



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/00094/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 December 2019**

**Decision & Reasons  
Promulgated  
On 10 January 2020**

**Before**

**THE HONOURABLE MR JUSTICE GOSS  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR JONATHAN ALEX MASSI  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Miss Gilda Kiai, instructed by Duncan Lewis, Solicitors

**DECISION AND REASONS**

1. This is an appeal by permission granted on 21 October 2019 against the decision of First-tier Tribunal Judge Pooler promulgated on 21 August 2019 allowing the respondent's appeal against the Secretary of State's decision of 26 January 2018 making a deportation order pursuant to the Immigration (European Economic Area) Regulations 2016 ("the Regulations") on the grounds that it breached his rights under the EEA

Treaties. The judge did not go on to consider the appeal by reference to Article 8 of the European Convention on Human Rights.

2. For the avoidance of confusion, we shall refer to the respondent in this appeal as 'the claimant'.
3. The claimant is an Italian national born on 26 December 1985. There is no challenge to the judge's finding that he entered the United Kingdom in 1988 at the age of 2 years with his mother and is an EEA national who had the right of free movement. He has not returned to Italy since 1990. On 17 April 2000 aged 14 he was convicted at the Inner London Youth Court of an offence of taking a motor vehicle without consent. On 27 April 2004 he was convicted of possession of a Class A controlled drug (MDMA) and was fined. On 6 July 2004, when aged 18, for an offence of assault occasioning actual bodily harm he was sentenced to a community punishment order at the Blackfriars Crown Court.
4. The offences which gave rise to the making of the deportation order were committed on 26 January 2013. For an offence of possession of a shotgun with intent to cause fear of violence and the possession of ammunition, namely 150 live exploding bullets, he was sentenced to concurrent terms of five years' imprisonment, and for an offence of possessing 3.45 kg of heroin, a Class A controlled drug, with intent to supply, he was sentenced to a consecutive term of five years' imprisonment. The total sentence was, therefore, one of ten years' imprisonment.
5. Following his release from prison the claimant was taken into immigration detention and released on immigration bail on 11 May 2018.
6. The Secretary of State accepts that the claimant is entitled to the highest level of protection under the 2016 Regulations and that his offending fell to be considered under imperative grounds of public security.
7. There is, essentially, a single ground of appeal, namely that the judge failed to take adequately into account the severity of the claimant's offences. In oral submissions before us today Mr Avery, on behalf of the Secretary of State, has emphasised what he submits to be the superficiality of the approach of the judge in his judgment and decision and argues that, essentially, he failed to engage with the seriousness of the claimant's offending. However, the sentencing judge described the claimant as "a serious player in the supply of drugs" and that the ten-year prison sentence was indicative of the seriousness of the offences. It is submitted by the Secretary of State that, by continuing to maintain that he was forced by threats to his family to commit the offences, the claimant demonstrates that he has not taken responsibility for his criminality and there was no evidence of remorse. It is further submitted that the judge failed to follow the **Bouchereau** principle and the seriousness of his crimes and the fact that he poses a medium risk to the public demonstrate that he presents a genuine, present and sufficiently serious threat

affecting one of the fundamental interests of society when taking account of his past conduct. The Secretary of State makes specific reference to the provisions relating to the fundamental interests of society set out in Schedule 1(7) of the Regulations which include the prevention of social harm and tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but there is a wider societal harm such as offences relating to the misuse of drugs.

8. In his decision the judge, applying the provisions of Regulation 27(5) and 27(6) of the Regulations, stated that the earlier convictions, in themselves, did not justify a decision to deport but recognised that the offences committed in 2013 were undoubtedly very serious. He also acknowledged the obligation to take into account the considerations of public policy and public security enunciated in Schedule 1 to the Regulations and that paragraph 3 makes clear that the longer the sentence the greater the likelihood that an individual's continued presence in the United Kingdom represents a sufficiently serious threat affecting the fundamental interests of society to justify deportation. He did not find the claimant to be a persistent offender and this finding is not challenged. The judge took the comments of the trial judge as a proper starting point and was conscious of the need to guard against relying on an explanation given by the claimant in evidence before him relating to threats made to him that lead to his involvement in the offences which appears to have been rejected by the jury. The judge had further reliable evidence of threats, which, in themselves, did not provide a defence to the relevant offences but did reveal his being subjected to ongoing pressure and danger. He also had an OASys Report that police intelligence did not support the view that he was a serious drug dealer, an assessment that he represented a medium risk of serious harm to others in the community and a low risk of reoffending. In oral submissions to us, Mr Avery has emphasised that, nevertheless, statistically there was a 34% risk of further offending which he submits is not low.
9. Although the judge's assessment was challenged by the Secretary of State, he was entitled, for the reasons that he gave, to accept the opinion expressed in the report. The claimant has been of good behaviour since release from prison, attended all supervision appointments and resumed employment. The judge found that the claimant had no connection whatsoever with Italy other than having been born there and being of Italian nationality and accepted that he was fully integrated in the United Kingdom prior to his arrest in 2013 since being a very young child, and has not lost his integrative links.
10. In her Rule 24 Reply and in her oral submissions, Miss Kiai, on behalf of the claimant, has gone through the grounds that are relied on by the Secretary of State both in writing and orally emphasised before us today, and identifies specifically the paragraphs in the decision which address the grounds upon which the Secretary of State relies. It is neither helpful nor necessary for us to go through them one-by-one today because,

essentially, the Secretary of State's argument is founded on the fundamental submission that the judge's decision was irrational on the material before him and we have already referred to the important findings that he made and the reasons for them.

11. It is not for the Upper Tribunal to substitute its own view in relation to the judge's findings below; rather, its role is to determine whether the judge made findings of fact that were irrational or otherwise not open to him on the evidence. We are satisfied that the judge did consider the regulatory requirements and the fundamental interests of society appropriately, and his finding that the imperative ground of public security was not met in this case on the evidence before him was one that was open to him for the reasons he set out in his judgment. The claimant may regard himself as fortunate that the judge found as he did: other judges might have reached a different conclusion and, no doubt, were the claimant to reoffend the outcome of any future decision in relation to deportation would be likely to be different.

### **Notice of Decision**

This appeal is dismissed. The decision of First-tier Tribunal Judge Pooler did not involve the making of an error of law.

No anonymity direction is made.

Signed J R W Goss

Date 6 January 2020

Mr Justice Goss  
Sitting as a Judge of the Upper Tribunal