



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

**Case No: UI-2022-003226**  
On appeal from: DA/00256/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 17 August 2023**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

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

Appellant

**And**

**ABDINASSER MOHAMED**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Ms Julie Isherwood, a Senior Home Office Presenting Officer

For the Respondent: Ms Sonia Ferguson of Counsel, instructed by Freemans Solicitors

**Heard at Field House on 27 July 2023**

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State challenges the decision of the First-tier Tribunal, allowing the claimant's appeal against her decision on 13 October 2021 to refuse to revoke an EEA deportation order made on 16 December 2019, and to remove the appellant as an illegal entrant, by reference to Regulation 32(4) of the Immigration (European Economic Area) Regulations 2016 (as saved) and Schedule 2 of the Immigration Act 1971.

2. The claimant is a citizen of the Netherlands, of Somali origin, born on 6 November 1997. He arrived in the UK in 2002, age five, with his mother. He has in the past been a heavy cannabis user, his usage having begun in 2012, when he was 15 years old, and escalated steadily.
3. The claimant turned 18 on 6 November 2015. Between 22 March 2017 and 5 July 2019, aged between 20 and 22, the claimant committed 10 offences which resulted in five convictions, one for theft, six drug offences and three miscellaneous offences.
4. The index offence which led to the deportation order being made was the claimant's conviction on 31 May 2019 at Winchester Crown Court for being concerned in the supply of class A drugs (heroin and crack cocaine): he was sentenced to 3 years 9 months imprisonment. The claimant's mother and siblings relocated to Somalia without him in 2017, when he was 20, and did not return until 2021, when he was 24. His mother's evidence was that she visited the Netherlands, of which she is a citizen, in 2018, 2019 and 2020.
5. On 21 February 2020, having served 8 months of his sentence, the appellant was deported to the Netherlands: he returned to the UK the same year, without the deportation order having been lifted. On 30 November 2020, when he was 23 years old, the claimant was encountered here in breach of the deportation order, and returned to prison in the UK to serve the rest of his sentence.
6. On 30 November 2020, the Secretary of State served the claimant with notice of liability to removal pursuant to Schedule 2 of the Immigration Act 1971 and Regulation 32(4) of the 2016 Regulations, which provides that:

“32. ...(4) A person who enters the United Kingdom in breach of a deportation or exclusion order, or in circumstances where that person was not entitled to be admitted under regulation 23(1) or (3), is removable as an illegal entrant under Schedule 2 to the 1971 Act and the provisions of that Schedule apply accordingly.”
7. The claimant made representations against deportation in March 2021, but on 13 October 2021, the Secretary of State served a supplementary letter, confirming her decision to maintain the deportation order and to remove the claimant as an illegal entrant.
8. For the reasons set out in this decision, I have come to the conclusion that the decision of the First-tier Tribunal should be set aside for error of law and remade, dismissing the claimant's appeal.

## **Background**

9. The First-tier Judge allowed the appeal. The First-tier Tribunal's reasons for allowing the appeal are at [61]-[64]. The Judge found that the claimant was entitled only to the basic level of protection: his mother had not been exercising Treaty rights during his minority, having begun work only in

2017, when he was already an adult. There was no evidence that either the claimant or his mother ever had comprehensive sickness insurance.

10. However, the First-tier Judge was not satisfied that at the date of hearing, the claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society: see Regulation 27(5) (c) of the 2016 Regulations.
11. The First-tier Tribunal decision records that both the claimant and his mother said he had neither friends nor family in the Netherlands. The judge found that he did have adult family members there whom he had tried to conceal from the Tribunal.
12. The judge gave reasons for finding that the claimant had a genuine wish to improve himself educationally, and that he was helping his younger brother with his school work. The judge concluded at [63] that:

“I find that these factors provide the appellant with a strong incentive not to reoffend and having heard the appellant and his brother giving evidence, my assessment is that the evidence in this case does not indicate that going forward, this appellant presents a sufficiently serious threat to public order and security. “

13. In the alternative, the First-tier Judge found that the claimant’s links to the UK were strong. Apart from a short period after his deportation when he was in the Netherlands, he had lived here since the age of five, had been educated and worked here. The claimant had lacked positive parental role models and had not had an easy childhood. He had a strong incentive not to re-offend and did not present a sufficiently serious threat to public order and security to justify removal.
14. The Secretary of State appealed to the Upper Tribunal.

### **Permission to appeal**

15. In her grounds of appeal, the Secretary of State asserted that the First-tier Judge had given inadequate reasons for finding that the claimant no longer presented a sufficiently serious threat, given the strong and escalating nature of his criminal history, which in May 2019 had warranted a custodial sentence of almost 4 years for the index offence.
16. The Secretary of State relied on the First-tier Tribunal’s finding that the claimant had not presented a true and complete picture of his personal and family links to the Netherlands, showing that he was prepared to deceive the Tribunal. She noted that the OASys report stated that the claimant and his co-defendant were the main instigators of the index offences. The Judge considered that it might be difficult for the appellant to dissociate himself from his drug-dealing peers in London, where he still lived. He had not sought to improve his education since his release from prison.

17. The Secretary of State argued that the claimant's release from prison on 19 February 2022 was too recent to establish whether he would in fact reoffend: the First-tier Tribunal hearing took place on 24 May 2022, just over three months later.
18. Upper Tribunal Judge Kamara granted permission to appeal because she considered it arguable that the First-tier Tribunal had failed to give adequate reasons for finding that the claimant did not represent a sufficiently serious threat, for all the reasons given in the grounds of appeal.
19. In December 2022, the claimant filed a Rule 24 Reply and cross-appeal challenging the First-tier Judge's findings as to the level of protection to which he was entitled, but not challenging the overall finding by the judge that he did not represent a sufficiently serious threat. By an amended Rule 24 Reply, the claimant argued that the First-tier Judge had erred in law in failing to deal separately with the claimant's Article 8 ECHR claim.
20. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

21. The hearing today took place face to face. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.
22. For the Secretary of State, Ms Isherwood set out the matters which she considered had been overlooked by the First-tier Judge in assessing the present risk from this claiming. She argued that the OASys report had not been considered properly; that the sentencing judge in the criminal proceedings did not consider that the claimant was under pressure; that he had accessed no drug rehabilitation support since leaving prison; that given his history, the claimant's mother was not a stabilising influence and that he had an escalating criminal history while in education.
23. For the claimant, Ms Ferguson argued that the First-tier Judge's decision was thorough and well-reasoned, and that the Secretary of State's criticism was 'island hopping', cherry picking some things which were not undermined in the overall findings: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed. The judge had made an holistic assessment: see *WAS (Pakistan)* [2023] EWCA Civ 894 at [87] and [34].

### **Conclusions**

24. The judge's reasoning begins at [44]. He did consider the OASys report and the extent to which it contradicted the claimant's account of having been pressurised into dealing drugs, while the sentencing judge had found that the claimant and his co-conspirator were the leading figures in the

drug dealing conspiracy. The inability of the claimant's mother to provide support or restraint is considered at [52]-[53], particularly given her absence from the UK between 2017 and 2021, the period when he was getting into trouble.

25. I remind myself that an appellate Tribunal may interfere with a fact-finding judge's conclusions only in the narrow circumstances set out in *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed. Unless the First-tier Judge's decision is 'rationally unsupportable', the Upper Tribunal should not interfere with findings of fact by the First-tier Judge who had seen and heard the oral evidence.
26. Unfortunately, this is such a case. The findings made by the First-tier Judge in the body of the decision appear to point to a negative finding, particularly as they raise credibility issues in the evidence of both the claimant and his mother. I am unable to understand how, given those findings, the First-tier Judge reached a positive conclusion in the claimant's favour.
27. It follows that there is a level of irrationality in the First-tier Judge's reasoning which amounts to a material error of law. I set aside the judge's reasoning in the First-tier Tribunal decision, but not the factual findings, which neither party has challenged.
28. When making her submissions at the hearing, Ms Ferguson asked that if I did set aside the decision, I should re-list the appeal for further oral submissions. I do not consider that this is necessary, having reviewed the evidence and the judge's findings. The claimant has not been found to be a credible or a reliable witness, and nor was his mother. He disregarded the deportation order, at a time when he still had most of his sentence to serve, and he is an adult. His mother has not supported him or been able to restrain him and there is no evidence from the uncle and aunt with whom he proposed to live on release.
29. The claimant has not pursued any educational opportunities since leaving prison, nor has he remained in a drug abuse programme to assist him in maintaining drug sobriety. I do consider that he still presents a genuine risk to the public, should he return to his previous activities. Given that he is entitled only to the lower standard of protection, I am satisfied that the public interest outweighs his claims to remain in the UK.
30. I substitute a decision dismissing the claimant's appeal.

### **Notice of Decision**

31. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

**Judith A J C Gleeson**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**Dated: 8 August 2023**