Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01959/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
On 5th May 2015	**On 19th May 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MNR
(Anonymity direction made)

Respondent

Representation:
For the Appellant: Mr Smart – Senior Home Office Presenting Officer
For the Respondent: Mr Bramall instructed by Raj Law Solicitors

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge PJM Hollingworth promulgated on the 29th January 2015 in which he allowed the Appellants appeal against the order for his deportation from the United Kingdom.

Background

2. The Appellant is a national of Mauritius born on 12th March 1992.

3. His immigration history shows he entered the United Kingdom on 25th December 2004 as a visitor with his parents and was granted six months leave to enter. Further applications for leave to remain as a dependant were rejected on 20th June, 27th July and 15th August 2005. On 19th September 2005 the Appellant was granted leave to remain as a student dependant of his father valid until 30th April 2006 which was extended until 31st May 2010.

4. On 10th January 2010 the Appellant married a British national in a religious ceremony and on 26th May 2010 applied for leave as a dependant over 18 which was refused. On 11th November 2010 an application for leave to remain outside the Immigration Rules was made on Article 8 grounds as the partner of a British national which was refused with no right of appeal on 12th December 2010 on the grounds the Appellant was an overstayer and the Islamic wedding which took place when he was underage was not recognised under UK law. That decision was reconsidered but upheld with no right of appeal. Judicial review proceedings followed which were settled by a consent order. On 19th April 2011 the Appellant was granted discretionary leave until 19th April 2014.

5. The Appellant was convicted on 27th July 2012 at Leicester Market Harborough and Lutterworth Magistrates Court of "Possession of a knife blade/sharp pointed article in a public place" for which he received an eight week prison sentence wholly suspended for twelve months.

6. On 23rd May 2013 the Appellant was convicted on his guilty plea at Leicester Crown Court for three counts of Robbery for which he was sentenced on 15th November 2013 to three sentences of two years imprisonment to run concurrently and, for the offence of the commission of further offences during the operational period of a suspended sentence, a further seven days period of imprisonment to run concurrently. An application to appeal against conviction/sentence was withdrawn.

7. The Appellant challenged the deportation order on the basis his deportation will be in breach of his rights under Article 8 ECHR in relation to his partner, two children and extended family members and private life based upon length of residence in the UK and lack of ties to Mauritius.

8. The Appellant was sentenced for the Robbery offences with five others. In his sentencing remarks HHJ Pert QC stated:

> …The offence or robbery, taking something from someone by force in public is a very serious matter and the word must go out that these courts –this court in particular – will treat as a serious offence such an offence.
>
> …
>
> The third offence, concerning you again, [SS], you [G] and you [MNR]; 11th October 2012 in the afternoon in Victoria Park, just up the road here, the victim and his friend were approached by two men, "I want some money, give me £2. If you haven't got any money let me see your phone. If you don't come back I'll batter you," and he was under the impression, it may have been a false impression, but in his terror it's hardly surprising, that one of you had a knife. The next offence, robbery of [ZI], 29th April

> 2013, he's 14 years of age and he's walking home and he's approached by you, [MNR], and you [G] , and asked if he had any money, told to empty his pockets, "Give me the money or I'll fuck you up. Give me the money if you don't want to get hurt."
>
> The next three robberies of you again [G], you [MNR] and you [MR]. All of the victims were 16. They'd been at the gym. As they were walking away they were approached by the three of you, asked the time, surrounded him. Asked if you could borrow his phone and he said he had no credit, "Don't lie," demanded the phone and just took it and then, when the other two denied that they had phones, searched them both and took their phones. You then had the gall as you walked away to complain about the quality of the phones that you had just stolen.
>
> This is appalling behaviour and it simply cannot – the message simply cannot go out that that type of conduct is going to go unpunished or is going to be dealt with by a slap on the wrists.
>
> …
>
> [MNR], you're 18. You're nearly 19. I have to deal with you for the robbery on 11th October. You pleaded guilty at the preliminary hearing, which takes your sentence down from what would have been 3 to 2 years. I also have to deal with you for the April offences, 29th and 30th. For 29th April you were obvious on bail. You pleaded guilty at the preliminary hearing, which takes the sentence from 3 years down to 2 years. For the offences the next day, all three of them, again you pleaded guilty at the preliminary hearing, again you were on bail for those offences, that takes the sentence from 3 to 2. Again I'll make the April offences concurrent one with another consecutive to the earlier offences, which again makes a sentence of 4 years, and in your case there's 84 days to be taken into consideration – taken off your sentence by virtue of qualifying curfew, and I so order.

9. The 28 day period for the breach of the suspended sentences was imposed for although the sentence had expired at the date of the sentencing exercise it was in existence, albeit at the end of its term, when the offences were committed. As a result the Sentencing Judge imposed what he thought was the minimum term of seven days consecutive for the breach of the suspended sentence.

The determination

10. The Judge considered the procedural history and evidence at paragraphs 1 to 26 before setting out his findings which can be summarised as follows:

- The evidence of the Appellant and his partner was accepted. There had been a religious but not a civil marriage. The evidence of the witness was accepted. No inconsistencies go to the heart of any of the witnesses. Nothing has undermined them [27].
- The key issue to be determined is paragraph 399A of the Immigration Rules and whether it would be unduly harsh for the children to remain in the UK without the Appellant [28].
- Applying section 55 it is in the children's best interests to be with their father [29].

- The Appellants release and return to the family has enabled corroboration to be obtained of the effect of separation [30].
- The Respondent has accepted that it would be unduly harsh for the Appellant's children to live in Mauritius [31].
- The Appellant has shown remorse [32].
- The children are very young although the Appellant's son is of sufficient age to understand the importance of the relationship with his father. The Appellants daughter has shown the degree of awareness her mother indicated. Both children will be affected by the Appellants absence. The development of the children will be harmed if the Appellant is not present given the period of time for which he would be absent following deportation and the ages of the children and their awareness. The criteria of significant impairment are fulfilled in this specific context [32].
- The children have been cared for by their mother who received substantial help in the Appellants absence. Both families have helped. The Appellants partner has suffered from stress which she seeks to conceal from all bar her mother. The Appellants partner was able to cope whist his absence was of a finite nature during which contact was maintained. The partner received help of both a practical and emotional nature. Even if she were to receive practical help the emotional damage which would be done to her and the stress from which she would suffer would affect the wellbeing of the children if the Appellant was deported [33].
- The degree of contact that can be satisfactorily maintained is significantly affected by the ages of the children. Contact will be indirect. In light of their ages they require direct contact. The children are British citizens who have lived with their father both before and after his period of custody [34].
- In relation to 339B of the Rules the issue is whether it is unduly harsh for the Appellants partner to remain in the UK without the Appellant. It is accepted she has a genuine and subsisting relationship with the Appellant [35].
- The Appellant has not been in employment since August 2012 and was unemployed and reliant upon state benefits prior to his imprisonment. The family supported themselves whilst he was in prison but struggled to remain solvent. She is paying certain debt slowly [37].
- The couple had known each other for a substantial period before the religious marriage. The practical impact of separation has to be considered. The onus is upon the Appellant to demonstrate this would be unduly harsh [38].
- The Appellant's partner would not be able to cope even with the practical assistance of members of her family and that of the Appellant. In the ordinary course of events the effect of separation would be harsh [39].
- The criterion of undue hardship is satisfied because of the additional impact upon the Appellants partner. Given the period of time the Appellant would be removed the criterion of significant impairment will be fulfilled due the passage

of time, the effect upon the partner of separation, and the clear inference that may be drawn upon the circumstances that would exist. The degree of support to date has not prevented the partner suffering in the way she has. This is not a case in which the Appellant could provide practical help because of a physical condition which could be substituted by medical assistance or care from the relevant social services. The root cause is the Appellant absence and external measures will not assist. No period of unlawful residence as a minor should be held against the Appellant. When the relationship was formed the Appellants immigration status was not precarious [41].

- The outstanding issue has been resolved in the Appellants favour making it unnecessary to consider private life under the Rules although it is necessary to consider Section 117 [42].
- The maintenance of immigration control is in the public interest. The Appellant was here unlawfully for a month. He has worked in the past as a carer and can work in the future [43].
- Under section 117C(3) exception 1 does not apply, exception 2 is met as the Appellant has a genuine and subsisting relationship with a qualifying child [44].
- The effect of deportation has been found to be unduly harsh. As the criteria in section 117 have been resolved in the Appellants favour the appeal is allowed [45].
- In relation to proportionality, the public interest does not require the Appellants deportation [47].

The law

11. The relevant Rules in force are not disputed. The relevant provision states that "the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months" – 398 (b).

12. Paragraph 399 applies as paragraph 398 (b) applies if –

> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

13. The issue in relation to the children and the Appellants partner was whether it would be unduly harsh for them to remain in the UK without the person who is to be deported.

Discussion

14. It is not disputed that the Appellant is a foreign criminal as defined by s117D (2) (a), (b) or (c).

15. It is not disputed that paragraph 399 of the Immigration Rules applies. The issue was whether the evidence supported the claim it was unduly harsh for the children and/or the Appellants partner to have to remain in the United Kingdom without him.

16. The Oxford English Dictionary defines "unduly" as "excessively" and "harsh" as "severe, cruel".

17. The IDIs: Chapter 13 – Criminality Guidance in Article 8 ECHR Cases V5.0 (28 July 2014) in relation to this element states:

2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal's immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.

2.5.4 For example, it will usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment of at least 12 months but less than four years to demonstrate that the effect of deportation would be unduly harsh than for a foreign criminal who has been convicted of a single offence, because repeat offending increases the public interest in deportation and so requires a stronger claim to respect for family life in order to outweigh it.

2.5.5 It will usually be more difficult for a foreign criminal to show that the effect of deportation on a partner will be unduly harsh if the relationship was

formed while the foreign criminal was in the UK unlawfully or with precarious immigration status because his family life will be less capable of outweighing the public interest than if he was in the UK with lawful, settled immigration status.

2.5.7 Section 117B(3) of the 2002 Act states that it is in the public interest that those who seek to remain in the UK are financially independent. If a foreign criminal cannot demonstrate that he is financially independent, it will be more difficult for him to show that the effect of deportation on his qualifying partner or qualifying child will be unduly harsh. Financial independence here means not being a burden on the taxpayer. It includes not having access to income-related benefits or tax credits, on the basis of the foreign criminal's income or savings or those of his partner, but not those of a third party. There is no prescribed financial threshold which must be met and no prescribed evidence which must be submitted. Decision-makers should consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence, e.g. from an employer or regulated financial institution.

18. The determination contains an arguably flawed structural approach in that it assesses the element of undue harshness before making reference to the Respondents case. As it is necessary to consider all relevant matters before arriving at this conclusion the core finding is arguably legally flawed.

19. There is also a relevant evidential issue. The Judge heard the evidence of the witnesses which he accepted. The evidence was that the Appellants partner had found it very difficult to cope with the children whilst he was in prison. She had the support of her sister and family members. This was a situation in which the Appellant was away from home for a defined period whilst he was serving his sentence and not for the period that would be experienced as a result of the deportation order.

20. Mr Smart put the physical availability of family support into context when he referred to the fact the Appellant's partner's father actually lives next door and to the fact the Appellant's own parents live only a short distance away in the same locality.

21. It is not enough per se for a partner to claim that he or she will not be able to cope based upon the emotional loss they may feel and sadness and distress that may result, as this is the effect of separation for most if not all loving couples. Similarly the fact the children may loose daily interaction with a parent and have to be brought up in a single parent family or with addition support is not determinative. This was recognised in AD Lee v SSHD [2011] EWCA Civ 348 where Sedley LJ found "the tragic consequence is that this family… Would be broken up forever, because of the appellant's bad behaviour. That is what deportation does."

22. The offences committed by the Applicant are serious. Robbery is the crime of taking or attempting to take anything of value by force or threat of force or by putting the victim in fear of violence to him or herself. The length of the sentence on a guilty plea

reflects the serious nature of the offending as does the content of the sentencing remarks where, in particular, reference is made to the strong deterrent element in preventing street crimes of this nature where the victims are often young persons targeted as a result of their possessing a type of mobile telephone or for cash. Offences were also committed in breach of a suspended sentence imposed for the possession of a blade and represent an escalation in the seriousness of the offending.

23. As a result of the serious nature of the offence, the strong deterrent factor in preventing the same, and the public interest in deportation, stronger countervailing factors are needed to be able to succeed.

24. The Judge refers to certain elements of the evidence which can be summarised and commented upon as follows:

- The Appellants statement that his son and daughter would see the situation as his not being there for them, they will grow up hating him with no one to look up to as a role model or to tell them the right from wrong as a father [3]. Certain elements of this claim are mere speculation. The children at the date of the hearing were four [a son born 9-11-2011] and two [a daughter born 22-01-2013]. There is no evidence to support the claim they will grow up hating the Appellant. His comment in relation to being a role model may raise an issue as a good role model does not carry a blade and commit robbery on younger more vulnerable victims.
- The Appellants claim that if deported he and his wife will miss each other [4]. This is an interesting response which arose in reply to a questions asked in examination in chief in relation to a claim in his witness statement at paragraph 8 that his wife could not cope by herself. The response set out the role played by the Appellant before loosing his job as a carer (2010-2012) and the time he and his partner have been together, but little else.
- The Appellants wife will look after the children in the UK if he were to be deported. Contact would be by telephone. His wife could not visit as money is the problem [9].
- The Appellants partner when asked about the effect upon the children if their father was to be deported claimed it would be upsetting for the children, especially their son as he has spent more time with the Appellant. He was quiet when his father was in prison and changed "quite a bit" but since his father's release was playing better, is louder, and talks a lot [11]. This may be the case and there is no evidence to the contrary. This arguably reflects the reaction of a normal child to the absence of his father in a situation he is too young to understand. The reaction to his father's return is further evidence of this.
- If deported the children will not have the father's love they need. Their mother did not want them to grow up without a father. They will dislike their father as he had misbehaved leading to removal. If deported their son will go quieter, their daughter will not understand, there will be big impact upon them both. It will not be nice for them not to have their father. The partner claimed she could

not cope on her own as she struggled whilst the Appellant was in prison. She became stressed but did not show her emotions to the children but only to her mother [12]. The Judge accepted that the best interests of the children are to live with both their father and mother but that is only one element as the section 55 assessment is not the determinative factor. This evidence is illustrative of a trend in this case in which statements are made of desire or intent which are not supported by additional evidence, but accepted. During the hearing Mr Bramall was asked about such additional evidence of which none was provided. When it was suggested there was an evidential lacuna in the material he argued there was not as the Appellant had submitted all the evidence he was seeking to rely upon. This may be the case but in a challenge to a deportation appeal the Judge is required to assess that material from an objective standpoint rather than accepting the subjective assertions as being all that are required to be considered, especially when assessing the impact of the evidence against the public interest. It is not the role of the Judge to seek such evidence as there is a legitimate expectation that all the evidence to be relied upon will be provided – SS (Nigeria) v SSHD [2013] EWCA Civ 550 refers in which Mr Justice Mann found:

> **MR JUSTICE MANN:**
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> 61. I agree with the masterful analysis of Laws LJ, and for my part wish to emphasise only one thing.
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> 62. In this appeal counsel for the appellant placed considerable emphasis on the need for the Tribunal to satisfy itself as to the interests of the child in such a way as suggested an inquisitorial procedure. I agree with Laws LJ that the circumstances in which the Tribunal will require further inquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned. The decision-maker would then make such additional inquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further inquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so.

Many children live in single parent families as a result of separation through divorce or events such as deportation. The initial impact of separation is often reflected in an emotional reaction. In some cases such a reaction can lead to developmental issues that are amenable to intervention by services such as a GP or if required the Child and Adolescent Services that form part of Social Services if they cannot be resolved within the family. Schools are experienced in such matters and give important support to children if they are aware of the issues and such assistance is sought. It is not known how the children with react as they get older. If they are settled in a routine with their mother in the UK the contact with their father will maintain him in their minds but it is known that as a child develops into a young person it is ordinarily their peer group that can become of more importance to them than their patents. The evidence does not support the implication that if the Appellant is removed the effect upon the

children will be unduly harsh or that any problems the children experience are incapable of being resolved through appropriate support. The children's mother claims she did not shown her emotions to the children suggesting she remained in control of such issues and was able to restrict those she shared her true feelings with to her own mother. If required it has not been shown appropriate support would not be available for the partner if required.

- When the Appellant was not at home they did not have enough money. Financial assistance was provided by family but it is claimed this was not sufficient. Bills were not paid, bills are being paid off slowly. The Applicants partner suffered panic attacks and could not sleep. There is no medical help. The partner stated that if the Appellant is deported she will be stressed and depressed. She stated she does not know how she will care for her children [13]. It is accepted that the partner will have been affected by the absence of the Appellant as the relationship appears to be close both between them and within the wider/extended family. There is reference by the use of medical terminology (depression) to the impact upon the partner which is not supported by medical evidence. For example it is claimed she will become depressed if the Appellant is deported but this is a self diagnosis if referring to the medical definition of depression rather than feeling low and very sad. True depression can result in a person being unable to function which may have an effect upon the ability of that person to parent adequately but it also has various degrees/levels most of which do not prevent a sufferer functioning adequately. The reason there is no medical diagnosis or evidence in support is because it was admitted during the Upper Tribunal hearing that none had been sought. Parents, including single parents, with depression can care for their children very well. Whether intervention or support is needed will depend upon the level of depression and impact of the same. In the absence of a diagnosis it is arguable all the Judge had was a claim by the partner that this is what will happen to her. This is arguably insufficient as otherwise all couples could make such a claim to avoid the impact of a deportation order. It is also a relevant factor that the partner has a very supportive family network. In paragraph 7 the Judge noted that the Appellant and his partner had been living with his father and mother since January 2010. When the partner fell pregnant they obtained a flat where they stayed for ten months before moving back into the parent's house. Other accommodation was then found before moving into a house next-door to the partner's father where they remain to date. It said there is daily contact, the partner's mother baby-sits and both parents come in to play with the children and the partner goes to her mother's house every day. When in prison the family provided help with the shopping, the rent, and the children. The partner's mother kept the son for four months when the Appellant was in prison as the daughter was young (which may have further confused the child if his father was in prison and he was taken from his mother too, rather than just as a result of his father's absence). The partner's sister moved in and remained to provide support until the Appellant returned. It has not been shown such support would not continue to be available following deportation and the level of support indicates it will, as there is nothing to suggest that the

family who have been so supportive to date would abandon their daughter/daughter in law and grandchildren if the Appellant is deported. The evidence does not shown that with such support from both family and professionals, if required, any impact upon the partner or children could not be managed or would result in unduly harsh consequences. I accept that harsh consequences may arise but this is not the required legal test. It is also noted that the partner's evidence in relation to why she could not travel to Mauritius with the Appellant is because she will be without the practical and emotional help of her family indicating she was aware that such will be available [14].

In relation to the issue of money, the family were in receipt of State Benefits whist the Appellant was in prison and it has not been shown they will not remain so post deportation. The Appellant has worked as a carer in the past but his conviction may be one that impacts upon the prospects of similar employment in the future. The evidence does not adequately analyse the cause of the financial problems/issues which are being managed by instalment payments and other assistance in any event. It is not suggested the children or partner will be homeless or destitute or the problem is such as to establish undue hardship for this reason. Financial advice and assistance is available from the CAB or other similar services if required. This may cause stress, especially if the partner is debt averse, but it has not been shown this is an issue that cannot be managed and which will satisfy the require test.

25. The Judge considered the Pre-Sentence Report and noted the assessment of risk of reoffending as medium and the assertion by the Appellant in his letters that he has grown in maturity and shown remorse. The content of the report is a relevant factor. It reports that the three victims were young males younger than the Appellant. All the victims were frightened of the Appellant and his two accomplices. Two tried to prevent themselves being robbed by claiming they did not have a phone which did not prevent a personal search of their belongings, through pockets and bags. The report specifically states:

> '[MNR] denies instigating these robberies. However, witness statements clearly identify him as the instigator. He is also the older of the three men, each of whom are related to him. [MNR] is unclear about why he committed the offences. He states that it was his cousin's suggestion and that he went along with it. Whether it was his suggestion or not, [MNR] appears to have taken the lead in the actual robberies. He admits to feeling nervously excited and to have no financial motive whilst he engaged the offences. He was adamant that he had never considered acting in this manner before. My assessment is that this indicates a motive of power and control over others who [MNR] considers to be weaker than him. The peer influence contributes to his offending, in that, one of his younger peers has suggested undertaking in illegal act, a dare as such, which [MNR] has regarded as a challenge to his status of being the older male in the group, although he did not admit to this in interview. There appears to have been no previous planning and [MNR] appears to have responded to a suggestion by his cousin, without considering the consequences of his behaviour, other than trying to impress his two accomplices. This would, therefore, appear to have been impulsive. [MNR] states that, with hindsight, he should have admonished his cousin for making such an anti-social suggestion, which would have been a more responsible

and effective proof of his peer status, whilst increasing his family's trust in him as a good influence on his younger relatives.

[MNR] accepts he did wrong and immediately regretted committing these robberies. He recognised the impact of his offending has had on his victims. However, he does not fully accept that he instigated the offences, since he complained that it was his younger cousin's suggestion. This indicates a minimum acceptance of responsibility and poor assertiveness skills.

[MNR] has committed these offences as a result of an impulsive decision to demonstrate some sort of male bravado to his peers. This amounts to immature and anti-social attitudes concerning the use of aggression and bullying behaviour to demonstrate power and control as part of establishing for himself status and notoriety among his peer group. [MNR] did not consider the negative impact of his offending behaviour on his victims at the time of committing the offence. However, it is apparent to me that he must have decided that the risk was worth taking as part of his impulsive decision making.'

26. The author of the report noted the negative influence of the Appellant associating with his brother and cousin and the degree of risk taking behaviour in respect of the decision to commit robberies for the sake of not loosing face. The author also concluded that the Appellants behaviour involved a predatory element in that he chose to target those he perceived to be weaker than him as a means to demonstrate his power to his associates. It was also found that:

'[MNR's] offending behaviour indicates poor consequential thinking, impulsivity, instrumental aggression to manipulate others and egocentric attitudes. Other areas of his life indicate a lack of direction and assertiveness in decision making with little commitment to long term goal setting.

[MNR] appears to appreciate the rights of others in society to be able to not become victims of crime. His remorse toward his victims appeared genuine in that respect during interview, and according to his account of wanting to put things right immediately after committing these offences. However, it is of concern that he did not appear to consider the likely impact of his offending, prior to engaging in these offences. I consider that [MNR] exhibits the potential to reoffend as a result of this impulsivity and lack of forethought if he fails to address it.'

27. In relation to the assessment of risk the author of the report states:

'[MNR] is considered to present a medium risk of serious harm in respect of direct physical violence or by presenting a threat of violence. His history of past cautions and warnings for offences against the person leads me to believe he is capable of being violent towards others if so motivated. His motivation appears to be largely in relation to wanting to impress his peers.

It is my view that [MNR] can effectively reduce these risks by addressing his immaturity about his self image and by improving his consequential thinking and pro-social reasoning skills. An increase in his understanding of the victim would also serve to improve his ability to take more responsibility for his behaviour in the future.'

28. At the hearing before the Upper Tribunal Mr Bradshaw repeated the claim that the Appellant considered his cousin was responsible for the offending and there is

insufficient evidence of the Appellant undertaking targeted work to address the identified factors contributing to his criminal conduct.

29. A Judge is entitled to come to a conclusion that others such as the Secretary of State may not accept and to have that decision defended on appeal and upheld provided the evidence provided has been considered with the required degree of anxious scrutiny, adequate have been reasons given for the findings made, and the conclusions are not irrational or contrary to the evidence. In this appeal there is sufficient evidence to show that when all relevant factors are considered this process was not adequately undertaken.

30. The further submission that the Judge had not erred in not considering the issue of proportionality when making the decision under the Rules has no arguable merit. Assessing whether the impact of deportation is harsh is a question of fact not arguably involving a need to weigh the competing interests. Assessing whether any harshness is unduly harsh does involve the need to undertake a proportionality assessment as demonstrated by the information set out above and the provisions of section 117 and in relation to the fact the more serious the offence the greater the public interest in deportation and the greater the public interest in deportation, the stronger the countervailing factors need to be to succeed.

31. The Judge failed to undertake such an assessment before finding in paragraphs 39 and 40 that the test of undue harshness has been shown to be met on the basis of the evidence that he accepted, despite the clear limitations in the same illustrated above and failure to consider the public interest until much later in the decision where he sets out the Appellants case with no reference to the competing arguments in the same detail and why he found as he did in relation to the proportionality/unduly harsh element. I find this amounts to a material legal error of law and set the determination aside. It has not been shown the decision was one properly open to the Judge on the basis of the evidence and the manner in which the same was assessed.

32. It was accepted that this is a family splitting case. This comes about as a result of the Appellants criminal conduct and the acceptance that it would be unduly harsh to expect the partner or children to relocate to Mauritius.

33. I proceed to re-make the decision as no additional evidence had been provided and the findings made in relation to the composition of the family and acts of criminality were not challenged. The issue was that of the correct assessment to be made on that material. Directions were sent with the grant of permission in relation to the provision of any additional evidence to be relied upon and no rule 15(2A) application was made on behalf of [MNR].

34. It is clear in this case that the Tribunal are dealing with a family unit of the Appellant, his partner, and their two young children. It is accepted the deportation of the Appellant will cause upset and distress within the family and that this may be considered by some within the family to be harsh although there is no evidence bar that from the family of the consequences of removal being such that severe or

irreparable physical or emotional/psychological harm will result. Claims made to this effect are not supported by additional professional or other evidence. The claim of resultant depression is a self diagnosis. It has not been shown the standard of care the children will receive from their mother if the Appellant is deported is such that it will fall below that of a competent parent. It has not been shown family will not provide support as they have previously for both the Appellants partner and the children. It has not been shown medical or other support/assistance is not available or effective as no one has asked for it. Although the Appellant expresses remorse and to have matured he maintains his claim that he was not responsible when the author of the pre-sentencing report clearly refers to witness statements demonstrating that he was. The assessment of the medium risk of the Appellant committing crimes of violence is also pertinent as is the fact the Sentencing Judge recognised the very strong deterrent factor in a case involving crimes of street robbery which blights some cities and towns in the UK. The deportation is also an automatic deportation in relation which clear guidance has been provided by the Court of Appeal in cases such as SS (Nigeria), LC (China) [2014] EWCA Civ 1310, and others in relation to the nature of the weight to be given to the pubic interest.

35. I find on balance that [MNR] has failed to discharge the burden of proof upon him to the require standard to show that his deportation will result in underlay harsh consequences for either his partner and/or their children. The decision has been shown to be proportionate. None of the exceptions contained in section 117 have been proved to be applicable. Having undertaken the task of assessing the competing interests to determine whether an interference with the Appellants right to respect for the private and family life he relies upon is justified under Article 8(2), or whether the public interest arguments should prevail notwithstanding the engagement of Article 8, I find the Secretary of State has established that the balance falls in favour of the public interest argument and the Appellants removal.

Decision

36. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

37. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 14th May 2015