Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00768/2017

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 29 January 2019 **On 5 March 2019**

Before:

THE HONOURABLE MR JUSTICE KNOWLES
UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department Appellant

And

Mrs. Natacha [N] Respondent
(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Mr T Wilding, Senior Presenting Officer.
For the Respondent: Ms C Robinson, of Counsel, instructed by Bindman's LLP.

DECISION AND REASONS

1. This is an appeal by the Secretary of State with the permission of the First-tier Tribunal (FtT) against the decision of the First-tier Tribunal (Judge Herbert) promulgated on 30 October 2018 allowing the appeal of the Respondent, Natacha [N], against the Secretary of State's decision of 20 December 2017 to make a deportation order for her deportation to Bulgaria.

2. For the following reasons we dismiss the Secretary of State's appeal and uphold the decision of the FtT.

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Background

3. The Respondent is a Bulgarian national. She arrived in the UK in 1997, prior to Bulgaria joining the European Union on 1 January 2007. She was dependent on her mother's asylum claim, which was refused on 10 January 1998.

4. On 9 January 2003 the Respondent was issued with an EEA residence card valid until 12 November 2007. That was as the spouse of an EEA national, her husband being Portuguese. On 4 March 2004, she was granted indefinite leave to remain as the dependent of her mother.

5. Bulgaria joined the EU on 1 January 2007.

6. On 21 April 2016 the Respondent was convicted of kidnapping and false imprisonment at Isleworth Crown Court. She had been arrested and remanded in custody for this offence in 2015. On 13 May 2016 she was sentenced to seven years imprisonment (which was reduced on appeal to 6 years in prison). The Respondent was involved with her sister, [RT], in the kidnapping, false imprisonment and robbery of a young woman whom we shall call T. Ms [RT] and T were involved in a dispute over a young man which led to what the judge described as 'a vicious, wicked and undoubtedly premeditated attack upon an innocent young woman', that is to say, T. A plan was hatched to kidnap and assault T. The judge said that the Respondent had been 'instrumental' in the creation of the plan and that she had demonstrated 'a cold ruthlessness in relation to the creation of the plant itself'. T was ambushed when she was returning from work one evening and forced into a car. Then, during a period of about an hour and a half, she was punched and beaten in the car. She was then removed from the car and assaulted with a piece of wood, possibly a baseball bat. She suffered injuries to her face and body which took her some time to recover from. She also had to have an operation on her back. This was, as the judge said, a serious attack.

7. Following her sentencing, on 23 June 2016 the Respondent was served with a notice of liability to deportation (ICD 4932). She submitted representations in response, however on 20 December 2017 the Secretary of State took the decision to deport the Respondent, which was served on the same date (the Decision Letter).

8. As the citizen of an EEA state the decision to deport the Respondent was made under the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) (the 2016 Regulations). The decision letter indicated that the Secretary of State had concluded that the Respondent had not obtained permanent residence in accordance with the 2016 Regulations because there was no evidence of her exercising treaty rights for five years in accordance with the Regulations. The Secretary of State said, therefore, that consideration had been given to whether her deportation was justified on grounds of public policy or public security, in accordance with reg 23(6)(b) and reg 27(1) (as opposed to the test of *serious* grounds of public policy and public security which would have applied had the Secretary of State been satisfied about the five year condition, *per* reg 27(3)). The Secretary of State also said he did not accept that the Respondent had been continuously resident in the UK for 10 years, and so consequently consideration had not been be given to whether her deportation was justified on imperative grounds of public security (which is the applicable test for such a person pursuant to reg 27(4)).

9. The Secretary of State's conclusion in relation to the 2016 Regulations was as follows:

> "You have committed a serious criminal offence in the United Kingdom and, as explained above, the professional assessment is that there is a real risk that you may re-offend in the future. You have made representations and account has been taken of these. Nevertheless, for the reasons set out above, and in particular the genuine, present and sufficiently serious threat you pose to one of the fundamental interests of United Kingdom society, it is considered that your deportation is justified on grounds of public policy, public security or public health in accordance with regulation 23(6)(b). Your personal circumstances have been considered but our view is that, given the threat you pose, the decision to deport you is proportionate and in accordance with the principles of regulations 27(3) and (6)."

10. The Secretary of State went on to reject the Respondent's contention that deportation would be incompatible with her rights under Article 8 of the European Convention on Human Rights.

11. The Decision Letter therefore concluded:

> "Your representations made pursuant to the [2016 Regulations] and your human rights claim are hereby refused and it has been decided to deport you in accordance with regulation 23(6)(b) and regulation 27 of the [2016 Regulations]."

12. The Respondent was released on licence on 29 October 2018 and is due to remain on licence (and thus liable to recall) until 2021.

13. The Respondent appealed in time to the FtT against the Secretary of State's decision.

The decision of the FtT

14. On the appeal, and contrary to the conclusion in the Decision Letter, the Secretary of State accepted that the Respondent did have permanent residence because she had resided in the UK in accordance with the 2016 Regulations for a continuous period of five years. That concession was based upon evidence submitted by the Respondent on the appeal. Accordingly, the Secretary of State accepted that the decision to deport the Respondent could only be justified according to the heightened standard of 'serious grounds of public policy and public security' contained in reg 27(3), and thus that the standard that had been applied in the Decision Letter of public policy and public security *simpliciter* was not the correct test. However, the Secretary of State did not accept that the Respondent had 10 years or more continuous residence counting backwards from the date of the deportation decision by reason of her imprisonment between 2016 and 2018, and therefore did not accept that deportation could only be justified on 'imperative grounds of public security' in accordance with reg 27(4): *FV (Italy) v Secretary of State for the Home Department; B v Land Baden-Württemberg* [2018] 3 WLR 1035 (CJEU).

15. Against that background, the Respondent submitted on the appeal that she did not pose any risk to the public. She relied on her family circumstances, including her supportive children and husband, and evidence from a social worker that she posed a low risk of re-offending. She had addressed her offending behaviour positively and there had been no disciplinary matters recorded against her in prison. She relied on evidence

that to deport her to Bulgaria would be damaging for her children (aged 7 and 11 at the date of the decision to deport her) for whom she had been the primary carer until her imprisonment.

16. The Secretary of State submitted in response that the test in reg 27(3) was satisfied because of the seriousness of the offence of which the Respondent had been convicted, the punishment which had been imposed, and the medium risk of harm to the public and unknown adults which she had been assessed as posing. He submitted that consideration of the factors in reg 27(5) and those in Sch 1 justified deportation according to the test in reg 27(3) in light of the Respondent's offending.

17. In his decision the judge directed himself that the burden of proof lay upon the Respondent on the balance of probabilities. He also directed himself that the relevant date was the date of the decision (i.e., 20 December 2017) because this was an in-country appeal.

18. At [59] et seq the judge set out his Findings of Fact and Law. He said he had been referred to the case of *FV*, supra, and he set out [72]-[73] of the judgment. We will return to that case later. He said that he found there was 'overwhelming' evidence, on the question whether there had been 10 years continuous residency broken by the period of the Respondent's imprisonment, that the Respondent had been genuinely rooted in the UK with her family and children before she committed her offence and that nothing since her sentence of imprisonment has changed that matrix. He said her bond with the UK had deepened and that her bonds with her children and her husband had strengthened during her time in prison. The judge said at [66]:

> "The consequences therefore taking all this into account are that the continuity of her residency in the UK had not been removed by her period of incarceration but I recognise it clearly has been stress tested to the extreme."

19. At [70] the judge directed himself that the test to be applied was the 'imperative grounds of public security, public policy and public health' test. He said he recognised that the Respondent's offence was 'extremely serious' but also noted that the risk of her re-offending was described as low in the OASys report. He concluded that the Respondent did not pose a 'genuinely present and sufficient threat affecting one of the fundamental interest of the society' (*sic*, at [72]).

20. He said that the Respondent's offence did not fall at the 'top end of the scale in terms of public policy'. Hence, he said that her offending did not satisfy the test in *Land Baden-Württemberg v Tsakouridis* (Case C-145/09), [41], where the CJEU said that:

> "… the concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons'."

21. He also said that the risk of reoffending must inform consideration of whether there were 'imperative' grounds: *Straszewski v Secretary of State for the Home Department* [2016] 1 WLR 1173.

22. The judge also said, on the question of rehabilitation, (per *Essa (EEA: rehabilitation/reintegration)* [2013] UKUT 316 (IAC)) that it was more likely that the Respondent would be rehabilitated in the UK than in Bulgaria, in essence because of the presence of her children here.

23. Accordingly, the judge allowed the appeal on the grounds that the Respondent's deportation could not be justified on 'imperative grounds of public security'. He therefore did not determine her Article 8 claim but allowed her appeal on EEA grounds.

The Secretary of State's appeal to the Upper Tribunal

24. The Secretary of State appealed to the Upper Tribunal on the single ground, namely, that the FtT made a material misdirection of law. He argued the FtT had been wrong to conclude that the Respondent had been continuously resident in the UK for 10 years prior to the decision, in light of her conviction and imprisonment between 2016 and 2018 for an extremely serious offence. It was argued that the FtT had failed to consider the serious of the consequences of re-offending and had erroneously found that deportation to another EU member state would jeopardise her rehabilitation because of the absence of her family (there being evidence that her husband would not allow their children to return to Bulgaria).

25. In response, the Respondent submitted that the judge had directed himself correctly on the proper legal approach as set out in *FV*, supra (a decision which the Secretary of State accepted set out the correct approach). She submitted that the FtT had undertaken a detailed and holistic approach and reached sustainable conclusions on the evidence before it.

Legal principles

26. The 2016 Regulations consolidate the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (the 2006 Regulations) as amended, and implement Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States (OJ No L 158, 30.4.04, p77) (the Free Movement Directive).

27. The relevant parts of regs 15, 23 and 27 provide:

> "*Right of permanent residence*
>
> 15. (1) The following persons acquire the right to reside in the United Kingdom permanently –
>
> > (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
>
> …
>
> *Exclusion and removal from the United Kingdom*
>
> 23. …

(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if -

…

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27;

…

Decisions taken on grounds of public policy, public security and public health

27. (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person."

28. Hence, in summary, the 2016 Regulations set out a three-tiered approach to the removal of EEA nationals on public policy grounds. Those who have acquired a right of permanent residence in the UK enjoy enhanced protection against deportation as compared with those who have not. The degree of protection, pursuant to the 2016 regulations and relevant case-law, varies as follows:

    a. An EEA national who has a right of permanent residence and (counting backwards from the date of the decision) 10 years continuous residence, who has become integrated into the UK and whose integration has not been broken by any period(s) of imprisonment may only be removed on 'imperative grounds of public security' (reg 27(4)(a)).

    b. A person who does not satisfy this condition, but who has a right of permanent residence under reg 15, may only be removed 'on serious grounds of public policy and public security' (reg 27(3).

    c. A person who does not satisfy either of these conditions may be removed 'on grounds of public policy, public security or public health in accordance with regulation 27' (reg 23(6)(b)).

29. In the present case, in his decision letter the Secretary of State held that the Respondent fell into the third of these categories. On the appeal to the FtT, he conceded that this was wrong and accepted that she fell into the second category, but not the first category. The Respondent submitted, and the judge found, that the Respondent fell into the first category, and that there were not 'imperative grounds of public security' properly justifying her removal under reg 27(4)(a).

30. In *FV (Italy),* supra, the Grand Chamber of the CJEU considered the Free Movement Directive in this context. The relevant provisions of the Directive that were in issue are as follows:

> "Article 16
>
> 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
>
> 4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years
>
> …
>
> Article 27
>
> General principles
>
> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members,

irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

…

Article 28 Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: (a) have resided in the host Member State for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

31. In the first of two joined cases the claimant, FV, was an Italian national who had moved to the UK where he had lived continuously for over 30 years, although he had no right of permanent residence there. He married his wife in the UK and his children were born here. Following his conviction for manslaughter, the claimant was sentenced to eight years' imprisonment. After his release in July 2006 the Home Secretary determined to deport him under reg 21 of the 2006 Regulations, which were intended to implement Articles 27 and 28 of the Free Movement Directive. The claimant's challenge to that decision subsequently gave rise to an appeal before the Supreme Court, which had been twice adjourned pending the determination of other cases. In support of the expulsion decision, the Home Secretary argued that, having been in prison between 2001 and 2006, the claimant had not acquired a right of permanent residence in the United Kingdom and could not, therefore, enjoy enhanced protection under Article 28(3)(a) of the Directive. The Supreme Court considered that, since no right of permanent residence could in law be acquired before 30 April 2006 the date on which the period prescribed for transposing the Directive expired and since, at that date, the claimant had been in prison for more than five years, he had remained in prison for a further two months thereafter and had been out of prison for less than nine months when the decision to deport him had been adopted, he had not acquired a right of permanent residence under Article 16(1) of the Directive when that decision had been adopted. In those circumstances the Supreme Court stayed the proceedings and referred to the Court of Justice of the European Union for a preliminary ruling three questions on the interpretation of Articles 16 and 28 of the Directive, viz whether enhanced protection under Article 28(3)(a) depended on possessing a right of permanent residence under Article 16 and, if not, how the period

of residence for the previous ten years was to be calculated, and what the true relationship was between the ten-year residence test and the overall assessment of an integrative link: see [2017] 1 All ER 999.

32. In the second case the claimant was a Greek national who had moved to Germany as a child, where he had continuously resided for 25 years and had a right of permanent residence within the meaning of Article 16 of the Directive. The claimant was convicted of a serious offence in Germany and was sentenced to over five years' imprisonment. Whilst he was in custody, the German authorities decided, on the basis of national law transposing Article 28(3)(a) of the Directive, that the claimant had lost his right of entry to and residence in Germany and he was therefore ordered to leave. After that decision had been annulled by a German court, the authorities appealed to the referring court, which, as a preliminary point, found that no imperative grounds of public security, within the meaning of Article 28(3)(a), could have arisen and that, therefore, if the claimant were entitled to enhanced protection against expulsion under that provision, it should dismiss the appeal. The court, accordingly, referred to the Court of Justice of the European Union for a preliminary ruling four questions on the interpretation of Article 28(3)(a) of the Directive.

33. The CJEU held, firstly, that the protection against expulsion provided for by Article 28 of the Free Movement Directive gradually increased in proportion to the degree of integration of the Union citizen concerned in the host member state, and that it followed that the enhanced protection provided for by Article 28(3)(a) was available to a Union citizen only in so far as he satisfied the eligibility condition for the protection referred to in Article 28(2), namely having a right of permanent residence under Article 16 of the Directive. Unlike a Union citizen with a permanent right of residence, who could only be expelled from the host state on the grounds under Article 28(2), a citizen who had not acquired that right could be expelled if he became an unreasonable burden on the social assistance system of the host state. The Court said that such a Union citizen could not, at the same time, enjoy the enhanced protection under Article 28(3)(a), and that, accordingly, it was a prerequisite of eligibility for protection against expulsion provided by Article 28(3)(a) of the Directive that the person concerned had a right of permanent residence within the meaning of Articles 16 and 28(2) of the Directive.

34. Secondly, and importantly for the purposes of the present appeal, the Court held that the ten-year period of residence necessary for the grant of the enhanced protection provided by Article 28(3)(a) of the Directive had to be calculated by counting back from the date of the expulsion decision and had to be continuous. The Court said that when looking at the extent to which absences from the host member state during the period referred to in Article 28(3)(a) prevented the person concerned from enjoying the enhanced protection, an overall assessment had to be made of the person's situation on each occasion at the precise time when the question of expulsion arose, and the fact that the person was placed in custody did not automatically break the integrative links which he had previously forged with that state and the continuity of his residence for the purpose of Article 28(3)(a) and, therefore, deprive him of the enhanced protection against expulsion. Accordingly, in the case of a Union citizen who was serving a custodial sentence and against whom an expulsion decision had been adopted, the condition of having resided in the host member state for the previous ten years under Article 28(3)(a) could be satisfied where an overall

assessment of the person's situation, taking into account all the relevant factors, led to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host state had not been broken. The Court said that those factors included, inter alia, the strength of the integrative links forged with the host state before the detention, the nature of the sentence which had resulted in the detention, the circumstances in which that sentence had been committed and the conduct of the person throughout the period of detention.

35. At [70]-[75] the CJEU said:

> "70 As to whether periods of imprisonment may, by themselves and irrespective of periods of absence from the host Member State, also lead, where appropriate, to a severing of the link with that State and to the discontinuity of the period of residence in that State, the court has held that although, in principle, such periods of imprisonment interrupt the continuity of the period of residence, for the purpose of Article 28(3)(a) of Directive 2004/38, it is nevertheless necessary - in order to determine whether those periods of imprisonment have broken the integrative links previously forged with the host Member State with the result that the person concerned is no longer entitled to the enhanced protection provided for in that provision - to carry out an overall assessment of the situation of that person at the precise time when the question of expulsion arises. In the context of that overall assessment, periods of imprisonment must be taken into consideration together with all the relevant factors in each individual case, including, as the case may be, the circumstance that the person concerned resided in the host Member State for the ten years preceding his imprisonment (see, to that effect, judgment of 16 January 2014, G., C-400/12, EU:C:2014:9, paragraphs 33 to 38).
>
> 71 Indeed, particularly in the case of a Union citizen who was already in a position to satisfy the condition of ten years' continuous residence in the host Member State in the past, even before he committed a criminal act that resulted in his detention, the fact that the person concerned was placed in custody by the authorities of that state cannot be regarded as automatically breaking the integrative links that that person had previously forged with that State and the continuity of his residence in that State for the purpose of Article 28(3)(a) of Directive 2004/38 and, therefore, depriving him of the enhanced protection against expulsion provided for in that provision. Moreover, such an interpretation would deprive that provision of much of its practical effect, since an expulsion measure will most often be adopted precisely because of the conduct of the person concerned that led to his conviction and detention.
>
> 72 As part of the overall assessment, mentioned in para 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid - including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings - the lower the probability that a period of detention could have resulted in those links being broken

and, consequently, a discontinuity of the ten-year period of residence referred to in Article 28(3)(a) of Directive 2004/38.

73 Other relevant factors in that overall assessment may include, as observed by Advocate General in points 123 to 125 of his Opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.

74 While the nature of the offence and the circumstances in which it was committed shed light on the extent to which the person concerned has, as the case may be, become disconnected from the society of the host Member State, the attitude of the person concerned during his detention may, in turn, reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host Member State with a view to his future social reintegration in that State.

75 On that last point, it should also be borne in mind that, as the Court has already pointed out, the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated is not only in his interest but also in that of the European Union in general (judgment of 23 November 2010, *Tsakouridis, C-145/09, EU:C:2010:708,* paragraph 50)."

36. The parties were agreed that these paragraphs set out the correct approach to the issue before the FtT, and they were also agreed that the FtT directed itself correctly that they set out the test to be applied. The question on the appeal before us is whether the FtT committed any material error of law in how it applied this approach to the facts of the case before it.

Discussion

37. We have carefully considered the judgment of the FtT and detect no error of law in it. As we have said, the FtT approached the issues on the correct legal basis. The conclusions which the FtT reached were open to it on the evidence that it considered, and its judgment is clearly reasoned and deals with all of the relevant matters.

38. The first issue is whether the FtT was correct in its conclusion that the Respondent qualified for the highest level of protection by reason of having lived in the UK continuously for 10 years from the date of the decision notwithstanding her imprisonment. In our view, the FtT was entitled to conclude that, notwithstanding the very serious offence which the Respondent committed, and the sentence of six years imprisonment which was imposed (three of which she served in prison), that sentence did not result in her integrative links with the UK being broken and, consequently, a discontinuity of the ten-year period of residence referred to in reg 27(4)(a), and that the FtT's decision on this issue was correct. We reject the Secretary of State's argument that the FtT erred on this question.

39. The starting point is that, as we have said, the Respondent came to the UK in June 1997 and had lived in the UK for over 20 years prior to the Secretary of State's decision to deport her in December 2017. She acquired the right of permanent residence no later than 2007, some nine years before she was sent to prison. The

evidence before the FtT demonstrated that for many years before her imprisonment the Respondent had a settled family life in the UK with her husband and two children, who were born in 2006 and 2009. Both children were born in the UK. There was a quantity of evidence before the Secretary of State and before the FtT including tax returns, financial records, family documents and photographs describing family life, as the FtT said, between 2002 and the time the deportation decision was taken. There was also evidence of the business interest here of the Respondent and her husband, which provides them with an income and with employment. On the whole of the evidence before the FtT, it was fully entitled to reach its finding that, prior to her commission of the offence of which she was later convicted, the Respondent was 'genuinely rooted in the United Kingdom with her family and children'.

40. Given that finding, the question that the FtT then had to consider was whether the Respondent's imprisonment broke her integrative links to the United Kingdom. The fact of the Respondent's settled family life in the UK at the time she went to prison was a factor to which the FtT was entitled to give great weight in determining whether prison had broken her integrative links with the UK. It demonstrated, in the language used by the CJEU in *FV*, supra, that she was 'rooted' in the UK. The FtT found that she planned to return home (subject to the approval of the Probation Service) once she was released. There was evidence before the FtT that in the event that the Respondent was deported her husband would not permit the children to go back to Bulgaria with her. The FtT considered the effect which imprisonment had had on the Respondent's family life and whether it had strengthened or weakened the bonds between the Respondent and her children, and between the Respondent and her husband. At [65] the FtT found that the links between the Respondent and her children had strengthened notwithstanding her imprisonment:

> "65. Nothing since her sentence in imprisonment has changed that matrix. If anything her bond with the United Kingdom have depend and in that of her relationship with her progression with her children not withstanding her incarceration. They have visited lengthily and discussed with her husband about her offending behaviour and they have almost certainly become stronger in the sense that they have endured the suffering that their mother had inflicted upon them in forced separation. Despite that the children remain loyal and committed to her and her to them. Her husband despite their difficulties of their relationship before the offence occurred has remained loyal to her and was in court today to show and continue that level of support." (sic)

41. The Secretary of State criticised this reasoning as improbable but we were of the view that the Secretary of State's criticism amounted to no more than a disagreement with the FtT's reasoning. It is highly likely that the enforced separation of the Respondent from her children caused them to miss her and so strengthen their love for her. It is also entirely possible that her love for them deepened because of her time away from them in prison. In any event, these were findings of fact by the FtT that were open to it on the evidence before it and they cannot be characterised as irrational. As for the relationship between the Respondent and her husband, the FtT acknowledged that they had separated as a consequence of her imprisonment but found as a fact at [57] that they wished to restart their relationship once she is released.

42. In summary, there was ample material before the FtT to support its finding that the Respondent's imprisonment had not caused a discontinuity in her residence in the UK which had otherwise subsisted for more than 10 years. It was therefore not wrong in law to conclude that she was only liable to be deported on 'imperative grounds of public security' (reg 27(4)(a)).

43. We turn to the second issue before us, namely whether the FtT erred in its conclusion that there no such grounds in respect of the Respondent.

44. We begin by iterating that we recognise the serious of the offences which the Respondent committed and which resulted in serious injury to T. Nothing in our decision should be taken as minimising in any way the suffering which she endured as a consequence. The question for us is whether the FtT was wrong as a matter of law to conclude that the Respondent's offences, and the other factors relied upon by the Secretary of State, did not amount to imperative grounds of public security so as to justify her removal to Bulgaria. For the following reasons we do not consider that FtT was wrong to conclude as it did.

45. First, the FtT correctly recognised that the concept of 'imperative grounds of public security' imposes a very high standard. It requires proof not only of the existence of a threat to public security, but also that the threat is of a particularly high degree of seriousness: *Land Baden-Württemberg v Tsakouridis*, supra, [41].

46. In *I v Oberbürgermeisterin der Stadt Remscheid* [2012] QB 799, the CJEU considered the meaning of the expression 'imperative grounds of public security'. The claimant had been convicted of multiple offences of sexual abuse, sexual coercion and rape of a 14-year-old girl in respect of which he had been sentenced to 7½ years' imprisonment. The CJEU was asked to decide whether the expression 'imperative grounds of public security' referred only to conduct which threatened the security of the state itself, its population and the survival of its institutions, or was broader in scope. The decision was considered by the Court of Appeal in *Straszewski v Secretary of State for the Home Department*, supra:

> "22 Our attention was not drawn to any case in which the CJEU has considered the kind of conduct that is likely to be sufficiently serious to justify deportation of an EEA national who enjoys a permanent right of residence but has not lived in the member state concerned for a period of at least ten years. Ms Chan did, however, draw our attention to the decision in *I v Oberbürgermeisterin der Stadt Remscheid* [2012] QB 799, in which the claimant had been convicted of multiple offences of sexual abuse, sexual coercion and rape of a 14-year-old girl in respect of which he had been sentenced to 7½ years' imprisonment. The CJEU was asked to decide whether the expression "imperative grounds of public security" referred only to conduct which threatened the security of the state itself, its population and the survival of its institutions or was broader in scope.
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> 23 In giving its judgment the court, at pp 814–816, paras 17–30, emphasised that member states retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, but that the requirements of the Directive must still be interpreted strictly. Criminal offences which constitute a particularly serious threat to one of the fundamental interests of society or which pose a direct

threat to the calm and physical security of the population may fall within the concept of "imperative grounds of public security", as long as the manner in which such offences were committed discloses particularly serious characteristics. However, the court also emphasised that even then deportation will not be justified unless the conduct of the person concerned represents a genuine, present threat affecting one of the fundamental interests of society, which normally implies that he has a propensity to act in the same way in the future.

24 I do not find that case to be of great assistance in determining whether in any individual case there are "serious" grounds of public policy or public security sufficient to justify deportation. It is clear, as the court confirmed, that the expression "imperative grounds of public security" creates a considerably stricter test than merely "serious" grounds, but since the application of the test is primarily for the member state concerned, which must take into account social conditions as well as the various factors to which the Directive itself refers, the question is likely to turn to a large extent on the particular facts of the case. It would therefore be unwise, in my view, to attempt to lay down guidelines. In the end, the Secretary of State must give effect to the Regulations, which themselves must be interpreted against the background of the right of free movement and the need to ensure that derogations from it are construed strictly. In that context it is worth noting that even in a case where it is considered that removal is prima facie justified on imperative grounds of public security, the decision-maker must consider, among other things, whether the offender has a propensity to re-offend in a similar way (judgment, paragraph 30).

25 In the present case the Secretary of State sought to justify Mr Straszewski's deportation on serious grounds of public policy or public security. "Public policy" for these purposes includes the policy which is reflected in the interest of the state in protecting its citizens from violent crime and the theft of their property. These are fundamental interests of society and therefore, although regulation 21(3) does not speak in terms of the risk of causing harm by future offending, in a case of this kind that is the risk which the Secretary of State is called upon to assess when considering deportation. That requires an evaluation to be made of the likelihood that the person concerned will offend again and what the consequences are likely to be if he does. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society requires the decision-maker to balance the risk of future harm against the need to give effect to the right of free movement. In any given case an evaluative exercise of that kind may admit of more than one answer. If so, provided that all appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in the sense of falling outside the range of permissible decisions."

47. In determining that the Respondent did not present a genuinely present and sufficient threat affecting one of the fundamental interests of society, so as to justify her removal on imperative grounds of public security the FtT took into account the following matters (at [67]-[71]); the 'overwhelming' evidence about the Respondent's achievements in

custody, that she had completed many courses, and that there were no disciplinary findings against her; she had expressed remorse for the victim, T; she planned to return to the family home (subject to approval by the NPS) on her release; and the evidence of a social worker, [LB], who said that the Respondent had made real progress in custody and posed a low risk of re-offending. The FtT said that it accepted Ms [B]'s evidence in full, she having given live evidence before it.

48. In light of these findings, which were open to the FtT, we are unable to regard its conclusion overall as being erroneous in law. The Secretary of State's grounds of appeal seek to impugn the FtT's reasoning in various ways, for example, by suggesting that it had not had sufficient regard for the seriousness of the consequences of re-offending. That criticism misses the point that the FtT expressly found, on the basis of the evidence it considered that the risk of re-offending was low. The case law we have discussed shows that the key question is whether the Respondent has a propensity to re-offend, and there was nothing before the FtT which could have compelled such a conclusion. All of the material pointed the other way.

49. The Secretary of State's grounds of appeal refer repeatedly to the seriousness of the offence as justifying deportation by itself. Given that it was not suggested in the grounds that the seriousness of the offence was such as to invoke the principle in *R Bouchereau* [1978] 1 QB 732 and *R v Secretary of State for the Home Department ex parte* *Marchon* [1993] 2 CMLR 132, the seriousness of the Respondent's offence was just one of the factors to be considered as we have explained. But the FtT expressly recognised the seriousness of the Respondent's offence at [64] and quoted the sentencing judge at [29] and thus did not overlook it. We agree with the FtT that, serious though the offence was, it did not fall into a category of criminality of the utmost seriousness so that an inference could be more readily drawn that the Respondent *prima facie* poses a sufficiently serious threat to one of the fundamental interests of society.

50. The Secretary of State also criticised the FtT's treatment of the issue of rehabilitation and in particular the finding at [75] et seq that the Respondent was more likely to be rehabilitated in the UK than in Bulgaria. The FtT referred to the case of *Essa*, supra, in this regard. In that case the Upper Tribunal said at [34]-[35]:

> "34. If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, then that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well [sic] be disproportionate to proceed to deportation.
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> 35. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance. Thus recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with impulses to commit sexual or violent offences and the like may well fall into this category."

51. In *MC (Essa principles recast) Portugal* [2015] UKUT 520 (IAC) the Upper Tribunal summarised the relevant principles as follows at [29]:

    a. *Essa* rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under reg 21 of the 2006 Regulations

    b. It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).

    c. There is no specific reference in the expulsion provisions of either the Free Movement Directive or the 2006 Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and reg 21(6) (*Essa* at [23]).

    d. Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (*Essa* at [32]-[33]).

    e. Reference to prospects of rehabilitation concerns *reasonable* prospects of a person ceasing to commit crime (*Essa* at [35]), not the mere possibility of rehabilitation. Where relevant (see (d) above) such prospects are a factor to be taken into account in the proportionality assessment required by reg 21(5) and (6) ((*Secretary of State for the Home Department v Dumliauskas* [2015] EWCA Civ 145, [41]). Such prospects are to be taken into account even if not raised by the offender (*Dumliauskas* at [52]). Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (*Dumliauskas* at [46], [52]-[53] and [59]).

    f. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (*Essa* (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (*Dumliauskas* at [55]).

    g. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (*Dumliauskas* at [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (*Dumliauskas* at [46] and [54]).

52. In light of these principles it seems to us that it was not actually necessary for the FtT to consider rehabilitation because it found that the Respondent does not pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. But we see no error in the FtT's approach. It found that her prospects of rehabilitation would be improved by her remaining with her family and children and being supervised on licence by the Probation Service. Given the

evidence that her children would not be permitted by their father to return with her to Bulgaria, and that she had no links with Bulgaria, this was a finding by the FtT based upon the evidence and it was a finding which was properly open to it.

Conclusion

53. Accordingly, we have concluded that the FtT did not err in law. This appeal is dismissed.

Decision

The decision of the First-tier Tribunal did not involve the making of any error of law.

Accordingly, the decision of the First-tier Tribunal to allow the appeal of Mrs. Natacha [N] against the respondent's decision stands.

Signed:

The Honourable Mr Justice Julian Knowles Date: 26 February 2019