Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00450/2016

THE IMMIGRATION ACTS

Heard at Stoke
on 12 May 2017

Decision & Reasons Promulgated
on 1 June 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DOMENICO PERSICO
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr Bates Senior Home Office Presenting Officer
For the Respondent: Mr A Hussain instructed by Trent Chambers, Nottingham.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Colyer ('the Judge'), promulgated on 4 January 2017, in which the Judge allowed Mr Persico's appeal against the decision to deport him from the United Kingdom pursuant to the Immigration (European Economic Area) Regulations 2006.

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2. Although the section of the decision marked "Notice of Decision" only refers to the appeal being allowed under the EEA Regulations, at [82] the Judge also indicates that the appeal is allowed on human rights grounds. This is a reference to Article 8 ECHR.

Background

3. Mr Persico was born on 2 December 1966 and is a citizen of Italy. Mr Persico appellant claims to have entered the United Kingdom in 1987 and worked in a restaurant which he left in approximately 1995, undertaking a different occupation importing and exporting clothing as a sole trader. Mr Persico claimed he was self-employed for approximately three years after which he moved to Glasgow when he met his former partner who was working with him. Mr Persico advised the Judge that he had not been absent from the UK for more than six months and had always retained an Italian passport.

4. The Judge refers to the appropriate legal provisions before setting out his findings of fact from [23]. A detailed chronology is set out at [25] in the following terms:

    a. 1980 - appellant left boarding school for catering in Italy at the age of 14 in order to be schooled in Switzerland. He also spent the summer working and staying there for three months.
    b. The appellant returned to Italy after his placement to complete his schooling.
    c. 1982 - the appellant returned to Adeleoden, Switzerland for three months.
    d. In October 1982, aged 16, the appellant first travelled to the United Kingdom by train to study English and started living in Eastbourne, Sussex.
    e. On 5 November 1985, the appellant was convicted at Eastbourne Magistrates Court for cultivating cannabis and ordered to pay a £10 fine.
    f. 1985 - the appellant returned to Italy to undertake his national service. He did this until 1987.
    g. 1987 - the appellant returned to the United Kingdom and started employment at [a restaurant] at Kings Street, Manchester. The appellant was living at [ ] Road, Prestwick until 1989.
    h. 1989 - the appellant resided at [ ] Court, Salford in Manchester. This property was bought by him with a mortgage provided by the Royal Bank of Scotland. The appellant also passed his driving test in the UK.
    i. From 1990 – the appellant was employed at [a restaurant] in Manchester for five years.
    j. 7 April 1992 at Manchester City Magistrates he was sentenced for theft; attempt/obtaining property by deception; and failing to surrender to bail with a conditional discharge for 12 months on the first two and a fine of £10 on the third charge, plus compensation of £151.94 and costs of £25 with eight other offences taken into consideration.

k. 1995 – the appellant started a self-employed company trading as [ ] Import Export. This was registered and he paid VAT, etc.

l. 1997 – the appellant bought a property at [ ] Drive, Erskine, Glasgow. The appellant had entered a relationship with [GB].

m. On 31 March 1999, at Mosley Magistrates Court, for possession of a controlled drug Class A heroin he was fined £250 with costs of £45.

n. On 16 December 1999 for indecent assault he was imprisoned for three months.

o. On 6 September 2001 Antonio Persico was born, the child of Mr Persico and [GB].

p. In early in 2002 - the relationship with [GB] ended. The appellant moved to Nottingham living first at Greasley Drive.

q. 11 February 2002 the appellant formed a relationship with [SS].

r. On 24 May 2002 at Glasgow Sheriff's Court appellant was convicted of drink driving and fined £400 and disqualified from driving for three years.

s. On 12 June 2002 at Forfar Sheriff's Court for driving whilst disqualified the appellant was fined £400 and disqualified from driving for four years.

t. On 13 June 2002 at South Lakeland Magistrates Court for driving with excess alcohol the appellant was disqualified for three years, fined £400 and costs of £58. For failing to surrender for bail the appellant was fined £100

u. In March 2003, the appellant was imprisoned for 12 months for dangerous driving, serving his sentence at HMP Manchester and then moving to HMP Sudbury for the remainder of his sentence.

v. On 28 September 2004, the appellant appeared at Oldham Magistrates Court for various offences but he was committed to the Crown Court for sentence, in custody. On 15 October 2004 at Minshull Street Crown Court for driving whilst disqualified the appellant was imprisoned for three months, for failing to stop when required, using a vehicle whilst uninsured is no separate penalty, for dangerous driving the appellant was imprisoned for nine months and disqualified from driving for five years until extended test is passed.

w. In 2004 the appellant contracted Hepatitis C and became in receipt of State benefits due to being unable to work. The appellant received treatment from the NHS.

x. On [ ] 2006 [BP] was born to the appellant and [SS].

y. On 10 March 2008 at Glasgow Sheriff's Court, for sending offensive/indecent/obscene/menacing messages the appellant was fined £250.

z. In 2009 the appellant's relationship with [SS] ended.

aa. Of 5 January 2011 at Nottingham Magistrates Court the appellant was sentenced for driving whilst disqualified for which he received a community order, disqualified from driving for six months and until an extended test was passed together with an unpaid work requirement.

bb. March 2013 [GB] passed away.

cc. In 2015 the appellant started treatment for his medical condition including a clinical trial at the Queens Medical Centre, Nottingham.

dd. On 16 December 2015 the appellant was convicted of the production of class B controlled drugs (Cannabis) at Nottingham Crown Court.

ee. On 27 January 2016 the appellant was sentenced to 15 months imprisonment.

5. The Judge was provided with a copy of the sentencing remarks of His Honour Judge Rafferty QC from which the following quote is set out at [27] of the decision:

> *"Dominic Persico, it's all very well asking the court to accept everything you say but tragically, when you tell such enormous lies to the police, it's not a good place for you to start. I have absolutely no doubt that you were setting out - and indeed had set out - when a serious commercial cannabis growing enterprise and if there had only been one crop, this was the first of them, you had not wasted your time equipping the second room to such an extent that it was not going to happen and frankly, for anyone to suggest that is quite simply losing sight of the truth. You maintained to the police that this was all for your own use. Plainly there was far too much cannabis for that. Therefore, inevitably, you were producing it to sell. The world and his wife, seemingly, thinks that growing cannabis in this country and sending it on is permitted. It is not. Cannabis is a pernicious drug. People who take the risk come - as you have - of producing it commercially can only expect one outcome, and that's imprisonment. I give you full credit for your plea. I reduce the sentence that I would otherwise have imposed. I sentence you on the basis that this is a category 3 case. I discount the maximum sentence from three years to two and a half years because of the fewer number of plants involved than the maximum in that category. I give you some further deduction. So the maximum sentence for you had you had a trial would have been two years imprisonment. You get a third credit because you pleaded guilty at the first opportunity. So the sentence is 15 months imprisonment."*

<u>Error of law</u>

6. In relation to the level of protection available to Mr Persico in opposing the deportation decision made against him as a result of his criminality, the Judge finds at [33]

> "33. I find the appellant's account of his personal history to be credible. I find the appellant having worked and resided in the UK since early 1987. I find that by 1997 the appellant had qualified for the "enhanced" protection which is now provided for under Article 28 (3) of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This "enhanced protection" prohibits an expulsion measure being taken against the appellant as a Union citizen who has resided in the host Member State for the previous 10 years, except if the decision is based on "imperative grounds of public security."

7. The Judge thereafter considered some case law before concluding at [48]

> "48. In considering the Respondents letter explaining the reasons for making a deportation order there appears to be no full and proper assessment when considering the EEA Regulations as to how the offence of cannabis cultivation resulting in a very low end sentence of 15 months can be shown to require the Appellants deportation on "imperative grounds of public security". Even if Regulation 21 (3) applied "serious grounds of public policy or public security" this too would require a detailed assessment of the offence and the risk of reoffending."

8. At [58 - 59]:

> "58. I find that it has not been established that the detention and subsequent deportation of this appellant is necessary in this democratic society or that it was in the interests of national security, public safety or the economic well-being of the country, or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others."
>
> 59. The Appellant is a citizen of Italy then the EEA Regulations may apply. I find it has not been established that this appellant when in the UK represents a genuine, present and sufficiently serious threat to the public to justify his deportation on the grounds of public policy. I find that it has not been established that it is justified on the grounds of public policy to deport the Appellant from the United Kingdom. I find that the respondent's decision is contrary to law and I allow the appeal on that basis."

9. The Judge therefore appears to have considered the deportation issue primarily on the basis the appellant was entitled to the higher level of protection, that is a requirement for imperative grounds of public security to justify his deportation but also, in the alternative, to consider the second level of serious grounds of public policy or public security.

10. The Secretary of State's challenge to this aspect of the decision is to the Judge's conclusion that the appellant was entitled to both levels of protection. Including the finding that having lived in the UK for a continuous period of 10 years by 1997, Mr Persico was entitled to the highest level.

11. In Secretary of State for the Home Department v MG (Case no c-400/12 CJEU) (second chamber) it was held that unlike the requisite period for acquiring a right of permanent residence which began when the person concerned commenced lawful residence in the post Member State, the 10 year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) must be calculated by counting back from the date of the decision ordering that person's expulsion. All relevant factors should be taken into account when considering the calculation of the 10 year period including the duration of each period of absence from the host Member State, the cumulative duration and the frequency of absences. A period of imprisonment was in principle capable both of interrupting the continuity of the period of residence needed and of affecting the decision regarding the grant of enhanced protection provided there under, even where the person concerned had resided in the host member state for 10 years

prior to imprisonment albeit that the fact that the person had been in the member state 10 years prior to imprisonment was a factor to be taken into account.

12. In MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 it was held that (i) Article 28(3)(a) of Directive 2004/38/EC contained the requirement that for those who had resided in the host member state for the previous 10 years, an expulsion decision made against them must be based upon imperative grounds of public security; (ii) there was a tension in the judgment of the Court of Justice of the European Communities in Case C-400/12 *Secretary of State v MG* in respect of the meaning of the "enhanced protection" provision; and (iii) the judgment should be understood as meaning that a period of imprisonment during those 10 years did not necessarily prevent a person from qualifying for enhanced protection if that person was sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration was concerned.

13. In Warsame [2016] EWCA Civ 16 it was held that in *Secretary of State for the Home Department v MG (Portugal)* (Case C-400/12) it was established that the ten-year period of residence required to benefit from the enhanced protection of imperative grounds must in principle be continuous and be calculated by counting back from the date of the deportation decision. The Court of Justice of the European Union ("CJEU") found that, in principle, periods of imprisonment interrupted the continuity of periods of residence for the purposes of granting the enhanced protection. However, the CJEU also held that claimants could still qualify for enhanced protection if they could show that they had resided in the UK during the ten years prior to imprisonment, but that depended on an overall assessment of whether integrating links previously forged with the host Member State had been broken. On the facts, because of an earlier period of imprisonment which also broke continuity, this appellant was not one of those in the narrow "maybe" category of cases contemplated in MG (Portugal) where a person has resided in the host state during the ten years prior to imprisonment, for which a more detailed individual assessment of links to the host and home state would be required.

14. It is arguable that the Judge erred in law in calculating the requisite 10 year period from the date of entry to the United Kingdom rather than counting back from the date of the deportation decision and assessing the extent of links forged in the UK and whether they had been broken. This arguably required a more detailed individual assessment of links to the host and home state.

15. The date of the deportation decision is the 12 August 2016. The relevant 10 year period counting back is therefore to 12 August 2006 for the requisite 10 year period although Mr Persico has been in the United Kingdom since 1982.

16. Mr Persico appears to have integrated, in part, although his continuous commission of criminal offences does seem to indicate that he is a person who did not consider himself fully integrated, as a person who is integrated will want to

ensure he respects the laws of the United Kingdom, which acts of criminality do not demonstrate.

17. The question is whether the appellant was sufficiently integrated taking his circumstances as a whole. Whilst a period of imprisonment may break continuity this cannot mean that an appellant loses the benefit of any earlier integration and effectively starts from the year zero, as otherwise a person with substantial periods of time in the United Kingdom could find them lost for even the shortest period of imprisonment. The actual periods of imprisonment served by the appellant were noted by the Judge to be in 1999, 2003, 2004 and 2016. The total period to imprisonment is in the region of 37 months in a total period of over 28 years in the UK but does demonstrate periods of imprisonment punctuating periods of non-custodial sentences.

18. The nature of the integration includes not only examples of employment, which shall be commented upon below, but also the relationships Mr Persico has formed, purchase of property in which to live in the UK, and the alleged establishment of his own import-export business. In addition, Mr Persico has family members in the UK. The Independent Social Worker provided a positive description of Mr Persico's relationship with his daughter. It was also noted the appellant is a co—primary carer and provides daily care as needed. It is also noted Mr Persico provides her with support consistent with the child's well-being.

19. The Judge noted a letter from the Roman Catholic Chaplain at HMP Nottingham dated 16 September 2016 in the following terms:

> "In recent years Domenico says he has been living by himself in a flat away from his family due to his drug habit. This specially had an effect on his relationship with his partner. He still saw his two children in Nottingham regularly. He says he was very involved with his biological daughter (8 years of age); taking her to school spending much time at weekends and holidays with her. He is also very involved with his stepson, aged 21 who also lives with his ex-partner. His younger biological son lives in Scotland. He says he still sees him regularly at holidays and weekends. Sometimes he goes to Scotland, sometimes his son comes and stays with his family in Nottingham. His photos show an obvious closeness and family affection between them all."

20. The longer a person has been in another Member State the greater they can integrate. European law recognises that a period of 10 years is an important yardstick after which a person is deemed to have ties similar to a national of that State, such that their removal should only be permitted in the most serious of circumstances. This is recognised by the enhanced level of protection provided under the Regulations.

21. The decision to make a deportation order rejected the enhanced protection on the basis that it was found not to be accepted that the appellant had been continuously resident in the United Kingdom for 10 years in accordance with the 2006

Regulations. It was found the appellant had failed to provide documentary evidence of entry in 1987 and consequently the decision-maker had not given consideration to whether deportation is justified on imperative grounds of public security.

22. The findings by the Judge that Mr Persico had been credible in relation to his employment history is also challenged in the grounds seeking permission to appeal by reference to the findings of the Sentencing Judge. Whilst the Sentencing Judge did find the appellant had told "enormous lies" to the police that does not prevent the Judge from assessing whether the evidence he was given was truthful. The difficulty is the one identified in the Grounds of Appeal, namely that the burden is upon Mr Persico to provide evidence to support his assertions. Mr Persico is noted as having claimed, at [8], that he could provide proof from the tax office of his employment but that it was difficult as he was in detention because of restrictions. This issue was considered by the Upper Tribunal in AG and others (EEA – jobseeker-so sufficient person- proof) Germany [2007] UKUT 00075 (IAC) at [86 – 89] in which it was found the burden remained upon the person alleging such entitlement to prove the same. The appellant had the benefit of legal representation and failed to provide an adequate explanation for why the evidence was not produced at the hearing. Accepting the employment record was as Mr Persico claimed it had been arguably requires more detailed reasoning in light of the comments by the sentencing judge about the appellant's propensity to lie to authority.

23. The Judge asserts there was no clear pattern of serious offending by the appellant which would have to be justified by reference to the 11 convictions for 24 offences including one offence against the person, one sexual offence, one fraud and kindred offences, one theft and kindred offences and three drug-related offences. The point the Judge may have been trying to make at [43] is that the offending does not show a clear pattern of serious offending when one looks at the nature of the offences and the sentencing. There is indeed a variety of offences undertaken some more serious than others. The error in this paragraph is the failure of the Judge to be clear in relation to the point being made which is open to misinterpretation, as demonstrated above.

24. At [44] the Judge indicates it is an indication of the consideration of public good that a recommendation for deportation can be made by the criminal court, although there was no evidence of the same in this case. The Judge appears to infer that the failure of the Sentencing Judge to recommend deportation is a point in the appellant's favour but this arguably ignores the fact that with the automatic deportation provisions recommendations by the criminal courts are now few and far between. Under the conducive deportation regime one of the grounds for deportation was a recommendation by the court. Mr Persico is an Italian national and therefore a EEA citizen in relation to which recommendations by the criminal court will have little impact upon whether deportation proceedings are taken against an individual, which depends upon the nature of the offending and other issues set out in the Regulations.

25. The point taken in the grounds in relation to [48] that the Judge comments upon there being no full and proper assessment when considering the Regulations as to how the offence of cannabis cultivation resulting in a very low sentence can be shown to require the appellant's deportation on imperative grounds is noted, as is the fact that the actual sentence that would have been passed before any discount for a guilty plea would have been two years. It is asserted the Judge has not given sufficient weight to the offence or sentence and the need to protect society against crime, the wider impact of drug offences on the community at large and its consequential effects upon other acquisitive crime committed to raise funds to acquire drugs.

26. The Secretary of State raises the issue of drug-related offences and in this regard, in Land Baden-Württemberg v Tsakouridis (Case C-145/09) CJEU (Grand Chamber), 23 November 2010 the claimant had an extensive criminal record, including eight counts of illegal dealing in substantial quantities of narcotics as part of an organised group and had been sentenced to six and a half years' imprisonment. The Grand Chamber held that a crime in connection with dealing in narcotics as part of an organised group was capable of being covered by the concept of 'imperative grounds of public security' within the meaning of Article 28(3). Drug trafficking represented a serious evil for the individual and society and could reach a level of intensity that might directly threaten the physical security of the population. However, an expulsion measure under Article 28(3) had to be based on an individual examination of the specific case. Such a decision could only be justified if, having regard to the exceptional seriousness of the threat, such a measure was necessary for the protection of the interests it aimed to secure, provided that that objective could not be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who had become genuinely integrated into the host Member State (para 49). Furthermore, a balance had to be struck between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned by reference to the penalties/sentences imposed and the degree of involvement in the criminal offending against the risk of compromising the social rehabilitation of the Union citizen in the State which he had become genuinely integrated.

27. In PI v Oberbürgermeisterin der Stadt Remscheid (Case C-348/09) CJEU (Grand Chamber) it was said that European jurisprudence had established that the fight against crime in connection with dealings in narcotics as part of an organised group was capable of being covered by the concept of "imperative grounds of public security" under Article 28(3). That concept 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, as reflected by the use of the words "imperative grounds" (para 15).

28. The Judge considers the issue of rehabilitation within the decision from [50] to [57] and notes at [51] there are no probation reports or any professional assessment as

to the risk of further offending or details of any rehabilitation work that has been undertaken.

29. In relation to the EEA Regulations it is concluded that the Judge legally erred when assessing the level of protection to which Mr Persico is entitled by material misdirection in relation to the starting point for calculating whether Mr Persico had acquired the necessary 10 years qualifying residence to entitle him to the higher level of protection. It is necessary on the facts to count back from the date of the deportation decision undertaking a detailed analysis of Mr Persico's personal circumstances and arrangements to assess the nature of any integration thereafter the impact upon the alleged integration into the United Kingdom because of Mr Persico's continuous offending. Until such an exercise has been undertaken the conclusion Mr Persico is entitled to the higher level of protection is arguably unsafe and is set aside.

30. In relation to the second level of protection, if Mr Persico had been exercising treaty rights as illustrated by his employment history the error in relation to higher level of protection might be amenable to consideration with a view to ascertaining whether the error is material. The difficulties that raised by the Secretary of State which is that the Judge accepted the word of Mr Persico without proper evidence that he had been exercising treaty rights for the relevant period and in relation to whom it had been found he has a propensity to lie. This aspect will require further consideration by the submission of appropriate documentation which Mr Persico should be able to obtain from HMRC and an assessment of whether the appropriate period of five years' residence in accordance with the regulation has been established to qualify Mr Persico for the second level of protection.

31. Mr Hussain made no response to the points raised by Mr Bates inferring, although not expressly submitted, that the extent of the area's relating to the Regulations had arguable merit.

32. Mr Hussain focused instead on the Judge's conclusions in relation to Article 8 ECHR in which the Judge concluded at [79] to [82]:

> "79. I find that the appellant had private and family life in the UK prior to his recent detention.
>
> 80. In summary I find that this appellant's deportation would be disproportionate when considering all matters in the round. In particular I find that as a result of his immigration detention and these proceedings I find that the appellant is now aware of the consequences of crime. In addition, he is now aware of the prospect of deportation and these combine to ensure that the appellant could be expected not to engage in further criminal activities. Having come to that conclusion, I find that the ultimate aim of justification of the interference has not been made out.
>
> 81. I find that the respondent has not established that the appellant's past criminal actions are now indicative that the respondent is able to justify

the decision to deport him. I take note of public interest issues but find that in this particular case the appellant's personal circumstances are such as to outweigh deportation factors when considering the proportionality of the respondent's decision.

82. In light of the above I find that the appellant's deportation from the United Kingdom was not proportionate to the legitimate aim pursued by the respondent and was therefore not necessary in a democratic society. There would accordingly be a violation of Article 8 of the European Convention on Human Rights by the respondent deporting the appellant from the United Kingdom. The appeal is allowed on human rights grounds."

33. Mr Bates submitted the Article 8 findings cannot exist in isolation as the deportation decision forms part of the proportionality decision. As the assessment of the deportation element of the appeal is flawed, this has a 'knock on' effect to the Article 8 findings.

34. The findings in relation to the best interest's assessment of the children are not challenged by Mr Bates, as they are issues of fact and stand as part of the proportionality assessment but it is submitted that even if these findings are preserved there still needs to be a proper assessment of the conflicting evidence in relation to Mr Persico's offending history and the matters relied upon by Mr Persico.

35. It is also said that a conflict in relation to whether a warning letter had been sent by the Secretary of State prior to Mr Persico's last offence and received, which had not been resolved by the Judge.

36. The Judge was, however, fully aware of the nature of the offending. The issue of the level of protection provided under EU law does not impact upon the nature of the crimes committed or consequences for society of those afflicted or the victims of such crimes but rather relates to the ability of a state to remove an EEA national exercising rights provided under European law from their territory. Even if the Judge was wrong in relation to the level of protection provided under EU law that does not prevent the Judge from considering the Article 8 aspects but it is imperative that a judge does so from the correct factual foundation.

37. It is recognised that in an appeal of this nature a judge must consider the European aspects first and only if the appellant fails under the same does the judge need to go on to consider article 8 ECHR, if raised.

38. When assessing Article 8 ECHR the Judge was required to adopt a structured approach as per the guidance in the case of Razgar. This is precisely what the Judge did in relation to this matter and found as a result of that approach, when examining the proportionality of the decision, that with the low risk the appellant poses to society by his past criminal offending, and the relationship with family members, particularly his daughter, the balance fell in Mr Persico's favour.

39. Although the Judge refers to paragraph 398 and 399 of the Immigration Rules and section 117 of the 2002 Act, there does not appear, on the face of it, to be any specific analysis of the provisions and how they impact upon the proportionality decision. It is appreciated that the First-tier Tribunal jurisdiction is that of a human rights jurisdiction but the Secretary of State's case is set out in the Immigration Rules. If the Judge was to properly consider the competing elements it is necessary to factor into the equation both the provisions under the Rules and the statutory provisions and weigh the outcome against the appellant's counterarguments.

40. Although the Judge notes the Independent Social Workers criticisms of the respondent's failure to ascertain the wishes and feelings of the child or to assess the likely effect of any change in circumstances, or any harm or suffering if Mr Persico is deported from the United Kingdom, the obligation was upon the Judge to do so himself. It is arguable that this has not been undertaken adequately.

41. The appellant was sentenced to 15 months imprisonment. As there is a qualifying child in the United Kingdom the Judge was required to assess whether it would be unduly harsh for the child to remain in the UK without the appellant if he was deported. Guidance is given by the Court of Appeal in MM (Uganda) as to how such an assessment should be undertaken.

42. It is arguable in relation to this matter that the Judge has failed to properly analyse the correct level of protection the appellant is entitled to benefit from under the EEA Regulations. The finding in the alternative does not arguably assist the appellant. It is also arguable that the assessment of the proportionality of the decision is flawed for two reasons being, firstly, that it is based in part of the assessment the level of protection afforded to the appellant under the EEA Regulations and, secondly, as the Judge fails to undertake a sufficiently detailed and proper analysis of the competing interests when assessing the proportionality of the decision.

43. I therefore find the Judge has made legal error material to the decision to allow the appeal on both grounds.

44. As the has been no proper consideration of the level of whether Mr Persico is integrated into the United Kingdom and if so to what level, and the appropriate degree of protection available for which further detailed analysis and findings of fact are required. Once the appropriate level of protection has been properly identified it will be necessary to consider all other relevant factors to be taken into account when assessing an EEA deportation decision. Also, as a result of there being no proper consideration of the Article 8 element of the appeal, there will have to be a further detailed analysis and findings of fact made. It is, therefore, appropriate for this matter to be remitted to the First-tier Tribunal to be considered afresh by a judge other than Judge Colyer.

Decision

45. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to be considered by a judge other than First-tier Tribunal Judge Colyer.**

Anonymity.

46. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 30 May 2017