Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00195/2021
(UI-2022-000064)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 12 May 2022	**On 8 July 2022**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAFAEL MARQUES MENDES

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr M McGarvey, instructed by direct access

DECISION AND REASONS

1. Although this an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal: Rafael Mendes (appellant) and the Secretary of State for the Home Department (respondent).

Introduction

2. The appellant is a citizen of Portugal who was born on 19 August 2000. He claims to have arrived in the UK in 2002, aged 2 years old with his mother

(also a Portuguese citizen) to join his father (also a Portuguese citizen) who was already resident in the UK. The appellant has lived in the UK ever since.

3. On 12 August 2020, the appellant was convicted at the Cardiff Crown Court on six counts of supplying a controlled drug, Class A (Heroin and Crack Cocaine). On 9 September 2020 he was sentenced to a total of two years' imprisonment and the victim surcharge was imposed. The appellant was also convicted of possessing a controlled drug, Class B (Cannabis) and sentenced to three months' imprisonment to run concurrently. The appellant was in prison from August 2020 to August 2021 before being released on licence.

4. On 16 September 2020, the appellant was notified by the respondent that she intended to make a deportation order against him on the grounds of public policy under reg 23(6)(b) (read with reg 27) of the Immigration (EEA) Regulations 2016 (SI 2016/1052 as amended) (the "EEA Regulations").

5. In response, representations were made on behalf of the appellant on 1 October 2020 and 5 February 2021.

6. On 28 April 2021, the respondent made a decision to deport the appellant under the EEA Regulations.

The Appeal

7. The appellant appealed to the First-tier Tribunal. Judge O'Rourke allowed the appellant's appeal under the EEA Regulations.

8. Judge O'Rourke found that, as a result of the appellant's ten year continuous residence dating back from the respondent's decision on 28 April 2021, the appellant was entitled to the highest protection against deportation set out in reg 27(4)(a), namely on "imperative grounds of public security". Judge O'Rourke found that the appellant's offending did not reach that highest level of protection from deportation and that the appellant's deportation was disproportionate.

9. The Secretary of State sought permission to appeal to the Upper Tribunal on a number of grounds. On 13 January 2021, the First-tier Tribunal (Judge Aziz) granted permission to appeal.

10. On 6 May 2022, the appellant filed a rule 24 response seeking to uphold Judge O'Rourke's decision.

11. The appeal was listed at the Cardiff Civil Justice Centre on 12 May 2022. The Secretary of State was represented by Mr Diwnycz and the appellant by Mr McGarvey.

The Respondent's Grounds

12. The respondent's grounds may be summarised as raising four principal points.

13. First, the judge erred in law in concluding that the appellant was entitled to the highest level of protection against deportation under reg 27(4)(a) based upon ten years' continuous residence. The grounds rely upon the decision of the CJEU in B v Land Baden-Württemberg; FV (Italy) v SSHD (Joined Cases C-316/16 and C-424/16) [2019] QB 126 ("FV(Italy)") that, in order to rely upon the highest level of protection set out in art 28(3)(a) of the Citizens' Directive (2004/38/EC) (which is reflected in reg 27(4)(a) of the EEA Regulations), an individual must have a permanent right of residence under EU law. The judge failed to determine whether the appellant had a permanent right of residence based upon five years' continuous residence in accordance with the EEA Regulations. The grounds contend that there was no evidence that either of the appellants' parents had been exercising Treaty rights in accordance with the EEA Regulations.

14. Secondly, in finding that the appellant's period of imprisonment did not break the continuity of residence required under reg 27(4)(a), the judge failed properly to consider whether the appellant had integrated into life in the UK given that his integration was based upon his relationship with his Portuguese family and his education in the UK. Reliance is placed upon Schedule 1, para 2 to the EEA Regulations. It is contended that a wider degree of cultural and social integration was required.

15. Thirdly, the appellant's offending was, contrary to the judge's finding, such as to satisfy the requirement of imperative grounds of public security given the nature of the appellant's offending. Reliance is placed upon the ECJ's decision in Land Baden-Württemberg v Tsakouridis (Case C-145/09) [2011] 2 CMLR 11 at [57(2)] ("Tsakouridis").

16. Finally, the grounds contend that the judge erred in law by failing to reach a finding as to whether the appellant constituted a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" under reg 27(5)(c).

Discussion

17. It was common ground that the relevant provision upon which the Secretary of State relies to justify the appellant's deportation is set out in reg 27(4)(a) of the EEA Regulations which provides as follows:

> "(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; …"

18. It is also common ground that it is for the Secretary of State to establish the justification for the appellant's deportation.

19. In addition, in applying the EEA Regulations in the context of deportation, Schedule 1 to the EEA Regulations sets out a number of matters to be taken into account in applying the expulsion criteria.

20. In his oral submissions, Mr Diwnycz indicated that he did not wish to add to the grounds. In the course of questions from me, Mr Diwnycz acknowledged that if all the documentation now before the UT had been available when the grounds were drafted a different view might have been reached about certain aspects of the judge's decision, for example in relation to whether the appellant had a permanent right of residence.

21. I will take each of the grounds in turn.

Ground 1

22. The case law makes clear that in order for an EEA national to have the benefit of the highest level of protection under reg 27(4)(a) of the EEA Regulations, that individual must also have established a permanent right of residence under the EEA Regulations. The CJEU made that clear in the case of FV (Italy). By reference to the relevant provisions of the Citizens' Directive, the CJEU said this at [60]-[61]:

> "60. A Union citizen who has not acquired the right to reside permanently in the host Member State because he has not satisfied those conditions and who cannot, therefore, rely on the level of protection against expulsion guaranteed by Article 28(2) of Directive 2004/38 cannot, a fortiori, enjoy the considerably enhanced level of protection against expulsion provided for in Article 28(3)(a) of that directive.
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> 61. In the light of all the foregoing, the answer to the first question in Case C-424/16 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is a prerequisite of eligibility for the protection against expulsion provided for in that provision that the person concerned must have a right of permanent residence within the meaning of Article 16 and Article 28(2) of that directive."

23. At para 14(i), Judge O'Rourke stated that it was not necessary for the appellant to establish a permanent right of residence before he could begin to rely on reg 27(4)(a):

> "(i) All that is required by regulation 27(4) for the threshold of 'imperative grounds' for removal to be reached is that the person has 'resided' in the UK for at least ten years, prior to the relevant decision. That is different to the 'serious' grounds threshold in 27(3), as that specifies that (in effect) Treaty rights must be exercised for five years to meet the threshold. I am entirely confident that therefore3, if Parliament had wished the same Treaty rights requirement to apply to the 'imperative' threshold, then it would have clearly specified so in 27(4), but it did not."

24. In reg 27(4)(a) Parliament was seeking to give effect to art 28(3)(a) of the Citizens' Directive. That provision, as the CJEU made clear in FV(Italy), does require the individual to have a permanent right of residence in order to be able to rely, if otherwise applicable, on the highest level of protection in art 28(3)(a) which is reflected in reg 27(4)(a) of the EEA Regulations. The judge was, therefore, wrong in law in his interpretation of reg 27(4)(a).

The appellant had to establish a permanent right of residence under the EEA Regulations as a precursor to relying on reg 27(4)(a).

25. That error was not, however, material to the outcome of the appeal. Although, the judge did not make any specific finding on the issue of whether the appellant had a permanent right of residence, he did make a number of findings relating to the residence of the appellant and his parents (in particular his mother) in the UK. So, at para 13 of his decision, despite the paucity of documentary evidence prior to 2011, the judge accepted that the appellant had been in the UK since 2002 and, on the basis of a letter from his mother's employer, Dolmans Solicitors, that she had been employed by them since 2007. The judge said this:

> "13. Length of residence in UK. I find, on the balance of probabilities that the Appellant has at least ten years' continuous residence in UK, for the following reasons:
>
> (i) Based on her employment record with Dolman Solicitors, from 2007 and the birth of her second child in UK, in the same year, the Appellant's mother has certainly been here since that date (and probably earlier) and therefore it seems extremely unlikely that the Appellant (as then a seven-year-old) would not have been also. Following on from that year there is then good documentary evidence of his continuing schooling from 2011.
>
> (ii) While it was a somewhat bizarre failure of the Appellant, or his representatives, to adduce no-doubt easily obtainable evidence of his primary schooling, or medical treatment prior to 2011, I note the consistent and clear oral evidence from the Appellant and his parents, as to his primary schooling in Cardiff, which I have no reason to doubt."

26. I was unable to find the letter from Dolman Solicitors in the digital bundle. Helpfully, through the appellant's father, Mr McGarvey obtained a copy of that letter at the hearing which he also provided to Mr Diwnycz. That letter is dated 23 December 2021 which was the day of the hearing before Judge O'Rourke. It is brief but it confirms the employment of the appellant's mother since 16 April 2007 in the following terms:

> "We can confirm that you have been employed by Dolmans Solicitors since 16th of April 2007 are still currently employed by us."

27. The letter is signed by an Office Administrator at the firm.

28. On seeing this letter, Mr Diwnycz accepted its contents and that, therefore, the appellant's mother had been working in the UK since 16 April 2007, i.e. she had been exercising Treaty rights since that date. Mr Diwnycz accepted that the judge could not have reached any other view than that the appellant, therefore, had established by the date of decision a permanent right of residence as a family member of a qualified person, namely his mother, an EEA national exercising Treaty rights.

29. That concession is, in my judgment, entirely properly made. By virtue of reg 14(2), the appellant as a family member of a qualified person (or who had a permanent right of residence once she acquired it after five years'

residence in the UK as a qualified person), had an extended right of residence. After five years, namely in April 2012, the appellant himself acquired a permanent right of residence under reg 15(1)(a) as an EEA national who had resided in the UK in accordance with the EEA Regulations for a continuous period of five years. There is no suggestion that he has, since April 2012, lost any right of permanent residence that he then acquired.

30. Consequently, even though the judge was wrong not to consider whether the appellant had a permanent right of residence as a necessary condition before he could rely upon reg 27(4)(a), that error was not material to the judge's application of reg 27(4)(a) as it was inevitable that he would have found in the appellant's favour on the basis of the evidence which was before him concerning the appellant's residence, his mother's residence and his mother's employment record.

31. For these reasons, therefore, I reject Ground 1.

Ground 2

32. Accepting that the appellant has been resident in the UK since his arrival in 2002 until the date of decision on 21 April 2019, it was argued before Judge O'Rourke that the appellant's imprisonment broke the "continuity" of his residence such that counting back from the date of decision he could not establish ten years' continuous residence.

33. The case law of the CJEU and domestically recognises that for the purposes of the 'ten years' continuous residence' requirement a period of imprisonment can break the continuity of an individual's residence such that they will not be able to rely on the protection from deportation on "imperative grounds of public security".

34. In MG (Portugal) v SSHD (Case C-400/12) [2014] 1 WLR 2441, the CJEU recognised that a period of imprisonment during the ten year period prior to the expulsion decision will "in principle" interrupt continuity of residence but, whether it does in fact, requires that an "overall assessment" of whether previously forged integrative links have been broken. At [27]–[36], the Court said this:

> "27 Given that the decisive criterion for granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 is the fact that the person concerned resided in the host Member State for the 10 years preceding the expulsion decision and that absences from that State can affect whether or not such protection is granted, the period of residence referred to in that provision must, in principle, be continuous.
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> 28 In the light of all of the foregoing, the answer to Questions 2 and 3 is that, on a proper construction of Article 28(3)(a) of Directive 2004/38, the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.
>
> ....

29 By its first and fourth questions, the referring court asks, in essence, whether Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is capable of interrupting the continuity of the period of residence for the purposes of that provision and may, as a result, affect the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment.

30 In that regard, the Court has already found that the system of protection against expulsion measures established by Directive 2004/38 is based on the degree of integration of the persons concerned in the host Member State and that, accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be, in view of the fact that such expulsion can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the FEU Treaty, have become genuinely integrated into the host Member State (see, to that effect, *Tsakouridis*, paragraphs 24 and 25).

31 The Court has also found, when interpreting Article 16(2) of Directive 2004/38, that the fact that a national court has imposed a custodial sentence is an indication that the person concerned has not respected the values of the society of the host Member State, as reflected in its criminal law, and that, in consequence, the taking into consideration of periods of imprisonment for the purposes of the acquisition, by members of the family of a Union citizen who are not nationals of a Member State, of the right of permanent residence as referred to in Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence (Case C-378/12 *Onuekwere* [2014] ECR I-0000, paragraph 26).

32 Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.

33 It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.

34 As regards the continuity of the period of residence, it has been stated in paragraph 28 above that the 10-year period of residence necessary for the granting of enhanced protection as provided for in Article 28(3)(a) of Directive 2004/38 must, in principle, be continuous.

35 As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person’s situation on each occasion at the precise time when the question of expulsion arises (see, to that effect, *Tsakouridis*, paragraph 32).

36 In that regard, given that, in principle, periods of imprisonment interrupt the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, such periods may – together with the other factors going to make up the entirety of relevant considerations in each individual case – be taken into account by the national authorities responsible for applying Article 28(3) of that directive as part of the overall assessment required for determining whether the integrating links previously forged with the host

Member State have been broken, and thus for determining whether the enhanced protection provided for in that provision will be granted (see, to that effect, *Tsakouridis*, paragraph 34)."

35. The CJEU in FV (Italy) returned to the issue of whether, and in what circumstances, a period of imprisonment can count towards establishing the ten years' continuous residence or would break the continuity of the residence (at [67]-[83]):

" 67 In that respect, it must also be noted, however, that while Article 28(3)(a) of Directive 2004/38 makes the enjoyment of the enhanced protection against expulsion provided for in that provision subject to the person's presence in the Member State concerned for 10 years preceding the expulsion measure, it is silent as to the circumstances which are capable of interrupting the period of 10 years' residence for the purposes of the acquisition of the right to that enhanced protection (judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 29).

68 Thus, the Court has held that, as regards the question of the extent to which absences from the host Member State during the period referred to in Article 28(3)(a) of Directive 2004/38 prevent the person concerned from enjoying that enhanced protection, an overall assessment must be made of the person's situation on each occasion at the precise time when the question of expulsion arises (judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 32).

69 In doing so, the national authorities responsible for applying Article 28(3) of Directive 2004/38 are required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned (see, to that effect, judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 33).

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 10 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 10 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 paragraph 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 10-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 the 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).

76 As regards the concerns expressed by the referring court that taking into account the period of imprisonment for the purposes of determining whether it has interrupted the continuity of the 10-year period of residence in the host Member State prior to the expulsion measure could lead to arbitrary or unfair results, depending on when that measure is adopted, it is appropriate to provide the following clarifications.

77 It is true that, in some Member States, an expulsion measure may be imposed as a penalty or legal consequence of a custodial sentence, a possibility expressly provided for in Article 33(1) of Directive 2004/38. In such a case, the future custodial sentence cannot, by definition, be taken into consideration for the purposes of assessing whether or not a Union citizen has been continuously resident in the host Member State for the 10 years preceding the adoption of that expulsion measure.

78 The result may therefore be, for example, that a Union citizen who has already resided continuously for 10 years in the host Member State at the

> date on which he receives a custodial sentence accompanied by an expulsion measure is entitled to the enhanced protection against expulsion provided for in Article 28(3)(a) of Directive 2004/38.
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> 79 Conversely, as regards a citizen against whom such an expulsion measure is adopted after his detention, as in the main proceedings, the question arises whether or not that detention had the effect of interrupting the continuity of the period of residence in the host Member State and depriving him of the benefit of that enhanced protection.
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> 80 However, it should be pointed out, in that regard, that, where a Union citizen has already resided in the host Member State for a period of 10 years when his detention begins, the fact that the expulsion measure is adopted during or at the end of the period of detention and the fact that that period of detention thus forms part of the 10-year period preceding the adoption of that measure do not automatically entail a discontinuity of that 10-year period as a result of which the person concerned would be deprived of the enhanced protection provided for under Article 28(3)(a) of Directive 2004/38.
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> 81 Indeed, as is apparent from paragraphs 66 to 75 above, if the expulsion decision is adopted during or at the end of the period of detention, the situation of the citizen concerned must still, under the conditions laid down in those paragraphs, be subject to an overall assessment in order to determine whether or not he can avail of that enhanced protection.
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> 82 Thus, in the situations referred to in paragraphs 77 to 81 of this judgment, whether or not the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 is granted will still depend on the duration of residence and the degree of integration of the citizen concerned in the host Member State.
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> 83 In the light of all the foregoing, the answer to the first three questions in Case C-316/16 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention."

36. The CJEU concluded that the 10-year period counted back from the date of the expulsion decision. Periods of imprisonment can, but do not necessarily, break that period of continuous residence. The central issues are integration in the host state and whether, if that existed before imprisonment, the effect of the imprisonment was to break it. The CJEU referred specifically to the situation where the individual already had 10 years' continuous residence *prior* to imprisonment and indicated such an individual is likely to be able to rely on art 28(3)(a) (see [78] and [80]). Whilst it is not entirely clear, the CJEU did not seem to exclude reliance on art 28(3)(a) where that was not the case but, nevertheless counting back from the date of decision, 10 years residence included a period of

imprisonment where, for example, integration nevertheless existed prior to imprisonment and, adopting an overall assessment, those links were not broken by the period of imprisonment.

37. However, the Court of Appeal in Hafeez v SSHD [2020] EWCA Civ 406 decided that a period of imprisonment cannot count to establish the ten years' period of continuous residence and a period of 10 years' continuous residence *prior to* imprisonment is necessary.

38. In Hafeez, Bean LJ (with whom Simon and Simler LJJ agreed) stated at [37]:

> "In my view, periods of imprisonment (or detention in a young offenders' institution: Viscu v SSHD [2020] 1 All ER 988) do not count positively towards establishing ten years' residence."

39. At [38]–[41], Bean LJ gave a number of reasons for reaching that conclusion which I need not set out here. At [43] Bean LJ added this:

> "….As I said in *Hussein* [*v SSHD* [2020] EWCA Civ 156] at paragraph [18] (in a judgment handed down after the FTT and UT decisions in the present case), an individual relying on imperative grounds protection who has served time in custody must prove *both* that he has ten years' continuous (or non-continuous) residence ending with the date of the decision on a mathematical basis *and* that he was sufficiently integrated within the host State during that ten year period. In the present case, if the Appellant could not count his three and a half years in prison towards the necessary ten years' residence, he failed to qualify for imperative grounds protection under Regulation 27(4) for simple mathematical reasons. The question of whether his integrative links with the UK were broken by the three and a half years in custody (as to which see *Viscu,* another decision of this court given after the FTT and UT judgments in the present case) therefore does not arise."

40. At [36], Bean LJ explained how the "simple mathematical reasons" prevented the individual in that case relying on reg 27(4)(a):

> "….Regardless of whether the Appellant arrived in the United Kingdom in 2006 (as the Appellant submits) or in 2007 (as the Respondent submits), he has to rely on his period of three and a half years in custody in order to establish ten years' residence. This is because, even assuming he arrived here on 1 January 2006, he would only have resided in the United Kingdom for at most eight and a half years prior to the deportation decision, excluding his time in custody. Thus he cannot rely on imperative grounds protection unless his period of imprisonment counts positively towards his ten years' residence."

41. As I have said, it is not entirely clear that the CJEU in FV(Italy), at least in its reasoning, "left open" (per Bean LJ in Hafeez at [36]) this issue rather than the Court was simply seeking to identify the greater strength in a claim to rely on art 28(3)(a) (i.e. reg 27(4)(a)) where the individual already had 10 years' continuous residence prior to his imprisonment. The decision in Hafeez is, however, authority in England and Wales that the distinction is determinative.

42. In this appeal, however, that issue does not arise. The appellant is able to establish a ten years' continuous period of residence since he came to the UK in 2002 prior to his imprisonment in August 2020. The issue is whether, by the time of the appellant's imprisonment, he was integrated

into the UK and whether, as a result of his imprisonment, that integration ceased and so the continuity of his residence was broken. The appellant served one year of his two year term of imprisonment between August 2020 and August 2021. Eight or nine months of that period occurred before the respondent's decision on 28 April 2021.

43. Regulation 3 of the EEA Regulations deals with this issue in reg 3(3)(a) and (4) as follows:

> "(3) Continuity of residence is broken when –
>
> (a) a person serves a sentence of imprisonment;
>
> .....
>
> (4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that –
>
> (a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;
>
> (b) the effect of the sentence of imprisonment was not such as to break those integrating links; and
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> (c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence".

44. Regulation 3(3)(a) states that "continuity of residence" is, in principle, broken by imprisonment but that is subject to reg 3(4). It is worth noting that reg 3(4) does not appear to adopt Bean LJ's approach requiring a 10 year continuous period of residence prior to imprisonment. Rather it looks to the overall period of residence – dating back from the deportation decision – and whether "integrative links" had been forged prior to imprisonment and whether that imprisonment was such as to break those "integrative links" with an added twist that it "would not be appropriate" to apply the discontinuity provision in reg 3(3)(a).

45. The "overall assessment" requires a broad evaluation of the appellant's personal and familial circumstances, his offending and conduct during the period of imprisonment. In Hussein v SSHD [2020] EWCA Civ 156 at [37], Bean LJ (with whom Lewison and Rose LJJ agreed) referred to the CJEU's decision in FV(Italy) at [83] that:

> "....in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention."

46. Bean LJ considered the issue of whether periods in custody broke the continuity of residence in these terms at [37]-[38]:

> "37. The question of whether periods in custody break the integrative links between the offender and the host state is in my view a much narrower question than that of whether there are imperative grounds of public security, or serious grounds of public policy or security, justifying deportation, let alone the question of whether deportation can be challenged on ECHR Article 8 grounds. I note the wording used by the CJEU in paragraph 83 of *Vomero*. The aspects of the case that must be taken into account in deciding whether, notwithstanding the detention, the integrative links with the host State have not been broken include "the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention". Except for the first, all these listed factors focus on the offending and the custodial sentence. Whether the offender was visited regularly or at all while in custody seems to me of little if any importance in the overall assessment.
>
> 38. ..... As Flaux LJ said in *Viscu* [*v SSHD* [2020] 1 All ER 988], a custodial sentence is in general indicative of a rejection of societal values and thus of a severing of integrative links with the host state. Repeated offending attracting a series of custodial sentences of more than trivial length is even more indicative of the same thing. These propositions are not inconsistent with the principle that an EEA national cannot be deported on the basis of criminal offending simply to deter others."

47. In his decision, Judge O'Rourke dealt with the issue of the appellant's continuity of residence, specifically referring to reg 3(3) and (4) at para 14(iii) of his decision:

> "(iii) I don't consider that it would be appropriate for the Appellant's continuity of residence in UK to be broken by his prison sentence, for the following reasons:
>
> a. The evidence indicates that the Appellant had *'forged integrating links with the UK'* prior to serving his sentence, by virtue of having lived here, with his entire immediate family and having gone to school here, since at least 2007, speaking English as his first language and entering into a long-term relationship with a British citizen.
>
> b. That sentence has not broken those links, in particular with his partner and now child.
>
> c. It seems entirely contradictory and illogical to have a 'protection' afforded to an EU criminal, of 'imperative grounds', following ten years' residence, to be negated by a period of imprisonment, when, even if that period of imprisonment were deducted, he would still have (as in this case), at least twelve years' continuous residence prior to that imprisonment. If it were simply the case that any EU criminal who received a prison sentence would have any period of continuous residence in effect cancelled out, then there would be no point or relevance to the granting of the protection by Regulation 27(4), in the first place."

48. As regards integration, the judge returned to this issue when considering proportionality at para 14(v)(d) as follows:

> "d. As I have found in paragraph 14(iii) above, the Appellant is entirely integrated into life in the UK. He has lived here for at least fourteen of his twenty-one years (and probably longer); the vast majority, or all of his schooling has been here; English is his first language and he is the father of a British citizen. Clearly, a sentence of imprisonment damages that integration, but not fatally and if predictions as to his future behaviour are correct, then he can rectify such damage in due course by becoming a valued member of society, as a father and a provider for his family. Conversely, he has only a passing, holiday-based, knowledge of life in Portugal and while he could, no doubt, improve his Portuguese, knowledge of the language alone, without substantive family or friendship groups in that Country, would not be sufficient for successful integration there".

49. The ground relies, in effect, on Schedule 1, para 2 to the EEA Regulations which is in the following terms:

> "2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom".

50. Paragraph 7 of the grounds was not doubt intended to set out other factors which the respondent wished to contend the judge "failed to have regard to" in finding that the continuity of residence was not broken. However, none are set out as the space for doing so in the structure of the paragraph is left blank.

51. The evidence before the judge was, as the judge accepted, that the appellant had been in the UK since 2002 when he was aged 2. There was documentary evidence before the judge, which he accepted, that the appellant had attended school since 2011 and the judge also accepted the evidence of the appellant and his parents that he had attended primary school in Cardiff prior to that. Those findings are not challenged in the Grounds nor sensibly could they be on the evidence.

52. Given that the appellant had lived in the UK since aged 2 and had attended primary and secondary school, it is difficult to see how the provision in Schedule 1, para 2 applies to him. That provision is aimed at a situation where an individual lives, in effect, within a closed cultural or familial society. It seeks to prevent such an individual claiming that they are integrated into the UK. Those limitations are simply not borne out by the evidence before the judge. The evidence does not establish that the appellant lived in a closed cultural or familial society. English is his first language. No doubt he lived largely within his family until he began to attend school, as would be expected at that stage of a child's life. But, thereafter, the appellant attended school in Cardiff (presumably from about the age of 4 or 5) and, since 2019, has had a partner who is a British citizen who gave birth to their daughter in April 2021. Some of those events, of course, post-date the respondent's decision. It has never been suggested that the appellant's relationship with his partner (a British citizen), formed in 2019, is other than genuine. The judge accepted the

appellant had little or no connection with Portugal which he had left aged 2 years old.

53. The judge had well in mind the provisions in Schedule 1 which he set out at para 7 of his decision. The substance of his reasoning clearly took them into account. In my judgment, the judge was fully entitled to approach the appellant's case on the basis that by the date of his imprisonment in August 2020, he was fully integrated into the UK. Thereafter, prior to the date of decision, he served eight or nine months in prison. A further period of three to four months before August 2021 when he was released, post-dated the decision. The appellant had, therefore, as a child, young person and young adult a period of residence in the UK of eighteen years before his imprisonment. He had a total period of some nineteen years' residence of which eighteen years was "continuous residence".

54. In these circumstances, I reject Ground 2. The judge was entitled to find that the appellant's continuity of residence continued up to the date of her decision and that the appellant was entitled to the highest level of protection from deportation of "imperative grounds of public security".

Ground 3

55. This ground contends that the judge erred in law in not accepting that there were "imperative grounds of public security" for deporting the appellant. It is uncontroversial to state that the concept of "imperative grounds of public security" is stricter than the "serious grounds" which applies to an EEA national (or family member) who has a permanent right of residence. In Tsakouridis the CJEU said this at [40]:

> "40. It follows from the wording and scheme of Article 28 of Directive 2004/38, as explained in paragraphs 24 to 28 above, that by subjecting all expulsion measures in the cases referred to in Article 28(3) of that directive to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive."

56. The CJEU added (at [41]):

> "41. 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'."

57. In LG and CC (EEA Regs: residence, imprisonment, removal) Italy [2009] UKAIT 0024, the Senior President of Tribunals (Carnwath LJ) gave the following guidance on the meaning of the requirement of "imperative grounds of public security" focusing on the individual's present and future risk to the public, rather than purely on the seriousness of the individual's offending:

> "110. …. [W]e cannot accept the elevation of offences to "imperative grounds" purely on the basis of a custodial sentence of five years or more being

> imposed. As was said by Carnwath LJ in LG (see paragraph 32(3)), there is no indication why the severity of the offence in itself is enough to make removal "imperative" in the interests of public security. Such an offence may be the starting point for consideration, but there must be something more, in scale or kind, to justify the conclusion that the individual poses "a particularly serious risk to the safety of the public or a section of the public". Terrorism offences or threats to national security are obvious examples, but not exclusive. Serial or targeted criminality of a sufficiently serious kind may also meet the test. However, there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion "imperative" and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level."

58. As the Senior President noted, the "imperative grounds of public security" is not limited to terrorist offences or threats to national security narrowly understood. The nature, and in particular future risk posed by an individual, may create an "imperative" risk to society sufficiently serious as to satisfy the test. So, for example, the CJEU in PI v Oberburgermeisterin der Stadt Remscheid (Case C-348/09) [2012] 3 CMLR 13 recognised that offences of sexual abuse or exploitation of children could engage the "imperative grounds of public security" (at [28]):

> "A particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population ... as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it".

59. In relation to drug offences, the CJEU in Tsakouridis acknowledged that drugs offending of a particularly serious nature could fall within the "imperative grounds of public security" requirement (at [45]-[47]):

> "45 It does not follow that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are necessarily excluded from that concept.
>
> 46 Dealing in narcotics as part of an organised group is a diffuse form of crime with impressive economic and operational resources and frequently with transnational connections. In view of the devastating effects of crimes linked to drug trafficking, Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) states in recital 1 that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States.
>
> 47 Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind (see, to that effect, inter alia, Case 221/81 *Wolf* [1982] ECR 3681, paragraph 9, and Eur. Court H.R., *Aoulmi v. France*, no. 50278/99, § 86, ECHR 2006'I), trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it."

60. In my judgment, particularly serious offending, not only in the area of sexual activity with children, but also in the area of, for example, drug importation or supply, human trafficking, or acts of violence directed at

the public or sections of the public could meet the requirements of "imperative grounds of public security" as a result of the "threat to public security" of a "particularly high degree of seriousness" (see Tsakouridis at [41]).

61. In this case, the judge dealt with this issue at para 14(v) of his decision as follows:

> "14. Having considered all the oral and documentary evidence to which I have been referred, I find the following:
>
> ....
>
> (v) I do not consider that the Appellant's offending meets the 'imperative' threshold, as to providing 'compelling' reasons for his deportation and I do so for the following reasons:
>
> a. It is his first offence. The sentencing judge noted that the Appellant is a young man, of previous good character and while not excusing the Appellant's behaviour, he considered him to be at a lower level of offending than the others convicted with him. He noted the 'helpful' pre-sentence report. The sentence he awarded was at the lowest level available to him.
>
> b. The pre-sentencing report considers the Appellant to be at low risk of re-offending, or of causing serious harm to the public. The sentencing judge noted the Appellant's 'obvious abilities and skills' (he has, for example, earned a well-above-average fourteen GCSEs). He has exceptionally strong family support, as well as being in a committed relationship with his partner and is now a father and it must, therefore, be considered that he has, at least, a more than reasonable chance of not reoffending. I note he has not undertaken any great degree of rehabilitation training, but it is the case that his time in formal imprisonment, rather than remand, was relatively brief and prison training resources will inevitably be focussed on longer-serving prisoners, combined also with the no-doubt restrictions imposed on such training by the COVID pandemic. Clearly, however, if, in the future this forecast as to the Appellant's future good behaviour proves to be incorrect and he does re-offend, particularly in the supply of Class A drugs to vulnerable individuals, which has often catastrophic implications for their health, both physical and mental and which leads to the commission of related crime, then any such offences would weigh heavily against him in any future judgment of this nature.
>
> c. I don't consider, therefore that the Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Provided he does not reoffend, public order, the protection of the public and prevention of wider social or societal harm are not adversely affected. I note that the Respondent argues that the maintenance of public confidence in its ability to deport foreign criminals will be damaged, but no evidence was adduced that there has been any 'public offence'/notoriety in this case. This is an offence which, sadly, will be all too common to the public and is very unlikely to arouse any particular public interest. In any event, Parliament has set the thresholds out in the Regulations and by specifying the need

> for 'imperative' grounds in a case of this nature, the public's confidence is maintained.
>
> d. As I have found in paragraph 14(iii) above, the Appellant is entirely integrated into life in the UK. He has lived here for at least fourteen of his twenty-one years (and probably longer); the vast majority, or all of his schooling has been here; English is his first language and he is the father of a British citizen. Clearly, a sentence of imprisonment damages that integration, but not fatally and if predictions as to his future behaviour are correct, then he can rectify such damage in due course by becoming a valued member of society, as a father and a provider for his family. Conversely, he has only a passing, holiday-based, knowledge of life in Portugal and while he could, no doubt, improve his Portuguese, knowledge of the language alone, without substantive family or friendship groups in that Country, would not be sufficient for successful integration there".

62. The sentencing remarks of the Crown Court Judge (HHJ Fitton QC) (at pages 99–101 of the digital bundle) disclose that the appellant was convicted of offences of the supply of Class A drugs as a 'street dealer'. Applying the sentencing guidelines, the judge considered that the starting point was the bottom of the scale within "Category 3" and that having given credit for the appellant's previous good character, his age and the more serious involvement of others, the judge imposed a sentence of two years concurrently for each of the offences.

63. That sentence, taken together with the evidence concerning the risk of the appellant reoffending in the future being "low", fully justified, in my judgment, the judge's conclusion that the "imperative grounds of public security" requirement in reg 27(4)(a) was not established. The appellant was not a significant 'player' in a drugs organisation. The grounds place some reliance on what was said by the CJEU in Tsakouridis at [57(2)] that:

> "…the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security…".

64. The CJEU's detailed view at [45]-[47] is set out in para 59 above. The appellant's offending, in supplying Class A drugs as a street dealer, was undoubtedly serious offending. There is no doubt about that. However, his particular role as a street dealer did not make him a significant player in an drugs gang or organisation. He was a relatively 'small fish' as Judge Fitton QC effectively acknowledged in his sentencing remarks and sentence. Whilst I, of course, accept what is said there by the CJEU, the type of case it had in mind simply does not fit the appellant's offending. He did not represent a "threat to public security" of a "particularly high degree of seriousness".

65. For these reasons, I reject Ground 3. The judge was entitled reasonably to conclude that the appellant's offending did not establish the "imperative grounds of public security" which was the only basis upon which the appellant could lawfully be deported.

Ground 4

66. This ground rather curiously suggests that the judge did not make any finding as to whether or not the appellant represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". In fact, the judge made a specific finding that the appellant did not fulfil that criterion in para 14(v)(c) where he said this:

> "c. I don't consider, therefore that the Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Provided he does not reoffend, public order, the protection of the public and prevention of wider social or societal harm are not adversely affected. I note that the Respondent argues that the maintenance of public confidence in its ability to deport foreign criminals will be damaged, but no evidence was adduced that there has been any 'public offence'/notoriety in this case. This is an offence which, sadly, will be all too common to the public and is very unlikely to arouse any particular public interest. In any event, Parliament has set the thresholds out in the Regulations and by specifying the need for 'imperative' grounds in a case of this nature, the public's confidence is maintained".

67. The specific basis upon which this ground is put in para 8 of the Grounds simply does not take into account what the judge actually found in para 14(v)(c).

68. The further suggestion that the judge should have found that the appellant had a propensity to offend runs counter to the sentencing judge's remarks and the fact that this was the first, and indeed only, conviction of the appellant. The judge took into account the pre-sentence report which put the risk of the appellant reoffending as "low" and of "causing serious harm to the public". Whilst not every judge would necessarily have found the appellant did not represent a "genuine and present and sufficiently serous threat" to the public, that finding was within the range of decisions a reasonable judge could make on the evidence. In any event, for the reasons I have given in relation to Ground 3, it was not Wednesbury unreasonable for the judge to find, indeed on the evidence it was an inevitable finding, that the "imperative grounds of public security" had not been established by the respondent to justify the appellant's deportation.

Conclusion

69. For the above reasons, I reject each of the respondent's grounds of appeal.

Decision

70. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal under the EEA Regulations did not involve the making of a material error of law. The decision, therefore, stands.

71. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
19 May 2022