would benefit from psychotherapy and would require it for a sustained period of time. If she complies there would be a real prospect of meaningful change. It is only when the appellant's immigration status is resolved that some insight could be gained into whether appellant is able to sustain an intensive period of treatment which would be long term and intensive over a period of two, possibly three years. As to the impact of deportation on her and the children, he states that she has strong family support in the UK and would be isolated in Jamaica, and would lose the benefit of the opportunity to receive the treatment that he has in mind for her. Her deportation would have an adverse effect on her relationships with her children.
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> (ii) Ms Larmie, a social worker appointed by the local authority compiled a report, dated April 2013, on the best interests of the appellant's second child Kingston. She notes that:
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> Appellant has demonstrated the ability to provide positive practical and warm emotional care to Kingston. She observed positive and warm interaction between the appellant and her children during contact visits. It is clear that the appellant was able to attune to his needs and she loves her son and wants to provide permanent care for him. Kingston's needs will increase as he grows older and the appellant's diagnosis of borderline personality disorder and emotional behavioural instability implies high level of risk with regards to consistent and safe parenting. She has engaged with counsellors well but at time gives in to anger. Her continued engagement in the medium to long term cannot be guaranteed, nor can her

engagement with professionals to ensure that Kingston's needs are appropriately met are assured.

(iii) Cafcass, appointed as the children's guardian in October 2012, states, in its April 2013 Final Report to Family Court that:

Care proceedings in respect of both children stemmed from a diagnosis of emotionally unstable personality disorder and a history of cannabis use, a chaotic lifestyle and domestic violence. Kingston would be at risk of significant harm as a result of the detrimental impact on him of his mother's personality disorder and historic concerns raised about the appellant being involved cannabis use, and being involved in a relationship in which she was the victim of domestic violence. It would be in the appellant's interests and would help her as parent in the future if she were to engage in psychotherapy for her personality disorder.

(iv) Sheila Sidhu, an independent social worker, states in her report that:

She observed good contact between the appellant and her children. The appellant has begun to address her cannabis misuse. She is however not yet able to assume the care of her children. Her own difficult experiences and unresolved personal issues and diagnosis of personality disorder indicate that she would struggle to meet Kingston's emotional needs as he gets older.

(v) Dr Castle, in his March 2013 update on his original diagnosis, states that:

Appellant has begun to address her cannabis use and has independently sought mental health treatment. She needs sustained treatment for change to take place. In recent meetings she seemed courteous and intelligent and capable of recollection and was able to demonstrate some insight and has been able to accept responsibility for her actions.

Appellant was keen to know the process for her to discharge the special order. She was vehemently opposed to the prospect of adoption of her children by the special guardians and had made threatening comments. She is not comfortable with the idea of Kinston being attached to someone else.

Cafcass recommends generous contact with Kingston – but this is predicated on the basis that the appellant is supportive of the children placements and that she is able to work positively with her aunt who will be his primary carer. She needs to understand that her own role in Kingston's upbringing will be limited. Kingston will need to develop an attachment to his primary carer as this will become his family home. This is likely to be very difficult for the appellant and the hope is expressed that the therapy she requires will be in place to support her. It is clear that the appellant will never be able to support any plans by her aunt and uncle to adopt her children if the decide to adopt this plan will have serious implications for the stability of the placement and could compromise

contact between appellant and both her children in the future. This is an area which needs further consideration.

22. In summary, the salient features that emerge from the opinions of the various experts, and that are relevant to the assessment for the best interests for the children are the following:

(i) The clinical diagnosis is that the appellant suffers from Emotional Unstable Personality Disorder. Her condition is treatable but this would require intensive therapy over a sustained period of up to three years. The appellant has, in recent months, shown a willingness to engage with her counsellors and a genuine commitment to receiving help. She is intelligent and articulate and has the capacity to show insight into her behaviour and its consequences.

(ii) The children are in immediate need of a stable and permanent environment which the appellant is not able to provide in the short and in the long term given the time frame it is likely to take for the full benefits of her treatment to take effect. It is not therefore in the best interests of the children for them to be reunited with the appellant. The arrangements with the special guardians are therefore permanent and will endure until both children reach the age of maturity.

(iii) It would be in the interests of the children to have contact with the appellant and to that end formal and informal contact arrangements have been put it place as part of the care plan. Although the special guardians shall be the primary carers, it is contemplated that the appellant will be consulted when important decisions concerning the children have to be made.

(iv) The appellant has a strong commitment to her children. She has a difficult relationship with her daughter, partly, because of her separation from her at birth and the lack regular contact in the first six months. Her ultimate wish is that her son Kingston will return to her. It was with real reluctance that she consented to the award of special guardianship to her aunt and uncle. She is strongly opposed to the children being adopted by the special guardians and has intimated that this might push her over the edge. The appellant's opposition to the adoption of the children could destabilise the children's placement in the future.

23. It is clear in our assessment that the best interests of the children have been served by the appointment of the special guardians who will provide them with a stable upbringing, the care plan recognises the importance of the children retaining contact with their mother and to that end provides for formal contact six times a year and also makes provision for informal contact. However, the experts recognise that there would be serious implications for the stability of the children, if the guardians adopt the children, because of the appellant's vehement opposition to such a plan. In our view the available evidence points to the real likelihood of the appellant causing long term instability to the children's placement because of her difficulty, which we do not believe is easily overcome,

even with therapy, in accepting the limited role she will apply in the children's upbringing."

7. The panel then turned to consider the guidance in Uner v The Netherlands [2006] ECHR 873 concluding its determination as follows:

"25. In considering proportionality we take into account the following factors:

(i) The gravity of the offence the appellant committed is reflected in the length of the sentence she received. As the sentencing judge observed, the appellant subjected an elderly lady to a campaign of threats that had a devastating effect on her life.

(ii) The appellant arrived in the United Kingdom at the young age of 14. She attended school in the United Kingdom. She has established strong social, family and cultural ties. Her mother and brother live in Jamaica but, as the experts have observed, she enjoys strong family support and ties in the United Kingdom and would be isolated in Jamaica. We accept that the appellant is devoted to her children and that her separation from them would be devastating for her. The medical evidence shows that she needs long term therapy for her condition, and whilst some form of mental health care is available in Jamaica, we accept the expert opinion that her deportation would deprive her of the very specific treatment plan that would be put in place for her if she were allowed to remain in the United Kingdom.

(iii) We accept that it would be in the best interests of the children if the appellant were, through the proposed treatment plan, to achieve a level of emotional stability that would enable her to develop a healthy relationship with her children. It is clear that the placement of the children with the special guardians meet their best interests. The guardians intend at some stage to formally adopt the children, a development that would enhance their best interests. We have real concerns that the appellant will have difficulty in allowing the children to develop strong and parental bonds with their primary carers. In this regard the real potential for the stability of the children's placement to undergo serious disruption, is clear from the evidence placed before us. We are concerned that this would seriously undermine the best interests of the children and their long term future.

(iv) The appellant's deportation is supported by important public interest considerations. We accept that the risk of the appellant reoffending is low. However, her deportation would serve the public interest in deterring others from committing offences in the first place. Her deportation also expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.

(v) It is right that we recognise that the weight to be attached to the public interest in this case is reduced by the respondent's delay of seven years in deciding the appellant's application for leave to remain. We cannot dismiss

as fanciful the appellant's assertion that her uncertain immigration status, when she left school, was a source of emotional. stability for her as she was unable to continue her education and to find employment.

26. The best interests of the child are a primary consideration and we have borne this in mind in our assessment of proportionality. A factor that has weighed with us in the assessment of proportionality, is the likelihood that the appellant's personality disorder, which requires long term treatment, poses the real danger, in the short and medium term, of being a source of serious instability in her children's placement. We do not therefore view her presence in the United Kingdom as being necessarily in the best interests of the children for the reasons that we have set out. Accordingly, we find that in all the circumstances, the decision to deport the appellant does not constitute disproportionate interference with the right to private and family life. This we appreciate is a grave decision. A different tribunal, we accept, may have come to a different decision, because the separation of parent and child breaks a natural bond that lies at the core of the values Article 8 seeks to protect."

8. Permission to appeal was applied for on various grounds and permission was granted on 17 July 2013 by the First-tier Tribunal on the basis that the panel had given no or insufficient reasons for its conclusion that the appellant posed a source of serious instability in her children's placement in the light of the evidence the panel heard. The panel had given insufficient reasons for finding that it would not be in the best interests of the children for the appellant to remain in the United Kingdom to continue to play a meaningful part in their lives. They had given insufficient reasons for disagreeing with the expert witnesses. Counsel submitted that the panel's finding head been in direct contrast to the conclusions of the family court. The court had concluded that it was in the best interests of the children that they should have contact with their mother. The Tribunal had ignored all the evidence that the appellant was dealing with her mental health difficulties. The children had been found to require a stable environment but the panel had failed to acknowledge that regular contact with the appellant was part of that environment. The panel had not properly mentioned or recorded the evidence given at the hearing or set out in the witness statements. They had attached no weight to the evidence given in support of the appellant's case. The evidence was that the appellant had improved and cooperated and was granted regular contact and was taking steps to overcome her difficulties. It was clear that the appellant's aunt wanted a normal relationship to develop.

9. It was acknowledged that the appellant had at some times been difficult and obstructive.

10. The panel had erred in finding that there were only formal contact on six occasions a year. In fact the appellant had nearly three times this level of contact. She had fifteen formal contact sessions with both the children in addition to informal contact. The panel had not mentioned the contact with Kingston. Counsel referred to the amended final care plan at page 100 of the bundle. She told me that the Family Court order had not been signed but would follow this care plan.

11. In relation to Kingston, the Tribunal had been the primary decision makers since the Secretary of State had not considered Kingston. In ground 2 it was said that the panel had erred in not considering the best interests of the children as a primary consideration and had overridden the conclusions of the Family Court and the experts.

12. In ground 3 the panel had referred to the Secretary of State's delay where it was submitted that the decision of the panel was perverse and lacked transparency and sufficient reasoning.

13. In ground 4 it was said that the panel had failed to take into account relevant considerations such as the appellant's destitution on return and her vulnerability and her mental health problems.

14. Mr Jarvis submitted that the panel had dealt properly with an unusual set of facts and had approached the issues and considered them lawfully. In relation to the claim that removal would result in her destitution, it was up to her to prove destitution: see MA (Jamaica) [2005] UKIAT 00013 at paragraph 14. No specific evidence had been provided about the facilities on return. It had been suggested that her criminal behaviour was a consequence of her personality disorder but she had not cooperated with the psychiatrist and had elected to be sentenced without the benefit of a report. She had been properly represented. (Counsel at this point conceded this particular submission). I pointed out that it appeared that Counsel who had granted permission did so on limited grounds.

15. The Secretary of State's delay had been acknowledged by the panel. Mr Jarvis referred to Onur [2009] ECHR 289 at paragraph 52 where there had been a lengthy delay. Even if the appellant had got indefinite leave to remain this would not have prevented her deportation.

16. Mr Jarvis referred to OH (Serbia) [2008] EWCA Civ 694 at paragraph 15. The risk of reoffending was one facet of the public interest but there was also the need to deter foreign nationals from committing serious crimes as well as the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who had committed such crimes. Where a foreign criminal's deportation was conducive to the public good under Section 32 the nature of the public interest was "vividly informed by the fact that by Parliament's express declaration that public interest is injured if the criminal's deportation is not effected" - see SS (Nigeria) v Secretary of State [2013] EWCA Civ 550 per Laws LJ.

17. At the conclusion of the submissions I reserved my decision. I have very carefully considered the points made and the passages in the bundle to which Counsel helpfully referred me. I remind myself that I can only interfere with the decision of the panel if it was flawed on a point of law.

18. I am not satisfied there was any unfairness in the panel's decision. It declined to adjourn the proceedings for reasons set out in paragraph 10 of its determination. It distinguished the facts in Tinizaray. That decision did not perhaps, receive unqualified support in the Court of Appeal in SS (Nigeria) v Secretary of State [2013] EWCA Civ 550 at paragraph 55. While the interests of a child affected by a removal decision are a matter of substantial importance and the court must proceed on a proper understanding of the facts which illuminate those interests, Lord Justice Laws did not accept that the decision in Tinizeray "should be regarded as a establishing anything in the nature of general principle".

19. The main point on which permission to appeal was granted was that the panel had misdirected itself in concluding that the appellant was a source of instability. I was taken by Counsel at some length through all the material that had been before the panel. I should observe *en passant* that this material is heavily marked in places by the panel and it is quite clear from exhumation of the material that it had full regard to the material placed before it.

20. It is also said that the panel overlooked or ignored material but I see no evidence of that. It is not incumbent on the appeal to set out all the evidence verbatim. It summarised the salient points and that was sufficient.

21. It is also said that the panel should have put matters to the witnesses. In a case of this type such an approach is unrealistic. The panel would need to give careful scrutiny to all the lengthy documentary evidence and reach its decision on that evidence taking into account the oral evidence in addition.

22. On reading through this evidence with Counsel I pointed out various occasions where there were expressions of concern about the appellant's behaviour and Counsel accepts that the appellant had occasionally been difficult and uncooperative. There is a reference, for example, on page 87 to the appellant's "extremely abusive behaviour", behaviour which the appellant acknowledged as described on page 89 although she denied she had made violent threats. She wanted to do anything in order to keep her son. She was very worried about Kingston becoming attached to someone else.

23. The issue of adoption was clearly one which troubled the appellant – see paragraph 25 on page 91 where the appellant stated that if her children were to be adopted this would send her "over the edge". Parents who adopt the children would have "serious implications for the stability of the placement ..." – see paragraph 28 on page 93.

24. I have only taken a few extracts from the large volume of material before me but I am quite unable to conclude that the view taken by the panel of the evidence was not open to the panel.

25. Of course the decision in the family proceedings is a matter to be taken into account by the panel but the panel is not bound by the decision in the family proceedings. It has to make its own decision. It is not there to rubber stamp the decision of the Family Court. If it were, there would be no point in having the proceedings at all. Its task is in any event different. When hearing an appeal against deportation under Section 32 a balancing exercise is required in which the child's interests feature prominently but there are other interests in play also, as Mr Jarvis points out.

26. Another point worth making is that this is a decision which the panel reached in my view conscientiously but it was also aware that another panel might reach a different decision. It was not a decision which was lightly undertaken. The fact that two panels might take different decisions does not mean that one or the other was not entitled to reach the decision it did.

27. Various subsidiary points were taken. Firstly, it is quite clear that the panel had regard to the decision in Uner and indeed it set out the relevant principles in paragraph 24 of the decision. It had regard to the gravity of the offence and it is quite clear that the offences of blackmail and the threat were serious matters quite apart from Section 32. That was one aspect of the decision which the panel had had to have regard to. It noted that the victim was subjected to a campaign of threats that had a devastating affect on her life.

28. The panel then had regard to the appellant's history, education and the young age at which she had arrived in the United Kingdom. It acknowledged all relevant circumstances, in my view. It further acknowledged the appellant's devotion to her children and the effects of separation from them. The panel considered mental health issues and found that mental health care was available in Jamaica although she would lose the benefits of the very specific treatment plan that she now had the benefit of.

29. The panel was concerned that the appellant would have difficulty in allowing the children to develop strong parental bonds with their primary carers and was entitled to see a real potential for disruption in the stability of the appellant's placement. The panel found this was clear from the evidence placed before it.

30. Again, while the risk of reoffending was low, the panel did not misdirect itself in finding that deportation would serve the public interest and Mr Jarvis draws my attention to paragraph 54 of SS (Nigeria) as well as paragraph 15 of OH (Serbia).

31. On the issue of delay, I see no evidence of misdirection. The panel, in paragraph 25, considered the question of proportionality taking into account factors including the question of delay. This was part of a legitimate balancing exercise conducted by the panel.

32. In the unusual circumstances of this case, the panel was entitled to conclude as it did.

33. It is said that the panel misdirected itself on the facts in relation to the level of contact. There is a reference in paragraph 23 to the provision for formal contact six times a year and provision for informal contact. Counsel says that understates the level of contact significantly. She says that the panel ignored the fact that there were two children involved.

34. I note that in paragraph 13(x) of the determination the appeal summarised the appellant's evidence to the effect that she was having contact with Maddison at least six times a year with further contact to be arranged on an informal basis with her aunt, and that the court had also approved contact with her second child Kingston at least nine times a year with informal arrangement to be made with her family.

35. I am not satisfied that the panel arguably proceeded on an incorrect assumption as to the facts underlying the appellant's level of contact with her children, still less that there was any material misappreciation of the facts in this case. This was not a point on which First-tier Judge was moved to grant permission to appeal.

36. The panel carefully summarised the medical and other evidence before it including the material from the family court. It did not overlook positive as well as negative aspects. It summarised the evidence properly. In short it reached a reasoned conclusion on the totality of the material before it. There was no element of perversity in the decision. The panel was fully aware of the appellant's case and the difficulties that she would face in Jamaica. However it was entitled to conclude that some form of mental health care was available in Jamaica. The panel no doubt had in mind the evidence contained in the Secretary of State's refusal letter at paragraphs 41 to 59.

37. As I have said, permission to appeal was granted on a specific issue and not a number of the sub-issues that were raised in this case. Mr Jarvis says that it would be for the appellant to show that she would be destitute, again in the refusal letter there was evidence of the grants available under the facilitated return scheme as well as resettlement services available in Jamaica and the fact that the appellant was a relatively well educated woman and support was provided locally for individuals who required assistance.

38. For the reasons I have given I am not satisfied that the panel erred on a point of law in its conclusions on the point on which permission to appeal was granted. I am not satisfied that the other points raise any error of law in the panel's approach. Accordingly this appeal is dismissed.

Signed Date 23 September 2013

Upper Tribunal Judge Warr