



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: DA/00290/2019**

Appeal

THE IMMIGRATION ACTS

**Heard at Field House
On the 15 February 2022**

**Decision & Reasons Promulgated
On the 29 March 2022**

Before

**THE HONOURABLE MRS JUSTICE ALISON FOSTER DBE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE BLUM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAXSIMS BOIKOV

Respondent

Representation:

For the Appellant: Mr. T. Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr. A. Boyd, Temple and Co Solicitors, Glasgow

DECISION AND REASONS

ISSUE

1. This is an appeal by the Secretary of State for the Home Department (“SSHHD”) against a decision of the First-Tier Tribunal (FTT) promulgated on 26 August 2021. The FTT allowed the Applicant’s appeal against the SSHHD’s decision to deport him dated 29 November 2018, supported by supplemental reasons in letters of 3 September 2019 and 30 June 2021.

2. The Respondent to this appeal is a national of Latvia who was born on 13 November 1999. Following conviction for grievous bodily harm and other violence and drug-related offences committed between April and November 2017, the SSHD made the removal decision under challenge. The Respondent, who was aged 17 and just 18 at the time of the offending was sentenced to 14 years in a Youth Offenders' Institution ("YOI").
3. The issue before the judge below was the applicability of the Immigration (European Economic Area) 2016 Regulations ("the Regulations") to the facts of the case and in particular Regulations 23(6)(b) and 27, governing protections from deportation for EEA nationals. The judge decided, notwithstanding the seriousness of the Respondent's offending, that his removal was not justified on imperative grounds of public security.
4. The SSHD argues that errors of law were made in the decision of the judge of the First-Tier Tribunal which require this tribunal to set aside the determination. She challenges the findings that the Respondent was entitled to "imperative grounds" protection for removal and challenges the FTT's finding that the SSHD could not show he should nonetheless be removed. She raises an alternative case that the finding that removal was disproportionate also evinced an error of law. Her case is that the conclusions reached by the FTT on the evidence were not open to the judge, were inadequately reasoned, and inconsistent with case law.

FACTUAL BACKGROUND

5. As the judge recorded, there was little dispute as to the relevant facts. Given the SSHD's perversity challenge, it is important to record them carefully, as the judge did.
6. The Respondent was born in Latvia on 13 November 1999 moving to the UK with his parents and siblings in about 2004 or 2005 and acquiring a right of permanent residence. He obtained some qualifications at school including a BTEC and NVQ level I and had worked for a short period of time; but, as the FTTJ put it "*after that spent his time dealing drugs*". In 2017 the Respondent "*set about a course of serious criminal offending, committed in the context of violence between two gangs of drug dealers operating in and around Bedford.*"
7. The Respondent's first offences, when he was 17½, were 3 counts of possession of a class A drug with intent to supply, and a failure to surrender to bail. They were the subject of a twelve month referral order in each case. This offending took place in April and June 2017, although it is fair to record, as did the judge, that the Crown Court found likely drug involvement during 2016.
8. The Respondent has not been at liberty since about 23 November 2017 following his arrest.
9. He was convicted as set out above of the initial offences committed in April 2017. The most serious offence was committed next, on 17 June

2017, although it did not come to trial until January 2019. He stood trial in the meantime, in April 2018, for offences committed in November 2017 and on his plea of guilty to GBH and other offences relating to drugs, the Respondent was sentenced to 20 months detention. The judge set out the following description of that offence from the OASys Report of 6 August 2019:

“At approximately 2:30 PM, the victim ... was walking with his partner along Nicholls Road. A vehicle passed him slowly and he recognised Mr Boikovs as the driver. He knew him, as Mr Boikovs had an issue with him as he blamed him for being the offender in a robbery that he was a victim [of] earlier that year. [The victim] was aware Mr Boikovs talked about him as a “dead man walking”. [The victim] stated that as the vehicle passed he [saw] gun signs made at him. He felt threatened and told his partner to walk off, but she refused. The vehicle came to a stop and reversed quickly. Mr Boikovs then drove at him and he fell onto the bonnet. He next recalls waking up on the floor with the car gone. He attended the hospital later that day due to the pain he was in. He sustained broken bones on his left foot, a graze to his right temple, bruised his right hip, lump to his head and grazes to his right arm.”

10. On 21 January 2019 the Respondent was convicted of the most serious offences: violent disorder, wounding with intent to do grievous bodily harm, and possession of a bladed article. The judge set out details of the offences from the presentence report thus:

“... The case relates to a number of violent assaults between two distinct groups of drug dealers who are all from guns and gangs backgrounds. The offences are extremely violent in nature and include a number of GBH knife and machete attacks, one of which almost severed the hand of a 16-year old male. This then escalated to the shooting of a rival gang member along with a relative who fled to avoid potentially fatal injuries. Mr Boikovs and Mr Romain are associated with the group A according to the prosecution documents, which operated as the Mild Road gang. The Group C was the Kempston Block gang... The events of 17 June 2017 were described as a reprisal attack by Group A on Group C for [a previous attack]. At about 7:45 PM that day Mr [B] sustained a serious injury to his left hand/wrist, which is described as a life changing injury. CCTV from Hawkins Road, Bedford shows two males identified as Mr Boikovs and Mr Romain entering Hawkins Road and walking towards Elstow Road. Minutes later they are seen running back out of Hawkins Road, Mr Romain having a conversation on his phone and Mr Boikovs holding what appears to be a machete.”

11. The judge reflected that the victim was a 16-year-old, and it appeared not to have been established whether Mr Boikovs or Mr Romain, who was some years older, inflicted the machete injury: they were convicted on the basis of a joint enterprise. The judge referred *in extenso* to the trial judge's sentencing remarks and the "*toxic combination of gang association, the use of knives or guns in the furtherance of their rivalry, and fuelled by the drug trade*" as a "*blight upon life in this country*". Although gang activity was denied, including by the Respondent, the Crown Court judge was sure this was gang activity and found that the Respondent and Mr Romain were working together as drug dealers within a wider organised structure over a fourteen-month period. The trial judge's comments made clear the use of a machete was no less serious than the firing of a shotgun because it put somebody's life in imminent danger: the victim had grievous injuries that could not be overstated. It was clear that the comments concerning the older co-defendant, Mr Romain, applied also to the Respondent. Because of his youth, a sentence of 14 years detention in a YOI was passed as stated, 4 years for violent disorder and 12 months for possession of a bladed article, which sentences were concurrent. The Crown Court judge held the criteria for an extended sentence were met but because of the age of the Respondent, did not impose one. Mr Romain, an adult, was additionally given a 3 year extended sentence, receiving a total of 18 years imprisonment.
12. The Respondent did not reply to an invitation to make representations against deportation sent by the SSHD in June 2018. By her decision of 28 November 2018 the SSHD determined pursuant to Reg 23(6)(b) of the Immigration (European Economic Area) 2016 that the Respondent should be deported on grounds of public policy and public security. The Deportation Order was dated 3 May 2019. When the Secretary of State for Justice indicated he was considering an application, now, to transfer the Respondent to a prison in Latvia, the Respondent did make representations, indicating the length of time he had been in the UK, that he did not speak Latvian and that he had no family there. An appeal was lodged, and further reasoning was advanced by the SSHD in support of the removal.
13. The SSHD considered the Respondent's case within the framework of the Regulations. In essence, whilst accepting the Respondent had a right of permanent residence in the UK, at that stage the SSHD did not accept the fact of his residence here for a continuous period of ten years and disputed that the Respondent was entitled to the highest level of protection, even if he could show 10 years in the UK. She decided he posed a genuine, present and sufficiently serious threat to justify deportation by reference to serious grounds of public policy and public security, and his deportation was proportionate given the fact that as a 19-year-old Latvian he was young enough to readjust to life in that country.
14. The SSHD later accepted, after representations, that the Respondent had been resident for at least 10 years before his offending but did not accept he should be accorded the highest level of protection. She did not accept

he was, during that time, integrated socially and culturally into the UK at the time the removal decision was made. She also determined that, were she wrong, it was still proportionate and lawful to remove him even if he had a right to the highest level of protection.

LEGAL FRAMEWORK

15. The SSHD's decision was made under regulations which take effect pursuant to the UK's obligations under EU Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Three levels of protection from deportation exist for EEA nationals. Any EEA national with the right to reside in the UK may only be removed on grounds of public policy or public security (Reg 23(6)(b)). A decision to deport may not be taken to serve economic ends (Reg 27(2)) and it must be proportionate; see Reg 27(5)(6) where other requirements are also set out. These provisions encapsulate the lowest level of protection. Where an EEA national has resided in the UK "for a continuous period of five years" a right of permanent residence is acquired (Reg 15(1)), which brings with it the protection of Reg 27(3). This "serious grounds protection" is the medium level afforded to an EEA national and requires the SSHD to show that serious grounds of public policy and public security exist in order to justify a removal. The highest protection is afforded to an EEA national who has resided in the UK "for a continuous period of at least 10 years prior to the relevant decision". Consistently with the provisions of Reg 27(4), the SSHD may only remove such an EEA national "on imperative grounds of public security". "Residence" nominally for 10 years or over may however be severed or is vitiated by behaviour demonstrating that social integration has ceased. See *Land Baden-Wurtemberg v Tsakouridis* (Case C-145/09) [2011] 2 CMLR 11 at [33]; *Secretary of State for the Home Department v Jacek Staszewski* [2015] EWCA Civ 1245; *CI (Nigeria) v State for the Home Department* [2019] EWCA Civ 2027; *Pl. v Oberburgermeisterin der Stadt Remscheid (Freedom of movement for persons)* (C-348/09) [2012] QB 799; and *Hafeez v Secretary of State for the Home Department* [2020] EWCA Civ 406.
16. The Regulations have now been repealed but no issue arises in this case on that fact.
17. The relevant provisions in the Regulations are as follows:
 - 27.— Decisions taken on grounds of public policy, public security and public health*
 - (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 a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

...

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

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

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

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

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

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

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

(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.)."

18. Schedule 1 provides materially:

"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.

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.

...

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 DECISION AND THE CHALLENGE

19. The judge set out the Respondent’s offending and, recognising that there was also a human rights appeal under the Nationality, Immigration and Asylum Act 2002 to be decided, with reference to s.117C of the same Act, reflected that the approach to that matter required showing “very compelling circumstances” which would render his removal disproportionate. The judge indicated that if the Respondent lost his

appeal based upon the Regulations which required assessment of the Reg 27 matters and proportionality, the court would inevitably decide the human right's appeal against him. By the same token, a positive decision on the one issue would constitute a positive decision on the other. No challenge was made, in our view correctly, to the judge's approach to this issue.

20. The decision identified as issues first, the dispute between the parties as to the effect of the Respondent's residence - now admitted by the SSHD to be over 10 years in length, but not accepted as a 10-year period of integration that could support the highest level of protection requiring imperative grounds. Secondly, whether a genuine, present, and sufficiently serious threat was shown by reference to the Respondent's personal conduct affecting one of the fundamental interests of society.
21. Although some complaint was made by the SSHD of this analysis we find nothing in that complaint: this was an accurate description of the issues arising before the FTTJ.
22. The FTTJ began by noting it was unusual that the SSHD had assessed the Respondent for removal at the start of his sentence. This arose because of the proposal for transfer to Latvia; it was not a concern of the Tribunal and did not form part of its operative reasoning. In considering the issue of integrative links forged with the UK, the FTTJ listed the relevant factors to be considered including age, health, family, the economic situation, length of residence and so forth citing *C I (Nigeria) v SSHD* [2019] EWCA Civ 2027 in which Leggett LJ at [57] - [62] made statements of general principle regarding Article 8 (1) ECHR which are of relevance to the Reg 27(6) considerations of social and cultural integration. He referred also to *SSHD v Viscu* [2019] EWCA Civ 1052.
23. In our judgement no issue may properly be taken with the manner in which the judge set out the relevant principles from the authorities and he listed the material parts of the recent CJEU consideration in *B v Vomero* [2019] QB 126, as follows:

"29. In the joined cases of B and Vomero [2019] QB 126 the CJ EU held that, in order to determine whether imprisonment has broken the integrative links previously forged with the host Member State, it is necessary to carry out an overall assessment of the situation at the time the question of expulsion arises (here, the removal decision). The several considerations specified at [72] - [75] as relevant to that assessment can be listed as follows:

(a) The more solid the integrative links - including from a social cultural and family perspective to the point where for example, the person concerned is generally rooted in society - the lower the probability that a period of imprisonment could have resulted in those links being broken;

(b) Also relevant is the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which it was committed, and secondly, all relevant factors as regards the behaviour and attitude of the person concerned during the period [of] imprisonment which may reinforce that disconnection or, conversely help to maintain or restore links previously forged with a view to future social reintegration;

(c) The individual's social rehabilitation 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."

24. The judge referred to the passage at [50] in *SSHD v Viscu* [2019] EWCA Civ 1052 in which Flaux LJ explained that offending by a child or young person may be less indicative of a rejection of societal values and that the nature and purpose of detention is less disruptive of integration in such a case than in the case of an adult offender. He indicated, correctly, that these were matters to be taken into account in the overall assessment of the situation of the offender. He further referred to Reg 27(6) and each of the factors required to be weighed and considered thereunder.
25. No particular issue is taken by the SSHD with the judge's analysis of the jurisprudence. In our judgement, none could be. The FTTJ fairly set out the applicable principles and those parts material to the decision before him. A general complaint is made that the judge did not apply the case law, but without reference to any particular approach to a case or its principles. We understand this complaint to be that whilst correctly setting out the principles, the judge did not apply them correctly because, had he done so, only one result could have eventuated.
26. The SSHD argues before us that the errors of law evinced by this decision are:
 - (a) the FTTJ's finding that the Respondent was entitled to imperative grounds of protection was not rationally available to him, similarly
 - (b) the finding that imperative grounds were not made out was irrational, in the alternative
 - (c) even if imperative grounds had existed the deportation would have been proportionate.
27. A further allegation of error of law is couched in terms of a failure to give adequate reasons for the first decision on integration.

1. IMPERATIVE GROUNDS OF PROTECTION?

28. The SSHD argued before the FTTJ that the Respondent's integration had been broken by his criminal and antisocial behaviour, and his subsequent imprisonment. The FTTJ noted that the earliest time there was a reason to suspect criminal/antisocial behaviour emerged from the sentencing

remarks of the Crown Court judge who referred to 14 months before the Respondent's arrest at the end of November 2017, in other words two months before the appellant's 17th birthday. He noted there was no actual evidence of criminal offending until April 2017 but took into account that it must have taken root by the end of 2016. He concluded that a very strong degree of cultural and social integration was inevitable given the fact that the Respondent came to live in the UK when he was about five years old, possibly less, and had received all his education including further education here. He concluded, in our judgement rationally, that the formation of his social identity took place entirely within the UK. All the Respondent's wider interactions (outside of his family with whom he did speak some Russian) were English, made in Bedford, in the UK and the associated cultural influences. The judge had an opportunity to hear the Respondent in person and commented that anyone listening to him but would assume he came from Bedford. These observations came after the FTTJ had set out the material passage in *CI (Nigeria)* in which Leggett LJ spoke in paragraph [58] of the importance of:

"... familiarity and participation in shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging."

29. A body of information was before the FTTJ including a psychiatric report by a Dr Aigbogan dated June 2021 and a statement from the respondent's mother, and the OASys Report dated August 2019 upon which the SSHD had relied in making the decision under challenge. The Respondent gave evidence in person in English (stating that he does not speak Latvian).
30. The judge, nonetheless, and as invited to by the SSHD, subjected to close scrutiny what the Respondent had said both in court and in other circumstances, some of which he just did not accept: for example, he had given an excuse (when it suited him) to the effect that English was not his mother tongue - whereas he was a fluent and confident English speaker. This was a "poorly thought out self-exculpatory lie", and the judge exercised caution in accepting evidence from the Respondent which was not otherwise corroborated.
31. Taking the SSHD's submissions into account, the judge was however of the view, on the balance of probabilities, that the Respondent had no family or connections in Latvia: the evidence on that issue was consistent through the documentation and both from himself and his mother. His full-time school attendance as well as his life in general indicated he had not spent significant time outside the UK during his childhood. This, together with the Respondent's family life, had led the FTTJ to conclude that the Respondent had forged extremely strong integrative links to the UK both in the sense set out by Leggett LJ and applying considerations required in the EU context (see paragraph 33 of the decision).
32. The FTTJ then gave an unflinching description of the "sudden and dramatic" descent into antisocial and criminal behaviour in 2017 reflecting

the seriousness of the initial drug offences. Exploring the evidence as to why, as the judge put it, his life took that turn, he referred to a psychiatric report of June 2021. That report recalled that the Respondent said he “grew up as a good person” and did well at school but got into the habit of smoking weed at a friend’s house where the friend and his mother both smoked. That friend introduced him to a drug dealer, although he had had a job, he could not afford it and so got into drugs dealing. The judge observed that parts of the explanation he gave to the psychiatrist was quite at odds with the finding of guilt against him. The FTTJ regarded him as minimising his responsibility and an unreliable witness; further, contrary to his own version to the psychiatrist, he was a gang member who did not act under coercion but willingly involved himself in criminality. In several carefully reasoned paragraphs the judge assesses the deleterious effect of the Respondent’s serious offending and recognised that the Crown Court judge was entitled to impose the severe sentence of 14 years.

33. The FTTJ found it difficult to see how the act of violence could sever the many aspects of social and cultural integration, as per *CI (Nigeria)*, but recognised that there had in fact been a rejection of the social and cultural values of the UK and he recognised the intrinsically anti-social character of a drugs offence by reference to the Regulations.
34. The judge carefully assessed, as case law obliges, the “balance sheet”. The factors mentioned above and matters flowing from the trial were put on one side. On the other side, he placed the age of the appellant and the evidence he had behaved himself in prison and reflected again on the caselaw. When assessing whether the fact of the offences in prison had destroyed the very strong integrative links that had been formed by the time of the offending, [i.e. between the age of five and the end of his 16th year], he declined to accept that that had been shown.
35. Mr Melvin submitted the FTTJ had erred in his assessment of integration which does not simply consist of presence in the country and going to school. It had not been shown what contributions to society the Respondent had made. He suggested the judge’s decision was inconsistent with the case of *Viscu*, where the CJEU made clear a custodial sentence indicates a rejection of societal values. His case was the offending, and the sentence destroyed the claim to “imperative grounds protection” despite the length of time in this country.
36. We incline to the view that requiring a “contribution” from a child between the ages of five and 16/17 in order to establish integration in society is not mandated by the authorities and is, in any event, unrealistic. The case of *Viscu* is not authority for the proposition that every custodial sentence represents a rejection of societal values that severs integration. In any event the judge himself concluded that there was evidence here that suggested some rejection – but the point here was the overwhelming strength of the years from 5-17 and his English cultural and social dimension.

CONCLUSION ON PROTECTION IMPERATIVE GROUNDS

37. The challenge to the finding that imperative grounds were required to support the removal in this case was fundamentally advanced as a challenge to the exercise of the FTTJ's discretion. The law was impeccably set out, and its principles properly applied. We are unable to conclude that no reasonable FTTJ could have come to the conclusion that this was a case requiring the highest level of protection. This EEA citizen had come as a very young child to the UK and received all his schooling and experienced all his family and private life here. It was in our judgement clearly open to the judge to hold that the sudden, extreme bout of serious offending was insufficient to sever or destroy the 11 years in which the Respondent had become, otherwise, wholly integrated. Whilst the SSHD did not share the FTTJs assessment, that is very different from concluding that a different view is perverse. It is important to emphasise that (on trite public law principles), the existence of a differing and rational alternative view is not evidence that the decision maker's conclusions evinced an error of law. There was clear evidence to support his conclusions, and in hesitating to find a break in integration in a young offender, the FTTJ followed well-established high authority.
38. Furthermore, in our judgement, the decision is in no way un-reasoned, the judge clearly and carefully set out his reasoning process and fairly put into the balance in unsparing detail the striking factual matters which the SSHD canvases before us in order to support her perversity challenge. The factors which supported his decision are similarly set out as stated. The case of *Viscu* is clear support for the proposition, reflected in the reasoning in the judgment, that offending by a young person may be less indicative of a rejection of the values of society than otherwise.

2. IS THE IMPERATIVE THRESHOLD REACHED?

39. The SSHD challenges the judge's conclusion that she had not shown imperative grounds for maintaining the removal of the Respondent. This also represents a perversity and/or reasons to challenge the FTTJ's conclusion. The SSHD points to the material before the judge including the sentencing judge's views that the criteria for an extended sentence under statute had been reached, as connoting a view that there was a significant risk of serious harm by the commission of further offences to members of the public (whether a specific person or persons, or generally). The SSHD referred before us to the Dangerousness Assessment before the court, which tied the risk of a continuation of offending behaviour to the Respondent's association with drug and gun gangs. The SSHD asserts in her skeleton argument the FTTJ was bound by the opinions of others before the court, including the OASys Report which assessed the Respondent as a medium risk of reoffending with a high risk of harm to known individuals (the gang) and a medium risk to the general public. In our view, all of the evidence fell to be considered by the judge; he was not compelled to accept the conclusions reached by others. He

was, rather, obliged in law to give expert and reliable evidence due respect given the expertise and/or special knowledge on which it was founded. In our judgement he did precisely this. However, his was the task of weighing it and assessing it and the overall picture before him.

40. Mr Melvin for the SSHD submitted that given the gang involvement was deliberate and voluntary and that it appeared that since school the Respondent had concentrated on drug dealing, the FTTJ should have given “more weight” to these factors, including the fact that he must have lied during his trial, (he pleaded not guilty). The judge therefore ought to have started from the position that the Respondent does pose a sufficiently serious threat. He reemphasised this was a sentence for violent conduct involving drugs and the Respondent had a MAPPA level 3 designation. Further, in this case the SSHD had requested that he serve his sentence in a Latvian prison: this is normally done at the end or in the middle of a sentence.
41. In fact, the FTTJ did start from the proposition that the Respondent posed a threat. He accepted in terms that the personal conduct of the Respondent represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. He observed, given the nature of the offending and the assessments of the sentencing judge and others that it was hard to argue otherwise - his counsel had not sought to do so (see Determination at paragraph [51]).
42. The judge approached the determination of the issue in the following way. Once again, carefully setting out the principles to be applied by reference to the case law. He properly reflected that imperative grounds applied to exceptional circumstances and required the threat to have a particularly high degree of seriousness. Reflecting that in *Tsakouridis* the court had said trafficking in narcotics as part of an organised group could reach the requisite level of intensity, but could not alone constitute imperative grounds, and referred himself to *Hafeez* in the Court of Appeal citing *LG and CC (EEA Regs: residents, imprisonment, removal) Italy* [2009] UK AIT 24 per Carnwath LJ, emphasising the individual’s present and future risk and the requirement that expulsion be imperative not merely desirable.
43. The FTTJ considered the facts and the findings of *Hafeez*, a 20-year old guilty of two counts of rape and one of robbery against the same victim and a case of dangerous driving. Physical violence and the use of a knife were also part of that offending. No remorse or empathy or understanding had been shown in the *Hafeez* case and the Court of Appeal had upheld the lower tribunal’s finding that he posed a particularly serious risk to the safety of the public although “by quite a narrow margin”. In assessing the present case the details upon which the SSHD relied were set out by him, including the OASys Report which the judge analysed in some detail, noting that the family had moved out of Bedford and lived elsewhere (in order to get the Respondent away from the violence, and the violence threatened to them because of the Respondent’s involvement in crime). The SSHD criticises the judge’s assessment of the mother as a positive influence, particularly because the Respondent was living at home when

the offences were committed. This very point is covered by the judge (paragraph [65]) who notes the mother's actions in also taking him with her on a trip to keep him away from further harm. He understood she exercised a positive influence but this was tempered by the fact he was living with her when he offended.

44. The judge reflected that the Respondent has not been in a position to present evidence to show that the risk he poses has diminished and he emphasises the significance of MAPPA level 3. Although not mentioned particularly by the judge, a probation report drafted following a two-year acquaintance with the Respondent is also in the bundle. It appears to be drafted in support of a categorisation to D. It is very positive indicating that he had completed the only course stipulated on his sentence plan in March 2020, had exemplary behaviour on the wing and was employed as an orderly. He had taken on the role of Social Care and Welfare orderly caring for two other prisoners and was described as having grown into a confident and thoughtful young man dealing with issues. It is unclear whether this material was before the judge at first instance, and we say no more about it. The judge in fact dealt with this issue by saying that on balance he found the appellant has largely behaved himself in prison neither causing trouble nor being a model prisoner in any exceptional sense. He had kept his family ties in the UK during both the offending and the imprisonment.
45. Reasoning on risk of serious harm is set out in paragraphs [58] to [69] by the judge, analysing each of the documents upon which the SSHD relied and in particular on the MAPPA level 3 designation. The judge concluded (paragraph [70]) that there was no question but that he presented at least a medium chance of reoffending; such reoffending would cross clearly, the lower threshold of "serious grounds". The judge then said this:
- "72. All that said, and after considerable reflection, I have decided that the risk posed by the appellant falls short of meeting the relevant test, if perhaps by only a short distance. While he presents a risk to a section of society, the magnitude of that risk is not so high as that described in the European or domestic authorities."*
46. He recognised that in *Hafeez* the CA had cautioned against factual comparisons, but indicated the different nature of the offences between the two cases which he described as qualitatively different for the evaluative assessments required. Although the SSHD relies upon this comparison by the judge as evincing some error of law, we do not think it does so. It is necessary to explain the significant difference to which the FTTJ was referring in order to understand the point.
47. There was, in *Hafeez* offending of an unpredictable and extreme nature against strangers namely rape and theft targeted at a sex worker. The Court of Appeal, in the judgment of Bean LJ in that case had recorded at length the remarks of the sentencing judge, highlighting the judge's observations of Mr Hafeez in the course of two rape trials. He was

described as highly intelligent and articulate, with an excellent academic record; highly unusually in the court's experience, he was prepared to use his considerable intelligence with misplaced ingenuity in order to avoid justice. The sentencing judge described Mr Hafeez as cynically manipulating the criminal process to cover his tracks with a degree of sophistication and cunning beyond many adults and beyond his chronological age. The court noted the very clear lack of empathy, insight or understanding – although the relevant medical report diagnosed no mental illness. This attack upon a sex worker, culminating in two counts of rape, had been committed when he was 17. He had described his victim, whom he also robbed at knifepoint of her takings, as a prostitute who deserved what she was going to get, people like her being “all scum”. That offence, the sentencing judge continued, was motivated by sexual gratification and revenge, showing complete disdain for the person. Mr Hafeez had constructed elaborate defences including decoy calls to the police, and alibis crafted to conceal his tracks and his DNA traces.

48. It seems to us, plainly, the risks in that case were wholly different in nature from those in the present case. By his comparison, the FTTJ was contrasting the drug and gang context of the sudden violence in the instant case, with the chilling, personality-driven offending of an unrepentant rapist who targeted sex workers.

CONCLUSIONS ON IMPERATIVE GROUNDS

49. In any event, and in conclusion, the judge in the instant case had weighed each of the relevant matters with conspicuous care, warning himself against the traps and pitfalls, but coming to a conclusion which was reasoned, and in our judgement plainly rational. In such circumstances, it is trite law (see by way of example the recent authority of *Caledonius De-Havelan Lowe v Secretary of State for the Home Department* [2021] EWCA Civ 62 at paragraphs [29] to [32]), this court will not interfere.

3. PROPORTIONALITY

50. The judge correctly stated that the question of proportionality did not arise, given his finding that imperative grounds could not be made out. The SSHD maintained an alternative challenge to the proportionality finding in which the judge held that there were wider issues that would have led to him allowing the appeal whether or not the imperative grounds threshold had been met. These factors were that the Respondent had spent most of his childhood and youth in the UK, was young at the date of the offences, had an ongoing relationship with his family (he was the middle brother of three in an otherwise law-abiding family), and he had always been dependent on that family; furthermore, the Respondent was without social ties in Latvia. These factors rendered his deportation disproportionate even when set against his offending.

51. The judge went on to hold, in any event, the prospect of removal now, to a Latvian jail where he had no family or social ties would surely present a smaller prospect of rehabilitation, which was relevant when considering proportionality. This incapacitation from crime, and the rehabilitation offered by the English prison achieved the objective of protecting public security, but with far superior prospects of rehabilitation, in the judgement of the FTTJ, than removal to Latvia. The ends could be achieved without what he called the disintegration and adverse effects upon the Respondent of removal. In those circumstances the objectives of public protection could be met by less intrusive means. This proportionality, would in any event, defeat a finding on imperative grounds of public security. Recognising such an outcome was rare (see the case of *Hafeez*) in this case, the Respondent was here, at the start of his imprisonment, not towards the end when removal usually was considered.

SUMMARY CONCLUSIONS

52. We can see no error of law in the approach of the FTTJ. His conclusions, which he described as unusual, were reached by means of his cautious and analytical approach to the particular facts and considerations arising in this case. He faced head on all the material advanced by the SSHD, much of which was drawn again to our attention on appeal. By the same token, we accept the submission of Mr Boyd on behalf of the Respondent, that this was not a case in which there was evidence of an offender with continuous repeat offending, who had embraced the gun culture: the offending took place in a relatively narrow compass between April and November 2017. The SSHD submitted, again on the facts, that the Respondent should be treated as a dangerous gang member who had shown no remorse and there was no evidence of any rehabilitation to which the court could point. We however agree with the judge below, this case must be distinguished on its facts from *Hafeez*. We can discern no error of law or approach by the judge below.
53. We conclude that the findings were available to the judge and that, perhaps necessarily, in light of the careful reasoning below, the SSHD is constrained to argue that the facts of the case meant that the judge's conclusion was not rationally open to him. We disagree. There is nothing in the Regulation 27 approach or the proportionality challenge that suggests to us that the judge erred; it is not possible to say that his assessment of the facts rendered his conclusion rationally unavailable to him, nor did his decision evince an error of law.
54. Further, and properly looking to the future, a number of factors suggested there was a prospect the Respondent may not return to criminal offending: he was a medium risk of reoffending, his family had moved away. Further, he was still young. The judge was entitled to reach the decision that he did in what was, we agree with him, an unusual case.
55. Accordingly, this appeal is dismissed.

NOTICE OF DECISION

The Secretary of State for the Home Department's appeal is dismissed

No anonymity direction is made.

Signed **THE HONOURABLE MRS JUSTICE ALISON FOSTER DBE**

Date 3 March 2022