Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00491/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th November 2019	**On 5th February 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL [L]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr. N Garrod, Counsel instructed by David Tang & Co Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr [L]. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr [L] as the appellant, and the Secretary of State as the respondent.

2. The respondent appeals the decision of First-tier Tribunal Judge Talbot promulgated on 29th July 2019 allowing the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") against the respondent's decision to refuse to revoke an extant deportation order.

Background

3. The appellant is a dual national of Bulgaria and Albania. He first arrived in the United Kingdom in August 2000 and claimed asylum, claiming to be a Kosovan national. That claim for asylum was refused on 26th August 2000 and an appeal against the refusal was dismissed by the First-tier Tribunal on 29th September 2000. The appellant was removed to Kosovo on 11th November 2000. The appellant returned to the UK in October 2003, and in March 2004, he applied for a residence document as the spouse of a Spanish national exercising treaty rights in the UK. He was issued with a residence document on 14th September 2005, valid until 11th May 2009. In February 2008, the appellant applied for an EEA Residence Card as the spouse of an EEA national. On 13th August 2008 he was issued with a residence card valid until 13 August 2013.

4. On 20th August 2009 the appellant was convicted at Wood Green Crown Court for false imprisonment. He was sentenced to 15 months imprisonment. Following that conviction, a deportation order was signed against the appellant on 16th December 2009 and he was deported to Albania on 25th December 2009. The appellant made three unsuccessful attempts to enter the United Kingdom, unlawfully, and in breach of his deportation order. The first was on 10th April 2013, the second on 15th January 2015 and the third on 19th March 2015. After each attempt, the appellant was removed to Albania.

5. The appellant returned to the UK unlawfully at the end of May 2015 and on 10th August 2016, the appellant's representatives applied for a revocation of the extant deportation order. The respondent refused the application for reasons set out in a decision dated 24th February 2017 and an appeal against that decision was dismissed by First-tier Tribunal Judge Sweet for reasons set out in a decision promulgated on

17th November 2017. The case advanced by the appellant at the hearing of his appeal is summarised at paragraph [12] of the decision of Judge Sweet as follows:

> "… The appellant had departed the UK voluntarily at his own expense and he has not committed any further offences since his conviction on 20 August 2009. He now held Bulgarian nationality and had the right to enter the UK as an EEA worker in his own right. He has a three-year-old son with his Bulgarian partner, Ana [I], and he is the father of an EEA dependent."

6. Judge Sweet heard evidence from the appellant's partner who confirmed that the relationship between the appellant and his son is very good. She gave evidence that she has known the appellant since 2006 but she had left him in 2013. She had visited the appellant in August 2017, and he had unlawfully returned to the UK to see his son. At paragraphs [26] to [28] of his decision, Judge Sweet stated:

> "26. The application for revocation of the deportation order has been made on the basis of a change of the appellant's circumstances. Firstly, he claims that he is now an EEA national, being a citizen of Bulgaria – but that is not a change of circumstances because he was treated as the partner of an EEA national when the revocation order *(sic)* was made in December 2009. Secondly, he submits that there is a change of circumstances, because his son [J] was born on 14 July 2013 in the UK and he claims that he has a relationship with him. There was evidence from his former partner, the mother of his children, Ana [I], that he is in contact with his son, and there was a meeting in Albania in August 2017. I accept that he appears to have a relationship with his son, but it is equally clear that he does not have an ongoing relationship with Ana [I], the mother of their son. This is confirmed in her witness statement made on 31 October 2017 (paragraph 8) – and in the appellant's own statement – and confirmed again in her oral evidence today. I accept that this is a material change in circumstances, but I am not persuaded that the respondent's decision to refuse to revoke the deportation order does not comply with the requirements of Regulation 27(5) of the EEA Regulations.
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> 27. I conclude that the respondent's decision does comply with the principle of proportionality, and it is based exclusively on the appellant's personal conduct. His personal conduct includes, not only the offence for which he was convicted in August 2009 (though I accept that the conviction is spent now that 4 years has passed), but also his other breach of the immigration requirements of the UK. He made 3 unauthorised attempts to return to the UK in April 2013, January 2015 and March 2015. He came to the UK illegally at the end of May 2015, and it appears that he was still in the UK in August 2016 in order to sign his name on their son's birth certificate and to make his current application. I accept that the best interests of the child are a primary consideration, but the public interest in his deportation outweighs the interests of the child. In my view there is a significant risk that the appellant will reoffend and that he presents a genuine, present and sufficiently serious threat to a fundamental interest of society and poses a risk to the safety of the public or a section of the public. I reached this

> decision, taking into account all the facts and evidence in this case including the email of 31 March 2017 from his former partner Marjeta [L] ([D]), who states that they are now on good terms with each other and with his family.
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> 28. Nor, for reasons set out in the refusal letter, do I consider that there is any breach of the appellant's Article 8 ECHR rights, whether in respect of his family life or his private life. He was not lawfully resident in the UK for most of his life, nor was he socially and culturally integrated into the UK, and there are not very significant obstacles to his integration in the country where he currently lives."

7. On 27th March 2018 the appellant's representatives again applied for revocation of the extant deportation order. The respondent refused to revoke the deportation order for reasons set out in a decision dated 10th July 2018 and it was that decision that was the subject of the appeal before FtT judge Talbot. Judge Talbot allowed the appeal.

The decision FtT Judge Talbot

8. Judge Talbot sets out the relevant history at paragraph [3] of his decision and at paragraph [7] of his decision, he summarises the evidence of the appellant set out in his witness statement. At paragraph [9], summarises the evidence of the appellant's partner Ms [I]. The submissions made by the parties are referred to at paragraphs [10] and [11] of the decision. Judge Talbot notes, at [11], the submission made on behalf of the appellant that the EEA Regulations do not fully implement Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. It was submitted on behalf of the appellant that the EEA Regulations are silent with regard to Article 27(3) of the Directive.

9. At paragraph [13], the judge noted that Regulation 27 of the EEA Regulations sets out the general principles as to how a decision to remove should be exercised. The judge noted that the burden of proving that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society rests on the respondent and the standard is that of a balance of probabilities. The judge noted, at [14], the principles referred to in Regulation 27 apply to exclusion and removal decisions taken on the grounds of public policy, public security or public health. The Judge noted that a deportation order remains in force (a) until the order is revoked under the regulations; or (b) for the period specified in the order, and the Regulations prohibit a person whose exclusion is justified on the grounds of public

policy, public security or public health in accordance with Regulation 27 from entering the United Kingdom until (a) the order is revoked; or (b) for a period specified in the order. The judge noted that here, no period has been specified by the respondent.

10. At paragraph [15], the judge referred to the guidance set out in Devaseelan and noted that the relevant findings in the previous decision of First-tier Tribunal Judge Sweet form his starting point. The judge noted that Judge Sweet had accepted the relationship that the appellant now appears to have with his son, is a material change in circumstances since the deportation order was made, but nevertheless, dismissed the appeal because the deportation remained justified on the grounds of public policy and public security taking account of the factors set out in Regulation 27(5). The Judge found that the appellant has maintained a relationship with his son, via indirect contact and direct contact when his son has visited him in Albania. The judge stated, at [16], that "*This continues therefore to constitute a material change in circumstances since the making of the deportation order.*". At paragraphs [17] and [18], the judge concluded:

> "17. I now turn to the key issue as to whether the factors in Regulation 27(5) continue to apply to the appellant. Judge Sweet considered that there was a significant risk that the appellant would re-offend and that he continued to constitute a risk to public safety. However, Judge Sweet does not appear to have had sight of the certificates that were before me from the Bulgarian and Albanian authorities (dated respectively 6.6.19 & 29.3.19), confirming that the appellant had never been convicted of any offence in either country. The fact that the appellant has not re-offended in the period of over nine years since his deportation is a significant factor affecting the future risk. With regard to the index offence itself, I did not have the benefit either of the Judge's sentencing remarks or of a risk assessment report from the probation service. However, there was a PNC indicating that this was the Appellant's only offence in the UK. Given these facts, I am unable to conclude that some 10 years after his offence and some 9 ½ years after his removal there continues to be a significant risk that he will re-offend on the basis of the conviction in 2009.
>
> 18. I note that the respondent relies on his behaviour since his removal in entering the UK illegally in breach of the deportation order. Whilst such behaviour is of course to be deplored, I have to bear in mind that the justification for exclusion of an EEA national has to be the future risk. If the deportation order were to be revoked, the appellant (as a Bulgarian national) would have all the rights of admission available to EEA citizens. There would therefore be little or no risk of him entering the UK unlawfully.

The appeal before me

11. The respondent claims First-tier Tribunal Judge Talbot erred in his approach as to the application of the guidance set out in Devaseelan [2002] UKIAT 00702. The respondent claims that there has been no change in circumstances such as to undermine the conclusion reached in November 2017, that there is a significant risk that the appellant will reoffend and that he presents a genuine, present and sufficiently serious threat to a fundamental interest of society. It is said that insofar as FtT Judge Talbot relied upon the certificates that were before him from the Bulgarian and Albanian authorities confirming that the appellant had never been convicted of any offence in either country, as a justification for departing from the previous conclusion, that is irrational because FtT Judge Sweet was aware that there was no evidence of any convictions other than the offence for which the appellant was convicted in August 2009. FtT Judge Sweet accepted the conviction is spent, but had properly considered the appellant's breach of the immigration requirements of the UK, whereas judge Talbot failed to take a holistic approach without adequate regard to the conviction and the appellant's continued and numerous attempts to enter the UK unlawfully, that demonstrate a disregard for the law.

12. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 22nd August 2019. In response to directions made by the Tribunal, the parties have filed skeleton arguments which helpfully formed the basis of the submissions made before me.

13. At paragraph [8] of her skeleton argument, the respondent claimed FtT Judge Talbot erred in giving insufficient weight to the public interest in maintaining the deportation order and has failed to consider the deterrent effect that would be weakened by revocation. At the outset of his submissions, Mr Lindsay confirmed the respondent does not maintain that submission. He accepts the appeal before the First-tier Tribunal was an appeal under the EEA Regulations.

14. The respondent maintains that as recently as 17th November 2017, FtT Judge Sweet had found there is a significant risk that the appellant will re-offend and that he presents a genuine, present and sufficiently serious threat to a fundamental interest

of society, and poses a risk to the safety of the public or a section of the public. The respondent submits that there has been no material change in the appellant's circumstances since that decision, and FtT Judge Talbot fails to identify any good reason for departing from that previous conclusion. Mr Lindsay submits FtT Judge Talbot erred in failing to apply the Devaseelan principles properly and the judge should have taken the decision of FtT Judge Sweet as the starting point and should only have departed from the previous decision, for good reason.

15. The respondent claims the only additional evidence before FtT Judge Talbot was the two certificates confirming the appellant has not committed any offences in Bulgaria or Albania. That was entirely consistent with the claim made by the appellant and referred to in paragraph [12] of the decision of FtT Judge Sweet, that the appellant has not committed any further offences since his conviction on 20th August 2009. Mr Lindsay submits that the certificates confirming that there was no further offending in Albania or Bulgaria did not advance the appellant's case any further and did not amount to a change of circumstances.

16. Mr Lindsay submits the judge erred in his consideration of 2 material matters. First, at paragraph [16], the judge found the evidence relating to the continuing relationship between the appellant and his son to be a material change in circumstances since the making of the deportation order. Mr Lindsay submits the judge should have considered whether there had been a change since the decision of FtT Judge Sweet. Second, at paragraph [17], the judge found the fact that the appellant has not reoffended in the period of over nine years since his deportation, is a significant factor affecting the future risk. Mr Lindsay submits the judge should have considered whether there had been further offending during the 2 years since the decision of FtT Judge Sweet in November 2017.

17. The respondent submits that FtT Judge Talbot simply substituted his own assessment of the risk of reoffending and whether the appellant presents a genuine present and sufficiently serious threat to a fundamental interest of society, to the assessment made by FtT Judge Sweet. The respondent submits that in reaching his

decision, FtT Judge Talbot failed to take a holistic approach to the evidence and in considering the future risk and fundamental interests of society, failed to have proper regard to the conduct of the appellant since his deportation, and the numerous attempts made by him to enter the UK illegally, and in fact, to have entered the United Kingdom unlawfully between 2015 and 2016.

18. The respondent submits the fundamental interests of society include the prevention of unlawful immigration and abuse of immigration laws and maintaining the integrity and effectiveness of the immigration control system; Schedule 1, Paragraph 7(a) of the EEA Regulations. The respondent submits that in reaching his decision FtT Judge Talbot fails to provide reasons explaining why the conduct of the appellant in entering the UK illegally and in breach of a deportation order, did not undermine the fundamental interests of society. Mr Lindsay submits that at paragraph [18], the judge refers to the appellant's conduct but simply concludes that if the deportation order were to be revoked, there would be little or no risk of the appellant entering the UK unlawfully. Mr Lindsay submits the appellant has shown utter disregard to the immigration laws and the judge did not engage with paragraph 7(a) of Schedule 1 of the EEA Regulations. The judge failed to consider the appellant's conduct as a whole, in considering whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

19. The respondent submits the judge erred in concluding that the continuing exclusion of the appellant from the UK is not proportionate (not least in the light of his relationship with his son) and the appellant would not pose a sufficiently serious threat to the fundamental interests of society. The respondent claims the conclusion reached by FtT Judge Talbot is at odds with the decision of FtT Judge Sweet, who had found in November 2017 that the best interests of the child are a primary consideration, but the public interest in maintain the appellant's exclusion outweighed the interests of the child. The respondent submits the appellant has been able to maintain relationship with his son and there was no evidence before FtT judge Talbot to undermine the finding made previously.

20. In reply, Mr Garrod submits that Devaseelan is an authority relating to appeals unconnected to the EEA Regulations, and the application of the guidelines is not as comprehensive as claimed by the respondent, because Devaseelan is specifically envisaged as addressing issues raised in human rights appeals. Here the appeal arises from the appellant's rights as an EEA national under the EEA Regulations, and Devaseelan has no direct application. Mr Garrod accepts there are difficulties with the proposition that Devaseelan does not apply at all, but even if the guidance does apply, he submits, it is the starting point and not determinative.

21. Mr Garrod submits it was open to FtT Judge Talbot to reach his own view of the appellants future conduct based on the greater evidence before him, taking account of matters including the effects of the simple passage of time.

22. Mr Garrod submits the appellant's application made on 27th March 2018 for revocation of the deportation order was made on the basis that the respondent had not properly complied with Article 27 of Directive (2004/38/EC) of the European Parliament on the right of citizens of the union and their family members to move and reside freely within the territory of Member States. Mr Garrod submits Article 27 of the Directive outlines the approach to be taken by Member States where the host nation perceives there to be an issue that could be resolved, in particular, to ascertain whether the person concerned represents a danger for public policy or public security.

23. He submits that in reaching his decision, FtT Judge Talbot assessed the evidence "through a different legal prism", because FtT Judge Sweet had not previously taken Article 27 of the Directive into account. He submits the appellant's circumstances can change over time, and likewise, an assessment of his possible future conduct can also change over time.

24. Mr Garrod submits there is no material error of law in the decision of FtT Judge Talbot. He submits there had been changes since the decision of FtT Judge Sweet and the findings made by him at paragraphs [26] and [27] of the decision promulgated in November 2017. Mr Garrod submits the passage of time, the

continuing relationship between the appellant and his son and the contact that the appellant has maintained are all relevant factors that FtT Judge Talbot was entitled to consider in reaching his decision.

25. Mr Garrod submits the respondent's reliance upon the conduct of the appellant in seeking to return to the UK, do not provide the respondent an opportunity to say that the appellant is a genuine, present and sufficiently serious threat affecting on of the fundamental interests of society when Article 27(2) of the Directive is carefully read. He submits that at paragraph [18] of his decision, FtT Judge Talbot considers the appellant's conduct and he reaches a decision that was open to the Tribunal. Mr Garrod submits the findings and conclusions reached by FtT Judge Talbot are neither irrational nor unreasonable and they were open to the judge.

26. In reply to submissions made by Mr Garrod, Mr Lindsay submits the appellant's reliance upon Article 27(3) of the Directive is misconceived. He submits Article 27(3) does not place a duty or obligation upon a Member State to request information concerning any previous police record the individual concerned may have. Article 27(3) is framed in discretionary terms by the use of the word "may", not "will", and in any event Article 27(3) provides that "*Such enquiries shall not be made as a matter of routine.*". Here, the respondent did not consider it essential to seek information from the authorities in Albania or Bulgaria. Mr Lindsay submits that in any event, the certificates that FtT Judge Talbot was provided with, confirm that there has been no offending by the appellant in Albania or Bulgaria. The absence of further evidence regarding offending since the appellant left the UK is positive evidence of no further offending, and that is the proper approach to the evidence adopted by FtT Judges Talbot and Sweet. The Tribunal could only consider proven conduct contrary to public policy.

Discussion

27. It is convenient to set out, at the outset, Article 27 of Directive (2004/38/EC) of the European Parliament:

> '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 security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures 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.
>
> The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.
>
> 3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.
>
> 4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.'

28. Article 27(3) was relied upon extensively by the appellant at the hearing of the appeal before FtT Judge Talbot. At paragraph [12] of his decision, the judge stated:

> "This appeal is under the Immigration (EEA) Regulations 2016 and Mr Garrod has correctly pointed out that if the Regulations failed to apply the relevant provisions of EU law in the form of Directive 2004/38, the Directive itself has direct effect in domestic law in that regard."

29. That is, as Mr Lindsay accepts, entirely correct as a legal proposition. As FtT Judge Talbot noted at paragraph [13], the decision to remove an EEA national or a family member must be justified on the grounds of public policy, public security or public health. Regulation 27 sets out the general principles as to how a decision taken on grounds of public policy public security and public health, should be reached. Regulation 27(5) of the EEA Regulations state:

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.

30. It is also convenient to set out Schedule 1 insofar as it is relevant to this appeal.

7. Fundamental interests of society

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

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

…

(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;

31. I accept, as Mr Lindsay submits, the appellant gains no assistance from Article 27 of Directive (2004/38/EC). Article 27 permits a Member State, should it consider this essential, to request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned

may have in order to ascertain whether the person concerned represents a danger to public policy or public security. It does not place an obligation upon the host Member State to make enquiries of other Member States concerning any previous police record the person concerned may have. In fact to the contrary, Article 27 uses the words "*should it consider this essential*" and expressly provides that "*Such enquiries shall not be made as a matter of routine.*". The language of the Directive demonstrates that such enquiries should only be made where there are genuine concerns that the person concerned represents a danger for public policy or public security and enquiries will be the exception rather than the norm.

32. I reject the submission by Mr Garrod that FtT Judge Talbot assessed the evidence "through a different legal prism". The appellant had maintained before FtT Judge Sweet that he has not committed any further offences since his conviction on 20th August 2009. FtT Judge Sweet accepted that conviction is spent, and there is nothing in his decision to suggest that FtT Judge Sweet doubted the appellant's claim that he has not committed any further offences. FtT Judge Sweet was however undoubtably entitled to consider, as he did, the fact that the appellant had made three unauthorised attempts to return to the UK in April 2013, January 2015 and March 2015. He was also undoubtably entitled to consider the fact that the appellant appeared to have been in the UK in August 2016 in order to sign his name on his son's birth certificate and to make the application for revocation of the deportation order that was made in August 2016, as relevant to the assessment of whether there is a significant risk that the appellant will reoffend and that he presents a genuine, present and sufficiently serious threat to a fundamental interest of society.

33. I reject the submission made by Mr Garrod that Devaseelan has no direct application. Mr Garrod is right to acknowledge that there are difficulties with the proposition that Devaseelan does not apply at all. In Aina [2016] CSIH 39 it was effectively accepted that Devaseelan applies in a case concerning EU law. It was held that where a second Tribunal relied on the conclusions of an earlier Tribunal in relation to a point which had in effect been overturned by the UT, that was contrary to the principle established in Devaseelan. In my judgement, the guidelines set out in

Devaseelan properly apply to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties, regardless of whether that is a human rights decision or an immigration decision concerning EU law.

34. FtT judge Talbot stated at paragraph [15] of his decision that he must follow the judicial guidance given in Devaseelan and his starting point should be the relevant findings made in the previous decision of FtT judge Sweet. It was, as Mr Garrod submits, a starting point and not determinative of the appeal. Like FtT Judge Sweet, FtT Judge Talbot considered the appellant's relationship with his son and found there continued to be a material change in circumstances since the making of the deportation order. It was open to him to do so. I reject the submission made by Mr Lindsay that taking the decision of FtT Judge Sweet as the starting point, FtT Judge Talbot should have considered whether there had been a change since the decision of FtT judge Sweet. Regulation 34(3) and 34(5) of the EEA Regulations are clear. A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked on the basis that there has been a material change in the circumstances that justified the making of the order. The Secretary of State must revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied. The focus is clearly upon the change in circumstances that justified the making of the order.

35. FtT Judge Talbot considered the factors set out in Regulation 27(5) of the EEA Regulations at paragraphs [17] and [18] of his decision. The issue was whether the appellant's personal conduct establishes that he represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct; and if his conduct does represent such a threat, whether the decision to maintain his deportation and refuse to revoke the order complies with the principle of proportionality (reg 27(5)(a)).

36. In reaching his decision as to whether there has been a material change in the circumstances that justify the making of the order, FtT Judge Talbot was plainly

entitled to have regard to the passage of time and note that the appellant has not re-offended in the period of over nine years since his deportation, as a significant factor affecting the future risk. FtT Judge Talbot stated, at [17]:

> "… given these facts, I am unable to conclude that some 10 years after his offence and some 9½ years after his removal there continues to be a significant risk that he will re-offend on the basis of the conviction in 2009."

37. FtT Judge Talbot refers, at paragraph [18], to the respondent's reliance on the appellant's conduct since his removal in entering the UK illegally in breach of the deportation order. He concludes that if the deportation order were to be revoked the appellant, as a Bulgarian national, would have all the rights of admission available to EEA citizens and there would therefore be little or no risk of him entering the UK unlawfully.

38. The question was whether there has been a material change in the circumstances that justified the making of the order. The question that arises under Regulation 27(5)(c) of the EEA Regulations is therefore, whether the appellant's personal conduct establishes that he continues to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct. The 'fundamental interests of society' include preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system (including under the Regulations) and of the Common Travel Area.

39. The judge acknowledges the behaviour of the appellant in entering the UK illegally in breach of the deportation order is to be deplored. The prevention of unlawful immigration, abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system is one of the fundamental interests of society. It was however open to the Judge, to conclude that the appellant who now also holds Bulgarian nationality, would have all the rights of admission available to EEA citizens, if the deportation order were to be revoked, and that in all the circumstances the continued exclusion of the appellant from the UK is not proportionate because of his relationship with his son and because the appellant does

not pose a sufficiently serious threat to the fundamental interests of society. Whilst Devaseelan establishes that the decision of FtT Judge Sweet is the starting point, that decision stood as an assessment of the claim the appellant was making at the time of that first determination. Since that determination, it was open to FtT Judge Talbot to have regard to the evidence before the Tribunal regarding the on-going relationship between the appellant and his son, the further passage of time, and the absence of any further attempts to enter the UK unlawfully.

40. The conclusion that the appellant does not pose a "sufficiently serious threat to the fundamental interests of society", is a conclusion that is neither irrational nor perverse and was a conclusion that in the end was open to the Judge on the evidence before him. The matter is finely balanced, and I accept, that another judge may have reached a different conclusion. That is not however enough to establish a material error of law in the decision of First-tier Tribunal Judge Talbot.

41. It follows that I dismiss the appeal.

Notice of Decision

42. The Secretary of State's appeal is dismissed, and the decision of F*t*T Judge Talbot shall stand.

Signed Date 23rd January 2020

Upper Tribunal Judge Mandalia