



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003927
First-tier Tribunal No: EA/51688/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd February 2024

Before:

THE HON. MR JUSTICE HENSHAW
UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department

Appellant

And

Myron Francisco Joseph Borges
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms E Everett, Senior Presenting Officer (on 22 November 2023)
Mr P Deller, Senior Presenting Officer (on 15 February 2024)
For the Respondent: Mr S Karim, of Counsel

Heard at Field House on 22 November 2023 and 15 February 2024

DECISION AND REASONS

Introduction

1. The Secretary of State appeals, by permission granted by the First-tier Tribunal (“FtT”), against the decision of FtT Judge Rodger (“**the judge**”), promulgated on 15 August 2023, following a hearing on 4 August 2023. By that decision, the judge allowed the appellant’s appeal, pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002, against a decision dated 22 November 2022 to make a removal decision under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) (as saved) (“**the 2016 EEA Regulations**”).

2. For the sake of continuity, we shall refer to the parties as they were before the FtT: we refer to the Secretary of State as “the respondent” and Mr Borges as “the appellant”.

Background facts

3. The appellant was born on 22 August 1988 and is now 35 years old. He is a Portuguese national.
4. The appellant arrived in the UK on 19 March 2002 at the age of 13. He arrived with his mother and a sibling to join his father, a Portuguese national who had been granted a residence permit on 15 October 2001.
5. On 10 May 2002, the father made an application on the appellant’s behalf for a residence card as a family member of an EEA national exercising Treaty rights. The appellant was issued with a residence card on 4 September 2002, which was valid until 15 October 2006.
6. The appellant applied on 12 September 2006 for a renewal of his residence card. A new residence card was issued on 13 December 2006, valid until 13 December 2011.
7. On 19 June 2007 the appellant, by now aged 18, applied for a permanent residence card. That card was issued on 20 September 2007, and was valid until 20 September 2017.
8. The appellant was in prison from February 2011 to March 2012 for two offences of robbery.
9. In 2014, the appellant renounced his Indian nationality, surrendered his Indian passport, and obtained a Portuguese passport.
10. On 3 June 2019, at Woolwich Crown Court, the appellant was convicted of burglary with intent to steal. He was sentenced to 6 years’ imprisonment. The respondent on 27 November 2019 served notice on the appellant asking him to give reasons why he should not be deported. The appellant submitted representations dated 7 March 2020.
11. During the period of his imprisonment, on or shortly before 29 September 2019, the appellant applied for leave to remain in the UK pursuant to the EU Settlement Scheme.
12. The appellant was released on licence, at or around the halfway point of his sentence, in October 2022.
13. The respondent on 22 November 2022 made a decision to remove the appellant, pursuant to regulations 23(6)(b) and 27 of the 2016 EEA Regulations. The respondent concluded that the appellant was not an EEA citizen who had resided in the UK for a continuous period of 10 years prior to the removal decision, because (i) he had been an EEA national only since 2014 and (ii) his continuity of residence had in any event been

interrupted by his imprisonment from 2019 to 2022. Accordingly, his case did not fall within regulation 27(4)(a), which would have required the respondent to show imperative grounds of public security for his removal. However, the respondent accepted that the appellant had exercised Treaty rights as a Portuguese national for 5 years from 2014 until 2019 and had therefore acquired permanent residence as an EEA national. Accordingly, pursuant to regulation 27(3), the respondent considered that the appellant could be removed on serious grounds of public policy or security; and that such grounds existed. In addition, the respondent concluded that removal would not breach the UK's obligations under Article 8 of the European Convention of Human Rights.

14. On the same date, 22 November 2022, the respondent refused the appellant's application for leave to remain in the UK pursuant to the EU Settlement Scheme. The decision was made on suitability grounds, *"because you are subject to a decision to make a deportation order which was made on 22 November 2022"*.
15. The appellant appealed to the FtT from the deportation decision and, purportedly, from the refusal of leave to remain. Following an oral hearing, at which the FtT heard evidence from the appellant and his partner, the FtT allowed his appeal.

The FtT's decision

16. The FtT concluded that:-
 - a. The continuous period of residence referred to in regulation 27(4) (a) was not limited to the period since 2014, when the appellant became an EEA national. That regulation did not contain any qualification as regards the type of residence required in order to accrue the enhanced protection for which it provided. Here, the appellant had been *"living in the UK under EEA leave"* since 2002, as a family member of an EU national, and had been granted permanent residence in 2007. Although the judge referred to the appellant *"living in the UK with EEA leave"*, it is clear that she meant that the appellant had been residing in the UK in accordance with the 2016 EEA Regulations and its predecessor, i.e. the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) which were revoked, with savings, with effect from 1 February 2017 (the **"2006 EEA Regulations"**).
 - b. The continuous 10-year period had to be calculated backwards from the date of the removal decision, here November 2022.
 - c. Applying regulation 3(4) (see below) and the CJEU case law, it was necessary to decide whether, prior to any imprisonment, the appellant had forged integrating links with the UK, whether the effect of the sentences of imprisonment was such as to break

those links, and whether, taking into account an overall assessment of the appellant's situation, it would be inappropriate to regard the imprisonment as breaking his continuity of residence.

- d. On the evidence, the appellant had forged significant and weighty links with the UK prior to his first period of imprisonment in February 2011, including having been educated here from age 13 onwards and having spent 9 years continuously and lawfully in the UK, living with his parents, prior to that prison sentence.
- e. The appellant did not cease to be significantly and sufficiently integrated in the UK when he went into prison in 2011 nor when he came out and until he next offended in 2019.
- f. The appellant remained strongly integrated to the UK during his second period of imprisonment, and continued to have strong integrative links with the UK following his release from his second period of imprisonment in 2022. He had been employed since his release, had been complying with his probation requirements, and was shortly to commence a Thinking Skills course arranged by his probation officer.
- g. Overall, it would not be appropriate to treat his imprisonment as having broken his continuity of residence.
- h. Accordingly the appellant had 10 years' continuous residence in the UK at the time of the decision in November 2022, and a removal decision could be made only on imperative grounds of public security (regulation 27(4)).
- i. The respondent had not put forward any imperative grounds for the removal, in either the refusal letter or oral submissions at the hearing. The FtT found there to be no such grounds.

The key provisions

17. Recitals (23) and (24) to Directive 2004/38 state:

“(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) 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. Only in exceptional

circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.”

18. Article 28 (“*Protection against expulsion*”) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States states, so far as relevant:

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

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

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

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

19. The relevant provisions of the 2016 EEA Regulations are regulations 3, 23(6) (“*Exclusion and removal from the United Kingdom*”), 27 (“*Decisions taken on grounds of public policy, public security and public health*”) and Schedule 1 (“*Considerations of Public Policy, Public Security and the Fundamental Interests of Society Etc.*”). Regulation 27 provides for different tests for removal depending upon the length of residence in accordance with the Regulations. All of these, in the form in which they stood as at 30 December 2020, provided as follows:

“Continuity of residence

3.(1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under these Regulations.

...

(3) Continuity of residence is broken when—

(a) a person serves a sentence of imprisonment;

(b) a deportation or exclusion order is made in relation to a person;
or

(c) a person is removed from the United Kingdom under these Regulations.

(4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—

(a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;

(b) the effect of the sentence of imprisonment was not such as to break those integrating links; and

(c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence.

Exclusion and removal from the United Kingdom

23. ...

(6) ... an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—

...

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

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

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

...

(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; ...

(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.).

Schedule 1 Considerations of Public Policy, Public Security and the Fundamental Interests of Society Etc:

"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.

...

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.

...

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

...

(b) maintaining public order;

(c) preventing social harm;

...

(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;

...”

Applicability of the provisions to the present case

20. It is necessary to consider to what extent the transitional provisions enacted upon the UK’s withdrawal from the EU affected the provisions quoted above, in the circumstances of the present case. This rather complex topic was not fully explored in the removal decision or in the proceedings before the FtT, and was the subject of a further hearing which we convened for 15 February 2024. The respondent’s position at the beginning of that hearing was that, on reflection, it seemed that the EEA Regulations should not have been applied at all in the present case. However, by the end of the hearing we understand it to have been common ground that they did apply. We are, in any event, satisfied that they applied (as preserved in modified form) for the reasons summarised below. The main focus is on regulation 27(4), which sets out the ‘imperative grounds’ test that the FtT applied.
21. From July 2018 to 30 December 2020, regulation 27(4) applied, in the case of adults, to *“an EEA national who ... 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”*. The appellant was an EEA national and had a right of permanent residence under the EEA Regulations. He would thus have fallen within regulation 27(4), subject to the continuous residence requirement which was the main focus of this appeal and which we address later.
22. However, regulation 27(4) was revoked by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2), subject to savings specified in various statutory instruments, specifically SI 2020/1209, SI 2020/1210 and SI 2020/1309.
23. The instrument of particular relevance in the present case is SI 2020/1209, The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020/1209 (**“the Grace Period SI”**). Regulation 3 of the Grace Period SI preserved various provisions of the EEA Regulations (including regulation 27), as modified pursuant to regulations 5-10 of the Grace Period SI, during a ‘grace period’ from 31 December

2020 to 30 June 2021. In addition, regulation 4 of the Grace Period SI made provision for cases where an application for leave to enter or remain pursuant to the EU Settlement Scheme rules (referred to in the regulations as the “*residence scheme immigration rules*”) had been made but not yet finally determined. So far as relevant, regulation 4 provides as follows:

“4.— Applications which have not been finally determined by the application deadline

(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with or without savings).

(2) This regulation applies to a person (“the applicant”) who—

(a) has made an in-time application (see paragraph (6)), and

(b) immediately before IP completion day—

(i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or

(ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15).

(3) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations in relation to the applicant during the relevant period.

(4) The provisions specified in regulation 11 apply in relation to the applicant during the relevant period as if any reference to the EEA Regulations 2016 or any provision of those Regulations are to the Regulations or provision of the Regulations as continued in effect and modified by regulations 5 to 10.

(5) The enactments specified in regulation 12 apply in relation to the applicant during the relevant period with the modifications specified in that regulation.

(6) For the purposes of this regulation—

(a) an in-time application is an application for leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules which—

(i) is valid under residence scheme immigration rules;

(ii) is made on or before the application deadline, and

(iii) has not been withdrawn;

(b) the relevant period begins immediately after the application deadline and ends—

(i) if the applicant is, by virtue of the in-time application, granted leave to enter or remain in the United Kingdom, on the day on which that leave is granted;

(ii) if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant does not appeal against that

decision, on the first day on which the applicant is no longer entitled to appeal against that decision (ignoring any possibility of an appeal out of time with permission);

(iii) if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant brings an appeal against that decision, on the day on which that appeal is finally determined, withdrawn or abandoned, or lapses under paragraph 3 of Schedule 1 to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020;

..."

24. It was common ground that regulation 4(1) applied. It was also common ground (at least by the end of the hearing on 15 February 2024) that the appellant had made an in-time application within regulation 4(2)(a) and 4(6)(a) because his September 2019 application for leave to remain was valid under residence scheme immigration rules, was made on or before the application deadline (defined in regulation 2 as 30 June 2021), and was not withdrawn. Further, there was no dispute that the appellant was lawfully resident in the UK by virtue of the EEA Regulations and/or had a right of permanent residence in the UK under regulation 15 of those regulations, with the result that regulation 4(2)(b) of the Grace Period SI was also satisfied.
25. It follows that, pursuant to regulation 4(3) of the Grace Period SI, the provisions of the EEA Regulations specified in regulations 5-10 (including regulation 27) continued to have effect, with the modifications specified in those regulations, in relation to the appellant during "*the relevant period*".
26. Under regulation 4(6)(b) of the Grace Period SI, the "*relevant period*" began immediately after the "*application deadline*" i.e. 30 June 2020. The question of when the period ended, in the present case, is more complicated.
27. The period did not end pursuant to regulation 4(6)(i), because the appellant was not granted leave to enter or remain in the UK. (Had such leave been granted, then it appears the case would then have been governed by SI 2020/1210, which preserves *inter alia* regulation 27 of the EEA Regulation, in modified form, for a person who "*has indefinite leave to enter or remain in the United Kingdom granted under residence scheme immigration rules ... and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision*").
28. Whether, and if so when, the "*relevant period*" came to an end pursuant to regulation 4(6)(b)(ii) or (iii) of the Grace Period SI raises a further difficulty, namely an apparent lacuna in the provisions for rights of appeal from refusals of leave under the EU Settlement Scheme. Regulation 3(1) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020/61 (as it stood at the relevant times) provided, so far as material:

“3.— Right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of residence scheme immigration rules

(1) A person ("P") may appeal against a decision made on or after exit day

—

...

(c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application, or

...

(2) In this regulation, "relevant application" means an application for leave to enter or remain in the United Kingdom made under residence scheme immigration rules on or after exit day."

The lacuna arises because in cases such as that of the present appellant, the decision not to grant leave was made on or after exit day (ultimately specified as 31 January 2020 by section 20 of the European Union (Withdrawal) Act 2018 as amended), but his application for leave to remain was made before exit day, with the result that it was not a "*relevant application*" within regulation 3 quoted above. We understand that no other provision conferred a right of appeal for such applications.

29. How, then, do regulations 4(6)(b)(ii) and (iii) of the Grace Period SI operate in such cases? One possible answer is that they do not apply at all, because if no right of appeal exists then there can be no day "*on which the applicant is no longer entitled to appeal*" within regulation 4(6)(b)(ii), and the applicant cannot "*bring[] an appeal*" within regulation 4(6)(b)(iii). On that basis, the "*relevant period*" would not come to an end at all in the event of a refused application for leave to enter/remain, so the provisions specified in regulations 5-10 would be preserved indefinitely (in modified form) in relation to those applicants. That would seem a surprising result: it would place them, somewhat arbitrarily, in a better position than applicants who had been refused leave and had not appealed or who had appealed unsuccessfully.
30. An alternative construction, which seems to us more coherent, is that in cases where no right of appeal existed, the "*relevant period*" would come to an end on the date of the refusal of leave to enter/remain itself, pursuant to regulation 4(6)(b)(ii), because the applicant will necessarily not have brought an appeal and his leave application will have been finally determined.
31. On that footing, the problem arises in the present case that the deportation decision and the refusal of leave to remain occurred on the same day, 22 November 2022. Does that mean that the "*relevant period*" ended on that date and, further, that the provisions specified in regulation 5-10 of the Grace Period of SI were not preserved for the purposes of the deportation decision? We consider the answer to the latter question to be 'no', at least in the circumstances of the present case. The decision to

refuse the appellant's application for leave to remain was premised, solely, on the decision to deport. The criteria to be applied when making the deportation decision cannot, in our view, be altered (in effect, retrospectively) by the logically subsequent decision to refuse leave to remain. Such a result would involve an unacceptable element of circularity, because it would mean that the applicant benefitted from a lower level of protection from deportation by virtue of a refusal of leave whose sole basis was the decision to deport. Accordingly, it appears to us that the "*relevant period*" must be regarded as having remained extant at the time of the deportation decision, in the same way that it would have done if (for example) the deportation decision had been made on 22 November 2022 and the refusal of leave on 23 November 2022.

32. As a result, the deportation decision in our view fell to be taken according to the relevant provisions of the EEA Regulations as preserved in modified form by regulations 5-10 of the Grace Period SI. As regards the provisions quoted in § 19 above, during the relevant period provided for in regulation 4 (and subject to a non-relevant exception concerning cases to which regulations such as SI 2020/1210 made under section 9 of the European Union (Withdrawal Agreement) Act 2020 applied):

a. regulation 3 of the EEA Regulations (continuity of residence) was preserved without modification (regulation 5 of the Grace Period SI);

b. regulation 23(6)(b) of the EEA Regulations (under the heading "*Exclusion and removal from the United Kingdom*") was preserved in the following revised form:

"(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 on conducive grounds in accordance with regulation 27A or if the person is subject to a deportation order by virtue of section 32 of the UK Borders Act 2007;..." (regulation 7 of the Grace Period SI)

c. regulation 27 of the EEA Regulations was preserved in unmodified form, but with the addition of a new regulation 27A:

"27A.— Decisions taken on conducive grounds

(1) An EEA decision may be taken on the ground that the decision is conducive to the public good.

(2) But a decision may only be taken under this regulation in relation to a person as a result of conduct of that person that took place after IP completion day."

(regulation 7 of the Grace Period SI)

d. Schedule 1 to the EEA Regulations was preserved, subject to the substitution for paragraph 1 of the following text, which removed references to the EU treaties and Member States:

“The United Kingdom enjoys considerable discretion, acting within the parameters set by the law, to define its own standards of public policy and public security, for purposes tailored to its individual context from time to time.” (regulation 7 of the Grace Period SI)

33. Thus, for the purposes of the present case, which involved conduct before IP completion day, the applicable provisions were preserved unchanged in any material respect from those in force on 30 December 2020 quoted earlier.

The arguments on appeal to the Upper Tribunal

34. The respondent’s arguments on appeal to this Tribunal may be summarised as follows.

- a. (“**Ground 1**”) The FtT was wrong to conclude that the appellant was “*an EEA national ... who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision*” within regulation 27(4). The respondent’s case is that residence qualifies for the purposes of regulation 27(4) only if it is residence accumulated as *an EEA national* in accordance with the 2006 and/or 2016 EEA Regulations; that is to say, it does not include residence accumulated as a family member because the regulation does not refer to family members. “*EEA national*” means a national of an EEA State who is not also a British citizen. The appellant did not become an EEA national until 2014, and therefore had not completed 10 years’ continuous residence as *an EEA national* counting back from the date of the removal decision. Accordingly he was entitled to only the ‘middle level of protection’ having acquired permanent residence as an EEA national, with the result that the test for his removal was whether there were serious grounds of public policy or public security, as set out in the decision letter.
- b. (“**Ground 2**”) Irrespective of the level of protection, and even though the decision letter did not consider the application of the ‘imperative grounds’ test, it was incumbent on the FtT to consider all matters relevant to the appropriate threshold. These included proportionality; the public interest; whether the appellant’s conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (taking into account past conduct and the fact that the threat need not be imminent: regulation 27(5)(c)); the social harm and public protection principles referred to in Schedule 1 § 7, given the seriousness of the offence as reflected in the length of the appellant’s more recent sentence; and the principle referred in Schedule 1 § 3 (quoted above) arising from the length of the sentence and/or number of the appellant’s convictions.

c. (“**Ground 3**”) The FtT focussed on the appellant’s integrative links of various kinds without bearing in mind that “*social and cultural integration in the UK connotes integration as a law-abiding citizen*” (citing *Binbuga v SSHD* [2019] EWCA Civ 551 § 56, where the Court of Appeal stated that membership of a pro-criminal gang told against rather than for social integration). The FtT did not address adverse matters including the appellant’s offending; the OASys assessment, following his more recent offending, of medium risk of harm to the public and medium risk of offending; the offender manager’s statement that the appellant’s pattern of offending indicated recklessness and risk-taking behaviour with the potential to endanger those around him, and that without substance abuse intervention he was likely to reoffend; and the lack of evidence of sustained, effective rehabilitation. The appellant was “*at risk of offending again which arguably demonstrates serious grounds for public security exists*”.

35. The appellant argued, in short, that the FtT was correct for the reasons it gave, and its approach was consistent with Article 28 of Directive 2004/38, which regulation 27 implements. Further, the ‘imperative grounds’ level of protection was considerably stricter than the ‘serious grounds’ test and must be interpreted strictly (Case C-348/09 *I v Oberbürgermeisterin der Stadt Remscheid* [2012] Q.B. 799). The concept of “*imperative grounds of public security*” presupposed not only the existence of a threat to public security, but also that such a threat was of a particularly high degree of seriousness (*ibid.*, § 20). Applying this test in *FV (Italy) v SSHD* [2012] EWCA Civ 1199, Pill LJ found no real prospect of the tribunal finding imperative grounds of public security to justify removal in a case where the appellant had committed a serious offence of violence justifying a sentence of eight years’ imprisonment as well as other offences” (§ 98). (We note that the Court of Appeal’s decision in that case was reversed by the Supreme Court in *Vomero v SSHD* [2019] UKSC 35, though not on the issue of the meaning of “*imperative grounds of public security*”.) The appellant submitted that, in the present case, there were neither imperative grounds of public security nor, if relevant, serious grounds of public policy or public security justifying removal.

Analysis

Ground 1

36. The respondent’s first ground of appeal, summarised in § 34(a) above, raises the question of whether the 10-year period of residence in the phrase “*an EEA national ... who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision*” in regulation 27(4) must represent residence accumulated in the United Kingdom as an EEA national exercising Treaty rights throughout the period in question, or whether any residence accumulated in accordance with the 2006 EEA Regulations and/or 2016 EEA Regulations, including residence as a family member of an EEA national exercising Treaty rights, qualifies

provided that the individual facing removal action is an EEA national at the time of the removal decision.

37. We asked Mr Karim and Ms Everett whether they were aware of any authority directly bearing on that issue, but both indicated that they were not. Ms Everett noted that CJEU and Supreme Court case law indicated that the enhanced ‘imperative grounds’ protection applied only to those who had acquired permanent residence, but that in the present case the appellant undoubtedly had acquired such residence. (We took this to be a reference to Case C-426/16 *Vomero* [2019] QB 126 and to the Supreme Court’s subsequent decision in *Vomero* cited above). As to the issue arising in the present case, Ms Everett indicated, in substance, that she relied on the provisions of Directive 2004/38.
38. As the FtT noted, regulation 27(4) does not state, at least in terms, that the EEA national in question must have resided in the host Member State as an EEA national exercising Treaty rights for the whole of the minimum ten-year qualifying period; and in that respect it contrasts with regulations 12 and 15 (dealing respectively with the conditions for the issue of EEA family permits and acquisition of the right to reside permanently in the UK), which refer to an EEA national who is “*residing in the United Kingdom in accordance with these Regulations*” or “*who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years*”. The language of regulation 27(4) thus tends to point towards, and at least is consistent with, enhanced protection being afforded to a person who is an EEA national at the time of the removal decision, and who has acquired the minimum period of continuous residence in accordance with the 2016 Regulations or 2016 and 2006 EEA Regulations combined, whether such residence has been accumulated as a family member of an EEA national exercising Treaty rights or as an EEA national exercising Treaty rights, provided that the individual facing removal is an EEA national at the date of the removal decision.
39. The same is true of the language of Article 28(3): it does not in terms require the relevant person to have been a Union citizen throughout the preceding ten-year continuous period of residence. Nor, in our view, is there anything in the broader scheme or objectives of the Directive that would lead to that conclusion. The underlying rationale for Article 28(3) is the conferral of additional protection on Union citizens who have exercised their free movement rights, in circumstances where they have become integrated into another Member State as demonstrated by length of residence. We see no logic in excluding from consideration residence accumulated as a family member of an EEA national where such residence preceded the individual’s residence as an EEA national exercising Treaty rights and was continuous with it. Individuals in that situation are, in the words of recital 24 to the Directive, “*Union citizens who have resided for many years in the territory of the host Member State*”. Although it might be argued that the first sentence of recital 23 contemplates that the exercise of Treaty rights will precede the period of integration, the operative provision, Article 28, does not make that a requirement.

40. For these reasons, we have concluded as follows:
- (i) The enhanced (third) level of protection in regulation 27(4) applies if an individual is an EEA national as at the date of the removal decision and has accumulated the minimum ten-year continuous period of residence (calculated backwards from the date of the removal decision) by residing in the United Kingdom in accordance with the 2016 EEA Regulations or a combination of the 2006 EEA Regulations and the 2016 EEA Regulations, even if such residence includes a period during which the individual resided in the United Kingdom as a family member in accordance with such regulations.
 - (ii) In other words, for the enhanced (third) level of protection to apply, it is not necessary for the individual to have resided in the United Kingdom as an EEA national exercising Treaty rights for the entirety of the minimum 10-year period of residence.
41. In the present case, the appellant arrived in the United Kingdom in March 2002. His father had been granted a residence permit as an EEA national who was exercising Treaty rights. In May 2002, his father made an application on his behalf for a residence card as a family member. The appellant then was issued with a residence card as a family member in 2002 and again in 2006; and obtained a permanent residence card as a family member in 2007. He became an EEA national in 2014. The respondent accepted that the appellant had acquired permanent residence on account of his residence in the United Kingdom as an EEA national from 2014 until 2019. Although the respondent considered that the appellant's imprisonment in 2019 broke the continuity of his residence, the judge found otherwise. Furthermore, the judge found that, as at the date of the removal decision, the periods of imprisonment had not broken the continuity of the appellant's integration. These findings have not been challenged.
42. Accordingly, on the basis of the judge's findings and given our conclusions on the interpretation of regulation 27(4) summarised at our para 40 above, we are satisfied that the FtT was correct to conclude that the appellant was entitled to the enhanced (third) level of protection by reason of having accumulated the minimum ten-year continuous period of residence in accordance with the 2006 and 2016 EEA Regulations notwithstanding that he became an EEA national only in 2014. The judge did not err in law in taking into account the appellant's previous residence as a family member of an EEA national exercising Treaty rights.
43. On that basis, the next question is whether the appellant's imprisonment from 2019 to 2022 broke his continuity of residence. As indicated above, we did not understand the respondent to challenge the FtT's conclusions in that regard on the present appeal. For completeness, though, we note that the FtT referred to the CJEU's decision in *Joined Cases C-316/16 B v Land Baden-Württemberg* and *C-424/16 FV (Italy) v SSHD* (otherwise

known as *Vomero v SSHD*) [2019] QB 126, which included the following statements of principle:

“70. As to whether periods of imprisonment may, by themselves and irrespective of periods of absence from the host member state, also lead, where appropriate, to a severing of the link with that state and to the discontinuity of the period of residence in that State, the Court has held that although, in principle, such periods of imprisonment interrupt the continuity of the period of residence, for the purpose of Article 28(3)(a) of Directive 2004/38, it is nevertheless necessary—in order to determine whether those periods of imprisonment have broken the integrative links previously forged with the host Member State with the result that the person concerned is no longer entitled to the enhanced protection provided for in that provision—to carry out an overall assessment of the situation of that person at the precise time when the question of expulsion arises. ...

71. Indeed, particularly in the case of a Union Citizen who was already in a position to satisfy the condition of 10 years’ continuous residence in the host Member State in the past, even before he committed a criminal act that resulted in his detention, the fact that the person concerned was placed in custody by the authorities of that State cannot be regarded as automatically breaking the integrative links that that person had previously forged with that State and the continuity of his residence in that State for the purpose of Article 28(3)(a) of Directive 2004/38 and, therefore, depriving him of the enhanced protection against expulsion provided for in that provision. Moreover, such an interpretation would deprive that provision of much of its practical effect, since an expulsion measure will most often be adopted precisely because of the conduct of the person concerned that led to his conviction and detention.

72. As part of the overall assessment, mentioned in para 70 above, which, in this case, is for the referring court to carry out, it is necessary to take into account, as regards the integrative links forged by B with the host Member State during the period of residence before his detention, the fact that, the more those integrative links with that State are solid—including from a social, cultural and family perspective, to the point where, for example, the person concerned is genuinely rooted in the society of that State, as found by the referring court in the main proceedings—the lower the probability that a period of detention could have resulted in those links being broken and, consequently, a discontinuity of the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38.

73. Other relevant factors in that overall assessment may include ... first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly, all the relevant factors as regards the behaviour of the person concerned during the period of imprisonment.

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

...

80. ...where a Union citizen has already resided in the host Member State for a period of 10 years when his detention begins, the fact that the

expulsion measure is adopted during or at the end of the period of detention and the fact that that period of detention thus forms part of the 10-year period preceding the adoption of that measure do not automatically entail a discontinuity of that 10-year period as a result of which the person concerned would be deprived of the enhanced protection provided for under Article 28(3)(a) of Directive 2004/38 .

...

83. In the light of all the foregoing, the answer to the first three questions in Case C-316/16 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention."

44. Subsequently, the Court of Appeal in *Hafeez v SSHD* [2020] EWCA Civ 406 concluded that periods of imprisonment did not positively count towards the 10 years' continuous residence, but, conversely, did not automatically reset the ten-year clock so that ten years' post imprisonment continuous residence had to be shown (see § 35); and the Supreme Court in *Vomero v SSHD* [2019] UKSC 35 concluded that a period of imprisonment could not be relied on as part of the five years' continuous residence required to acquire a right to permanent residence under Article 16 of the 2016 EEA Regulations (that being a pre-requisite to the enhanced protection from removal in Article 28(3)(a)). However, neither of those cases is inconsistent with the conferral of enhanced protection on a person in the position of the appellant, who has resided in the UK in accordance with the 2006 and 2016 EEA Regulations for a continuous period of at least 10 years counting backwards from the date of the removal decision and without taking into account periods of imprisonment towards the ten years, and in circumstances where the periods of his imprisonment did not break the integrative links he had previously forged with the UK. We consider that the FtT applied the correct approach when deciding whether the periods of imprisonment broke the appellant's integrative links with the UK, and detect no error of law in that regard.
45. Accordingly, we conclude that the FtT was correct to find that the appellant was entitled to the enhanced protection provided for by regulation 27(4) of the 2016 EEA Regulations.

Grounds 2 and 3

46. In the light of our conclusion on Ground 1, Grounds 2 and 3 must be approached on the basis that the respondent was entitled to remove the appellant only on imperative grounds of public security.
47. In our view, it was the primary duty of the respondent to identify the imperative grounds for the appellant's removal. However, the respondent's decision letter expressly stated that, given the conclusion the respondent had reached that enhanced protection did not apply, "*consideration has not been given to whether your deportation is justified on imperative grounds of public security*" (§ 37).
48. The FtT recorded that "*[t]he respondent has not put forward any imperative grounds for the deportation within either the refusal letter or oral submissions at the hearing*" (§ 32).
49. Ms Everett submitted that, if we concluded that the judge was correct to find that the appellant was entitled to enhanced protection, the Upper Tribunal could decide whether or not imperative grounds of public security existed; in her view, there would be no need for a further hearing. The respondent relies upon the OASys report. There is no further evidence that the respondent would rely upon.
50. In response, Mr Karim said that, if we were to conclude that there were no imperative grounds for the appellant's removal, he was content for us to proceed to re-make the decision on the appeal. However, if we were of the view that there were potentially imperative grounds, the appellant should have an opportunity to address the Tribunal; furthermore, in that case, he submitted that a remittal to the FtT would be necessary as the appellant's circumstances have changed, in that, he now has a son.
51. We have some difficulty with the respondent's submission that the FtT ought of its own motion to have considered whether there are imperative grounds of public security for the appellant's removal, even in circumstances where (a) the primary decision-maker had not put forward any such grounds as such and (b) the respondent did not invite the FtT to find any such grounds to exist. However, we find it unnecessary to decide the FtT might nonetheless have erred in law by not considering the issue, because (having considered the matter ourselves) we find no such grounds to exist.
52. We note the strictness of the 'imperative grounds' test, and that the guidance document of Home Office staff "*Public policy, public security or public health decisions*" (Version 7.0, published on 30 September 2022) states:

"Imperative grounds of public security are not defined in the EEA Regulations 2016. The threshold may be interpreted more widely than threats to the state or its institutions, and can, for example, include serious criminality, such as drug dealing as part of an organised group. See: *Tsakouridis (European citizenship)* [2010] EUECJ C-145/09.

In the case of *P.I (Imperative grounds of public security)* [2009] EUECJ C-348-09 the Court of Justice of European Union held that it was open to member states to consider that those crimes referred to in Article 83(1) of the Treaties of the European Union (TFEU) constitute a particularly serious threat to the fundamental interests of society and are capable of justifying a decision on 'imperative grounds of public security' provided the manner in which such offences were committed disclose particularly serious characteristics and the person in question poses a genuine, present and sufficiently serious threat. The areas of crime covered by Article 83(1) of TFEU are:

- terrorism
- trafficking in human beings and sexual exploitation of women and children
- illicit drug trafficking
- illicit arms trafficking
- money laundering
- corruption
- counterfeiting of means of payment
- computer crime
- organised crime

This list is not exhaustive and other crimes without a cross-border element may also be relevant depending on the nature and severity of the offence, the circumstances of how the offence was committed and whether it has characteristics considered to pose a threat of a particularly high degree of seriousness. " (p.32)

53. The list set out above is expressly non-exhaustive, but perhaps gives a flavour of the types of case in which imperative grounds might exist. In the present case, the respondent drew attention to the length of the sentence passed on the appellant in 2019 (a reflection of the seriousness of the offending) and the matters from the OASys report mentioned in § 34.c above. The OASys report dated 27 August 2022 included the following points, which we quote at some length in an attempt to give a fair sense of a mixed picture:

"- In my assessment Mr Borges does pose a risk of harm to the public due to his substance misuse and his financial situation. Mr Borges does have previous employment history and has attained some custodial qualifications, however his increased substance misuse over the past 4 years, has resulted in an inability to maintain employment. Mr Borges also has some violent offences which have been financially motivated and have included the misuse of substances. It is my assessment that without adequate support for his financial situation and substance dependency, he is likely to re-offend in the future and this may pose a risk of harm to those around him.

[I]n addition the fact that it has been confirmed that there was a weapon brought into the victims house there is a ROSH [risk of serious harm] physical and emotional if this were to be used." (p.10)

“Mr Borges does have previous employment experience where he was employed for a number of years, and has began enquiring about potential employment opportunities for when he is released. During my interview with Mr Borges he states that he has the opportunity for employment on release to work at his local garage as a mechanic as he has qualifications in this. Mr Borges seems genuinely passionate of this and displays a positive attitude to work which is a change from his previous assessment 2 years ago.

Mr Borges in general has shown a good level of motivation to gain work related skills, during his time in custody.

In my assessment Mr Borges ETE circumstances are not linked to a risk of serious harm within the community. However, if Mr Borges is unable to find or maintain suitable employment, he has demonstrated that he is likely to resort to offending behaviour. If this is not addressed appropriately the likelihood of this happening will be high.” (p.13)

“Mr Borges's previous and current offences demonstrate this, and include a pattern of offences which involve recklessness, risk taking and aggression towards others. This as a result could endanger those within the community. It is my assessment that Mr Borges would benefit from receiving support in gaining stable employment and managing his finances. Without such support Mr Borges is highly likely to occur illicit debts, resulting in him re-offending in order to repay such debts, and thus posing a risk of harm to members of the public in doing so. ” (p.15f)

“It is my assessment that Mr Borges does not pose a risk of serious harm within the community. However, it is felt that his relationship circumstances have the potential to lead to further offending behaviour. If Mr Borges faces a stressful relationship situation in the future, he has already demonstrated that he struggles to cope with this. If Mr Borges is not supported in relational to his emotional regulation, this could lead to further offending behaviour. ” (p.16)

“Mr Borges since his time in custody has shown some level of motivation to tackle his substance misuse problem, and has not been found to have misused cannabis or any other substance.

Mr Borges has also most recently completed the Psychoactive Substance Misuse Course.

Mr Borges's most recent offence was a violent offence in the form of an aggravated burglary, and included him being under the influence of cannabis. When considered alongside Mr Borges offending history, he has demonstrated that if he is faced with a situation where he is under the influence of substances, he has the potential to become aggressive/violent towards others, resulting in harm being caused.

When Mr Borges is under the influence of substances he displays limited if any victim empathy or consequential thinking, and this impacts on his inhibitions and decision making to offend. Mr Borges's recent offence also saw two weapons being included, and despite Mr Borges stating that these items did not belong to him, they were still equipped and brought into the victims home, during the commission of the offence.

Therefore, heightening the risk posed should the victim have been at home.

Therefore, it is my assessment that Mr Borges does pose a risk of serious harm towards others, as the above information demonstrates his behaviour being a risk towards those around him within the community. " (p.20)

"RSR [risk serious recidivism] score (DYNAMIC) is 0.59% Low" (p.37)

"MYRON BORGES has been assessed as medium risk to the public.

They are quite motivated to address offending behaviour.

...

- Mr Borges was under the influence of cannabis during the time of his offence and has disclosed that his actions were also motivated by his intention to steal potential substances for his own consumption, and to sell substances for financial gain.

...

- Mr Borges has stated that he intends to reside with his parents upon release, as they offer him continued support. Mr Borges family do not in any way condone or minimise his behaviour, but do indeed offer him support and will continue to do so upon his release.

- Mr Borges has a history of substance misuse namely cannabis, however throughout his sentence he has remained substance free and has engaged in in-house courses relating to psychoactive substances.

- Mr Borges has a tendency to engage with negative lifestyle associates and has been known to engage in group offending as a result. Since his time in custody Mr Borges has not been involved in any group incidents or received any negative entries for behaviour towards other offenders.

- Mr Borges has shown that he is willing to address his offending behaviour and has completed various ETE related courses, in order to enhance his chances of employability once he is released. Mr Borges has completed the custodial course relating to Dry Lining and has achieved his CSCS card qualification.

- OGRS3 probability of proven re-offending in 2 years - 27% Low

- OGP probability of proven non-violent re-offending in 2 years - 32% Low

- OVP probability of proven violent-type offending in 2 years - 18% Low

RoSH [risk of serious harm]

...

Public: Medium

...

- Mr Borges has been assessed as posing a medium risk of harm to the public and low in relation to all other areas. in particular this risk of harm relates to individuals who are home owners, or individuals who are believed to be in possession of substances which Mr Borges feels he can steal or take for personal usage.

Circumstances likely to increase risk:

- Lack of stable accommodation, as a result of a breakdown in support offered by his family. ...
- Increase in substance misuse
- Returning to negative lifestyle associates

Factors likely to reduce risk:

- Mr Borges gaining and maintaining suitable employment, in order to make more constructive use of his time and to improve re-integration back into the community.
- Mr Borges engagement with pro-social peers.
- Mr Borges continued engagement with his Probation officer as part of his licence and supervisory requirements, and completion of specified one to one work regarding the effects of using substances. " (pp.41-42)

In a summary section, the appellant was assessed as having on OGRS3 probability of proven reoffending within one year of 19% and within two years of 33% (categorised as "low"); an OGP probability of proven non-violent reoffending within one year of 25% and within two years of 33% (categorised as "medium"), and an OVP probability of proven violent-type reoffending within one year of 10% and within two years of 17% (categorised as "low"). (p.47)

54. The FtT found that, since the appellant's release on licence in 2022, his licence address had been with his parents in London; he had formed a new relationship with a partner who was expecting her third (the appellant's first) child; the appellant had been employed (of which evidence was produced); he had been complying with his probation requirements; and he was shortly to commence a Thinking Skills programme arranged by his probation officer. It is clear from the OASys report that these are all factors that reduce the appellant's risk of re-offending. During his imprisonment, he remained substance free and had engaged in in-house courses relating to psychoactive substances. There is no evidence that he has returned to substance misuse following his release. There is no evidence that he has returned to negative life-style associates following his release, nor any evidence of the factors identified in the OASys report as factors that increase the risk of re-offending. We therefore do not accept the submission in the grounds that there is a lack of evidence of sustained and effective rehabilitation. In all the circumstances, the appellant's risk of re-offending is low, on any legitimate view.
55. We take into account the public interest in the removal of offenders, the factors set out in regulation 27(5) and Schedule 1 of the 2016 EEA Regulations (including those referred to in § 34.b above), the risk the appellant poses to the community, the nature of Appellant's offending and the contents of the OASys report. Having done so, we are the clear view that this case falls well short of one where removal is justified on imperative grounds of public security. Serious as the appellant's offending was, the circumstances do not in our view rise to the particularly serious

level where he could be said to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society such that imperative grounds for his removal exist, on any legitimate view.

56. We have therefore concluded that, even if the FtT ought to have made its own findings as to the existence or otherwise of imperative grounds of public security, it would have been bound to have concluded that no such grounds existed. Accordingly, there was no material error of law.

Conclusions

57. For these reasons, we consider that the FtT was correct to hold that the appellant could be deported only on imperative grounds of public security, and that no such grounds had been shown to exist. The appeal must therefore be dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve an error on a point of law sufficient to require it to be set aside, and its decision stands.

The appeal to the Upper Tribunal is accordingly dismissed.

No anonymity direction is made.

Signed:

Date: 20 February 2024

The Hon. Mr Justice Henshaw, sitting as an Upper Tribunal Judge.

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email