



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

Appeal Number: UI-2021-000721  
FTT No: DA/00069/2021

**THE IMMIGRATION ACTS**

**Heard at: Field House  
On: 24<sup>th</sup> July 2023**

**Decision & Reasons Promulgated  
On: 15<sup>th</sup> August 2023**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Renato Sebastio Almada Lopes Da Costa  
(no anonymity direction made)**

Appellant

**And**

**Secretary of State for the Home Department**

Respondent

**For the Appellant:**

**For the Respondent: Mr Tufan, Senior Home Office Presenting Officer**

**DECISION AND REASONS**

1. The Appellant is a Portuguese national born on the 13<sup>th</sup> November 1990. This appeal is concerned with the Respondent's decision to deport him in accordance with Regulation 27 of the Immigration (European Economic Area) Regulations 2016.

**Background and Case History**

2. The Appellant was born in Portugal in 1990 to a migrant single mother from Guinea-Bissau. When he was sixteen she sent him to live with relatives in the UK, because she was worried about his exposure to crime in the area that they were living. She hoped that he would have a new start in the UK.

3. Unfortunately his mother's strategy does not appear to have worked. The Appellant has been the victim of crime, having been stabbed on three occasions, and has committed a number of crimes himself. He accrued his first conviction within three years of his arrival, and has since then been sent to prison on multiple occasions, for offences including theft, threats, robbery, possession of an offensive weapon and drugs. He has received non-custodial sentences for a number of other offences. He has never exercised treaty rights for a period long enough to justify a submission that he might be entitled to a right of permanent residence: he had therefore no enhanced protection against removal under the Immigration (European Economic Area) Regulations 2016. The index offence, for which he now faces deportation, related to a riot that erupted outside Forest Gate Police Station in 2020. A friend of the Appellant had died in police custody, and at the conclusion of a lawful protest about that death, the Appellant deliberately stayed outside the police station, throwing missiles and encouraging others to attack the police and the building: witnesses told the trial that he was heard to shout things like "let's fuck these guys up". As a result of this "persistent and sustained personal involvement" in the violent disorder that ensued, the Appellant was sentenced to 30 months' imprisonment.
4. It was this history, and in particular the index offence, which led the Secretary of State to issue the Appellant with notification of her intention to deport him.
5. The Appellant's appeal to the First-tier Tribunal was pursued on two grounds. First that the Secretary of State had not shown that his expulsion was justified under the Immigration (European Economic Area) Regulations 2016, and second that his deportation would be a disproportionate interference with his Article 8 rights in the UK, in particular the family life he shares here with his partner and two children.
6. The matter came before Judge Wilsher of the First-tier Tribunal on the 12<sup>th</sup> July 2021. The Appellant attended the hearing along with his mother and his partner; he was represented by counsel who made submissions on his behalf. For reasons that I shall return to below, Judge Wilsher allowed the appeal.
7. The Secretary of State appealed against the decision of Judge Wilsher, and on the 4<sup>th</sup> March 2022 the matter came before Upper Tribunal Judge Norton-Taylor and Deputy Upper Tribunal Judge Welsh. The Appellant attended the hearing and informed the Tribunal that he was no longer represented by Turpin Miller Solicitors, who had represented him before the First-tier Tribunal. He asked that the appeal be adjourned so that he could get a new lawyer. The panel agreed.
8. On the 23<sup>rd</sup> May 2022 the appeal came before me. Notices of hearing had been sent to the Appellant at his last known address, but he did not attend the hearing. My clerk contacted his former solicitors, Turpin Miller, who informed the Tribunal that they had no forwarding address, nor functioning telephone number for the Appellant. I therefore had to consider whether to proceed in the absence of the Appellant. I noted that he was plainly aware of the Secretary of State's appeal, because he had attended the hearing in

March. I noted that it was his responsibility to stay in touch with the Tribunal. The Tribunal was unable to establish contact with him because we had no telephone number nor current address on file. All we had was an email address to which we sent two notices of hearing for the hearing before me, in addition to those sent relating to an earlier CMR. I concluded that the Appellant had either received those emails but had elected not to attend or otherwise contact the Tribunal, or that this email address is no longer correct. I could be satisfied, in either case, that a further adjournment would mean that the Appellant would be likely to attend a subsequent occasion. I also took into account that the Appellant had had some 12 weeks in which to secure new representation, but the Tribunal had not heard from any firm subsequent to Turpin Miller coming off the record.

9. I indicated to Mr Lindsay, who represented the Secretary of State on that day, that in these circumstances the overriding objective required that I should proceed to hear his submissions in the Appellant's absence. In the event that those submissions were successful, the appeal would need to be reheard in any event, and renewed efforts could then be made to make contact with the Appellant.
10. Having heard the submissions made on behalf of the Secretary of State I allowed her appeal and set the decision of Judge Wilsher aside. My reasons are set out below. In my written decision of the 3<sup>rd</sup> July 2022 I also gave directions that the Secretary of State was to use her best endeavours to make contact with the Appellant, and to provide the Tribunal, as a matter of urgency, with all relevant information, including email addresses, telephone numbers, emails and details of any recent contact with the Appellant. I also directed that the Appellant make contact with the Tribunal as soon as he receives this decision, to provide full contact details and given an explanation for his non-attendance. If it is his assertion that he did not receive any notice of hearing then this should be set out in writing and supported by evidence where possible; it would in those circumstances be open to him to apply to have my decision set aside.
11. The Tribunal then heard nothing from the Appellant. The Respondent provided the details that she held, which corresponded with those already held on Tribunal files. On the 30<sup>th</sup> August 2022 the matter was listed before Upper Tribunal Judge Canavan as a case management hearing. Again, the Appellant did not attend. Judge Canavan issued directions that he should contact the Tribunal, and instructed Tribunal staff to do all that they could to verify his contact details. She then set the matter down to be listed for a final hearing.
12. That final hearing took place before me on the 24<sup>th</sup> July 2023. Once again, there was no attendance by the Appellant. The Tribunal has now held three hearings at which the Appellant did not attend. I am satisfied that no more could reasonably have been done by Tribunal staff to contact him. It does not seem to me that a further adjournment of the appeal will lead to his attendance in the future. I therefore proceeded to hear the Secretary of State's submissions in the Appellant's absence, and I reserved my decision, which give below. I begin though by explaining why I set the decision of Judge Wilsher aside.

## **Why the First-tier Tribunal Decision was Set Aside**

13. Judge Wilsher started his decision by noting the Appellant's criminal history and the views of probation services about his likelihood of re-offending. He concludes that the Secretary of State was "absolutely right to consider deportation" [at his §25]. He then directs himself: "the only question then is whether or not it is proportionate in all the circumstances. I now turn to that issue".
14. Having heard extensive evidence from the Appellant and his partner, Judge Wilsher found that he has an established family life in the UK and a genuine and subsisting parental relationship with his children. Judge Wilsher noted the evidence of an independent social worker who concluded that it would be damaging to the children if they lost their bonds with their father. As to the relative prospects of rehabilitation in Portugal and the UK, Judge Wilsher found that the Appellant's prospects would be better in the UK, given his support network and the fact that he has not been to Portugal since he was 16 years old. In this regard Judge Wilsher gives some weight to the view expressed by the probation service that the Appellant's family here operate as a protective factor: he has expressed regret at being separated from his children and wants to do better for them. The conclusion is expressed at paragraph 40:

Of course it is not possible to say that there is no risk because some of the protective factors could fall away. This said however on balance I have concluded that the effect on the life of this family taken as a whole, particularly on the young children involved in this case, would be serious and detrimental. There is no indication that alternative arrangements could be made to substitute for the close contact that he provides at the present moment to the boys at home. If he were deported to Portugal I find as a fact that his partner and the boys would stay in the UK. The other factor of considerable weight in my assessment is the fact that rehabilitation is much more likely to occur if he remains in the UK than if he is returned to Portugal. In Portugal none of the protective factors indicated by the Probation Service would be present. Whilst it is true that he would not necessarily have the same associates that may have caused him to commit violence in the past, the other factors in particular family support and active engagement with Probation Services would not be present. For all these reasons I find that his deportation would be disproportionate and a violation of his rights under the relevant EEA Regulations.

15. Having allowed the appeal under the Immigration (European Economic Area) Regulations 2016, the Tribunal does not go on to consider the Article 8 appeal.
16. The Secretary of State was given permission to appeal against that decision for four reasons, or 'grounds'. They are as follows:
  - (i) Material misdirection.

The FTT Judge has not reached any clear finding, as required under Reg 27(5)(c) of the Immigration (EEA) Regulations 2016, as to whether the Appellant presents a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The level of threat posed by the Appellant is necessarily material to the question of whether the appealed decision complies with the principle of proportionality (per Reg 27(5)(a)). It is submitted that, in the absence of a clear finding as to threat, the assessment of proportionality upon which the appeal was allowed is flawed and cannot stand.

(ii) Material misdirection / Taking immaterial matters into account.

The Judge has treated the prospects of the Appellant's rehabilitation as a 'factor of considerable weight' [§40]. In Vasconcelos (risk- rehabilitation) [2013] 00378 (IAC), Blake J stated at [§80] that the appellant's 'future prospects of rehabilitation are uncertain and whatever they are cannot be a weighty factor in the balance given the absence of integration and a right of permanent residence'. Paragraph [80] of Vasconcelos was approved by the Court of Appeal in SSHD v Dumliauskas [2015] EWCA Civ 145 at [43-44]. The same principle has been affirmed by the UT in MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC) at case headnote (10). In the present case, the Appellant does not benefit from a right of permanent residence. The Judge has accordingly erred by treating prospects of integration as a weighty factor in the proportionality assessment.

(iii) Failing to resolve material conflict.

The Appellant's OASys report concludes that he presents both a medium risk of serious harm to the public and a medium risk of reoffending (see RFRL at [§57]). The Judge has concluded [at §25] that the Appellant 'clearly does present that degree of risk to the public as was assessed by the Probation Service'. However, the determination goes on to state [at §39] that: 'I therefore find, unlike the decision maker in the deportation decision, there has been a change in his personal circumstances indicating that the risk of reoffending has now diminished considerably.' It is submitted that the findings at [§25] and [§39] are mutually contradictory, and the overall assessment of the appeal under Regulation 27 is accordingly unsafe.

17. Although this was in many ways a careful and thoughtful decision, a matter I return to below, I am satisfied that the Secretary of State's grounds are made out and that the decision of the First-tier Tribunal must be set aside.

18. There is, as the grounds identify, a central difficulty in that it is simply not clear whether the Tribunal accepts that the Respondent presents a genuine, present and sufficiently serious threat to one of the fundamental interests of

society, as it is required to do by Regulation 27(5)(c). On one reading of paragraph 25 this is what the Tribunal appears to do, since it there directs itself that the “only” question remaining is proportionality. If that was indeed what is meant there, then the Secretary of State has legitimate complaint in that the seriousness of that finding does not appear to be reflected in the proportionality balancing exercise which follows. If this was not the finding of the Tribunal, then some explanation should have been given as to why.

19. At paragraph 40 the Tribunal further errs in ascribing “considerable weight” to the Respondent’s prospects of rehabilitation in Portugal. As explained in MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC) rehabilitation is properly understood as an aspect of integration and as such is not a factor capable of attracting any significant weight on its own. In this case it is not apparent that the Tribunal set those aspects of the probation service’s evidence that did weigh in the Respondent’s favour in the context of his integration in the UK as a whole: in the 16 years that he has lived here he has consistently committed crime, and has failed to achieve a permanent right of residence. This in turn feeds into the Secretary of State’s third ground, which concerns the extent to which the probation evidence could properly be read as supporting the Respondent’s case.
20. These grounds being made out, I set the decision of the First-tier Tribunal aside. I did not however see any reason to interfere with its findings of fact in relation to the family, which are detailed, soundly reasoned and unchallenged by the Secretary of State. The findings at paragraphs 26-33 are preserved.

### **The Decision Remade**

21. The First-tier Tribunal found that the Respondent did not qualify for any enhanced level of protection under the Immigration (European Economic Area) Regulations 2016. There is no evidence before me capable of suggesting a conclusion to the contrary.
22. The framework against which I must make my assessment is set out in Regulation 27(5) of the Immigration (European Economic Area) Regulations 2016:

(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.

23. I begin with the risk analysis required by Reg 27(5)(c). It is for the Secretary of State to show that the decision to deport is justified because the Respondent's personal conduct represents a genuine, present and sufficiently serious threat to the fundamental interest of the United Kingdom to protect the population from criminality.

24. When Judge Wilsher conducted her analysis in July 2021, the Appellant had in the preceding 12 years been convicted of a total of 19 offences. These included multiple convictions for common assault, theft, failure to appear for trial, violent disorder, use of threatening and abusive words, robbery, possession of Class B drugs, possession of an offensive weapon, possession of a knife blade, and failure to appear for a community order. Unfortunately since her decision the Respondent has once again found himself back in front of the courts, this time for obstructing the police in their powers of search for drugs. That is of course a relatively minor offence, but reviewing the his history as a whole I see that the threat of deportation from the United Kingdom would appear to have had very little impact on his behaviour. The Secretary of State warned the Respondent that his repeat offending court lead to deportation action on a number of occasions: on the 9<sup>th</sup> November 2010, on the 21<sup>st</sup> October 2013 and on the 21<sup>st</sup> October 2016, all letters which preceded the conviction for violent disorder which has given rise to the present proceedings. As the sentencing remarks of the trial judge make clear, the Respondent can have been under no illusions that what he was involved in that day was criminal offending:

In determining your culpability, it is not just your own precise acts that matter, it is the fact that you remained as part of the unruly mob of persons plainly determined to cause disorder and violence outside Forest Gate Police Station, but the evidence makes clear that you played a particularly significant role in all of this, plainly intending to incite others and to encourage the escalating display of violent disorder.

Despite your attempts to cover your face, you have been identified as one of the persons who were seen to throw missiles at the police officers. The evidence of your involvement in the violent disorder is both cogent and compelling. You called out, and we know this from body warm

footage, you called out to police officers 'murderers' you shouted, 'fuck the police'. Whilst standing close to one officer you shouted, 'police killed Edson', the person I referred to who tragically died whilst in police custody.

Whilst standing close to one officer, again you shouted out, 'fuck the police' and you shouted, 'do you want a riot' and so it continued, you shouted 'no justice, no peace, fuck the police and fuck Forest Gate police', making it clear that your rant was directed specifically at those officers present and trying to control the public disorder that you were seeking to encourage; and so it went on with you continuing to shout at police, 'murderers and all you 17 lot will burn in hell' and 'guilty of murder, fuck the police', and finally in a clear attempt to incite those around you further, you shouted, 'hey let's fuck these guys up' and that generated a response from those around you resulting and during and the throwing of more missiles.

25. The latest offence appears to tally with the opinion expressed by the probation service following that conviction that the probability of the Respondent committing a non-violent offence within 2 years of release from custody was 66%. The risk of him committing a violent offence was calculated to be 36%. Both of these scores place him in the 'medium' bracket for risk of reoffending.
26. All of this evidence strongly points towards there being a genuine, present and sufficiently serious threat of the Respondent re-offending. Why then did the First-tier Tribunal conclude otherwise? The focus of that decision (otherwise flawed for the reasons I have identified above) was what the Tribunal found to be the protective factor of the Respondent's family life with his partner and children who were then aged 4 and 3. The Respondent gave sincere evidence that he loved his children and wanted to get away from "this life" so that he could be a role model for them, and a present father. All of that evidence was accepted by the Judge and I do not go behind it now. The difficulty is that the Tribunal's finding was that there was a strong family life then: that decision was taken 2 years ago and I have absolutely no idea whether the Respondent even still lives with his family. As I note above, he has continued to offend notwithstanding their presence in his life. I am bound to conclude that the protection offered by his family was not in the end enough to stop him offending. I find that the burden on the Secretary of State to prove that the Respondent continues to pose a risk has been discharged.
27. In assessing the overall circumstances of the case I have taken the following matters into account. The Respondent is today a man of 33 years of age. He has spent his formative years in this country after coming to the UK as a teenager. He has no connections to speak of in Portugal. He is, as far as I am aware, in good health. It perhaps follows from what I have said about the lack of current evidence that I am however unable to make any more positive findings that would weigh in the Respondent's side of the scales in the proportionality balancing exercise that I am required to undertake by Regulation 27(6). I fully accept the findings made by Judge Wilsher in 2021, but I know nothing about his current circumstances. I do not know whether he is working, or still living with the mother of his children.



I am unable to say, without hearing from him myself, that he is culturally integrated in the UK. The Secretary of State may certainly with justification point to his long record to submit that he is not.

28. Having taken all of those matters into account, I conclude that I must dismiss the appeal with reference to regulation 27.

### **Decision**

29. The decision of the First-tier Tribunal is set aside for error of law.
30. The decision in the appeal is remade as follows: the appeal is dismissed.
31. There is no order for anonymity.

Upper Tribunal Judge Bruce  
3<sup>rd</sup> August

2023