IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2022-001679
First-tier Tribunal No: DA/00013/2021

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 14 November 2022

Decision & Reasons Promulgated
On the 22 February 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDREJS SAVELJEVS
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Habte-Mariam, instructed on behalf of the respondent

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Mensah) promulgated on 28 March 2022.

By its decision, the Tribunal allowed the appellant's appeal against the Secretary of State's decision dated 17 December 2020 to deport him from the United Kingdom.

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Andrejs Saveljeves as the appellant, reflecting their positions before the First-tier Tribunal.

3. The First-tier Tribunal did not make an anonymity order and no grounds have been advanced on behalf of the appellant to make such an order.

4. The decision to deport was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appellant's case was that the decision was not in accordance with Regulation 27 and Schedule 1 of the Regulations, and/or that it was incompatible with his rights under Article 8 of the Convention, and thus unlawful by reason of S.6 of the Human Rights Act 1998.

5. The Secretary of State appealed and permission to appeal was refused by the First-tier Tribunal but on renewal was granted by UTJ O'Callaghan for the following reasons:

> "The respondent seeks permission to appeal a decision of the FtT allowing the appellant's appeal against a decision to deport him to Latvia.
>
> It is arguable that the FtT erred in law, at [13]-[17], when concluding that the appellant enjoyed imperative grounds protection by not calculating the required 10 years backwards from the date of the respondent's decision: Case C-400/12 Secretary of State for the Home Department v. MG (Portugal) EU:C:2014.9, [2014] 1 WLR 2441, at [24]. 3.
>
> Additionally, it is arguable that the FtT failed to adequately consider whether the appellant's period of imprisonment broke his integrative links with this country. In respect of the challenge to the FtTJ's alternative conclusion that the appellant is not a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, I am satisfied, just, that it is arguable that the reasons given are inadequate."

6. The hearing took place on 14 November 2022, Mr Diwnycz, Senior Presenting Officer appeared on behalf of the respondent and Mr Habte-Mariam appeared on behalf of the appellant.

Background:

7. The key factual background is set out in the decision of the FtTJ, the decision letter, and the bundles of documentation. It was recorded in the decision of the FtTJ that the immigration history that she had set out and summarised in her decision was agreed between the parties (see paragraph 8 of th FtTJ's decision).

8. The appellant is a citizen of Latvia. The date of arrival is not specified but it is stated that he arrived in the United Kingdom in 2004. In 2011 he sought a registration certificate and on 5 April 2011 was issued with an EEA registration certificate as an EEA national. On 4 April 2017, the appellant was issued with a document certifying his permanent residence in the United Kingdom.

9. On 19 June 2020, the appellant was convicted of possession of an imitation firearm with intent to cause fear and was sentenced to a period of 30 months in imprisonment. The FtTJ summarised the sentencing remarks at paragraph 4 of her decision. The FtTJ recorded at paragraph 5 that this offence was “extremely serious”, and it had a profound effect on the police officer involved. The sentencing judge took into account the mitigating factors, that the weapon was a toy and not loaded, that the appellant was a man of good character and a reduction of 25% was applied for the guilty plea.

10. On 15 July 2020, the appellant was issued with a notice of liability to deportation and on 16 July 2020 the appellant submitted representations against his deportation.

11. On 17 December 2020, a decision was made to refuse the appellant’s human rights claim in the context of his deportation. The decision is set out in a comprehensive letter of 18 pages and is a matter of record. It is therefore only necessary to summarise the essential parts.

12. Between paragraphs 12 and 16 the respondent set out her position on the appellant’s residence in the United Kingdom. It was noted that the appellant claimed to have lived and worked in the UK for the last 16 years. It was accepted that the documentary evidence provided in April 2017 demonstrated that he had been resident in the UK in accordance with the EEA regulations 2016 for a continuous period of 5 years and had thus acquired a permanent right of residence. However it was not accepted that he resided in the UK for a continuous period of at least 10 years and that taking into account the documents, the period of continuous residence was taken from 1 January 2012 to 27 December 2019 (the date he was placed in custody).

13. As a result, consideration was given to whether his deportation was justified on serious grounds of public policy. At paragraph 19 – 28, the respondent summarised her view of the risk of harm taking into account his conviction on 19 June 2020 and the subsequent sentence of 30 months imprisonment. The risk of reoffending was considered between paragraphs 29 – 39. The conclusion reached on the risk of harm and reoffending was that the offence for which he was convicted was a serious one as reflected in the sentence. The respondent considered that the available evidence indicated that he had a propensity to reoffend and that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy. It was noted that the appellant did not have an extensive criminal record and that the offender manager had

calculated his risk of reconviction is low however the respondent took the view that seriousness of the offence in the light of the full circumstances of its perpetration was indicative that he posed a significant threat.

14. As to the issue of proportionality (Regulation 27 (5) (a), the respondent took into account the appellant's age and state of health noting that it was aged 36 and had been shot in the shoulder by armed police as a consequence of his index offending. He was in good health other than the effects of the injury which included that he continued to experience discomfort in his arm, could not lift heavy objects or squeeze his fingers together or make a fist. He was undergoing physiotherapy but was told he would make a full recovery. As to his family situation he had a wife and 2 children in the UK having married in 2012. His wife had an adult son from a previous relationship. He had been separated from his wife 8 months at the time of the offence however the pre-sentence report confirmed that the appellant's wife had made a supporting statement to the court on his behalf. The appellant claimed that he and his wife and reconciled. Whilst that was currently unsubstantiated, it was noted by the appellant's offender manager that "his wife confirms that Mr Saveljevs had visited her and the children every day since separating at their relationship had been improving." His son had been diagnosed with autism in both he and his wife had indicated difficulties within the family coping with his condition and this contributed to their estrangement. The appellant claimed that his family were financially dependent on him and that he had continued to financially support them whilst he was in custody as his wife had access to his account. It was accepted that the appellant enjoyed family life in the UK but was not considered on balance to argue significantly against deportation.

15. Between paragraphs 52 – 54, the respondent had regard to the appellant's economic situation, and his length of residence taking into account that he claimed to have lived and worked in the UK for 16 years. The respondent did not accept that it substantiated his claim in relation to length of residence or employment history, but it was accepted he had acquired the right of residence and have resided in the UK since 1 January 2012. It was considered that he could be financially independent in Latvia as he had been in the United Kingdom.

16. The appellant's social and cultural integration was considered between paragraphs 55 – 58 where it was identified that there were factors that weighed in his favour with regard to social and cultural integration notably accepting that he resided for a considerable period in the UK and develop friendships and ties as a result. Reference was made to the sentencing remarks and the number of references that had been provided for the appellant describing him as "a respectable member of the community who would lead until recently an extremely prosocial lifestyle and whose main aim in life is to support and provide for his family." The respondent considered that the appellant had not demonstrated that any friendships or relationships formed extended beyond normal emotional ties and thus could be continued by modern methods of communication. The

respondent accepted that there was evidence of social and cultural integration as a result of his employment history, his family life and letters of support provided to the sentencing court but that they were outweighed by the seriousness of his offence, and the uncertain status of his relationship with his wife and that the OASys's report indicated that his cultural attitude to firearms was a contributory factor in the threat of serious harm posed.

17. As to his links with Latvia, the appellant claimed to have no links with the country although it was noted that he had stated to immigration officials that he had cousins in Latvia. However he had spent his youth and formative years in that country and last visited some 3 years prior to his imprisonment. It was acknowledged that he was absent from the country of origin for some time.

18. The respondent therefore concluded that the appellant had not demonstrated that it would be disproportionate to pursue deportation.

19. The issue of rehabilitation was set out between paragraphs 63-69 . Having regard to all the available information, it was concluded that his deportation to Latvia would not prejudice the prospects of rehabilitation and that any interference to it would be proportionate and justified when balanced against the continuing risk posed. It was concluded that there was a real risk that he may reoffend and therefore it was considered that his deportation was justified on grounds of public policy, public security, or public health in accordance the regulation 23 (6) (b). His personal circumstances had been considered but given the threat posed, the decision to deport was proportionate and in accordance with the principles of Regulations 27 (5) and (6).

20. The decision letter also addressed additional matters relevant to Article 8 of the ECHR between paragraphs 73 – 111, such consideration included family life with his children, with his partner and his private life. The respondent considered whether there were very compelling circumstances such as it should not be deported (see paragraphs 112 – 134). The respondent concluded that having considered the facts about his circumstances, including the best interest of the children, it was considered that his deportation would not breach the U.K.'s obligations under article 8 of the ECHR.

21. The remains of the decision letter related to Regulation 33.

<u>The decision of the FtTJ:</u>

22. The appellant appealed the decision, and it came before FtTJ on 7 March 2022. In a decision promulgated on 28 March 2022 the FtTJ allowed the appeal. The FtTJ undertook an assessment of the appellant's length of residence in the UK and found that he had been resident in the UK since 2004 but applying the accession regulations, he was lawfully resident in the United Kingdom since 1 May 2019 through to 26 December 2019. The

judge further found that he had therefore 10 years continuous lawful residence which entitled him to have his deportation considered under the highest threshold of “imperative grounds”. In the alternative, the FtTJ considered whether the respondent had shown there were serious grounds of public policy and public security and in addressing that the FtTJ undertook an assessment under paragraph 27 (5) (c) of the Regulations and concluded for the reasons given between paragraphs 18 – 20 that the respondent failed to show that the appellant was a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the appellant that the threat did not need to be imminent. The FtTJ therefore allowed the appeal.

The legal framework:

23. The appellant is an EU citizen. Under Article 20 of the Brexit Withdrawal Agreement the conduct of EU Citizens, their family members, and other persons, who exercise Citizens' rights under the Withdrawal Agreement, where that conduct occurred before the end of the transition period, 31 December 2020, shall be considered under the provisions of Directive 2004/38/EC which gives effect to the free movement of persons. This means that in this appeal it is the EU standards and not the UK standard that applies to any decision to deport, which are more favourable to the appellant than those applying under UK law.

24. Although the EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, many of its provisions are preserved for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ("the EEA Transitional Regulations").

25. The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

26. Thus, the issue is not whether the decision is in accordance with the EEA Regulations, but whether the decision is in accordance with the appellant's Treaty Rights as expressed through the Directive.

27. The deportation of EEA nationals was subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ('The EEA Regulations') which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.

28. By virtue of Regulation 23(6) of the 2016 regulations 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:

> (a) that person does not have or ceases to have a right to reside under these Regulations; or
>
> (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security, or public health in accordance with regulation 27; or
>
> (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

Regulation 27 of the EEA Regulations provides as follows: -

> '**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 concerned 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.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

...

(8) A court or Tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security, and the fundamental interests of society etc.).

SCHEDULE 1

29. CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

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.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present, and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as-"

(a) the commission of a criminal offence.

(b) an act otherwise affecting the fundamental interests of society.

(c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including-"

(a) entering, attempting to enter, or assisting another person to enter or to attempt to enter, a marriage, civil partnership, or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include-"

(a) preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area.

(b) maintaining public order.

(c) preventing social harm.

(d) preventing the evasion of taxes and duties.

(e) protecting public services.

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action.

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union).

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27).

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking.

(j) protecting the public.

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child).

(l) countering terrorism and extremism and protecting shared values."

The appeal before the Upper Tribunal:

30. Before the Upper Tribunal, the Secretary of State was represented by Mr Diwnycz Senior Presenting Officer and the appellant was represented by Mr Habte-Mariam, who had represented the appellant before the FtT.

The submissions:

31. Mr Diwnycz relied upon the grounds as drafted.

Ground One - Material Misdirection/Lack of adequate reasons in relation to the “imperative grounds” finding

32. It is submitted that the 10 year period is to be counted back from the date of the deportation / expulsion decision (17th December 2020) and not the date of the sentence of imprisonment as stated at [13]. The FtTJ has therefore erred in her consideration of the relevant dates.

33. It is submitted that the FtTJ has not conducted any assessment of the integrative links which are in principle broken by the escalating criminality and subsequent imprisonment.

34. 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. (From B/FV)

35. Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting 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. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken. (From MG)

36. Given that the FtTJ finds 'the incident was extremely serious, and it had a profound effect on the Police Officer involved' it is submitted that the FtTJ has erred in finding the appellant can rely on 'imperative protection.'

37. It is submitted that the appellant's criminal history started in 2004 and he has been involved in serious criminality, thereby significantly weakening and arguably breaking any integrative links. It is respectfully submitted that for these reasons the appellant cannot rely on 'imperative' protection which is not an absolute right.

38. The FtTJ has fallen into material misdirection by failing to assess the imperative grounds test adequately.

Ground Two - Lack of adequate reasons

39. While the FTTJ concludes the appellant is not a genuine present and sufficiently serious threat, the respondent contends that the FtTJ has erred by applying a higher threshold than applicable (imperative grounds). It follows that the assessment of genuine, present and sufficiently serious threat is infected by a material error of law and is, therefore, unsustainable.

40. In the written grounds, it is stated that the respondent wishes to establish the correct protection currently available to the appellant, which she considers is the medium level offered by Regulation 27(3). It is submitted that when this level of protection is applied, the appellant's conduct does warrant deportation.

41. It is submitted that the FtTJ has not considered that there is no evidence that the appellant has undertaken any rehabilitative work while in custody. Neither is there evidence that his family have previously been able to stop his criminality. At the time of the offence the appellant was separated from his wife and indicated that this separation and associated low mood contributed to the offending. At the hearing, the appellant claimed to have resumed his relationship with his wife, however the FtTJ did not accept this at [15]. It is therefore considered that the potential exists for the appellant to commit further offences in the future.

42. It is submitted that the FtTJ fails to consider that appellant has continued to offend without being deterred by a previous conviction. It is submitted that this indicates a lack of regard for the law, a lack of remorse, and a lack of understanding of the negative impact the offending behaviour has on others.

43. It is submitted that the appellant is only recently released on 26 March 2021, under the threat of deportation and therefore it is too soon to say that he has changed and is not a risk to the UK public.

Ground Three- Material Misdirection

44. It is submitted that the FtTJ fails to consider the prospects of the appellant's rehabilitation in Latvia. Reliance is placed on Dumliauskas [46], [52]-[53] and [59]: 'In respect of rehabilitation, it is not to be assumed that the Appellant's prospects are materially different in that other Member State in the absence of evidence.' Given the Appellant's age, work skills and relatively good health, it is submitted that he could find employment and accommodation and undertake his rehabilitation in Latvia.

45. Mr Diwnycz on behalf of the respondent relied upon the written grounds summarised above. Mr Diwnycz confirmed that respondent did not seek to withdraw that concession which was recorded in the FtTJ's decision at paragraph 12, however he submitted that on the dates given, the FtTJ could not have found that the imperative grounds test was met as it was broken by his imprisonment in 2019.

46. He further submitted that the FtTJ had not gone into the integrative links of the appellant or conducted the relevant assessment in law.

47. As to ground 2, Mr Diwnycz submitted that he did not know if any rehabilitative work has been undertaken with the appellant and the OASys report been completed on 14 August 2020.

48. As to ground 3, he relied upon the written grounds summarised above.

49. Mr Habte-Mariam on behalf of the appellant confirmed that he had not filed a rule 24 response. He submitted that he relied upon the FtTJ's initial refusal of permission and that even taking the date of 17 December 2020, it did not affect the substance of the FtTJ's decision and therefore was irrelevant.

50. He submitted that there was no material error of law in the decision of the FtTJ and that the judge had undertaken a careful analysis. In essence he submitted that the application is a disagreement with the conclusions that were reached and that the grounds failed to have regard to the facts of the case in context. He submitted that even by taking the date of 17 December 2020 given the history of the appeal set out between paragraphs 13 and 16, the appellant resided in the UK since 2004. Even if

the lawful residence had been broken, it did not mean that he cannot benefit from the length of his residence.

51. Mr Habte-Mariam submitted that the judge evaluated the case and made findings on integration, including the appellant's family circumstances and the sentencing remarks. He submitted the grounds gave the impression that there had been an escalation in his offending however it was a matter of record that he had a conditional discharge for shoplifting in 2004.

52. He further submitted that it is possible to look at the integrative links as set out in his history, his devotion to the children and his length of residence in the UK. Whilst he had a conditional discharge from 2004, there is only one serious offence which was considered by the sentencing judge to be out of character. The appellant was not a man receiving state benefits and had been in full-time employment. As to his language skills, he can speak English and maintains his employment in the UK. Therefore he submitted that there was no material misdirection in law.

53. Mr Habte-Mariam further submitted that the respondent was wrong to state that there was "escalating criminality" as there was no evidence of this. He submitted that at paragraph 17 of the FtTJ's decision the judge found that he had lawful residence and that he should benefit from the enhanced level of imperative grounds protection.

54. He further submitted that the FtTJ in the alternative had found at paragraph 20 that the appellant did not demonstrate a present and sufficiently serious threat, and therefore the respondent had not discharged the test under the medium level of protection

55. He directed the tribunal to paragraph 4 of the grounds and submitted that it was a misreading of paragraph 20 and that the FtTJ had not applied the wrong threshold as the judge had found on the evidence before her serious grounds did not apply.

56. In relation to the assertion that there was a lack of reasoning Mr Habte-Mariam submitted that relying on the decision of the Upper Tribunal in the VHR (unmeritorious grounds) UKUT [2014], it was not necessary for the FtTJ to refer to all of the evidence and the judge is required to make reasoned findings on the key issues, and this was what the FtTJ had done. The ground which asserted there was a lack of adequate reasoning mis -read the decision.

57. He submitted that the respondent argued that the judge had erred by applying the wrong threshold however this was a disagreement of fact and the judge had not applied a higher threshold.

58. Mr Habte-Mariam referred to ground 2 subsection 7 and submitted that it lacked substance and was not based on any evidence. The appellant had no previous convictions and what is said at subsection 7 was contrary to

the sentencing judge's remarks about his offence being out of character and that he was motivated to change.

59. As to ground 3, he submitted that the FtTJ had found at paragraph 19 that the appellant had a strong desire to look after his family and that he had seen the children every day. The judge gave adequate reasons for finding that the respondent had not shown a "present" threat and the decision of Judge Mensah should therefore not be disturbed.

60. Mr Diwnycz by way of reply submitted that it was not possible to infer the integrative links. He pointed to paragraph 15 and the factual finding made by the judge that he was a "devoted father" but his desire to reunify the family was not an integrative link. He submitted that if there had been links to his family it may have swung the decision in his favour, but his wife was not present in court, and this was an obvious failing.

Conclusions:

61. I am grateful for the submissions made by each of the advocates. I confirm that I have taken them into account and have done so in the light of the decision of the FtTJ and the material that was before her and the relevant legislative background.

62. Dealing with ground 1, under Regulation 27 of the Immigration (EEA) Regulations 2016 there are 3 tiers of protection open to persons facing deportation under the Regulations.

63. The present hierarchy of levels of protection, based on criteria of increasing stringency, is identifiable as:

    (1) A general criterion that removal may be justified 'on the grounds of public interest, public security or public health';

    (2) a more specific criterion, applicable to those with permanent rights of residence, that they may not be removed 'except on serious grounds of public policy or public security'

    (3) the most stringent criterion, applicable to a person 'who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision', who may not be removed except on imperative grounds of public security.

64. Which of those tiers applied was the first step in the decision undertaken by the FtTJ. The respondent in the decision letter considered the appellant's residence in the UK between paragraphs 12 – 16, and on the evidence presented did not accept that the appellant had lived and worked in the UK for the last 16 years. It was however accepted that on the basis of the decision dated 4 April 2017 and the documentary evidence the appellant had provided at that time, that he had been resident in the UK in accordance with the "EEA Regulations 2016" for a continuous period of 5 years and thus had acquired a permanent right of residence. The

respondent's position was that she did not accept that the appellant has resided in the UK for a continuous period of at least 10 years and the period of continuous residence that was accepted was taken to be from 1 January 2012 to 27 December 2019. As a result the respondent only gave consideration to whether the appellant's deportation was justified on serious grounds of public policy, the medium level threshold (see the decision letter at paragraph 16 and also the decision of the FtTJ at paragraph 12).

65. In her decision the FtTJ undertook an assessment of the appellant's length of residence and whether he met the imperative grounds threshold on the basis of the evidence before the tribunal. Between paragraphs 13 – 17 the FtTJ set out her analysis of the evidence. The FtTJ had a number of documents attesting to the appellant's work record and employment in the UK during the time of his claimed residence and the FtTJ also had the advantage of hearing oral evidence from the appellant as to his employment and residence in the UK since his arrival in 2004. The FtTJ concluded at paragraph 15 that she was entirely satisfied that the documentary evidence alone was sufficient to prove on the balance of probabilities that the appellant had been living and working at least since 2005 and he had been in United Kingdom continuously since he arrived in 2004. The judge also recorded that the presenting officer had not suggested that any of the documentary evidence was reliable. It is also right to observe that during this hearing the respondent does not seek to undermine or challenge those findings of fact.

66. At paragraph 16 the FtTJ set out her factual assessment on whether the appellant's residence in the UK was lawful in the context of the accession regulations as a result of his country of nationality, Latvia. Having set out the relevant regulations, the FtTJ concluded at paragraph 17, that she had no evidence regarding whether the appellant had sought registration between 2004 and 1 May 2009 however the judge found, "it is clear he was working from 2005 onwards. In the light of the evidence, I am satisfied the appellant was on the balance of probabilities lawfully resident in the United Kingdom for the relevant period 1 May 2009 through to 26 December 2019."

67. Crucially the FtTJ concluded "I find therefore he had 10 years lawful and continuous residence entitling him to have his deportation considered under the highest threshold of imperative grounds. As the respondent does not seek to argue the conviction meet that highest threshold his appeal succeeds."

68. As set out in the earlier part of this decision, the respondent challenges that finding on the basis that the FtTJ made a material misdirection in law by finding that imperative grounds had been established. In essence it is argued that the judge had erred in 2 principal ways; firstly that the 10 year period should be counted back from the date of the expulsion decision which was 17 December 2020 and not the date of the sentence of imprisonment as the judge had done at paragraph 13 and secondly, the

judge had not conducted any assessment of the integrative links which in principle are broken by criminality and subsequent imprisonment. The grounds cite parts of the directive taken from the decision in case C-400/*12 Secretary of State for Home Department v MG (Portugal)* EU:C: 201 4.9, [2014] 1 WLR 2441.

69. Notwithstanding the submissions made by Mr Habte-Mariam on behalf of the appellant seeking to uphold the decision of the FtTJ on her assessment, I am satisfied that the FtTJ erred in law.

70. 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; ..."

71. The case law makes clear that in order for an EEA national to have the benefit of the highest level of protection under Regulation 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).

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

73. On the accepted facts of this appeal the respondent accepted that the appellant established a permanent right of residence.

74. However whilst the FtTJ found that the appellant had had 10 years continuous lawful residence in the UK, it is not the case that once 10 years residence has established that deportation may only be justified on imperative grounds of public security. A person relying on imperative grounds of protection who has served a period of imprisonment has to satisfy both the 10 years continuous residence ending with the date of the expulsion decision and has been sufficiently integrated within the host state during that 10 year period.

75. For the purposes of 10 years continuous residence a period of imprisonment can break the continuity of an individual's residence such that they would not be able to rely on the protection from deportation on imperative grounds of public security.

76. 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.
>
> 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). "

77. 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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."

78. The CJEU concluded that the 10-year period counted back from the date of the expulsion decision.

79. Whilst the FtTJ was correct in her findings of fact that the appellant was continuously lawfully resident in the UK from 1 May 2009 until his imprisonment in December 2019 and therefore met the 10 year period, that was not the end of the assessment that she was required to undertake. In assessing the issue of whether the imperative grounds threshold applied, the 10 year period counts 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, which was 17 December 2020 the period of 10 years residence included a period of imprisonment from December 2019 to December 2020. The FtTJ was therefore required to undertake an assessment of his circumstances that existed prior to imprisonment, and adopting an overall assessment, whether those links were not broken by a period of imprisonment.

80. The appellant is able to establish a ten years' continuous period of residence since he came to the UK in 2004 based on the factual finding of the judge that his residence was lawful from 1 May 2009 prior to his imprisonment in December 2019. The issue the judge was required to assess was whether, by the time of the appellant's imprisonment, he was integrated into the UK and additionally whether, as a result of his imprisonment, that integration ceased and so the continuity of his residence was broken.

81. The appellant was in custody in December 2019 therefore there was a period of 12 months that occurred before the respondent’s decision on 17 December 2020.

82. 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;
>
> ...

83. (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
>
> (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".

84. Regulation 3(3)(a) states that "continuity of residence" is, in principle, broken by imprisonment but that is subject to reg 3(4). 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).

85. As a consequence, 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."

86. 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. "

87. FtTJ Mensah made no reference to the relevant Regulations and whilst that is not fatal, the judge also did not undertake that relevant assessment taking into account those factors to reach a conclusion on whether any integrative links that had been forged prior to imprisonment had been broken.

88. Consequently in her finding at paragraph 17 the FtTJ did not apply the correct legal test, nor did she carry out the necessary assessment as to whether the time of his imprisonment he was integrated in the UK and whether as a result of that imprisonment, his integration ceased so the continuity of residence was broken.

89. Whilst the FtTJ refers to the respondent's concession that the respondent "does not seek to argue the conviction meets that highest threshold" (at paragraph 17), this was a reference to the decision in in *R v Bouchereau* [1978] QB 732 and not the assessment of integration.

90. For those reasons, the respondent's grounds are made out and I am satisfied that the FtTJ erred in law. It might be said that the factual findings made within the body of the decision generally were relevant findings to the issue of integration, prior to the imprisonment as they concerned his level of employment and his family life. There was also evidence as to his conduct when in custody and thereafter. However, I accept the submission made by Mr Diwnycz that the FtTJ was in error in the calculation of the time and by failing to undertake the assessment that was necessary before reaching the conclusion that the appellant had established the imperative grounds threshold as she did at paragraph 17 of her decision.

91. However, the error is not material if the FtTJ properly considered the alternative basis as set out between paragraphs 18 – 20 applying the medium threshold applicable of "serious grounds" and her assessment of whether the appellant represented a genuine, present and sufficiently serious risk was properly undertaken by her. This requires consideration of ground 2.

Ground 2:

92. Ground 2 relates to the assessment as to whether the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (set out in Regulation 27 (5) (c) of the EEA Regulations 2016).

93. The grounds asserts that the FtTJ's decision in relation to the Regulation 27 (5) (c) test is lacking adequate reasoning. Mr Diwnycz on behalf of the respondent did not seek to add to the matters set out in the written grounds when addressing this ground.

94. The 1st point relied upon by the respondent is that while the FtTJ concluded that the appellant is not a genuine, present and sufficiently serious threat, it is contended that the FtTJ erred in law by applying a higher threshold than applicable (imperative grounds) and therefore the assessment is infected by material error of law and is therefore unsustainable (see paragraph 4 of the grounds).

95. Contrary to paragraph 4 of the grounds, the FtTJ did not undertake her assessment by applying the higher threshold of imperative grounds. This is clear from her decision at paragraph 13 where the FtTJ had regard to the issues before the tribunal that if the appellant could not establish that he met the imperative grounds threshold, by reference to his lawful residence of that period, "then he falls back on the serious grounds test". This reference can only refer to the 2nd and medium level of protection as it is common ground that the appellant, even if he could not establish the highest threshold, he had a permanent right of residence and therefore the medium level would apply in the alternative.

96. Furthermore, after the FtTJ had conducted her assessment of whether the higher threshold applied, the judge then proceeded to consider the appellant's appeal on the alternative basis "for sake of completeness" and turned to the question set out in Regulation 27 (5) (c). Between paragraphs 18 – 20 (wrongly numbered by the judge as paragraphs 14 – 16), the FtTJ set out her assessment of that issue. When reading those paragraphs there is nothing to suggest that the FtTJ was applying the "higher threshold" when undertaking the assessment in accordance with the issues as identified at paragraph 13.

97. Paragraph 5 of the grounds states "the respondent wishes to establish the correct protection available to the appellant which he considers is the medium level offered by Regulation 27 (3) and when this is applied the appellant's conduct warrants deportation". That paragraph of the grounds does not identify any error of law and amounts to no more than a statement of disagreement.

98. Turning to the substance of the grounds, it is submitted that the FtTJ failed to consider that the appellant had not undertaken any rehabilitative work in custody, and the family had not been able to stop his criminality and that there was potential for the appellant to commit further offences.

99. The FtTJ was plainly aware of the circumstances of the appellant's offence. She set out in full the sentencing judges remarks in her decision at paragraph 4. At paragraph 5 she set out her assessment that this was an extremely serious incident and that it had a profound effect on the police officer involved. The FtTJ had regard to the maximum level of sentence, and she found that "given the seriousness of the offence there is absolutely no doubt in my mind the respondent has shown the offence that has the potential to meet the test for deportation. That in my view must be right given the length of sentence and the circumstances in which a British police officer was confronted with a man he believed had a loaded gun and forcing the officer to discharge his own weapon. There are clear public interest considerations. I identify those as where the conduct of that person is likely to cause, was in fact cause, public offence, protecting the rights and freedoms of others, protecting the public and protecting shared values. It is also based exclusively on the appellant's conduct and the conduct that has been considered and decided by a criminal court to a higher standard of proof. I recognise the concept of general prevention does not justify deportation." That was in accordance with the schedule to the Regulations.

100. The FtTJ set out her assessment of Regulation 27 (5) (c) between paragraphs 18 – 20 (as renumbered). She again returned to the seriousness of the conviction and properly reminded herself that she was required to satisfy herself that the appellant is a "present threat" (see paragraph 18) which is the correct test.

101. When looking at the relevant law, Regulation 27(5) (c) requires that the decision to expel the appellant must be based exclusively on his personal conduct and such conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The onus is placed on the respondent to establish such a serious threat and the standard to be applied is the civil standard (see Arranz (EEA Regulations-deportation – test)[2017] UKUT 00294 (IAC) at paragraph [81]). That the burden of proof lies on the SSHD has recently been accepted by the Inner House of the Court of Session in *SA v SSHD [2018] CSIH 28*. The person concerned must also be a present threat, Orphanopoulos and Oliveri v Verwaltungsgericht Stuttgart, [2004] ECR 1999 and previous convictions are relevant:

> "*Only insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy*".

102. Thus the FtTJ was required to be satisfied that the appellant is a present threat to the interests of society, and so his past record is not in itself sufficient (see B (Netherlands) v SSHD [2008] EWCA Civ 806,[2009] QB 536 at paragraph [16]). Therefore when considering whether serious grounds exist, focus is to be placed upon the propensity of the individual to reoffend rather than the issues of deterrence or public revulsion, which have no part to play in the assessment (see decision in Secretary of State

for the Home Department v Straszewski [2015] EWCA Civ 1245, [2016] 1 WLR 1173.

103. The grounds do not assert that the FtTJ applied the wrong legal test when undertaking her assessment under the relevant Regulation but that the FtTJ gave inadequate reasons for her conclusions.

104. The assertion in the grounds at paragraph 7 that the judge should have found that the appellant had continued to offend, and this indicates a lack of regard for the law, a lack of remorse and a lack of understanding of the negative impact the offending behaviour has on others, runs counter to the sentencing judge's remarks and the evidence in the offender managers' report. The FtTJ expressly engaged with this evidence in her assessment.

105. In reaching her overall conclusions, the FtTJ had regard to the measurement of his inherent risk of reoffending, as set out in the OASys report, and the measures to be put in place on release to facilitate his rehabilitation.

106. The FtTJ began her assessment by stating "does the evidence show a present threat?" The FtTJ undertook her assessment of the evidence stating, "I have considered this evidence (of threat) very carefully."

107. As can be seen from her decision, she had regard to the evidence that the appellant had a single spent conviction for shoplifting in 2004 and that in the period between that and the index offence, the appellant had been described as a "law-abiding person". He had been a family man who had worked consistently throughout and that his behaviour was deemed "out of character." That assessment made by the judge was based on the evidence taken from the sentencing judge's remarks who dealt with the appellant on the basis of his good character where he stated, "you are a man of good character" and later stating "I treat you as a man of good character" and referred to the period of his life prior to the index offence and that "you developed into a law-abiding citizen." The sentencing judge also had the benefit of a number of character references (as did the FtTJ as set out in the bundle) attesting to his character and conduct and that the behaviour in relation to the index offence was "out of character." The judges sentencing remarks also took this into account by concluding that the offence was "totally out of character."

108. As Mr Habte-Mariam submitted the grounds appears to read that the appellant had been an offender whose offending had escalated or there had been persistent offending but that was not the position on the evidence before the FtTJ. The FtTJ's finding on his previous good character was also supported by the evidence from the offender managers updated risk assessment dated May 2021 which the FtTJ afforded weight to. The probation officer had prepared the report as the appellant's offending manager and having known the appellant for a period of 8 months. The offender managers evidence was that the appellant presented as a "hard-

working family man who had made an honest yet costly mistake." She assessed the appellant as being a "very polite honest man who showed remorse for his actions and behaviour both of which he genuinely regrets." This was also evidenced in the updated OASys's report attached to the offender's manager statement dated May 2021 (see page 11 onwards AB).

109. Contrary to the grounds at paragraph 7 the FtTJ did not fail to consider or take into account his previous conviction of shoplifting but properly addressed this in the factual context of his conduct between that offence and the index offence.

110. Furthermore the grounds mis state the evidence as to the appellant's view of his offending. The most recent probation officers evidence and the OASys's report refers to the appellant's genuine remorse and his understanding of the impact of the offence.

111. As to the assessment of risk undertaken by the FtTJ, she was plainly aware that he had not engaged in courses involving alcohol abuse and set this out at paragraph 18. However it was open to the FtTJ when assessing the risk of reoffending overall that she accepted his evidence that he had been completely abstinent since the offence and the evidence contained in the offender managers' report as to his conduct both in prison and upon release. The offender manager had reported that whilst in custody the appellant had complied with all areas of the regime and completed courses in respect of his education. The offender manager also referred to the appellant having engaged very well with all the requirements and attended all appointments sent to him. The offender managers evidence was "I have no concerns over his engagement with myself, I have already reduced his reporting from fortnightly to monthly."

112. Whilst the appellant had not started any courses in prison, the offender manager referred to courses identified to be undertaken during his future supervision including that relating to alcohol use.

113. The FtTJ also addressed the issue of his relationship with his wife. Having heard the appellant's evidence and having read the evidence contained in the OASys's report, the offender managers' report and the written letter from the appellant's wife, the FtTJ accepted that whilst he had a strong desire to reunite with her, this had not occurred. However the FtTJ was entitled to accept his evidence that notwithstanding the lack of the subsistence of the marriage that he "spent a considerable time at home with his wife as he saw the children every day and so spends time with his wife in that context." The FtTJ found on the evidence that he had a strong family life and that he had strong ties with the children as accepted by the sentencing judge and that this "subsists."

114. When considering his past conduct and his social and family circumstances, the FtTJ's conclusions on the evidence were set out at paragraph 19 and that "there is nothing before me to suggest that the appellant's behaviour and lifestyle choices at the time of the offence has

subsisted, he has resumed employment and is helping support his children. There is nothing before me to suggest any negative factors in his behaviour, lifestyle and engagement."

115. Those findings were reasonably open to the FtTJ on the evidence before her the including the evidence contained in the offender managers' report who confirmed his level of engagement and that he had quickly re-established employment upon his release and had been resumed his life in society.

116. The grounds challenge the FtTJ's assessment that the appellant had only been released on 26 March 2021 and that he was under the threat of deportation and therefore it was too soon to say that he had changed. However neither the grounds nor the submissions made at the hearing has the respondent sought to challenge the evidence and the assessment made by the offender manager. The FtTJ was entitled to place weight and reliance on the offender managers' report given that she had worked with the appellant for eight-month's and since his release and had undertaken regular and detailed contact which had been deemed successful so that the reporting had been quickly reduced. The FtTJ was entitled to place weight on the professional evidence of the probation officer.

117. Whilst the grounds are paragraph 8 refer to his recent release in March 2021, the FtTJ heard the appeal in March 2022 which is one year after his release. It is correct that by the date of the hearing he had not completed his sentence, but the FtTJ was entitled to consider the evidence as to risk of reoffending and her conclusions as at the date of the hearing and that the position had not altered since the offender managers evidence.

118. The assessment made of risk of reoffending was one that was reasonably open to the FtTJ to make. The FtTJ took into account his engagement with the probation service since his release, his behaviour and lifestyle, his resumption of employment and the continuing maintenance of the children. It was open to the judge to find on the evidence that we nothing before her to suggest the appellant's behaviour, lifestyle choices at the time of the offence subsisted and that there were no negative factors in his behaviour, lifestyle and engagement.

119. The FtTJ had proper regard to the measurement of his inherent risk of reoffending set out in the offender managers' report, the measures in place to facilitate his rehabilitation and was entitled to place weight on the offender managers' report which was written from a professional assessment relating to this particular offender. The conclusion in that report was that it was highly unlikely that he would commit further offences and assessed the appellant as being at a low risk of reoffending. The offender managers' report stated, "it is also my professional opinion that the appellant is a genuinely hard-working man who made a mistake, one I very much doubt he will be likely to make again."

120. In the circumstances the FtTJ was entitled to place weight on that evidence in assessing the risk of reoffending and this was a factual evaluation supported by the evidence and also explained by reference to that evidence.

121. The respondent's grounds as drafted are a "reasons "challenge. Where that is advanced there are two bases upon which the case can be made. Firstly, based on where the reasons are inadequate so that it is not possible to understand the judge's conclusion and do not show that he properly engaged with the relevant issues including the evidence (see decision in Budhathoki (reasons for decision) [2014] UKUT 00431. The Court of Appeal stated in English v Emery Reimbold and Strick Ltd [2002] EWCA Civ 605 at [16]:

> "justice will not be done if it is not apparent to the parties why one has won and the other has lost." Secondly, the reasons given do not rationally support the conclusion or findings reached.

122. The grounds relied upon by the respondent fall into the first category, i.e., a "reasons challenge." However, the FtTJ did give adequate reasons as explained above and it cannot be said that it was unclear why the FtTJ found in his favour.

123. As set out in the decision of SSHD v Straszewski [2015] EWCA Civ 1245 at paragraph [25], it required an evaluation to be made of the likelihood that a person concerned would offend again and the consequences if he did so. 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 required the decision maker to balance the risk of future harm against the need to give effect to the right of free movement. This was the evaluation carried out by the FtTJ.

124. In summary and in my view, the judge took into account all of the relevant factors including the seriousness and nature of the offence and evaluated the appellant's propensity to reoffend taking into account the probation officers report. The judge was rationally entitled to reach the view that the appellant did not pose a genuine present and sufficiently serious threat.

125. I remind myself I can only interfere with the decision of a judge if it has been demonstrated that there was an error of law. The question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis.

126. As also stated in the decision of Straszewski, in any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions.

127. The respondent did not seek to assert that the decision of the FtTJ was irrational. The test of irrationality is a high one and requires a tribunal to be satisfied that no reasonable tribunal properly directing itself could have reached the conclusions or findings challenged.

128. The fact that a tribunal has reached what might be characterised as a generous view, for example in striking the balance between the public interest and individual circumstances does not in itself necessarily establish an error of law.

129. Whilst a different judge may have reached a different conclusion as to whether he was a present threat, I am satisfied that the judge did consider the Regulations correctly and made a careful assessment of the evidence.

130. Dealing with ground 3, there is no error of law in the decision of Judge Mensah based on paragraph 9 of the grounds. As the FtTJ's finding as to the conduct of the appellant did not represent a genuine, present and sufficiently serious threat which was a prerequisite for the expulsion measure, it is only on such a threshold being established, that the issue of proportionality arises.

131. For those reasons, whilst the FtTJ erred in law in her assessment of the issue of whether the appellant met the highest threshold, such error was not material to the decision reached as the FtTJ considered the appeal on the alternative basis applying the medium level threshold and properly addressing the regulation 27 (5)(c) test and gave adequate and sustainable reasons for reaching the conclusion that the respondent failed to show that the appellant is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Decision

The decision of the First-tier Tribunal did not involve the making of a material error on a point of law; the appeal of the Secretary of State is dismissed and the decision of FtTJ Mensah allowing the appeal shall stand.

Signed Upper Tribunal Judge Reeds
Dated : 13 January 2023