



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2021-000712  
First-tier Tribunal No: DA/00061/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 27 March 2023**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department

Appellant

And

Mustafa Hersi

Respondent

**(ANONYMITY ORDER NOT MADE)**

**Representation:**

For the Appellant:

Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent:

Ms U Dirie, of Counsel, instructed by Wilson Solicitors.

Heard at Field House on 27 January 2023

**DECISION AND REASONS**

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Burnett (hereafter the “judge”) promulgated on 17 August 2021 following a hybrid hearing on 19 July 2021 by which the judge allowed the appeal of Mr Hersi, a national of Sweden born on 19 March 1995 (hereafter the “claimant”), against a decision of the Secretary of State dated 28 January 2021 to make a deportation order in accordance with regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 (hereafter the “EEA Regulations”).
2. It was agreed before the judge that the appeal was brought under the EEA Regulations because the behaviour relating to the decision took place before 31 December 2020 (para 8 of the judge's decision).

3. It was accepted by the Secretary of State's representative at the hearing before the judge that the claimant was entitled to the second level of protection under the EEA Regulations because he had resided in the United Kingdom in accordance with the EEA Regulations for a period of more than five years. This meant that the Secretary of State had to show that there were serious grounds of public policy and public security for the claimant's deportation. Ms Dirie, who represented the claimant before the judge, did not seek to argue that the claimant was entitled to the highest (or third) level of protection (para 7 of the judge's decision).
4. The claimant had two convictions for drug dealing offences prior to which he received a caution for battery on 31 October 2014. On 8 October 2018, he was convicted of possession with intent to supply a Class B controlled drug (cannabis) and sentenced on 14 May 2019 to 6 months' imprisonment concurrent to the index offence. On 14 May 2019, he was convicted of two offences of possession with intent to supply a Class A controlled drug (cocaine and another drug) and sentenced to a total term of 4 years' imprisonment and ordered to pay a victim surcharge of £170.00.

#### The judge's decision

5. The judge heard oral evidence from the claimant, his sister and his mother.
6. At para 23 of his decision, the judge said that regulations 23 and 27 and Schedule 1 of the EEA Regulations were relevant to his decision. He then set out these provisions in full at para 23 and repeated regulation 27(3) and 27(5) at paras 27 and 28 of his decision, including para 7 of Schedule 1.
7. The Secretary of State's grounds rely upon paras 7(b), (c) and (g) and Mr Tufan relied upon 7(f), (g) and (j). These read:

#### The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—
  - (a) ...;
  - (b) maintaining public order;
  - (c) preventing social harm;
  - (d) ...;
  - (e) ...;
  - (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) ...;
- (i) ...;
- (j) protecting the public;
- (k) ...;
- (l) ....

8. The judge considered the level of threat posed by the claimant at paras 29-41 and concluded, at para 42, that the threshold set out in the EEA Regulations had not been demonstrated by the Secretary of State and that the claimant no longer represented a genuine, present and sufficiently serious threat to meet the required threshold (para 42).
9. The judge gave his reasons for his finding that the claimant did not represent a genuine, present and sufficiently serious threat to meet the required threshold at paras 29-42 which read:

“29. I have hence proceeded to consider the threat posed by the appellant and considered carefully the engagement of 27(5) in this case. As stated above the burden of proof is upon the SSHD to show that the appellant represents the necessary threat required under the regulations.

Offending behaviour

30. I turn to a consideration of the appellant's offending behaviour which triggered the Home Office decision under appeal. The appellant has one other criminal matter apart from the conviction for drug dealing. That matter was a warning in respect of an offence of battery.
31. I have had careful regard to the sentencing remarks of the Judge. The judge set out that the appellant had entered guilty pleas to the offences but had done so belatedly. In January 2018 the police had seen a car with a defective rear light and decided to stop it. The appellant was the passenger. The co-defendant was the driver and absconded. The police found digital scales, a burner phone, 29 wraps of cocaine, 58 individual deals of heroin, and some other amounts of drugs. The street value was estimated at £1000. The appellants *[sic]* phone showed messages consistent with drug dealing. In August 2018 whilst the appellant was still under investigation for the January offences, he was seen on CCTV dealing cannabis in Ponders End Park. The appellant was found in possession of snap bags. The judge considered that the appellant's best migration *[sic]* was his young age and his pleas of guilty. The judge passed a sentence of 4 years imprisonment.
32. I conclude that the offences the appellant committed were very serious indeed, and I take into account that drugs offences have a wider impact upon society. The appellant committed the second offences whilst being investigated for the drugs offences.
33. I take into account the seriousness of the appellant's offences but that in itself is not sufficient to meet the test. The focus must be upon the risks posed by the appellant. I remind myself that the appellant is entitled *[sic]*

the second level of protection. This is that there must be serious grounds of public policy and public security.

34. The appellant has not provided any certificates of qualifications and achievements, showing the steps that he has taken towards rehabilitation.
  35. The appellant's sister and mother are also of the opinion that the appellant has made strides to address his offending behaviour and have offered to provide support to the appellant so he will not return to his offending ways.
  36. I have an OASys report dated in the header as 10 October 2020 but it is stated that the report was signed in April 2020. The report assesses the appellant as at a low risk of re-offending. I note that the appellant's sentence expiry date is May 2023. The appellant was aged 22 at the date of conviction. The appellant had a release date of May 2021 from his sentence.
  37. There is little provided within the OASys report regarding the appellant's rehabilitation and any information about courses he had undertaken. The assessment of risk though concluded that the risk was low.
  38. The appellant's relationship with his family is still strong as was shown by the attendance at the hearing and support for him. I accept that they are determined to help the appellant avoid returning to his previous criminal offending path. The appellant is stated to be motivated to avoid returning to prison. I draw from the report that the author has given the appellant's young age and that this is his first period of custody, some weight in the conclusions as to why the appellant is a low risk of re-offending. I am prepared to accept the assessment made by the OASys report's author, having heard evidence from the appellant and his family.
  39. The respondent provided no information that the appellant has any further convictions or been involved in any further criminal activity. I take into account though that the appellant has only just been released from detention. The appellant has expressed remorse for his behaviour and stated that his first period in prison has taught him a lesson about his behaviour.
  40. The appellant has stated he did not take his offending so seriously but now understood the consequences of his behaviour. I conclude that the whole process including the deportation proceedings of the appellant, has been a salutary lesson.
  41. In my judgment there is some risk that the appellant might offend again but this is small. The appellant has been convicted of dealing drugs on two occasions. He himself describes his actions as committed out of stupidity.
  42. The question I need to answer is whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It must meet the serious grounds test. In all the circumstances, I consider that the threshold set out in regulations has not been demonstrated by the respondent and I conclude that the appellant no longer represents a genuine, present and sufficiently serious threat to meet the threshold required. This finding in itself is sufficient to allow this appeal.
  43. However, I have also gone on to consider the question of proportionality."
10. The judge stated, correctly, at para 42 that his finding that the claimant did not represent a genuine, present and sufficiently serious threat was sufficient in itself to

allow the appeal. Nevertheless, he went on to consider proportionality, at paras 44-56. At para 56, he said that, having carefully balanced all the factors in the case, the decision was disproportionate. He gave his reasons for his finding that the decision was disproportionate at paras 44-55. Paras 44-56 read:

“Proportionality

44. There are a number of considerations listed in regulation 27 of the regulations (See above). I have had careful regard to those considerations in this appeal.
45. I have set out above the appellant’s criminal record.
46. There is no confirmation of the date given for the appellant’s entry into the UK. I have set out above the date when the appellant claimed to have arrived in the UK, 2004. The appellant provided a letter from a school to state he had attended there from September 2004.
47. The appellant has had employment in the past and no doubt he will seek employment in the future. He is assisted by his family in the UK with whom he has *[sic]* as strong bond. This is also a protective factor in looking at the potential for future lawful conduct.
48. The appellant has lived in the UK since he was 9 years old. He is now 26. He has spent 17 years of his life in the UK. The appellant has strong ties to the UK. This is a factor which deserves considerable weight. I conclude that he has limited ties and links to Sweden after such a long period of time in the UK. The appellant has attended school and obtained some qualifications. The respondent noted these in the RFRL. The appellant has worked in the UK. His mother is his sole parent in the UK, and she did not demonstrate that she was exercising treaty rights until 2012 ( by working).
49. The appellant is young and does not have any children or a partner that was brought to my attention.
50. The appellant’s mother has maintained contacts with friends in Sweden and visited them in 2016. The appellant states he does not know the Swedish language and the family communicate in Somali (and English). The appellant stated he could not now learn Swedish, but I do not accept this, especially given his age and that Sweden is a European country. There will also be many people in Sweden who speak and communicate in English. I do not accept that the appellant could not adapt to life there.
51. I have considered carefully the evidence regarding the appellant’s father. I do not accept that I was told the true circumstances regarding him. The appellant’s mother did not adequately explain why she had informed HMRC in the past that she was still married. I was not provided evidence regarding any divorce at the hearing although the appellant’s mother stated she had the papers at home and could provide them. In any event the appellant is now an adult and there is nothing preventing him turning to his father for help. I also do not accept that the appellant has no contact and does not know him at all. I do accept that the appellant might have very limited contact with him especially after the length of time the appellant has been in the UK and that the family survive on benefits.
52. I have set out the nature and quality of the appellant’s claimed private and family life above. I have found that the appellant does not represent a genuine, present and sufficiently serious threat to society. I consider that there is a small risk he will offend again.

53. I have considered the case of Essa (ESSA(EAA: Rehabilitation/integration) v SSHD [2013]UKUT 00316) and the issue of rehabilitation. This is a factor which must play a part in my deliberations under the regulations.
54. I have some information that the appellant has engaged with rehabilitation in the sense of working with his probation officer in the UK. In the OASys report it states that the appellant is motivated to address his offending behaviour, and I consider that there is a reasonable prospect of rehabilitation within the UK.
55. I have had particular regard to the comments in paragraph 35 of ESSA and whether there are reasonable prospects of rehabilitation and whether the appellant is a present threat and whether he is likely to remain so for an indefinite period in the future. It was stated in paragraph 35 of ESSA that appellants who act with impulses to commit sexual or violent offences and the like, may well fall into the category where little weight is given to rehabilitation as a factor. However, I give limited weight in my assessment to the factor of rehabilitation.
56. I have carefully balanced all the factors in this case and the issues raised in respect of the proportionality of the decision. I find that the decision of the respondent is a disproportionate response on the information before me. I hence allow the appeal of the appellant under the EEA Regulations.”

### The grounds

11. There is a single heading in the grounds which gives the ground of appeal as: *“Failing to give adequate reasons for findings on a material matter/Material misdirection of law”*. Under this generic heading are eight substantive paragraphs, the last of which submits that the decision to deport was justified on serious grounds of public policy and security and is proportionate in the fundamental interests of society. The remaining seven paragraphs set out the Secretary of State's grounds, which I now summarise.
12. The judge erred in reaching his finding that the claimant posed a small risk of re-offending, that he had learnt his lesson and that he did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, for the following reasons:
  - (i) (Para 1 of the grounds) The claimant was released only recently, in May 2021, with his sentence expiry date being May 2023, whilst under the threat of deportation action. Therefore, he has not been tested in the real world. It is too soon to say that he is a changed person to the balance of probabilities. He has returned to his pre-incarceration address. There was no evidence that he had taken steps to distance himself from his criminal peers. There was no evidence that he had taken any steps towards rehabilitation in the form of courses.
  - (ii) (Para 2 of the grounds) In reaching his finding at para 38 that the claimant's family were supportive, the judge failed to consider that they could not stop his offending previously. The judge failed to take into account his finding at para 51 that he (the judge) had not been told the true circumstances regarding the claimant's father. The grounds contend that this disrespect for the law should have been taken into consideration at para 38. Instead, the judge conducted a one sided, one dimensional approach.

(iii) (Para 3 of the grounds) The judge failed to take into consideration para 56 of the decision letter which stated that, following the claimant's arrival at HMP Brixton on 21 May 2019, he had one proven adjudication on 27 November 2019 which was for fighting with another prisoner and that he had also received some negative behaviour entries, mainly for not attending work and taking his time to return to his cell at "*bang up*". The decision letter had stated that the claimant's current attitude and behaviour provided further concerns regarding his compliance with prison regime. The grounds contend that this evidence demonstrated that even in prison the claimant's behaviour was of concern. It was therefore evidence that he had not changed and that he had no respect for the law.

(iv) (Para 4 of the grounds) Given the above, it is contended that, on the balance of probabilities, the claimant does represent a genuine, present and sufficiently serious threat to society and that, given the lack of evidence, the risk of harm to the public emanating from drug crime and the seriousness of the offending, the judge erred in finding otherwise. He gave inadequate reasoning for his finding.

(v) At para 5 of the grounds, it is contended that the claimant had failed to provide substantive evidence that he was not a threat.

(vi) (Para 6 of the grounds) The judge failed to have adequate regard to the provisions of Schedule 1 of the EEA Regulations 2016; specifically, maintaining social order; preventing social harm; 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); and protecting the public.

(vii) (Para 7 of the grounds) There were no reasons preventing the claimant's deportation and rehabilitation being undertaken in Sweden and that, pursuant to paras 4, 8 and 9 of MC (Essa principles recast) Portugal [2015] UKUT 00520, it is not to be assumed in the absence of evidence that rehabilitation would be less likely in the member state.

### Submissions

13. Mr Tufan relied upon para 19-20 of MA (Pakistan)v SSHD [2014] EWCA Civ 163 in which Elias LJ said at para 19, referring to the fact that the appellant in that case was assessed in the OASys report to be at 17% risk of re-offending, that "*... a risk of 17% re-offending over a 2-year period is not, in my judgment, in the context of a deportation case a matter which can be treated as insignificant. It is a good reason for supporting a decision to deport*". Although Mr Tufan acknowledged that MA (Pakistan) was not an EEA deport, he nevertheless asked me to note that the risk of re-offending in the instant case was 26% according to the OASys report.
14. Mr Tufan submitted that the judge erred by failing to take into account the adjudications against the claimant whilst he was in prison. Ms Dirie agreed that there was no mention of this in the judge's decision.

15. Mr Tufan submitted that, although the judge cited Schedule 1 to the EEA Regulations in his decision, he did not deal with the relevant factors. Schedule 1 enunciates what are the fundamental interests of society. The claimant was convicted of drugs dealing offences. The judge should therefore have engaged with paras 7(f), 7(g) and 7(j) of Schedule 1 and given reasons as to how they applied and why the claimant was not a sufficiently serious threat and/or why the decision was disproportionate.
16. In fairness to the claimant, Mr Tufan submitted a copy of the Court of Appeal's judgment in SSHD v Straszewski [2015] EWCA Civ 1245 but did not direct me to any particular paragraph of the judgment.
17. Ms Dirie relied upon her skeleton argument the title of which she asked me to correct on her behalf from "*Rule 24 response*" to "*Skeleton Argument*". I received this document just before 10 a.m. on the hearing day.
18. Ms Dirie submitted that the Secretary of State's grounds failed to engage with the fact that the claimant had been assessed as being at low risk of re-offending in the OASys report. The adjudication against the claimant whilst he was in prison, relied upon in the grounds, was considered by the author of the OASys report who nevertheless concluded that the claimant was at low risk of re-offending. The final sentence of the text quoted at para 3 of the grounds, which referred to there being concerns with the claimant's compliance with the prison regime, was a quote from the decision letter and not the OASys report. Whilst the grounds quoted from the OASys report, the author of the grounds had omitted the observations of the author of the OASys report about the adjudication at page 151 of the Home Office bundle, set out in the quote on page 4 of Ms Dirie's skeleton argument. Ms Dirie asked me to note that the author of the OASys report stated that the incident has been made out to be bigger than it actually was and that there were positive entries. All of this was before the judge.
19. Ms Dirie asked me to note that para 5 of the grounds (my para 12(v) above) reversed the burden of proof.
20. Ms Dirie submitted that, although the judge did not specifically mention in the course of his assessment how his reasoning tied in with specific factors in Schedule 1, the fact is that he considered all relevant factors. He took into account that the drug-dealing offences were serious offences and the sentencing remarks. She submitted that the judge clearly had in mind that he had to adopt a holistic approach and not one that only focused on the nature and seriousness of the offences. The judge considered the contents of the OASys report.
21. Ms Dirie submitted that it was not appropriate to make comparisons between the assessed risk of re-offending in the case of the appellant in MA (Pakistan) and the claimant in the instant case. Every case has to be decided on its own facts. The appellant in MA (Pakistan) never admitted guilt for his offences whereas the claimant in the instant case has and there was high mitigation in his case. The judge noted at para 39 of his decision that the Secretary of State had provided no information that the claimant had had any further convictions or been involved in any further criminal activity. The judge also specifically took into account that the claimant had only just released from detention.



22. I reserved my decision.

## **ASSESSMENT**

23. Para 7 of the grounds and its reliance upon the Essa principles, concerns the judge's alternative finding that the decision was disproportionate. If he did not err in law in reaching his finding that the claimant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, then it will not be necessary for me to consider ground 7 because the finding that the claimant did not represent a genuine, present and sufficiently serious threat is determinative in the claimant's favour. If he did err in law in reaching his finding that the claimant did not represent a genuine, present and sufficiently serious threat, then I will need to consider whether the error was material. At that point, unless the error is immaterial when seen in the context of the judge's overall reasoning in relation to the threat that the claimant poses, it will be necessary for me to consider the judge's reasoning on proportionality and para 7 of the grounds.

24. I therefore begin by considering the remaining grounds, starting with ground 3.

25. Although Mr Tufan referred, in the plural, to the claimant having had adjudications against him whilst in prison, it is clear that there was one adjudication.

26. Ms Dirie accepted that there is no specific mention of the adjudication in the judge's decision. I must therefore consider whether the judge failed to take it in account. If so, whether that amounted to an error of law. If so, whether the error was material.

27. Judges are not obliged to engage with every piece of the evidence. Whether or not the failure to engage with a particular piece of evidence amounts to an error of law will depend upon the circumstances, including the nature of the evidence, what it relates to and its significance or importance to the issue under consideration as well as its context in the circumstances of the case as a whole.

28. Although it would have been preferable if the judge had specifically addressed the adjudication against the claimant in reaching his finding that the claimant did not represent a genuine, present and sufficiently serious threat to society, this was addressed in the OASys report, the relevant section of which reads (page 151 of the Home Office bundle/page 4 of Ms Dirie's skeleton argument):

“Mr Hersi is standard on the cell sharing risk assessment and Enhanced on the incentive and earned privilege scheme.

Since arriving at HMP Brixton on 21/05/2019 he has received 1 proven adjudication on 27/11/2019, this was for fighting. I have spoken to Mr Hersi, the other person involved in the fight and his employer who witnessed the fight and from my understanding from the information provided to me is *[sic]* would appear that this fight was made to be something bigger than it was, although Mr Hersi and the other prisoner were adjudicated for the incident they both received suspended sentences and are both still employed and work together in the same work area. He has also received some negative behaviour entries, mainly for not attending work and taking his time to return to his cell at bang up. To his credit he has 11 positive entries for passing MDT's, hard work and professionalism, being helpful and good work.”

29. This states clearly that the incident had been made out to be bigger than it actually was. This fact is material in my consideration of whether or not the judge erred in law in failing to engage specifically with the evidence of the adjudication. In my judgment, given these observations by the author of the OASys report about the adjudication against the claimant and the fact that the author of the OASys report nevertheless assessed the claimant to present a low risk of re-offending notwithstanding the adjudication, it was not incumbent upon the judge to specifically engage with the evidence of the adjudication in addition to engaging with the OASys report.
30. The same is the case for the negative behaviour entries when one considers, firstly, that the claimant had eleven positive entries and, secondly, that the negative behaviour entries were mainly for not attending work and taking his time to return to his cell.
31. I have therefore concluded that the judge's failure to engage in terms with the adjudication and the negative entries against the claimant does not mean that he erred in law. It does not mean that he failed to take the evidence into account. By taking into account the OASys report, he dealt with the evidence that was before him on this issue adequately.
32. Next, I deal with those parts of the grounds that reverse or appear to reverse the burden of proof.
33. It is clear that para 5 of the grounds reverses the burden of proof in terms. In addition, para 1 of the grounds seems to come close to reversing the burden of proof in stating that "*it is too soon to say that [the appellant] is a changed person on the balance of probabilities*". Further, and in any event, this assertion ignores the fact that judges have to make relevant findings of fact on the evidence before them. If the assertion in para 1 of the grounds is accepted, that would mean, as Ms Dirie submitted (para 10 of her skeleton argument), that no person who has an appeal listed quickly after their release could succeed in the appeal.
34. There is no substance in the remainder of para 1 of the grounds. The judge specifically took into account that the claimant had only recently been released from detention in May 2021 – see para 39. He specifically took into account that the sentence expiry date was May 2023 – see para 36. He specifically took into account that there was little information regarding the claimant's rehabilitation and courses taken – see paras 34 and 37. There is no reason to think that he did not take into account that the claimant returned to his pre-incarceration address. In reality, the remainder of ground 1 amounts to no more than a disagreement with the judge's reasoning.
35. I turn to para 2 of the grounds. This relates to the judge's assessment of proportionality at para 51 of his decision. Para 2 of the grounds contends that the judge erred in reaching his finding concerning the threat that the claimant posed by failing to take into his assessment at para 51 that he had not been told the truth concerning the circumstances regarding the claimant's father. Para 2 of the grounds contends that this amounts to disrespect for the law.
36. This is such a small point in the context of the fact that the judge was considering a case in which the appellant was entitled to the second level of protection. The

Secretary of State is clutching at straws in relying on this point. In any event, I cannot see how the fact that the claimant did not tell the judge the truth about whether he still had contact with his father increases the risk that he poses to one of the fundamental interests of society.

37. The remainder of para 2 of the grounds amounts to no more than a disagreement with the judge's reasoning.
38. I have already dealt with paras 3 and 5. Leaving aside for the moment para 4 of the grounds, I turn to para 6 of the grounds.
39. I agree with Ms Dirie that, whilst the judge did not 'match' his reasoning to specific sub-paragraphs of para 7 of Schedule 1, the fact is that he took into account, in terms, that the offences were "*very serious indeed*" and that "*drugs offences have wider impact on society*" – see para 32 of his decision. It is therefore clear that he took into account para 7(g) even though he did not say so in terms.
40. The remaining paragraphs of para 7 of Schedule 1, relied upon by Mr Tufan and in the grounds, were not specifically mentioned by that part of his decision where he gave his assessment. However, he quoted the whole of para 7 of Schedule 1 at para 23 of his decision. Given that the remaining considerations relied upon by the Secretary of State underpin any EEA deportation case, I cannot see that the judge can be said to have erred in law by failing to demonstrate how his reasoning related to specific paragraphs of para 7 of Schedule 1, nor do I accept that his failure to do so means that he failed to take into account these considerations. He must have had them in mind in his assessment when one considers his overall reasoning.
41. Turning now to para 4 of the grounds, I do not accept that the judge gave inadequate reasons for his decision. Plainly he did – see paras 30-42.
42. Mr Tufan's reliance upon MA (Pakistan) is misconceived. As Ms Dirie submitted, each case is decided on its own facts. It is not helpful to extract a single point from a case and make comparisons on that basis with another case. Secondly, his submissions on MA (Pakistan) failed to recognise that the appellant in MA (Pakistan) did not accept his guilt whereas the claimant in the instant case had done so. Thirdly, and importantly, MA (Pakistan) did not concern an EEA deport whereas it is the case that not only did the instant case concern an EEA deport, it was accepted on the Secretary of State's behalf that the claimant was entitled to the second level of protection.
43. For all of the reasons given above, it has not been established that the judge erred in law in reaching his finding that the claimant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
44. This conclusion is determinative of the Secretary of State's appeal to the Upper Tribunal, irrespective of whether there is any error of law in the judge's finding that the decision is disproportionate.
45. However, I shall nevertheless go on to consider whether the judge did err in law in reaching his finding that the decision was disproportionate.

46. There is no substance in para 7 of the grounds which simply ignores the fact that the judge specifically took into account Essa (ESSA(EAA: Rehabilitation/integration) v SSHD [2013] UKUT 00316 – see paras 53-55 of his decision.
47. There is no other challenge to the judge's alternative finding, that the decision was disproportionate.
48. Accordingly, even if the judge had erred in law in reaching his finding that the claimant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the Secretary of State's appeal still fails.
49. Indeed, I am satisfied that permission in this case should not have been granted. On any reasonable view, it cannot be said that the Secretary of State's grounds were even arguable. In reality, they amounted to no more than a disagreement with the judge's reasoning and findings.

### **Decision**

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed  
Upper Tribunal Judge Gill

Date: 3 February 2023

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### **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