



Neutral Citation Number: [2020] EWCA Civ 406

Case No: C9/2019/0842/AITRF

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM UPPER TRIBUNAL (IMMIGRATION AND ASYLUM**  
**CHAMBER)**  
**MRS JUSTICE COCKERILL AND JUDGE CANAVAN**  
**DA/00006/2018**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/03/2020

**Before :**

**LORD JUSTICE BEAN**  
**LORD JUSTICE SIMON**  
and  
**LADY JUSTICE SIMLER**

-----  
**Between :**

<b>ALI HAFEEZ</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>THE SECRETARY OF STATE FOR THE HOME DEPARTMENT</b>	<b><u>Respondent</u></b>

-----  
-----  
**Leonie Hirst** (instructed by **Wilson Solicitors LLP**) for the **Appellant**  
**Claire van Overdijk** (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date : 5 March 2010  
-----

**Approved Judgment**

## Lord Justice Bean

### *Introduction*

1. Ali Hafeez is a German national, born in 1995, who has lived in the UK since 2006 or 2007. On 12 March 2015 he was convicted of rape and other offences in the Crown Court at St Albans and sentenced to 7 years detention. On 8 December 2017 the Home Office made a decision under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) that he should be deported to Germany. His appeals to the First Tier Tribunal (“FTT”) and Upper Tribunal (“UT”) were unsuccessful. He now appeals to this court by permission of Hickinbottom LJ.
2. The 2016 Regulations were made pursuant to the UK’s obligations under EU Directive 2004/38: relevant passages from both the Directive and the 2016 Regulations are appended to this judgment. (It was not suggested by either side that the UK’s withdrawal from the EU makes any difference to the present case.) There are three levels of protection from deportation for EEA nationals. Putting to one side decisions made on public health grounds, which are not relevant in this case, any EEA national who has the right to reside in the UK (either personally or as a family member of another EEA national who has that right) may only be removed on grounds of public policy or public security (Regulation 23(6)(b)); the decision may not be taken to serve economic ends (Reg 27(2)); and it must comply with the principle of proportionality and a number of other requirements set out in Regulation 27 (5) - (6). I will call this “basic protection”.
3. If the EEA national has resided in the UK in accordance with the 2016 Regulations “for a continuous period of five years”, he acquires the right of permanent residence (Regulation 15(1)), and in addition to basic protection he has the benefit of Regulation 27(3), which states that a decision to remove him may not be taken “except on serious grounds of public policy and public security”. I will call this “serious grounds protection”.
4. Finally, if the EEA national has resided in the UK “for a continuous period of at least ten years prior to the relevant decision”, Regulation 27(4) states that a decision to remove him may not be taken “except on imperative grounds of public security”. I will call this “imperative grounds protection”; it is also sometimes referred to as “enhanced protection”.
5. The two principal issues before us are (a) to which level of protection was the Appellant entitled when the decision to deport him was made; and (b) given that he had that level of protection, was the decision lawful?

### *The facts*

6. Mr Hafeez claims to have resided in the United Kingdom since some time in 2006, though the Respondent maintains that he only arrived in 2007 and first attended school here in July 2007. On 1 October 2008, Mr Hafeez’s father applied to register himself as an EEA national and his family, including the

Appellant, as his dependants. They were granted registration certificates on 14 December 2009.

7. His conviction at St Albans Crown Court was on two counts of rape committed while he was aged seventeen in June 2013, for which he received a sentence of six years, one count of robbery committed against the same victim on the same date (three years concurrent); and one count of dangerous driving for which he received a sentence of 12 months consecutive to the six years received for the index offence. He had an earlier conviction for theft from a motor vehicle for which he had received a conditional discharge.
8. The facts are vividly described in the remarks of the sentencing judge, which were quoted in the Home Office's decision letter:

“Your victim was a 27 year old sex worker. There was some evidence at the trial you had met her previously. But on the night in question you got in to your car and went with her to a secluded car park, as she thought for consensual paid for sexual intercourse. When you were there you grabbed her by the throat. She could feel something cold, sharp and hard pushing at the back of her neck. I am satisfied, having heard both trials, that you had with you a knife or other sharp implement, and you had it with you when you went out that evening. You said that you'd been robbed by a prostitute and they all deserved what they were going to get. You described people like her as being “all scum”.

You got hold her hair, pulled her head on to you and forced her to give you oral sex. You told her to pull her tights down, and you then got on top of her and vaginally raped her, and said several times according to her evidence, “Move like you want it, bitch,” while holding her throat and putting pressure on her windpipe. When she tried to use her phone you grabbed it from her. You grabbed her by the neck again and you asked whether she had any money. When she said that she didn't you said, “Don't lie to me, you've been out since seven,” and you told her to take off her shoe, and lifted up the insole and took the money from where she'd been keeping it. She ran away, crying.

This was a terrifying ordeal so far as she was concerned. And I'm quite satisfied, as I've already said, that a weapon of some sort was used by you to carry it out. Which indicates some degree of planning by you. You did all this when you had her at your mercy, and it is aggravated by the fact that you robbed her at the same time.”

9. The judge went on to state that:-

“This offence was motivated, so it would appear, not only by you seeking your own sexual gratification, but also some form

of revenge. And it showed a complete disdain for her as a person by reason of what she did to earn money. An insight in to your character is to be gained from the fact that you constructed an elaborate defence at both these trials, tailored to the facts of the case, and rejected by the jury that convicted you. That included your father, who was called as a witness by you to say that it was he who was using the car on the night in question, and not you. You also alleged that you had consensual sex with her for a few days before at the very same location, done in order to explain -as you realised you had to – why your DNA was found on a discarded condom at the scene.

In addition, you made a hoax call to the police very shortly afterwards on her phone, and there was expert evidence called at retrial to show it was you who making that call. Whether it was to distract the police or to help establish an alibi on your part is perhaps immaterial. You also provided an elaborate explanation for the presence in your car of a police document which she was able to recognise, and which you realised that you needed to explain. And you then invented an approach by her to demand money from you to drop the case, and you called the police to say that she's done that in a blatant attempt to discredit her at any forthcoming trial.

I do not, I make plain, increase your sentence because you contested the trial, nor for the way in which you contested it. But you have shown no remorse or acceptance of guilt. I cannot give you any credit for a plea of guilty, and I will say more in a moment about why these matters have relevance in your case. What is clear is that by contesting the case you obliged her to give evidence, and to relive the ordeal which she had undergone.

On 27<sup>th</sup> February of last year, whilst you were on bail for this, you then drove a vehicle dangerously. It was in the early hours of the morning. It involved a high speed chase by police as you tried to get away. You failed to stop for them. You drove through a number of red traffic lights and speeds of up to 100 miles an hour were recorded. The distance is not entirely clear. The duration was about four or five minutes. But is plain is that by driving in that manner you caused the risk of serious injury or worse to other road users, although thankfully in the particular circumstances of this case no injury or accident actually occurred.

When the police stopped you they found a second set of index plates for the vehicle. You contested that trial as well. And the conduct of that trial for dangerous driving initially involved accepted in police interview and your defence statement that you'd been the driver, although you hadn't driven dangerously. But that defence was then abandoned subsequently in favour of

the defence that it wasn't you driving at all. And you produced a number of phone messages in order to try and confirm that. Again, I make it plain I don't increase your sentence because you conducted the trial in that way.

But I had the advantage of seeing you give evidence at both those rape trials. You are a highly intelligent and articulate young man, with an excellent academic record, who became for a period of time a law student with hopes of entering the legal profession. You have thrown away any prospect of such a career. But what is unusual about this case, certainly unusual in my experience, is the fact that you were prepared to use your intelligence and all those attributes with a degree of misplaced ingenuity in order to go to very considerable lengths to try to avoid justice. You cynically manipulated the criminal process to cover your tracks, using a degree of sophistication and cunning beyond that of many adults, and certainly beyond your chronological age. And that shows the sort of person you are.

You are indeed young, and I take that fully into account. But you are not naïve, and you are not immature. And although I intend to reduce your sentence because of your chronological age, in my view the reduction that applies is less than it would otherwise be when account is taken not only of the aggravating features of the offences themselves, but also what I've described about your behaviour and the sort of personality you've shown.

I've considered the contents of the pre-sentence report and the very clear lack of empathy, insight or understanding of what you've done that shows on your part. And I've also taken account of what is in the psychiatric report, which diagnoses no mental illness in your case.

I have, as I've indicated, had full regard to your age, and sentence you as you would be at the time that you committed each of the offences in question. I take account of the fact that although you have a conviction it is for an entirely different sort of offence, and I've also taken account of the letters that you've written, and also what has been said on your behalf by Counsel.

I have considered whether this is a case in which I should find you dangerous, and impose an extended sentence. However unattractive the conduct of your defence is, I do not consider that in this case I should rely upon that to find you dangerous. I have also considered the use of a weapon and the hostility that you demonstrated towards the victim of the rape case is considering that issue. I have come to the conclusion that although there are some very worrying features about you, and your behaviour, that this is a case where both the length of the

sentence that I have in mind as a determinate sentence and your chronological age mean that it is not a case in which I should impose an extended sentence.”

10. The custodial part of the Appellant’s sentence ended on 4 January 2018. After a short period in immigration detention he was released on bail on 31 January 2018. Thus at the date of the decision which gave rise to these proceedings, the Appellant had spent three and a half years in prison out of his ten or eleven years residence in the United Kingdom (depending on whether he arrived in 2006 or 2007).
11. The decision issued on behalf of the Secretary of State on 8 December 2017 was to deport the Appellant. The Respondent considered whether the Appellant, as an EEA national, was entitled to protection under either of Regulations 27(3) and 27(4). The Respondent found that the Appellant had not resided continuously in the United Kingdom for ten years and so was not entitled to imperative grounds protection. The Respondent also found that the Appellant had not acquired five years’ permanent residence and so was not entitled to serious grounds protection.
12. The Respondent concluded that the Appellant should only be afforded basic protection under the 2016 Regulations: his removal had to be justified on “grounds of public policy, public security or public health”. The Respondent decided that this threshold was satisfied, because the Appellant represented a genuine and sufficiently serious threat to the public, and decided that the Appellant’s expulsion was proportionate. The Respondent also concluded that the Appellant’s risk to the public would be enough to surmount the relevant thresholds under Regulations 27(3) or 27(4), should either serious grounds or imperative grounds protection apply.
13. The Respondent certified pursuant to Regulation 33 of the 2016 Regulations that Mr Hafeez was to be removed before the conclusion of any appeal he might make against the removal. That certification was contested (a challenge which has recently been upheld by Foster J on judicial review: *R (Hafeez) v SSHD* [2020] EWHC 437 (Admin)) and the appeal proceeded without Mr Hafeez being removed.
14. The Appellant duly appealed to the FTT but FTT Judge O’Hagan dismissed his appeal on 2 October 2018. He was granted permission to appeal to the UT, but Cockerill J (sitting as a UT Judge) and UT Judge Canavan dismissed the appeal on 10 January 2019. On 22 August 2019, Hickinbottom LJ granted permission to appeal on the basis that the case raised an important issue as to the correct approach to the “imperative grounds of public security” required to justify the deportation of an EEA national. On 30 January 2020, this court granted the Home Secretary permission to file a Respondent’s Notice to support the decisions below on additional grounds.

*The First-Tier Tribunal decision*

15. Judge O’Hagan noted at paragraph [8] of his judgment that the Respondent had not accepted in its decision letter that the Appellant had lived in the United

Kingdom for a continuous period of five years so as to acquire a right of permanent residence. At paragraph [22] he recorded the submissions of Mr Tallis, the Home Office Presenting Officer, that “continuity has been breached by the Appellant’s imprisonment”, but there do not appear to have been any submissions that the Appellant had not acquired the status of a permanent resident. Unsurprisingly, therefore, the judge accepted the argument of Ms Shaw for the Appellant that her client had acquired that status and was thus entitled at least to serious grounds protection.

16. The judge then considered whether the Appellant had ten years’ continuous residence and so could rely on imperative grounds protection under Regulation 27(4). He said:

“31. I have considered whether the appellant qualifies for the higher level of protection afforded by paragraph 27(4) on the basis that he has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision. Again, it is not in dispute that he has been physically present. The sole issue here is whether his period of imprisonment has broken that continuity.

32. In the case of *Essa (EEA: rehabilitation/integration)* [2013] UKUT 00316 (IAC), it was said that, pending further clarification of the law by the Court of Justice, it is uncertain whether it would do so. In *SSHD v Franco Vomero (Italy)* [2016] UKSC 49, the Supreme Court summarised the position as follows:

“The ten-year previous period is... only “in principle” continuous, and may be non-continuous where, for example, interrupted by a period of absence or imprisonment. Whether the ten years is to be counted by including or excluding any period of imprisonment is however unclear.”

33. Given the uncertainty in this crucial point of ten years residence, it seems to be appropriate to give the appellant the benefit of the legal doubt. In deciding to do so, I have had regard to the fact that he has lived here since he was 10 or 11, had his secondary education and started his degree here, speaks fluent English, and has built a life in the community of this country. He is, to that extent, integrated. I will, therefore, consider the case on the basis that he enjoys the highest level of protection, the imperative ground threshold.”

17. The judge proceeded to examine whether the Appellant’s expulsion was justified on the imperative grounds basis. The judge took note of the interpretation of “imperative grounds of public security” provided by Carnwath LJ, sitting as Senior President of Tribunals in what was then the Asylum and Immigration Tribunal, in *LG and CC (EEA Regs: residence, imprisonment, removal) Italy* [2009] UKAIT 00024:

“37. The factual details of the appellant’s criminal factor provide one indicator of its severity. The level of punishment imposed by the criminal courts which dealt with these matters provides another. In this case, the sentence imposed was seven years. That is not, in itself, sufficient to support a finding that there are imperative grounds as was made clear in *LG and CC (EEA Regs: residence, imprisonment, removal: Italy)* [2009] UKAIT 00024. I am particularly grateful for the following formulation:

110.... “[We] cannot accept the elevation of offences to “imperative grounds” purely on the basis of a custodial sentence of five years or more being imposed... there is no indication why the severity of the offence in itself is enough to make removal “imperative” in the interests of public security. Such an offence may be the starting point for consideration, but there must be *something more, in scale or kind, to justify the conclusion that the individual poses “a particularly serious risk to the safety of the public or a section of the public.”* [emphasis added]

18. Judge O’Hagan proceeded at paragraphs [39] and [40] to consider other factors such as the nature of the Appellant’s offending, his lack of remorse and the Appellant’s contempt towards his victim. The judge concluded that the Appellant’s conduct was “consistent with his being a risk” to women and in particular to sex workers. At paragraphs [41] and [42] of his judgment, the judge noted evidence that the Appellant’s rehabilitation was “at best variable” and that his risk of re-offending was “high or, at best, medium”. The judge considered at paragraph [44] that society had a right to expect that women will be protected from crimes such as those which the Appellant had committed, and that the Appellant, if deported, would be able to integrate into life in Germany.
19. At paragraph [49] the judge concluded that the imperative grounds threshold was satisfied; and consequently that the serious grounds threshold was also met:

“49. Having regard to all of these matters and to all the circumstances of the case, I am satisfied that the requirements of the regulations are met, that there are imperative grounds of public security, and that deportation is a proportionate response to the appellant’s conduct. Since I have found that the higher test of imperative grounds is met, it follows that I am satisfied that the lower tests are also met. Whatever way I assess the case, the outcome is the same.”

20. Permission to appeal to the UT was granted by FTT Judge Froom, who wrote:

“It is arguable that the FTTJ erred by failing to explain how he concluded that there were imperative grounds of public policy [sic] justifying the appellant’s deportation, in the light of the need to show the threat posed by the appellant is exceptionally serious”.



*The Upper Tribunal decision*

21. At paragraph [15] of its decision, the UT observed that:

“15. ... the judge proceeded on the basis that the Appellant had acquired a permanent right of residence and was prepared to assume in his favour that he had acquired the highest level of protection. We do not consider that the judge did decide this point; he specifically said that this was an assumption... An issue remains, at least contingently, as to whether the Appellant did indeed meet the requirements of that highest level of protection; but given the basis of the judge’s decision and the basis upon which the appeal is brought the focus is primarily on Regulation 27(4) which provides for removal only on “imperative grounds of public security”.”

22. On the imperative grounds issue the UT held that Judge O’Hagan was right to take as his starting point the seriousness of the Appellant’s offending, before he considered other factors such as the Appellant’s contempt for women and particularly sex workers, his “mixed” progress with rehabilitation, his “real and significant” risk of reoffending, his personal circumstances, and the impact of his removal on his prospects of rehabilitation. At paragraphs [30] to [32], the UT concluded that the FTT judge was entitled to find that the Appellant’s removal was justified on imperative grounds of public security:

“30. In essence therefore what one sees is a series of findings which were manifestly open to the judge to make, and which plainly reflect a careful and balanced approach to the exercise being undertaken. These are then considered appropriately. It cannot be said that the conclusion that the requisite test was met was one which on the basis of these evidential findings was not rational. Different tribunals might have reached different conclusions on this point, based on this evidence. Nor do we consider that there was any failure to explain how the test was met: the test was clearly stated and applied with suitable explanation of each part of the decision and the overall evaluation.

31. Two other questions were raised during the course of argument:

- a. Whether the FTTJ erred in his approach to residence;
- b. Whether any error in the Appellant’s favour (ie. an erroneous conclusion that he was entitled to “imperative grounds” protection) would be material in the light of the factual findings and their consequences for a “serious grounds” test.

32. In the light of our conclusions above that the imperative grounds test is in any event met, these do not arise and we make no determinations in relation to them.”

23. The UT therefore upheld the FTT judge’s decision and dismissed the appeal.

*Grounds of appeal*

24. Ms Hirst, for the Appellant, advanced two grounds of appeal before us. The first was that the FTT and UT judges had erred (a) in failing to distinguish the imperative grounds threshold from the serious grounds threshold, and (b) in conflating the risk posed by the Appellant with the nature of his offending (“the exceptionality ground”). The second ground was that both tribunals erred in their approach to proportionality under Regulation 27(5) by failing to consider whether the Appellant’s removal was necessary and the least restrictive way of meeting the legitimate aim of protecting public security (“the proportionality ground”).

25. Ms van Overdijk’s Respondent’s Notice can in essence be condensed into two grounds. The first is that the FTT judge erred in holding that the Appellant had acquired a right of permanent residence, despite the fact that the Respondent’s decision letter had stated that the Appellant had no such right (“the permanent residence ground”). The second is that the FTT judge erred in finding or assuming in the Appellant’s favour that he was entitled to imperative grounds protection, when the Appellant did not have the qualifying ten years’ continuous residence (“the ten years’ residence ground”).

*Discussion*

26. I will consider the Respondent’s Notice first, because Ms Hirst’s principal ground of appeal does not come into play if the Respondent is correct that the Appellant should not have been afforded imperative grounds protection in the first place.

*Did the Appellant have permanent resident status?*

27. Ms van Overdijk sought to argue that the Appellant did not have a right of permanent residence under Regulation 15(1) and so was not entitled even to serious grounds protection under Regulation 27(3). The basis of this submission was the following passage in the Respondent’s decision letter:

“As a German national your entry to the United Kingdom would have been lawful, however it is not accepted that you have been resident in the United Kingdom in accordance with the EEA Regulations 2016 for a continuous period of five years, given that you have not provided sufficient evidence of exercising treaty rights in the UK. Therefore you have not acquired a permanent right of residence. As you have not acquired a permanent right of residence under the EEA Regulations 2016, consideration has been given to whether

your deportation is justified on grounds of public policy or public security.”

28. In my view, the FTT judge was entitled to proceed on the basis that the Appellant did have a right of permanent residence. The point now sought to be raised does not seem to have been argued on behalf of the Respondent at the FTT hearing. At paragraph [22] the FTT judge noted the Respondent’s submissions “that the appellant does not qualify for enhanced protection on the basis of five / ten years’ residence”. But at [29] he said:

“29. .... the Respondent did not dispute that the Appellant has been resident in the United Kingdom for the requisite level of time to satisfy both the five year and ten year tests. The argument advanced is that his continuity of residence has been broken by his imprisonment.”

29. Moreover, the Appellant gave evidence in the FTT that he had started school in the United Kingdom in 2007 (this appears to be undisputed) and that his father had worked in various occupations in the United Kingdom since arriving. If the Respondent had wanted to argue that the Appellant, despite attending school in the UK for at least five years, had never acquired permanent resident status under Regulation 15(1) because his father was not exercising Treaty rights, the Home Office Presenting Officer should have raised the point expressly in cross-examination and submissions before the FTT judge. It would be unjust to allow the point to be raised for the first time in this court.
30. There was no attempt to argue, either in this court or below, that permanent residence status, once acquired, could be forfeited by a long prison sentence.

*Did the Appellant have ten years’ continuous residence prior to the decision to deport?*

31. Ms van Overdijk argued that the Appellant did not have ten years’ continuous residence and, as such, was not entitled to the imperative grounds protection under Regulation 27(4). Calculating ten years’ continuous residence has been the subject of much litigation. In *MG (Portugal) v Secretary of State for the Home Department* (Case C-400/12) [2014] 1 WLR 2441 (a case in which, it should be noted, the appellant had already resided in the UK for 10 years before being sentenced to imprisonment) the CJEU considered four questions:

“1. Does a period in prison following sentence for commission of a criminal offence by a Union citizen break the residence period in the host Member State required for that person to benefit from the highest level of protection against expulsion under Article 28(3)(a) of Directive 2004/38 ... or otherwise preclude the person relying on this level of protection?

2. Does reference to the “previous ten years” in Article 28(3)(a) [of Directive 2004/38] mean that the residence has to be continuous in order for a Union citizen to be able to benefit from the highest level of protection against expulsion?

3. For the purposes of Article 28(3)(a), is the requisite period of 10 years during which a Union citizen must have resided in the host Member State calculated

(a) by counting back from the expulsion decision; or

(b) by counting forward from the commencement of that citizen's residence in the host Member State?

4. If the answer to Question 3(a) is that the 10-year period is calculated by counting backwards, does it make a difference if the person has accrued 10 years' residence prior to such imprisonment?"

32. At paragraphs [27] to [36] of its judgment, the Court held that if an individual is imprisoned during the ten years prior to the expulsion decision, this will "in principle" interrupt continuity of residence and that an "overall assessment" is required: [emphasis added]

"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, 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 para 28 above that the ten-year period necessary for the grant of enhanced protection as provide 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).”

33. As I noted recently in *Hussein v Secretary of State for the Home Department* [2020] EWCA Civ 156, it remains unclear whether time in custody can be counted towards the ten years. When the *Vomero* case (*FV (Italy) v Secretary of State for the Home Department* [2017] 1 All ER 999) was first before the Supreme Court, Lord Mance JSC compared the qualifying periods of residence for the serious grounds and imperative grounds protections:

“20. ... The five-year period is expressly required to be continuous, and is (it seems) broken by any period of imprisonment, but will, once acquired, only be lost by absence (or, it may be, imprisonment), lasting two years. The ten-year previous period is, in contrast, only ‘in principle’ continuous, and may be non-continuous, where, for example, interrupted by a period of absence or imprisonment. Whether the ten years is to be counted by including or excluding any such period of interruption is however unclear.”

34. The Supreme Court asked the CJEU whether periods of imprisonment (a) positively count towards ten years’ continuous residence or (b) cannot be relied upon to establish ten years’ continuous residence. However, in the joined references of *B v Land Baden-Württemberg* (C-316/16) and *Vomero* (C-424/16) [2019] QB 126, the Court of Justice held that it was unnecessary to answer this question in the light of its conclusion on a different question. The CJEU also confirmed at paragraph [61] that permanent residence is a necessary prerequisite for acquiring imperative grounds protection:

“61. ... article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is a prerequisite of eligibility for the protection against expulsion provided for in that provision that the person concerned must have a right of permanent residence within the meaning of article 16 and article 28(2) of that Directive.”

35. In many cases, the uncertainty identified by the Supreme Court in *Vomero* will not be of great importance. Suppose an EEA national has resided in the UK for 15 years before being sentenced to 12 months’ imprisonment; he then serves six months in custody. Six months after his release he is given notice that he is to be deported. In contrast with the position for permanent residence, the period in

custody does not automatically reset the ten-year clock (if one can imagine a clock counting backwards) to zero. Otherwise, as Ms Hirst rightly pointed out, since all but a tiny proportion of deportations follow the imposition of a prison sentence, the ten years' continuous residence test could almost never be met. The hypothetical appellant whom I have described has 16 years' continuous residence if the time in custody is counted, but 15 ½ years non-continuous residence if the time in custody is treated as interrupting continuity. It seems to me highly likely that he would be held to have imperative grounds protection.

36. But in the present appeal the issue left open by the Court of Justice in *Vomero* is determinative. Regardless of whether the Appellant arrived in the United Kingdom in 2006 (as the Appellant submits) or in 2007 (as the Respondent submits), he has to rely on his period of three and a half years in custody in order to establish ten years' residence. This is because, even assuming he arrived here on 1 January 2006, he would only have resided in the United Kingdom for at most eight and a half years prior to the deportation decision, excluding his time in custody. Thus he cannot rely on imperative grounds protection unless his period of imprisonment counts positively towards his ten years' residence.
37. In my view, periods of imprisonment (or detention in a young offenders' institution: *Viscu v SSHD* [2020] 1 All ER 988) do not count positively towards establishing ten years' residence. I have reached this conclusion for three reasons.
38. Firstly, that is the only interpretation which can be placed on the unqualified determination by the CJEU in paragraph [33] of *MG (Portugal)* 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", before the court went on to add "and in principle such periods interrupt the continuity of the period of residence for the purposes of that provision". If the Court had wanted to qualify the first part of the paragraph with "generally" or "usually" or "in principle" it could have done so; but it did not.
39. Paragraphs [34] to [36] deal with the question of whether periods of imprisonment interrupt continuity of residence, with paragraph [35] referring to "the non-continuous nature of the period of residence during the ten years preceding the decision to expel". I do not see how this phraseology is consistent with the idea that time in custody counts positively towards the ten years. It rather supports the view that imprisonment presses a pause button. Mr Hafeez does not, on any view, have a non-continuous period of residence in the UK of ten years or more. Taking his claimed arrival date of 2006, at the time of the deportation decision he had between 11 and 12 years continuous residence if the three and a half years in custody count towards the total, but a non-continuous period of at most eight and a half years if they do not.
40. Secondly, allowing individuals to count periods of imprisonment towards the ten year period would produce unjustifiable inconsistency between the tests which must be satisfied to rely on the serious grounds or imperative grounds protections. As the CJEU made clear in *Onuekwere v Secretary of State for the Home Department* (Case C-378/12) [2014] 1 WLR 2420, a decision handed

down on the same day and by the same panel as *MG (Portugal)*, in calculating five years' residence, periods before and after time spent in custody cannot be aggregated. It seems contrary to common sense that one day in custody will reset the clock to zero and prevent an individual from relying on serious grounds protection, but that several years in custody can be used positively to establish ten years' residence and, subject to an "overall assessment" of whether continuity has in fact been broken, entitle an individual to the imperative grounds protection

41. Thirdly, such a distinction would produce arbitrary results. This can be illustrated by two hypothetical examples. A has resided in the United Kingdom for 11 years prior to his deportation decision. He has spent years 5-7 in custody, pursuant to a six year sentence for rape passed on the fourth anniversary of his arrival; so he only had two sets of four years residence (either side of the period of imprisonment) unblemished by imprisonment. He would not have acquired the right of permanent residence and thus has neither serious grounds protection nor imperative grounds protection.
42. B has also resided in the United Kingdom for 11 years prior to his deportation decision. He has spent years 7-9 in custody, pursuant to a six year sentence for rape passed on the sixth anniversary of his arrival; which meant that prior to entering prison he had more than five years' residence unblemished by any period of imprisonment. If Ms Hirst is right, he would have a right of permanent residence and, subject to an assessment of whether his integrative links had been broken, would also be able to argue that he had ten years' residence. Thus, despite residing in the United Kingdom for the same number of years as A, and serving time in prison for the same offence and the same number of years as A, B could be entitled to imperative grounds protection – two levels higher than A, who has only basic protection – simply because his period of custody commenced at a later stage.
43. For these reasons, I consider that the FTT judge was wrong to give the Appellant the benefit of the legal doubt on this point. As I said in *Hussein* at paragraph [18] (in a judgment handed down after the FTT and UT decisions in the present case), an individual relying on imperative grounds protection who has served time in custody must prove *both* that he has ten years' continuous (or non-continuous) residence ending with the date of the decision on a mathematical basis *and* that he was sufficiently integrated within the host State during that ten year period. In the present case, if the Appellant could not count his three and a half years in prison towards the necessary ten years' residence, he failed to qualify for imperative grounds protection under Regulation 27(4) for simple mathematical reasons. The question of whether his integrative links with the UK were broken by the three and a half years in custody (as to which see *Viscu*, another decision of this court given after the FTT and UT judgments in the present case) therefore does not arise.
44. The Appellant thus only had a right of permanent residence and accordingly should have been afforded serious grounds protection under Regulation 27(3), but not imperative grounds protection under Regulation 27(4).



*Was the FTT entitled to uphold the deportation on “imperative grounds of public security”?*

45. In the light of my conclusion that Mr Hafeez was not entitled to the enhanced imperative grounds protection, it is not strictly necessary to determine whether the FTT judge was correct to find that his expulsion was justified on imperative grounds of public security. But since this was the ground on which the Appellant was granted permission to appeal, it is right to address it.
46. Ms Hirst submitted that the FTT judge’s conclusion was tainted by two errors. First, the judge failed to follow the guidance provided by Carnwath LJ in *LG and CC* by conflating the seriousness of the Appellant’s offending with the level of the present threat posed by the Appellant. Secondly, the judge failed to consider adequately whether the threat posed by the Appellant was exceptionally serious. As the CJEU held in *Land Baden-Wurtemberg v Tsakouridis* (Case C-145/09) [2011] 2 CMLR 11:

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

47. In *LG and CC*, Carnwath LJ set out the following guidance about the meaning of imperative grounds of public security, emphasising that the focus must be on the individual’s present and future risk to the public, rather than on the seriousness of the individual’s offending:

“110. ...[We] cannot accept the elevation of offences to “imperative grounds” purely on the basis of a custodial sentence of five years or more being imposed... [T]here is no indication why the severity of the offence in itself is enough to make the removal “imperative” in the interests of public security. Such an offence may be the starting point for consideration, but there must be something more, in scale or kind, to justify the conclusion that the individual poses “a particularly serious risk to the safety of the public or a section of the public”. Terrorism offences or threats to national security are obvious examples, but not exclusive. Serial or targeted criminality of a sufficiently serious kind may also meet the test. However, there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion “imperative” and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level.”

48. In the present appeal, I consider that there was material entitling the FTT judge to find that the imperative grounds test had been satisfied. In addition to the sentencing judge's remarks which I have cited above, the pre-sentence report to the Crown Court, which was included in the papers before the FTT, included this assessment:

“In my view, the circumstances of the offence represent a high risk of serious harm. These risks relate to violence, sexual violence and include the use of deception as a means of obtaining compliance. I would also suggest some risk of psychological violence may be present to those who Mr Hafeez perceives as obstructive to his goals... I question the level of value Mr Hafeez has actually derived from his education and have concerns as to the ease in which any acquired knowledge may be distorted for illegitimate purposes.”

49. Ms Hirst drew our attention to the fact that the sentencing judge had not made a finding of dangerousness. For my part I do not read the sentencing remarks as rejecting the view that the Appellant presented a high risk of serious harm: rather the judge was saying that the case was not one requiring the imposition of an extended determinate sentence under s 226A of the Criminal Justice Act 2003, as amended. (Such a sentence requires the court to conclude that the offender presents a significant risk of serious harm to members of the public occasioned by the commission by the offender of further specified offences, and also that one of two further conditions is specified; even then the use of the power is discretionary.) An obviously important factor in that decision was the fact that Mr Hafeez had been only 17 at the time of the rape, though 19 at the time of conviction.
50. Ms Hirst submitted that the FTT judge quoted only a small section of *LG and CC* and did not have regard to Carnwath LJ's full guidance. However, the judge did quote the “particularly serious risk” test at paragraph [37] of his judgment. He also had some regard to the risk which the Appellant posed, as shown by his comments in the following paragraphs:

“38. The length of sentence imposed is a factor which I can and do take into account in my assessment. As set out above, it is not, in itself, sufficient to justify the elevation of the offences to imperative grounds. I do not treat it as such. It is something which forms a part of my broader assessment of the seriousness of the offences.

40. ... The appellant's conduct is consistent with his being a risk either to women generally, or to those women, such as sex workers, whom he views with contempt.

42. ... It is clear that the appellant's engagement in rehabilitative work was, at best, variable and that it was hampered by its inability to accept the reality of his offending. It is unsurprising that those who assessed him concluded that the risk of re-offending is high or, at best, medium. Looked at

in the round, I found that there is a substantial risk of his reoffending. It is not a certainty, but it is a real and significant risk. In other words, I concur with the author of the reports [written during the Appellant's time in custody] that it is, at best, a medium risk

46. ... I do not doubt his behaviour has caused immense harm to his victims. I wish I could be confident that he would not repeat such behaviour in the future. Sadly, I am not confident of that for the reasons discussed."

51. While the FTT judge's decision is for the most part admirably clear, there is some force in Ms Hirst's submission that he gave excessive emphasis to the seriousness of the Appellant's offending when he should have focused primarily on the seriousness of the risk posed by the Appellant. Nevertheless, reading his judgment as a whole, I agree with the UT that he did apply the test of whether Mr Hafeez posed a particularly serious risk to the safety of the public or a section of the public; and that, albeit in my view by quite a narrow margin, Mr Hafeez could properly be found to be someone whose removal was indeed justified on imperative grounds of public security.
52. However, that is strictly academic since, in my judgment, the Appellant should not have been afforded the imperative grounds protection and was liable to be deported on serious grounds of public policy or public security.
53. As to that, it is clear from paragraph [49] of the FTT judge's decision that he regarded the Appellant's expulsion to be justified on serious grounds of public policy or public security under Regulation 27(3). That conclusion was clearly one at which the judge was entitled to arrive, in the light of the evidence before him. The Appellant's offending was serious. He consistently revealed contempt for his victim and for sex workers more generally. He showed no genuine remorse and, before the FTT judge, was unable to recognise his own status as a perpetrator of sexual violence. The evidence as to his behaviour in custody heightened the judge's concerns about the risk he posed rather than reducing them.

#### *Proportionality*

54. Ms Hirst submitted that the FTT judge erred in his approach to proportionality by failing to consider whether the Appellant's removal was necessary and the least restrictive way of meeting the legitimate aim of protecting public security.
55. If, as the FTT judge found, the Appellant's expulsion was justified on imperative grounds of public security, his expulsion would plainly also be proportionate: Ms Hirst acknowledged that it would be rare for an expulsion to be justified on imperative grounds of public security and yet also be disproportionate.
56. Whether the imperative grounds or serious grounds test is applicable, the FTT judge was entitled to find that the Appellant's expulsion would be proportionate. The judge considered the relevant principles from Regulation

27(5) and the factors set out in Regulation 27(6). At paragraphs [45] to [48], the judge considered in detail the Appellant's ties to the United Kingdom, his ability to integrate into life in Germany and the effect of expulsion on his rehabilitation.

57. Accordingly, in agreement with the UT, I do not think the FTT judge erred in concluding that the Appellant's expulsion was proportionate and justified on serious grounds of public policy or public security.

*Conclusion*

58. I would dismiss the appeal.

**Lord Justice Simon:**

59. I agree.

**Lady Justice Simler:**

60. I also agree.

**Appendix**

**EU Directive 2004/38/EC**

“16. General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
4. Once acquired, the right of permanent resident shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

...

27: General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public scrutiny or public health. These grounds shall not be invoked to serve economic ends.

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

...

28. Protection against expulsion.

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

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

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States if they:

(a) have resided in the host Member State for the previous 10 years...”

**The Immigration (European Economic Area) Regulations 2016 (SI 2016 no 1052)**

“Right of permanent residence

15. (1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;”

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(d) the family member of a worker or self-employed person who has ceased activity, provided—

(i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and

(ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of the period, a family member who has retained the right of residence.

.....

Exclusion and removal from the United Kingdom

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

(a) that person does not have or ceases to have a right to reside under these Regulations;

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

.....

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

27.—

- (1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.
- (2) A relevant decision may not be taken to service economic ends.
- (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
- (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
  - (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
  - (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.
- (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
  - (a) the decision must comply with the principle of proportionality;
  - (b) the decision must be based exclusively on the personal conduct of the person concerned;
  - (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
  - (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
  - (e) a person’s previous criminal convictions do not in themselves justify the decision.
  - (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(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..”

[subparagraph [7] concerns decisions on the grounds of public health and is not relevant for present purposes]

---

**ORDER**

---

UPON hearing Ms Hirst of counsel for the Appellant and Ms van Overdijk of counsel for the Respondent at a hearing on 5 March 2020,  
AND UPON the court having given judgment on 17 March 2020,

IT IS ORDERED THAT:

1. The appeal is dismissed.
2. The Appellant shall pay the Respondent’s reasonable costs of and occasioned by this appeal, which if not agreed shall be determined on an application by the Respondent under Regulation 16 of the Civil Legal Aid (Costs) Regulations 2013. Any request by the Respondent for costs to be paid by the Lord Chancellor is to be determined in accordance with regulations 10 and 16 of the Civil Legal Aid (Costs) Regulations 2013.
3. The Appellant’s costs of the appeal shall be subject to a detailed assessment in accordance with the 2013 Regulations and CPR 47.18.