Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01295/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 April 2014	**On 28 May 2014**
Oral determination given following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS K
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant (the Secretary of State): Mr P Nath, Home Office Presenting Officer
For the Respondent (Ms K): Ms K Cronin, Counsel, instructed by Birnberg Peirce

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of a panel of the First-tier Tribunal consisting of First-tier Tribunal Judge Munonyedi and Mrs S E Singer, non-legal member, which in a determination promulgated on 24 December

2013, following a hearing at Taylor House on 29 November 2013 allowed Ms K's appeal against the Secretary of State's decision to deport her. For ease of reference throughout this determination I shall refer to Ms K who is the respondent to this appeal but was the original appellant, as "the claimant" and to the Secretary of State who was their original respondent as "the Secretary of State".

2. The deportation order was made on the basis that following her conviction for what has been accepted by all parties including the claimant as quite appalling offences for which the claimant was sentenced to five years' imprisonment (this was for three counts of false imprisonment, causing actual bodily harm and blackmail, the sentences running concurrently) the claimant was subject to automatic deportation pursuant to Section 32(5) of the UK Borders Act 2007. This order was of course subject to an exception in the event that her removal would be in breach of any of her rights under the ECHR but the Secretary of State considered that no exception applied.

3. The background to this appeal will need to be gone into in some detail but I will summarise it briefly at the outset. The claimant, who is a citizen of Jamaica, was born in 1991 and came to this country in 2001 aged 10 with valid entry clearance as a visitor in order to join her mother who had arrived in this country in November 1991. Shortly after the claimant had arrived in this country she was subjected to very serious abuse indeed (this will be referred to in a little more detail below) and it appears to be common ground that in consequence of this abuse coupled with the failure of social services to give her the assistance which she needed, she became traumatised to some extent. This will also be discussed in more detail below.

4. On 21 May 2010 in respect of the offences which the claimant committed when she was 18, she was sentenced at Southwark Crown Court to concurrent sentences of imprisonment totalling five years. The public in general has a right to be protected from foreign criminals who commit these sorts of offences and it is only in really quite exceptional circumstances that such a foreign criminal will not be deported, and so it is right that I set out in a little detail the circumstances of these offences. I do so by reference to the sentencing remarks of Judge Taylor.

5. There was apparently a drug deal which went wrong as a result of which a young man [W] was abducted, imprisoned and tortured by a group of individuals. He was taken to a garage where he was held against his will overnight for a period of about seventeen hours during which as the judge states, he was subjected to violent and humiliating and repeated assaults. He was threatened with electric shocks while a paint stripper and a heat gun were held near his body. He was punched and kicked and beaten on his back and arms with cam belts to the extent that the impression of those belts were clear on his body afterwards. His face was beaten so that it was swollen and he had black eyes. He was at one stage chained to his chair.

6. As the judge went on to state, this ordeal lasted many hours, with demands being made of him for details of those who had been involved in supplying the drugs and for the money paid for them, £4,000 which he did not have. Threats were made to

him and calls made to a friend and to his sister in order to try and get the money. It was only after W promised to pay the money that he was released.

7. As the jury found (because the defendants had all pleaded not guilty), this was a planned abduction and a cruel and sustained group attack carried out for revenge and debt collection as the defendants in this case had seen it, and it was a terrifying ordeal for the victim who believed that he would die. He had past mental health difficulties and was in consequence vulnerable. The judge considered that all the defendants had clearly thought that the victim would stick to the story that he had been told to give, would not go to the police and that they would "get away with it".

8. The judge referred to a victim impact statement which he had seen, dealing with the lasting psychological and some physical effects of this attack. The judge rightly considered (as anybody considering the circumstances of these offences would do), that these were very serious offences and the sentences of imprisonment which he imposed on the defendants reflected this.

9. With regard to this claimant's involvement, the judge said as follows:

> "[Ms K], you were not involved in the kidnap but you came to the garage and took the willing part in guarding [W] overnight and in assaulting him by taking a main role in hitting him with cam belts, pouring hot and cold water on him and in demanding details of the drug dealers and money from him. You too have shown no remorse.
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> I have taken into account the contents of the pre-sentence reports and all that has been said about you and on your behalf. I take into account, in particular, your age, 18 at the time of these events and also your background and the extent to which you were influenced by what you did by others.
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> I also take into account the fact that you have previous good character, but again, taking the totality in respect of these offences, there will be a sentence in respect of false imprisonment of five years in a Young Offenders' Institution; in respect of causing actual bodily harm, four years concurrent and in respect of blackmail, five years concurrently."

10. As already noted, the claimant not being a British citizen, by virtue of Section 32(5) of the UK Borders Act, she was subject to automatic deportation and the Secretary of State made a decision that this section applied to her and she should be deported.

11. The claimant appealed against this decision and, as already noted, her appeal was heard at Taylor House on 29 November 2013 before a panel of the First-tier Tribunal whose composition has been set out above. The claimant was represented at this hearing by Ms Cronin, Counsel, who has also represented the claimant before me. She prepared a skeleton argument which was before the Tribunal and she also was assisted by evidence provided by Dr Roxanne Agnew Davies, who gave oral evidence in support of a report which she had prepared dated 13 September 2013.

12. At paragraph 13 of its determination the panel set out briefly the facts of this case which it considered were not in dispute and it is right that these facts are now recorded for the purposes of this determination.

13. The claimant was born in Jamaica in 1991. When she was only 8 months old, her mother emigrated to this country leaving her with her maternal grandmother. The claimant was beaten and ill-treated by her grandmother and raped by two men while in her care. This occurred while the claimant was no more than 8 years old. In early 2000 the claimant's half brother, K, came to the UK.

14. On 25 April 2000 the claimant's half sister, I, was born in the UK and on 18 July 2001 the claimant and another half brother were brought to the UK as visitors by her mother. Then in December 2001 the claimant's mother married a Mr T. Things did not get any better for the claimant because in or around 2001 she was raped by Mr T's brother and a friend of her mother's. She was then aged about 10.

15. On 17 May 2002 the claimant ran away from home to escape abuse, was seen by her teacher and disclosed domestic violence and her own physical but not sexual abuse. She was admitted to Whittington Hospital following a fainting spell. The claimant's mother admitted that she would give the claimant a "good beating" because she wet her bed. Notes of a strategy meeting recorded lots of old scars on her body consistent with whipping. The claimant was initially held in social services care under an emergency protection order. The claimant's mother agreed for her to be in voluntary care.

16. On 30 May 2002 the claimant was discharged from the Whittington Hospital and placed with foster carers in Isleworth. This was a voluntary placement agreed by the claimant's mother, not a care order. Then in June 2002 the claimant's mother applied for leave to remain as a spouse and for her children, including the claimant, to be allowed to remain as her dependants.

17. On 2 June 2002 the claimant was admitted to St Mary's Hospital after cutting her wrists. She was then aged 11.

18. On 19 June 2002 the claimant disclosed to social workers that she had been raped in Jamaica and in the UK. Sexual penetration was confirmed by medical examination in July 2002. In her description to Dr Agnew Davies it is clear, as noted by the panel, that there had been repeat occasions of rape including one occasion where her mother knew of the offence but counselled the claimant not to tell.

19. On 26 June 2002 the claimant again tried to cut her wrist with broken glass and was removed to a new foster placement in Kent. She was referred for child and adolescent mental health assessment due to the risk of suicide. At some time in June 2002 Mr T left the family home.

20. On 12 July 2002 the claimant was entered on the Child Protection Register because of her previous history of physical and sexual abuse and neglect.

21. On 27 October 2002 the Entry Clearance Officer wrote to inform the Home Office Immigration and Nationality Enquiry Bureau that the claimant had been taken to the UK by her mother and retained there but the claimant's father (with whom the claimant had had frequent contact before coming to the UK) wished her to be returned to his care. The father was aware of allegations that the claimant had been abused and was in foster care.

22. As the panel records, on 5 February 2003 "through social work error" the claimant was removed from her foster carer, Ms M "causing real distress" to the claimant "who had settled well in her care and was very attached to her".

23. The following day, 6 February 2003, the claimant was placed in [C] Young Peoples' Resource Centre on an emergency basis. She was maintained there. Her bedwetting was noted. She was forced to perform oral sex with a boy in the unit and was beaten by another boy (this being during a time when she was supposedly under the protection of social services). The police were involved and the matter was pursued. The boy was removed from the unit. The claimant was then aged almost 12.

24. On 30 April 2003 the claimant's half brother T was born.

25. On 12 May 2003 a risk assessment concluded the claimant had been chronically abused, had low self esteem, suicidal ideation, emotional and behavioural difficulties and required but was yet to receive therapeutic care. The report recommended that her legal status be clarified.

26. On 17 June 2003 the claimant was placed in a therapeutic residential care unit in Wiltshire [X].

27. On 13 August 2003 the claimant's mother applied for ILR as a spouse victim of domestic violence and for the children as her dependants.

28. On 22 June 2004 the claimant was removed from X and placed in [W] Children's Home in Wood Green. Apparently she had settled well in X; her enuresis improved significantly and she had 95% attendance, but she became distressed and disruptive when her close friend died and favourite staff left.

29. In July 2004 the claimant moved to [C] Children's Care Home. On 24 September 2004 the claimant's mother removed her from care to the family home where their relationship quickly deteriorated. So notwithstanding that she had been placed on the Child Protection Register, the claimant was allowed to return to live with the same person who (to the knowledge of social services) had been aware of incidents of abuse but had counselled her to say nothing about them and who had admitted that she would give the claimant a "good beating" because she wet her bed (which from the scarring recorded by social services must have occurred repeatedly).

30. On 11 December 2004 the claimant contacted Childline to seek help because her mother was hitting her. She was directed to London Refuge who arranged a medical

examination which showed bruising, but the claimant was yet again returned to her mother against her wishes.

31. On 21 January 2005 the claimant was placed on the Enfield Child Protection Register as at risk of physical and emotional abuse and neglect.

32. On 27 June 2005 the ILR claim was refused.

33. On 21 July 2005 another half brother of the claimant, J, was born.

34. In May 2006 there were further reports to social services of the claimant being hit and taunted by her mother and feeling "empty", "highly distressed" and suicidal. The claimant had not attended school for two years. The claimant notes hiding her urine soaked clothes because of embarrassment. The Enfield file was apparently closed in July 2006. The closing summary records that the claimant should have been removed from her mother's care.

35. On 3 April 2006 Dr Ogunde reported that the claimant's relationship with her mother had broken down, that the claimant needed and was motivated to access therapeutic services but had no safe base from which to access these services. He advised that the claimant's psychological development, education, risk of self-harm and mental health were all likely to be "greatly impaired" if she remained living with her mother and "strongly advises" an alternative placement for her.

36. In April 2006 the family (including the claimant) moved back to Haringey. Enfield Transfer-In-Child Protection conference records apparently stated that if the family remained in Enfield the claimant would be removed from her mother's care. Haringey seem to have been unhappy about the case responsibility and it appears that they considered that there was enough evidence at Enfield to take care proceedings. However, no action was taken by either Enfield or Haringey.

37. On 5 February 2007, the appeal against refusal of ILR was dismissed. The claimant's mother did not attend or provide evidence.

38. On 6 June 2007 the claimant's mother made a human rights application and in August 2007 the family returned to Enfield and care and responsibility was transferred.

39. On 4 October 2007 the claimant, who at that time would have been 16, had a miscarriage.

40. On 21 November 2007 there is an Accident and Emergency record showing that the claimant had a severe burn to her right arm and psychiatric symptoms, being low mood, checking rituals and paranoia. A professional noted that "I am worried that this 16 year old is vulnerable and by attending A&E is slipping through the net."

41. On 21 October 2008 the claimant was admitted to hospital for another burn injury. She was noted to be suffering from OCD (obsessive compulsive disorder) and

reported suicidal ideation. It was on 3 October 2009 that these offences which have given rise to the deportation decision and to this appeal were committed. The claimant was then 18.

42. On 7 October 2009 the claimant was remanded in custody. While in prison she suffered a panic attack, her fourth burn injury in two years and repeated head banging and hair pulling.

43. On 15 October 2010 as already noted, she was convicted of blackmail, false imprisonment and ABH for which on 21 May 2010 she received the concurrent sentences of imprisonment referred to above.

44. On 14 June 2011 the claimant's mother (who as already noted was complicit in the serious sexual and other abuse which had been perpetrated on the claimant and who had herself physically abused the claimant) together with the claimant's siblings were granted discretionary leave to remain but the claimant was refused such leave because of her conviction.

45. The claimant was released from prison on 5 April 2012 on immigration bail.

46. On 9 August 2012 the claimant's GP confirmed that she was suffering depression and had a history of OCD and self-harm.

47. As the panel remarks at paragraph 14 of its determination:

> "14. It was not in dispute that the [claimant] had suffered severe, chronic and prolonged sexual, emotional and physical abuse from an early age and throughout her childhood and adolescence. This abuse included:
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> - Being left in her grandmother's care when her mother knew the [claimant] suffered extreme physical chastisement.
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> - She was sexually abused by two men when she was aged 8 and in the care of her grandmother and stepmother
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> - She was raped (full vaginal penetration and anally) aged 10 by her stepfather's brother and a male friend of her mother's when in the care of her mother in the UK. The man threatened to kill the [claimant] if she disclosed. The [claimant]'s mother admitted the man slept on the [claimant]'s bedroom floor 'but she thought nothing of it'.
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> - She was severely and routinely beaten by her grandmother and mother (the medical examination showed whip mark scarring – including on the [claimant]'s arms which she appears to have raised up to protect herself).

> The [claimant]'s mother admitted hitting her on the back of the neck, pulling her by her ears, pulling her hair, pushing and 'cussing her'. The mother received a police warning.
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> - The [claimant] was routinely taunted, humiliated and punished 'given a good beating' by her mother because she suffered from persistent enuresis (itself an indicator of stress) and her enuresis is shown to recur for [the claimant] when she is under severe stress. [The claimant] is noted to be self-harming - including cutting her wrists with broken glass from May 2002 (aged 11) and four severe burns from 2007 - 2010
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> - The [claimant's] mother did not contact her when she was admitted to hospital and for much of her time in care. The social services assessment was that the omission by mother 'almost equate with abandonment'. The hospital noted that the [claimant] manifested psychosomatic symptoms to avoid being returned to her mother's care.
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> - The [claimant] was routinely required to act as carer for her siblings, to take responsibility for household chores and kept home from school by her mother for this purpose. She was required to wash her own bed linen (without a washing machine) when they were soiled with urine.
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> - She witnessed repeat serious domestic violence against her mother by the mother's various partners. (One partner was later imprisoned for murder)."

48. The panel then in the determination sets out the medical evidence of Dr Agnew Davies, the clinical psychologist who had given evidence in support of her report dated 13 September 2013.

49. There is an issue in this appeal as to precisely how much of this report had been accepted by the Secretary of State which is a matter which has to be addressed below. I do not intend to set out this report in detail, but it is is clear that the panel considered this report very carefully indeed and especially the conclusions which Dr Davies reached. It is also apparent that the panel considered Dr Davies' diagnosis of the trauma that the claimant was suffering from (from paragraphs 16 to 20 of its determination) separately from the consideration which it gave at paragraph 21 to Dr Davies' understanding "through her professional contacts in Jamaica" "that the specialist trauma focussed treatment that the appellant required was not available in Jamaica".

50. To summarise Dr Davies' opinion briefly, she considered that this claimant was currently suffering from "a very severe degree and complex and chronic form of post-traumatic stress disorder and major depressive disorder", that this profile "is highly consistent with victims of extensive and severe abuse, physical abuse,

conceptual abuse and neglect perpetrated by a number of people over time", that the abuses which the claimant "suffered throughout her childhood and adolescence are also consistent with life experiences of people who have resorted to crime" and that her "psychiatric condition renders her highly vulnerable to the risk of further abuse and severely impedes her ability to manage situations of risk to avoid further harm".

51. Dr Davies considered that there was little risk of the claimant further offending but that her prognosis was poor "given the longevity of her symptoms and the duration and multiple types of abuse, as well as a lack of effective safeguarding throughout her childhood". The key part of her finding is recorded by the panel at paragraph 20 as follows:

> "It was also her view that the [claimant's] psychiatric symptoms and difficulty in functioning would be greatly exacerbated if she was returned to Jamaica and/or to be removed from the limited factors in her daily life that offer some sense of hope for her future such as her involvement with 'User Voice'. Returning to Jamaica is highly likely to aggravate her severe, acute PTSD, as well as her depressive disorder, and other symptoms. This exacerbation of mental illness is highly likely to increase her risk of suicide and/or self harm to a clinically significant extent from moderate to high risk. Moreover the loss of limited social support network that she has in the UK including an understanding of how statutory services work can be assessed would significantly reduce her rehabilitative prospects."

52. As noted, Dr Davies understood through her professional contacts in Jamaica that the specialist focus trauma treatment that the claimant required (and which to some extent she was receiving in this country) was not available in Jamaica. It is also right in this regard that I note that it is recorded at paragraph 11 of the determination that the Secretary of State was of the view "that there is adequate mental health provision in Jamaica for the [claimant] to access" and that "furthermore the [claimant] would be offered help and support from the female prisoners' welfare project – Hibiscus Jamaica ..." and also that it was the Secretary of State's case that the claimant's "medical needs did not meet the high threshold required, as set out in *N (FC) v SSHD* [2005] UKHL 31".

53. The basis of the claimant's appeal was that her removal to Jamaica in the circumstances of this case would be in breach of both her Article 3 and Article 8 rights and for this reason would be unlawful because Section 33 of the UK Borders Act 2007 provides that an automatic deportation order should not be made (even though such an order would be conducive to the public good) in circumstances where this would be in breach of an applicant's protected rights which include the rights she is entitled to enjoy under Articles 3 and 8 of the ECHR. It was the Secretary of State's case that deportation would not be in breach of the claimant's Article 3 rights and that it would be proportionate under Article 8.

54. Having considered the issues in this case very carefully indeed, and having set out its findings in clear and cogent terms, the panel reached findings that the deportation of

this claimant would indeed be in breach of the claimant's Article 3 and Article 8 rights.

55. The panel noted (and this has been the subject of some challenge in the grounds) that Dr Davies' report had not been challenged on behalf of the Secretary of State. It is said in the grounds that this is not correct, and this is a matter with which I deal below. Having considered this report and in particular the diagnosis of the claimant's medical condition, the panel concluded that there had been substantial failures by social services by reason of social services taking no effective remedial action to prevent the abuses which continued for some years even after they should have been aware that this claimant needed proper protection which was not being provided to her.

56. In this regard it is worth setting out the conclusions of the panel at paragraph 26 onwards of its determination which it reached having regard to the decision in the Grand Chamber in *Z and Others v United Kingdom* application number 29392/95, 10 May 2005.

57. The panel found as follows:

> "26. In the [claimant's] case we have had an opportunity to consider the extensive social services file and records.
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> It is our finding that the [Secretary of State] as early as 27 October 2002 was aware that social services were involved with the [claimant].
>
> They were also informed by Entry Clearance Officer Andy Fenell the [claimant's] father was concerned that his daughter was in foster care and wanted her returned to him in Jamaica. It would appear that the [Secretary of State] did nothing with the letter or the information. This failure in our view meant that this [claimant] was denied the opportunity of being removed from an abusive and highly damaging situation and being looked after by her father.
>
> 27. Having regard to the facts in this case we are of the view that the state failed to protect this particular [claimant] from serious long term neglect, physical and sexual abuse and therefore there has been a violation of Article 3.
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> This state's failure to protect has resulted in this [claimant] suffering from complex depressive illness and chronic post traumatic stress disorder that requires complex and specialist trauma focused therapy over a prolonged period of time."

58. The panel then had regard to what was said at page 528 of *Oppenheim's International Law* 9th edition, to the effect that "the principal legal consequences of an international wrong are reparation of the emotional and material harm done. The essential principle is that reparation must, as far as possible, wipe out all the consequences of

the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed."

59. Where the European Court of Human Rights find that a state has breached an individual's human rights, the result is the imposition on the Secretary of State of "a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".

60. It was the panel's view that the decision of the Secretary of State now to deport this claimant in circumstances where the state had clearly failed to comply with its obligations to this claimant would be a further breach of her Article 3 rights. At paragraph 30, the panel stated as follows:

> "It is the [claimant's] case that reparation involves providing her with a chance to recover with the support basis she has established and on which she depends. In our view had the state not breached Article 3, the [claimant] would have been protected and would not have had to experience the trauma in her life which has led to her suffering from mental illness. Had she been properly cared for it is highly likely that she would not have involved [herself] in criminal activity and therefore would have been granted the right to remain with her mother and other siblings. The state's failure to look after this [claimant] has greatly contributed to her involvement in crime and her mental illness. In our view the state has an obligation to assist this [claimant]."

61. The panel also considered that the removal of this claimant in the circumstances of this case would be in breach of her Article 8 rights. The panel set out her circumstances from paragraph 31 onwards. It found that the claimant did not have any close cultural ties with Jamaica and did not have family there. It is stated in moderate terms that "she has a difficult relationship with her mother" but noted that "the majority of here life has been in the United Kingdom. For a good part of her minority the state was involved through social services".

62. The panel had regard to the Tribunal decision in *MF v SSHD* [2012] UKUT 00393 in which the panel had found that there was a two stage test with regard to Article 8 but it also had regard to the Court of Appeal decision in that case reported as *MF (Nigeria)* [2013] EWCA Civ 1192. The panel also had regard to the decision of the Court of Appeal in *SS (Nigeria*) [2013] EWCA Civ 550 as well as to the Presidential decision of this Tribunal in *Masih (Deportation – public interest – basic principles) Pakistan* [2012] EWCA Civ UKUT 0086. The panel set out a number of other authorities to which it also had regard.

63. The Tribunal noted at paragraph 51 that it had eventually been conceded on behalf of the Secretary of State that "help was only available [in the Hibiscus Jamaica Project] to women who had been involved in drug related offences" which was not the case with this claimant and concluded at paragraph 54 that "In our view, the [claimant's] private life is highly dependent upon her support base, including "User Voice" and that "such social support has to be given significant weight in this case,

as it provides the [claimant] with security, a sense of purpose critical to her self-worth, some degree of health care, purpose and containment." The panel found that "It provides the necessary base from which she can be helped to recover."

64. It is important to note that the panel did not attempt to minimise in any way the very serious nature of the offences of which the claimant was convicted, noting at paragraph 39 that she had been "found guilty of very serious offences which included acts of violence". However, the panel did take into account as it was entitled to, that the claimant had indicated her genuine remorse, noting at paragraph 39 also that "we have heard the oral testimony of the [claimant] and we accept that she is genuinely remorseful and ashamed of her conduct". The panel sets out what the claimant herself has now said about these offences, at paragraph 41, as follows:

> "The [claimant] herself states that
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> > 'What I did to the victim [W] was terrible and I deserved to go to prison for it. I am ashamed of what I did and I think shame was part of the reason why I didn't fully accept responsibility for my actions – and indeed denied committing the offence at the time. I believe another reason was that I felt that I had been harmed by others and that they had not taken responsibility for what had happened to me so that when it came to admitting my own wrong-doing I was reluctant to do so. I have learnt the importance of taking responsibility for my own actions and that I must deal constructively with the abuse I suffered not become a person who abused others. These are the sorts of issues I began to face in prison and which I now put to use in my voluntary work with User Voice.'"

65. The panel also noted at paragraph 42 that the NOMS assessment had assessed the claimant as a high risk to the victim but a low risk to the public and a low risk of reoffending and that in that report it had been stated that the risk of future harm would reduce if the claimant accepted (as she now has) full responsibility for her actions and the harm caused. It is also noted that the assessing officer recommended counselling support to explore her emotions, increase her victim empathy and reduce the risk she poses to others.

The Hearing

66. I should state at the outset my appreciation to both representatives in a case which is a very sensitive one both because of the seriousness of the offences but also because of the appalling history of abuse which this claimant has suffered from a very early age and from which she had the right to be protected, especially as she was under the care of social services for the majority of the time when this abuse was being perpetrated against her. On behalf of the claimant, Ms Cronin has had a very detailed knowledge of this case because she has represented the claimant from an early stage and was present during the hearing concerning which there was some dispute as to what precisely may have been agreed.

67. I am also grateful to Mr Nath for the sensitive way in which he maintained the arguments which he was obliged to make on behalf of the Secretary of State, especially in circumstances where he did not receive his instructions until much later than he ought to have done. No blame can attach to Mr Nath for this but in a case such as this it is very regrettable indeed that the Secretary of State or those who at the time were holding the file of this case on her behalf did not ensure that it was better prepared. In particular and I will make further reference to this below, it is very regrettable indeed given the basis upon which permission to appeal was granted, that directions which had been made by Upper Tribunal Judge O'Connor as long ago as 26 February 2014 were not complied with by the Secretary of State.

68. The Secretary of State's case can be summarised very briefly indeed. It is argued on her behalf in the grounds that the panel had failed to provide adequate reasons for finding that the claimant's Article 3 rights would be breached if she was deported to Jamaica. In this regard it is said (at paragraph 1 of ground 2 in the grounds) that the panel had found that the claimant's expert report's findings had not been challenged, whereas they had been.

69. It is asserted in the grounds that the Presenting Officer at the hearing before the First-tier Tribunal had challenged the expert's findings "given that both the experts and their colleagues had no formal experiences of knowledge of medical treatment in Jamaica" and therefore, it is asserted, "the [panel's] findings are inadequate and inadequate reasons have been given as to why the expert's findings can be relied upon".

70. Further, it is submitted in the grounds that the panel had "failed to provide adequate reasons as to why the medical treatment in Jamaica is not adequate or why the access to unlimited support here will lead to an exacerbation of her condition upon return".

71. It is also asserted that the panel had not given adequate reasons as to why the claimant's circumstances were exceptional enough to outweigh the public interest in deporting her and that the panel made no assessment of the claimant's cultural ties to Jamaica or why she would be unable to continue her private life in that country.

72. When granting permission to appeal Judge O'Connor setting out his reasons stated as follows:

> "The Secretary of State appeals against a decision of the First-tier Tribunal allowing the claimant's appeal on Article 3 and 8 ECHR grounds.
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> Contrary to [what is] asserted in the first ground, Article 3 was in issue before the First-tier Tribunal. It was dealt with in the Secretary of State's refusal decision, and was specifically pleaded in the claimant's IAFT1 appeal form. It is not arguable therefore that the First-tier Tribunal did not have jurisdiction to consider Article 3 grounds.
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> Given the assertion made in paragraph 1 of ground 2, it is arguable that the First-tier Tribunal erred in its consideration of the evidence provided by Dr

> Davies. It is also arguable that the First-tier Tribunal's reasons for allowing the application on Article 3 grounds are inadequate. *In the former regard both parties are directed to serve and file copies of any record made of the proceedings before the First-tier Tribunal, with the parts relevant to this ground appropriately sidelined.* [my emphasis]
>
> Although there appears to be little merit in the other grounds, I do not restrict the grant of permission."

73. On behalf of the claimant Ms Cronin settled a Rule 24 response which substantially complied with the direction which had been given. At paragraph 7 of this response it was stated as follows:

> "Counsel's note (and her clear recollection) of the Presenting Officer, Ms Laverack's submission on Dr Agnes Davies's evidence is that the challenge to her evidence was a narrow one, restricted to the care available to A in Jamaica. Thus:
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> i. in answer to the FtTJ's direct question 'do you agree with the conclusion of Dr Agnew Davies' Counsel's note to Ms Lavarack responses records 'I think in terms of her conclusions – [there is] no agreement re support in Jamaica'.
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> ii. Counsel's note (again concurring with her recollection) records concerning Ms Lavarack's submission on Dr Agnew Davies' evidence 'Does not challenge expertise and diagnosis. No knowledge Jamaica [support and treatment]'
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> iii. Counsel's note further records Ms Lavarack's submission to include a reference to 'psychiatrists there [Jamaica] – there is <u>some form</u> of therapy. Not the same level'. (Counsel underlined 'some form' as a prompt for her own submission). The note further shows that the FtTJ then intervened to pose the question 'but needs suitable [treatment]' and that Ms Lavarack replied that A had 'chosen not to take psychiatric t [treatment] here."

74. Notwithstanding the direction which had been made, there was no evidence submitted on behalf of the Secretary of State and in particular no copy of any record made in the proceedings by Ms Laverack was submitted to the court and nor was any witness statement from Ms Laverack provided. As I have already indicated earlier, Mr Nath cannot be blamed personally for this failure because he was not given the file in this case, if at all, until the day of this hearing.

75. During the course of the hearing, at the invitation of Mr Nath I examined the Record of Proceedings which had been made by Judge Munonyedi and her notes record that the report of Dr Davies was "not challenged". It is also recorded that the Presenting Officer who presented the case on behalf of the Secretary of State accepted she was a formidable expert who was "not challenged today". It was recorded in the notes (as set out in paragraph 11 of the determination) that "The [Secretary of State] is of the

view that there is adequate mental health provision in Jamaica for the [claimant] to access" and that it was argued on behalf of the Secretary of State that "doctor does not have knowledge of services in Jamaica"; however, there is nothing in the Record of Proceedings to suggest that other than this point (which was anyway recorded in the panel's determination), there was at any point any challenge made to Dr Davies's diagnosis.

76. Mr Nath, as I have said doing the best he could on behalf of the Secretary of State in a very sensitive case, felt obliged to ask for an adjournment in order that a witness statement could be prepared by Ms Laverack so that if this was possible some flesh could be added to the Secretary of State's submissions. I remarked during the course of the hearing, and I repeat in this determination, that in my judgement such an adjournment would in the circumstances of this case be scandalous. The Secretary of State knew what she had to do in order to make out her case and had been specifically directed to provide the evidence which it is now suggested might be available if an adjournment was granted.

77. In this case this claimant has been let down by the state over such a long period of time, that even bearing in mind the seriousness of the offences which she now admits having committed, it would be wholly improper to delay this decision any longer merely to give the Secretary of State a further opportunity of putting in evidence which if available should already have been provided. I also do not consider in light of the Record of Proceedings when viewed in the context of the panel's determination that any further evidence would be likely to assist the Tribunal in this case.

78. For these reasons I consider that I can justly determine this appeal now without an adjournment and I shall do so.

79. Mr Nath in his oral argument essentially tried to expand upon the submissions advanced within the grounds, in particular with regard to the medical facilities which are available within Jamaica, but given the total failure of the Secretary of State to comply with the directions which had been made to provide proper evidence in support of these submissions and given also what is recorded both within the Record of Proceedings made by the panel and the notes supplied by Ms Cronin, there was no basis upon which this Tribunal could properly find that the arguments which had been advanced before the panel had been misrecorded in its determination. In these circumstances, although he did his best, Mr Nath lacked the material on which he could advance the Secretary of State's case further.

80. On behalf of the claimant, Ms Cronin made her points concisely but cogently. She reminded the Tribunal that at paragraphs 10 and 11 the panel had set out exactly what the Secretary of State's case was as it had been put at the hearing before it. The Secretary of State had accepted Dr Davies' diagnosis and the cause of her mental illness but it had been recorded that it was the Secretary of State's case that there were adequate mental health facilities available in Jamaica. So that contention was understood by the panel at the outset.

81. At paragraph 51 it was recorded that the Presenting Officer had conceded that although the Secretary of State's case had originally been that the claimant would be offered support from Hibiscus this support would only be available to criminals who had been involved in drug related proceedings which this claimant had not. Ms Cronin then referred to her recollection which is set out in the Rule 24 response made on behalf of the claimant. It was the claimant's case that if one looked at the way in which the panel carefully set out the evidence of Dr Agnew Davies it could be seen that it had first set out her professional view which was not in dispute but then at paragraph 21 had referred to Dr Davies's "understanding" as to what the position was in Jamaica. So it was entirely clear that the panel understood that this aspect of the report had not been accepted without more on behalf of the Secretary of State.

82. With regard to the finding under Article 3 it was the claimant's case that this finding was sustainable. The panel had first of all referred to the decision in *Z and Others* and referred to the breach of Article 3 in the way that the claimant had been treated (or rather not treated) as a child.

83. Ms Cronin then referred to what was said by the panel at paragraphs 26 and 27, which I have already set out above. Ms Cronin's submission was that this Tribunal now should find that there had not only been a breach of Article 3 but that the removal of this claimant in circumstances where that would lead to a serious deterioration in her conditions would be a further breach of Article 3. I will just add a gloss on this submission which is that it is not for this Tribunal so to find; the decision of the panel to this effect is sustainable if it had been open to the panel so to find. It is the claimant's case that in this appeal this finding flowed from the findings which the panel had made.

84. Although it was the Secretary of State's position that the risk to the claimant did not reach the threshold of *N*, since that time there had been the decision of the European Court in *MSS v Belgium and Greece* – 30696/09 [2011] ECHR 108 [2011] 53 EHRR 2, [2011] INLR 533 which had been concerned with the situation which would arise where there had been serious harm or privation for an applicant, for which the state through its action or inactions would be held responsible. Particular reference was made (and set out at paragraph 16 of the Rule 24 response) to the finding at paragraph 263 of *MSS* as follows:

> "263. In … view of the obligations incumbent on the Greek authorities under the European Reception Directive ... the court considers that the Greek authorities had not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction for the situation in which he found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The court considers that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without more, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the

prolonged uncertainty in which he has remained, and the total lack of any prospect of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

264. It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly there has been a violation of that provision."

85. It is submitted that the findings in this case were clear, rational and sustainable.

Discussion

86. I deal first with the submission made on behalf of the claimant founded on the decision of the Strasbourg Court in *MSS*. Although the panel found that there had been a breach of Article 3 in this case, from the extract of *MSS* relied upon by the claimant, I do not consider that this by itself takes this claimant any further. The issue in this case is not whether or not there had been a breach of Article 3, which in my judgement the panel was entitled to find there had, but whether or not the removal of this claimant to Jamaica now would itself be a breach.

87. However, in my judgement the claimant does not need to rely on *MSS* for this purpose. The panel's conclusion that the failure of the authorities in this country had been such as to amount to a breach by the state of its obligations towards this claimant was in the circumstances of this case not only open to the panel but in my judgement inevitable. The facts are as the panel found quite simply appalling. On repeated occasions the claimant suffered abuse which was preventable and should have been prevented. That it was not reflects extremely badly on the social services involved (in particular Enfield and Haringey). While it is not a defence to criminal activity that the criminal has suffered abuse in the past, nonetheless when considering this claimant's situation in the round as the panel had to do, this was an extremely important factor which had to be taken into account and was.

88. The sad facts regarding this claimant as the panel found and as this Tribunal would have found on the facts as presented to it, the bulk of which were accepted by the Secretary of State, is that following serious breaches by the state of her Article 3 rights, she is for perhaps the first time in her life in a position where there is at least some prospect that she may be able to come to terms with her past and with the help that she is currently receiving go on to lead some kind of useful life.

89. The panel's finding, which was based upon that part of Dr Agnew Davies's report and evidence which was not challenged, that removal of the support she is currently receiving would be likely to lead to a serious deterioration in her condition, in my judgement was entirely open to it on the evidence and the panel's conclusions are reasoned very clearly in a determination to which considerable care has plainly been given.

90. I deal with Article 8 below because in my judgement the claimant is entitled to succeed under Article 8 also but so far as Article 3 is concerned, this is very far from

being a case which is comparable to *N*. It would in the circumstances of this case be unconscionable for the Secretary of State simply to remove this claimant to Jamaica thereby not only enabling the state to avoid its responsibility to attempt to repair the damage to a young person whose condition has deteriorated to the extent that it has at least partly because of the state's failure to comply with its obligations towards a vulnerable child, but also causing further damage to her on top of that which she has already suffered. The contrast between the claimant's prospects were she to be returned to Jamaica and her prospects if she remains in the UK are so marked that in light of the background as described above, her removal would be in yet further breach of her article 3 rights.

91. I will turn now to Article 8. I will summarise the law very briefly indeed because there is really no need to set out all the competing authorities. Following the decisions of the Court of Appeal in *SS (Nigeria)* and *MF (Nigeria)* it is clear that where a "foreign criminal" is convicted of serious criminal offences (and the offences in this case are very serious indeed) there need to be very compelling reasons indeed to justify departing from the usual course of deporting that person. As the Court of Appeal noted in *SS (Nigeria),* the court has to give great weight to the will of parliament as expressed in legislation that such deportation is conducive to the public good, which of course it is. In *MF (Nigeria)* the Court of Appeal was careful to note that although there was not a test of exceptionality as such, it would nonetheless only be where the factors militating against deportation were "very compelling" that these would outweigh the public interest in deportation.

92. In my judgement if ever there were very compelling reasons why deportation would not be appropriate, even were this removal not in breach of Article 3 as such, they would be present in this case. I would sincerely hope that the circumstances in this case are exceptional; I consider that Parliament (as representatives of the public) would be entitled to expect that the circumstances in which a 10 year old child is let down by social services to the extent that this claimant was (and for so long), are so exceptional that they would occur only very infrequently indeed and preferably never.

93. This Tribunal is very conscious indeed of the will of parliament that foreign criminals should be deported unless there are such very compelling reasons, and would not lightly find that a person who has committed offences such as this claimant has should not be deported. But as I have noted, and as the panel found, the circumstances in this case are very exceptional indeed; this is a case not only where the consequences to this claimant if she is removed could be catastrophic, but also where the state has an obligation to try to put right the wrongs done to her partly as a result of its neglect .

94. The fact is that this claimant has been badly let down by the state in this country. She has served the penalty of imprisonment which she acknowledges it was right that she served because of the offences she committed, but she is now for perhaps the first time in her life facing up to the consequences of her offending and to the circumstances of her upbringing. It would be quite wrong for this country now, by

deporting this claimant, to avoid the responsibility which it has towards allowing this claimant an opportunity to recover from the damage which has been done to her.

95. Accordingly even though the offences of which this claimant was convicted and which she now admits having committed, are very serious and even though but for the mitigating factors in this case she would have been subject to deportation under the automatic deportation provisions, in this case such a decision is unlawful because it is in breach of her Article 8 rights as well as her Article 3 rights.

96. Accordingly for the reasons which are contained within this determination it is my firm conclusion that the very thorough, detailed and careful determination of the panel does not contain any material error of law and that the Secretary of State's appeal must accordingly be dismissed.

97. On behalf of the claimant Ms Cronin submitted that it would be appropriate to make an anonymity direction. In light of the background to this appeal, involving a history of abuse to a vulnerable child I agree and I so order.

Decision

There being no material error of law in the decision of the First-tier Tribunal, this appeal by the Secretary of State is dismissed.

The decision of the panel of the First-tier Tribunal, allowing the claimant' appeal under Articles 3 and 8 of the ECHR is affirmed.

No report of these proceedings shall be published which may identify the claimant.

Signed: Date: 27 May 2014

Upper Tribunal Judge Craig