Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00022/2019**

THE IMMIGRATION ACTS

Birmingham CJC	**Decision & Reasons Promulgated**
On the 10th May 2022	**On the 26th September 2022**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

RUI DE SOUSA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Osman, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Portugal. On 21st January 2016, the respondent took a decision to deport him under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). Although that decision attracted a right of appeal, the appellant did not appeal the decision at the time. On 15th October 2018, the appellant made a request to revoke the deportation order and that request was treated as a human rights claim. The appellant's appeal against the respondent's decision of 26th October 2018 to refuse his human rights claim, was allowed by First-tier Tribunal Judge M A Khan for reasons set out in a decision promulgated on 11th July 2019.

2. The respondent was granted permission to appeal by First-tier Tribunal Judge Ford on 7th August 2019. Following a hearing before Upper Tribunal Judge Stephen Smith 24th October 2019, the decision of Judge Khan was set aside for reasons set out in a decision promulgated on 15th November 2019. Upper Tribunal Judge Stephen Smith found the decision of the First-tier Tribunal Judge is tainted by a material error of law and that the appropriate course is for the decision to be remade in the Upper Tribunal.

The background and the issues in the appeal

3. The appellant was born on 24th December 1969 and is a national of Portugal. He is said to have entered the United Kingdom as a child, in 1975, aged 6, but there is no documentary evidence of his date of entry. Between June 1988 and December 2015, he was convicted on 52 occasions for 101 offences. His crimes included the possession of an article with blade or a point in public, theft, attempted burglary, assault occasioning actual bodily harm, common assault, criminal damage, affray, being drunk and disorderly, breach of a community or probation order, wounding, possession of class A and class B drugs, harassment, driving offences and using threatening abusive or insulting words or behaviour.

4. In his 'error of law' decision, Upper Tribunal Judge Stephen Smith records, at paragraph [7], that it was common ground that the respondent correctly addressed the appellant's request to revoke the deportation order as a human right claim, rather than under the 2006 Regulations. He noted, at [17], that the appellant had not applied to bring an out-of-country appeal against the substantive deportation decision, although the ability to make such an application remained open him. Taking a steer from what had been said by Judge Stephen Smith, at the outset of the hearing before me, Mr Osman confirmed that on 8th December 2021, the appellant lodged an appeal with the First-tier Tribunal against the respondent's decision dated 21st January 2016 to deport him from the United Kingdom. I was provided with a copy of the decision of First-tier Tribunal Judge O'Brien dated 9th May 2022 refusing to admit the out-of-time appeal.

5. The issues in the appeal are summarised in broad terms in the skeleton argument of Mr Osman dated 9th May 2022. The appellant claims:

   a. His deportation amounts to a breach of Article 3 ECHR because of his medical conditions;

   b. His deportation would amount to a disproportionate interference with his rights to a private and family life under Article 8 ECHR because:

i. There are very compelling circumstances such that deportation would breach Article 8 ECHR pursuant to section 117C(6) of the 2002 Act.

ii. The decision breaches s55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") and therefore the appellant's deportation breaches Article 8 ECHR.

iii. Deportation in the circumstances is contrary to Articles 27 and 28 of the Citizen's Directive and in breach of Article 20 of the Withdrawal Agreement and therefore breaches Article 8 ECHR

The evidence

6. In preparation for the hearing of the appeal before the First-tier Tribunal, the respondent produced a bundle of documents which was filed with the Tribunal and served on the appellant. This bundle contains an immigration history followed by annexes A-S. Amongst those documents are copies of 'warning letters' served upon the appellant in October 2009 and September 2015. The bundle also includes the 'Notice of Liability to Deportation' served upon the appellant, the signed Deportation Order and the correspondence received by the respondent from the appellant's representatives in September 2016, and from the appellant in October 2018. The bundle also includes a copy of a 'letter before claim' sent by the appellant's representatives to the respondent on 5th December 2018 and the decision to remove the appellant to Portugal. The bundle includes a copy of a witness statement made by the appellant dated 26th November 2018 [Annex O] and copies of statements made by the appellant's daughters Annalie Sian De Sousa dated 18th June 2019 [Annex O26], and an unsigned and undated statement of Paiton Lorraine [Annex O29]. The bundle also includes a copy of the respondent's decision dated 26th October 2018 and a copy of the respondent's letter dated 31st December 2018 confirming the appellant enjoys a right of appeal against the refusal of his human rights claim.

7. The appellant's representatives had not filed an 'appellant's bundle'. Mr Osman confirmed that in addition to the material already contained in the respondent's bundle, the appellant relies upon two manuscript letters that he handed up. The first is from Miss Michelle Robertson and is dated 9th May 2022. The second is from the appellant's youngest daughter, who I will refer to as [LD]. Mr Osman provided me with a series of photographs that were marked 'A' to 'J' and with copies of the birth certificates of some of the appellant's children and grandchildren that were marked 'K' to 'X'

8. The appellant also relies upon a 'Psychiatric report' prepared by Dr Nuwan Galappathie that is dated 21st March 2022. Dr Galappathie states the appellant should be treated as a vulnerable witness due to his mental health problems by way of depression and generalised anxiety disorder, and that special measures need to be put in place if he is required to give evidence in Court, given his current mental health problems and the distressing nature of giving evidence in Court. His recommendations are set out at paragraph [164] of his report and were followed during the course of the hearing before me. Mr Osman did not suggest any additional measures were required or that the appellant had encountered any difficulties when giving his evidence.

9. I heard oral evidence from the appellant only. He gave his evidence in English. He adopted his witness statement dated 26th November 2018, a copy of which is to be found at 'O16' to 'O25' of the respondent's bundle.

10. The appellant claims he and his siblings arrived in the United Kingdom in 1974, when he was about six years old, to join their parents, who had left Portugal earlier leaving the appellant and his siblings in the care of their grandparents. He could not speak English when he arrived, but as soon as he started learning English, he and his siblings all stopped communicating in Portuguese. The appellant states he did not receive any formal education in Portugal. He started attending school following his arrival in the UK. He claims he moved out of the family home at the age of 13 because he was physically abused by his father. A teacher noticed bruises around the appellant's body and social services were informed. He was initially placed in care and moved back with his family when he was 14. Although things were better at first, the appellant was again subjected to abuse and moved out of the family home when he was approximately 15, to live with a cousin in London. He remained there until he was 18.

11. The appellant claims he started working as a window fabricator and sealed unit maker with a company named Argos Holdings Limited. He then worked for Computer Glazing Ltd, until he was 20. The appellant refers to the relationships he then established. He has four children from his relationship with Gillian Camar. The appellant explained that during that relationship, he started doing odd jobs now and again working as a labourer. His employment did not last because of his alcohol abuse. The appellant states that on reflection, his relationship with Gillian was spoilt by his alcohol abuse. The appellant also has three children from his relationship with Michelle Roberson. He was in a relationship with her for about 14 years. The appellant explains that the relationship with Michelle Roberson ended after they moved to Birmingham. The appellant was addicted to drugs and started taking heroin and cocaine. Finally, the appellant has one child from his relationship with Jackie Bennet.

12. The appellant maintains that he was in full-time education between the ages of 6 and 15, and in employment, between the ages of 15 to 20. He

claims he paid tax and is in the process of obtaining evidence from "Inland Revenue" to confirm he was exercising treaty rights.

13. Responding to the reference made by the respondent to the appellant's convictions, the appellant claims that from a very young age, he drank and took drugs because of his traumatic childhood. He states most of the offences he has committed were a result of substance abuse. The appellant confirms he has now acknowledged that he is an alcoholic and is trying his best to get help. The appellant confirms that he was aware of the respondent's decision of 31st December 2015 but claims he did not understand that document. He confirms he had a face-to-face interview at the Portuguese Consulate in May 2016 but claims he did not understand Portuguese and when spoken to in English, he refused to sign documents because he did not wish to return to Portugal. He claims he forgot to respond to the letter sent to him by the respondent on 27th March 2018 because of his 'drinking problem'. He states he attended several courses whilst in prison relating to alcohol abuse. He states that on 17th April 2018, he had an argument with his daughter because he had been drinking and stormed out of her house. He did not report to the respondent because he was homeless and moving.

14. The appellant claims he does not have any family in Portugal and last spoke to his parents when he was 15. He claims he does not speak to any of his family members, does not speak Portuguese and it will be very difficult for him to find a job in Portugal.

15. Before me, the appellant said his mother passed away, he thinks in 2015, when he was in detention. He does not know what has happened to his father but has heard, via his daughter Paiton, that he is in Portugal and is 'a sick man'. The appellant confirmed that the photographs that have been provided to the Tribunal and marked 'A' to 'J' show the appellant with his daughter Paiton, and the appellant with his daughter, Lois, and his grandson, who I refer to as [M]. There are also historic photographs *(taken 5 to 6 years ago)*, with the appellant, his former partner Michelle, their daughter [LD], with other family and friends. The appellant also identified the birth certificates that he has been able to provide for some of his children and his four grandchildren.

16. The appellant was cross-examined by Mr Williams. He accepted he has a long history of alcohol and substance abuse. He confirmed that he received certificates for the courses that he completed when he was in prison, but they have not been provided to the Tribunal. When asked whether he is doing anything at the moment to address alcohol abuse, he said that he does not have any alcohol or drug problem now. The appellant was referred to paragraph [147] of the report of Dr Galappathie which records that he was told by the appellant that "*… He now only uses cannabis a few times per week and occasionally uses cocaine…".* The appellant accepted that is what he told Dr Galappathie and said that he does occasionally *"smoke a bit of weed",* but it is not an everyday thing. The appellant also accepted that, as set out in paragraph [28] of

the report of Dr Galappathie, he normally drinks cider about three times per week and there have been times when he has drunk 2-3 cans of cider in a day. Mr Williams asked the appellant where he would get help from if he were struggling with drink and drugs. The appellant said, "*Alcoholics Anonymous, but I do not have an alcohol problem".* The appellant confirmed he lives on his own, although he is now in a relationship. He confirmed that he takes medication to manage the depressive disorder diagnosed and he is aware of the need to get tablets before they run out. The appellant confirmed that he knows how to get help if he feels suicidal. The appellant was asked why none of his children have attended the hearing of the appeal to support him. The appellant said his sons and daughters have their own lives, and it is not easy for them to get to the Tribunal. He has provided letters from them but does not like to involve his children because they worry too much. They are aware of the potential outcome. The appellant was asked whether his children would visit him in Portugal. He said they are on benefits and would be unable to afford any visits. The same applies to his siblings. The appellant confirmed that he left Portugal in 1974 and has only returned on one occasion for a two-week holiday in Lisbon, when he was about 14 years old. He does not speak Portuguese now, although he did when he had previously lived there. He said it would be difficult for him to learn the language again because of his age and it would take him a while to learn the language fluently. The appellant confirmed he does not know of any other relatives in Portugal other than his father. He confirmed that in the UK, he has worked as a sealed unit maker, window fabricator, and had labouring and warehouse jobs. There was no re-examination.

17. For clarification I asked the appellant how many children he has and their ages. He said that he has five daughters aged 30/31, 25, 24, 15 and 13, and 4 sons aged 26, 18, 18 and 12. He confirmed that he does not have any contact with his youngest son. The appellant also confirmed that he has seven grandchildren. The oldest is 10 and the youngest is 4.

18. I also have in the evidence before me witness statements made by two of the appellant's daughters, Annalise Sian De Sousa, and Paiton Lorraine. I was also provided with letters written by Michelle Roberson and [LD]. The authors of the statements and letters did not attend to give evidence and there has been no opportunity to test their evidence. I do not propose to rehearse what is said in those statements and letters at this stage of my decision. In reaching my decision I have also had regard to the psychiatric report prepared by Dr Nuwan Galappathie, a Consultant Forensic Psychiatrist. Dr Galappathie addresses the questions asked of him at paragraphs [140] to [164] of his report. I will refer to that evidence insofar as it is necessary to do so to explain my findings of fact and conclusions.

<u>Findings and conclusions</u>

19. As I have already set out, I was invited by Mr Osman to treat the appellant as a vulnerable witness, and the appellant has throughout been treated as a vulnerable witness. I have had regard to the Joint Presidential Guidance Note No.2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance, and my assessment of the appellant's evidence has been considered in the round, taking due account of the medical evidence and making due allowance for the fact that many individuals that have been subjected to abuse, will have problems giving a coherent account.

The Immigration (European Economic Area) Regulations

20. Mr Osman submits that despite the Upper Tribunal not having jurisdiction to consider the respondent's refusal to revoke the deportation order, the Regulations remain relevant in determining whether there is a public interest in deportation pursuant to the decisions of the Upper Tribunal in JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC), at [9] and Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) at [59]. Mr Osman submits that in considering the Article 8 claim, the Tribunal must consider whether the deportation of the appellant is consistent with the appellant's EU rights, and, it is entirely permissible for the Tribunal to have regard to the EU rights as a vehicle to inform the Tribunal's Article 8 proportionality assessment.

21. Here, by a decision dated 21st January 2016, the respondent took a decision to deport the appellant under the Immigration (European Economic Area) Regulations 2006. The appellant did not appeal that decision and a belated appeal has not been admitted by the First-tier Tribunal. As Judge Stephen Smith said in his error of law decision, it was common ground that the respondent correctly addressed the appellant's request to revoke the deportation order made against him as a human rights claim, rather than under the Immigration (European Economic Area) Regulations. The Regulations expressly provide that the appellant could not appeal under the Regulations whilst he is in the UK against an EEA decision to refuse to revoke a deportation order made against him.

22. In Hydar (s 120 response; s 85 "new matter": Birch) [2021] UKUT 00176 (IAC), a Presidential panel of the Upper Tribunal considered whether the First-tier Tribunal and the Upper Tribunal have jurisdiction to consider an EEA ground of appeal in a human rights appeal. The headnote to the decision of the Upper Tribunal states:

> "Section 120 of the Nationality, Immigration and Asylum Act 2002
>
> (1) Where, in the course of a human rights appeal under section 82(2)(b) of the 2002 Act, P responds to a notice served by the Secretary of State under section 120 of that Act by raising a matter that is of a different origin than P raised as a human rights ground under section 84(2) for resisting removal, section 86(2)(b) requires the Tribunal to determine that "different" matter. Thus, a protection issue or (where it still applies) an EU

> rights issue will need to be determined by the Tribunal alongside the human rights issue.
>
> Section 85(5): "new matter"
>
> (2) A matter of the kind described in paragraph (1) is a "new matter" which, by reason of section 85(5,) may not be considered by the Tribunal unless the Secretary of State has given the Tribunal consent to do so.
>
> (3) Section 85(5) applies to both the First-tier Tribunal and the Upper Tribunal. The finding to the contrary in Birch (precariousness and mistake; new matters) [2020] UKUT 86 (IAC); [2020] Imm AR 873 was made per incuriam the judgment of the Court of Appeal in Alam & others v SSHD [2012] EWCA Civ 960; [2012] Imm AR 974 and is not to be followed."

23. Here, the appellant did not respond to a s120 notice served by the Secretary of State under section 120 of the 2002 Act raising any EU rights issue. In any event, that would have been a "new matter" that cannot be considered by the Upper Tribunal unless the respondent has given the Tribunal consent to do so. No such consent has been given in this appeal. The appellant gains no assistance from the decisions of the Upper Tribunal in JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC), at [9] and Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) at [59], which both concern the proper application of the public interest considerations set out in contained in Part 5A (Article 8 of the ECHR: Public interest considerations) of the 2002 Act. It is uncontroversial that the respondent's policy on immigration control as expressed through the rules and statutory framework is entitled to be afforded *'considerable weight'*; TZ (Pakistan) [2018] EWCA Civ 1109 *at [34],* but that is not to say that an appellant is able to rely upon EU rights when he/she has no lawful basis to do so. Permitting the appellant to proceed in that way would be to permit him to mount an appeal in circumstances where he has no 'in-country' right to do so.

ECHR

24. I have considered whether the appellant's deportation would be unlawful under section 6 of the Human Rights Act 1998 as being in breach of Articles 3 and 8 ECHR. It is convenient to begin by addressing the Article 8 claim. I am required by cases such as NA (Pakistan) v SSHD [2016] EWCA Civ 662 to adopt a structured approach to that question.

25. Section 117A in Part 5A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act") provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

26. The first question which arises is whether the appellant is a foreign criminal, as defined in s117D(2) of the 2002 Act. He has not been sentenced to a period of immediate imprisonment of more than twelve months and he has not committed an offence which has caused serious harm.

27. Between June 1988 and December 2015, the appellant was convicted on 52 occasions for 101 offences. The appellant's offending history is set out in the respondent's bundle and is not in issue. It is, on any view, unedifying. The test in Chege v SSHD [2016] UKUT 187 (IAC), approved in SC (Zimbabwe) v SSHD [2018] EWCA Civ 929 and Binbuga v SSHD [2019] EWCA Civ 551 summarised a persistent offender as someone who 'keeps on breaking the law'. There was no attempt by Mr Osman to persuade me that that is not an apt description of the appellant. I am quite satisfied from the evidence before me and find that the appellant is a persistent offender. I therefore first proceed to consider whether he is exempt from deportation as a result of the private or family life exceptions set out at s117C(4) and (5) of the 2002 Act.

Exception 1; s 117C(4) of the 2002 Act

28. As far as 'Exception 1' is concerned, the appellant claims he arrived in the UK when he was about 6 years old (i.e. in or about 1974/1975). The respondent claims there is no evidence of the appellant's entry or residence, and the respondent's records show the appellant first came to the attention of the respondent after he was cautioned by Thames Valley police for possession of cannabis in February 1997. It is surprising that the appellant has unable to adduce evidence of his presence in the UK earlier than 1997 because on his case, he was educated in the UK, and he was placed into the care of a local authority at the age of 13 (i.e. in or about 1982/83). However, the appellant has remained consistent throughout that he entered the UK with his siblings and grandparents when he was about 6 years old. The PNC record that appears at Annex R of the respondent's bundle records that the appellant was first convicted at Willesden Magistrates Court of possession of a controlled drug on 13th June 1988 and was fined. There are then a series of convictions recorded between March 1990, and September 1996. Although I do not have copies of the birth certificates relating to the appellant's children Annalise, Shannon, Jordan and Kai, I have been provided with a copy of the provisional driving licence issued to Analise, which records her date of birth as a 2nd December 1990. There is also evidence before me that the appellant's daughter Paiton was born in Milton Keynes on 3rd November 1996, and he was named as her father on her birth certificate when her birth was registered in December 1996. Taking the evidence as a whole, on balance, I accept the appellant's evidence that he arrived in the UK when he was about 6 years old, in or about 1974/75. The

appellant is now 52. On a purely arithmetical calculation, I accept the appellant has been resident in the UK for most of his life.

29. I do not however accept the appellant to be socially and culturally integrated to the UK. In CI (Nigeria) v SSHD [2019] EWCA Civ 2027, the Court of Appeal confirmed a person's social identity was not defined solely by their social ties, but by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situated a person in a society or social group and generated a sense of belonging. The impact of offending and imprisonment upon a person's integration in the UK will depend not only on the nature, frequency and duration of the offending, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with.

30. The appellant came to the UK as a child, aged about 6. He has committed a series of criminal offences which tell against his integration to the UK. The appellant's convictions are a matter of record and are not disputed. His first conviction was on 13th June 1988 (when the appellant was 18) for possession of a controlled drug. He received a fine. He has amassed a string of convictions since. On 22nd September 2009, the appellant was convicted at Birmingham Crown Court of burglary and sentenced to a 12-month term of imprisonment. By letter dated 29th October 2009 [RB/A1], the appellant was informed that the respondent had reviewed his liability to deportation but decided not to take any further action against him. The appellant was warned that the respondent may not be prepared to exercise such leniency should the appellant come to her adverse attention again. The appellant continued to offend, and on 6th July 2015 he was convicted at Northampton Crown Court of crimes of violence for which he was sentenced to a six-month term of imprisonment. Again, by letter dated 9th September 2015 [RB/D2], the appellant was informed that the respondent had considered the appellant's conviction and his liability to deportation but decided not to take any further action against him. The appellant was warned that a person who is deported is normally prohibited from returning to the UK while the deportation order remains in force and that if the appellant commits any further offences, the respondent may seek to pursue his deportation. That too did not deter the appellant. On 22nd December 2015 he was convicted at Kettering Magistrates Court of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. He was sentenced to a 12-week term of imprisonment.

31. As is apparent from the PNC print adduced by the respondent, the appellant did not learn from the suspended sentences of imprisonment previously imposed. Nor did he learn from the activation of sentences in the face of breaches. I accept the appellant has not engaged in any offending since the conviction in December 2015, but that must be considered in light of the fact that the appellant has been aware since January 2016 of the respondent's decision to make a deportation order,

and a deportation order having been signed. The appellant has remained under the threat of deportation since.

32. The appellant has clearly formed some relationships in the UK and is the father of eight children *(he appears to have 8 children, not 9 as he said in his oral evidence)* and at least four grandchildren. The appellant's daughters, Annalise and Paiton speak fondly of the appellant. They state that he has been there for them at crucial moments in their lives, and of the guidance that he has provided. They refer to the active role that he played during their childhood, and the role that he now plays as a grandfather. They both state that they would be devastated if the appellant is removed from the UK, and it will be very difficult to visit him. Michelle Roberson has been in a relationship with the appellant and has known him for 26 years. They have three daughters. She too claims the appellant has a good relationship with his daughters (two of whom are minors), and that he seems them regularly. She states the girls will be devastated if their father is sent back to Portugal. There is no further elaboration upon the appellant's relationship with his two youngest daughters of that relationship, and the contribution that he makes to their lives.

33. Beyond the appellant's own limited evidence, there is very little evidence of academic or vocational integration since the appellant arrived in the UK. He seems, instead, to have lived on the periphery of society, committing offences. The appellant claims that from a very young age he used to drink and take drugs, because of his traumatic childhood. He claims that he committed most of the offences when he was under the influence and had to commit criminal offences to aid his drug use. Although the appellant has some relationships in the UK, the appellant's conduct and criminality militates against a finding that he is socially and culturally integrated in the United Kingdom. There is scant evidence before me of any meaningful integration.

34. Nor do I consider that the appellant would encounter very significant obstacles to re-integration in Portugal. I remind myself that the assessment of 'integration' calls for a broad evaluative judgement. In SSHD -v- Kamara [2016] EWCA Civ 813, Sales LJ said, at [14]

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that

> society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

35. The appellant was born in Portugal and lived there until he was about 6 years of age. He initially lived with his grandparents following his parents departure, but the family were reunited in the UK in or about 1974. I accept the appellant's immediate family (i.e. siblings, children and grandchildren) all live in the UK, and that for reasons that are entirely understandable, he will not wish to resume contact with his father in Portugal. I am not satisfied however, that the appellant does not have extended family who remain in Portugal and to whom he could turn to, for at least some support. The appellant does not refer to any aunts, uncles or cousins in his witness statement. The only reference is to a 'cousin' that the appellant lived with in London, after he moved out of the family home. That is not to say that he does not have any other uncles, aunts and cousins in Portugal. Both Annalise and Paiton state in their witness statements that the appellant does not have any family in Portugal. There has been no opportunity to test those claims and I attach limited weight to their evidence in that respect. In her letter dated 9th May 2022, Miss Roberson states the appellant has *"no real family in Portugal and no one he can rely on"*. The expressions "no real family" and "no one he can rely on" set out in a manuscript letter written by Miss Roberson, is in my judgment an indication that the appellant does not have immediate family in Portugal, but has some family remaining in Portugal, albeit not close family that he would be able to rely upon. In cross examination, when asked whether he has any relatives in Portugal other than his father, the appellant replied, *"I don't know"*. Taking the evidence before me as a whole, I do not accept that the appellant has no remaining family connections to Portugal aside from his father. It is in my judgment likely that the appellant has some, albeit limited, familial connections to Portugal, and that not withstanding the appellant's lengthy absence from Portugal, he would have some familial links that he can turn to for at least some limited support.

36. Although the appellant left Portugal when he was a young child, I find that it is reasonably likely that the appellant will be familiar with general Portuguese culture and traditions. He was able to speak Portuguese when he was much younger and although that is a language he may not have spoken for a considerable number of years, I find he would undoubtedly be able to re-learn that language and acquire greater fluency in Portugal. I accept his claim that all his education and skills have been gained in the United Kingdom, but they are in my judgement skills that will assist the appellant to secure work and employment in Portugal.

37. I have carefully considered the matters set out in the report of Dr Galappathie and although there will inevitably be a good degree of disruption for the appellant to begin with, I find the appellant would be able, within a reasonable period, to find his feet and exist and have a meaningful life within Portugal. Having heard the appellant give evidence, I find that he has been managing his mental health and that he

knows what he must do, and how to secure the help that he requires. The appellant spoke about the fact that he has stopped self-harming, and the progress he has made with his drug and alcohol dependence. Although the appellant has been diagnosed as suffering from recurrent depressive disorder and is said to be suffering a severe episode of depression, and generalised anxiety disorder, the appellant has throughout his time in the UK lived on the periphery of society and there is in my judgment, nothing that will prevent him from engaging fully in life in Portugal. I am quite satisfied the appellant has gained an insight into his mental health and developed strategies so that he knows when and how to get help. Even though he does not have friends or immediate family in Portugal, that does not mean that he would encounter very significant obstacles. There will inevitably be a period of adjustment, but in my judgement he could adjust to life there within a reasonable timescale. The appellant is of working age. He has experience of working in the UK and has acquired transferable skills. He has experience of employment and I find he would be able to secure employment using the skills he has now attained, within a reasonable timeframe. He has the support of his eldest daughters in particular, who are clearly very fond of him, and I find, would provide some short-term emotional support to the appellant. Life in Portugal will not be easy initially, but I do not accept he could not cope. Having considered the evidence as a whole, whilst I accept that he will naturally encounter some hardship in returning to Portugal, I do not consider that hardship to approach the level of severity required by s117C(4)(iii). The appellant therefore fails to meet the first exception to deportation.

Exception 2; s 117C(5) of the 2002 Act

38. As for the family life exception, although the appellant's oral evidence before me was that he is now in a relationship, there is no other evidence of that relationship before me. What is required by the subsection is a 'genuine and subsisting relationship with a qualifying partner'. On the evidence before me, I am not satisfied that any relationship that the appellant is in, is one which satisfies the test in s117C(5).

39. The evidence before me regarding the appellant's children and their ages, is unclear. I have been provided with a number of birth certificates relating to some, but not all of the appellant's children. I accept however that he has at least three children who I refer to as [T], [LD], and [K] who are under the age of 18 and are British citizens.

40. In reaching my In reaching my decision, I have throughout had regard to the best interests of the appellant's minor children as a primary consideration. The leading authority on section 55 remains ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are "a primary consideration", which, she emphasised, was not the same as "the primary consideration", still less "the paramount consideration". As

a starting point, I readily accept that the best interests of a child are usually best served by being with both or at least one of their parents.

41. The appellant accepts in his witness statement that he has not seen [K] since he was about 5 years old. In her letter dated 9th May 2022, Michelle Roberson confirms the appellant has a very good relationship with [T] and [L] and he sees them regularly. The frequency of that contact is not set out. She states the appellant helps her when he can. She states the girls will be devastated if their father were to be sent back to Portugal. Although the evidence before me is sparse and vague, I accept the appellant's current relationship with his daughter's [T] and [LD] engages Article 8 ECHR in its family life aspect. I am prepared to accept the appellant's relationship with his daughters is one which can properly be characterised as a genuine and subsisting parental relationship.

42. The evidence regarding the appellant's relationship and the role that he plays in their lives is very limited. On the evidence before the Tribunal, I cannot be satisfied that that the consequences which the appellant's children would face in the event of his removal, would be unduly harsh. Recently, in HA (Iraq) & Others v SSHD [2022] UKSC 22, the Supreme Court held that in determining whether the deportation of a foreign criminal would be unduly harsh on their partner or child for the purposes of s117C(5) of the 2002 Act the court has to follow the direction given in MK (Section 55; Tribunal Options: Sierra Leone) [2015] UKUT 223 (IAC) and approved in KO (Nigeria) v SSHD [2018] UKSC 53, and has to recognise that the threshold for the level of harshness justifiable in the context of the public interest in the deportation of foreign criminals was highly elevated. Whilst I am prepared to accept that it is in the best interests of children to be raised, where possible, with both of their parents being available to them, and that the appellant's removal to Portugal will have some impact upon his ability to see [T] and [LD] regularly, there is quite simply nothing before me to suggest (let alone to establish) that the consequences for the appellant's children will even be harsh. In respect of [T] and [LD], I consider that the deportation of their father will, at its highest be a matter of limited significance. They will be upset, but they will continue to live in the day-to-day care of their mother and have the stability that she has provided to them throughout their lives. They have contact with the appellant, but it is to their mother that the children will turn, and not father, who has had his own difficulties throughout their lives. On the very limited evidence before me, the appellant is a very long way indeed from establishing that the consequences for [T], [LD] and [K] in particular, would be of a sufficiently enhanced degree to outweigh the public interest in the deportation of the appellant.

S117C (6) of the 2002 Act

43. The appellant therefore fails to meet the statutory exceptions to deportation in every respect and what he must show, if he is to avoid

deportation on Article 8 ECHR grounds, is that there are very compelling circumstances, over and above those in the exceptions to deportation, which suffice to outweigh the public interest in deportation: s117C(6) of the 2002 Act.

44. The test in s117C(6) is a proportionality test, balancing the rights of the appellant against the public interest in his deportation. The scales are nevertheless weighted heavily in favour of deportation. Whilst the appellant has never received a lengthy sentence of imprisonment, and indeed falls beneath the statutory threshold for automatic deportation as a foreign criminal, I consider that there is a cogent and strong public interest in his deportation.

45. The appellant's evidence before me is that most of the criminal offences he committed were as a result of substance abuse. In his statement, he now acknowledges that he is an alcoholic. In his oral evidence before me, the appellant, in cross examination, initially said that he did not have an alcohol or drug problem now. In his report, Dr Galappathie records a history of alcohol and substance misuse. At paragraph [28] of his report, Dr Galappathie records that he was told by the appellant during the assessment "*..that he now normally drinks cider and usually drinks this three times per week..".* At paragraph [29], he records being told by the appellant *"..he initially smoked most days and now smokes 3 to 4 spliffs of cannabis per day.....he stopped using heroin and crack cocaine a few years ago. He told me that he does not use any Illicit drugs other than cannabis a few times per week and occasional cocaine "*.

46. The appellant accepted in cross-examination that he does "*occasionally smoke a bit of weed"*, but claimed it is not an everyday thing. I find that the appellant has failed to adequately address his substance abuse and without the threat of removal to Portugal hanging over him, there is a reasonable likelihood that the appellant will continue his offending behaviour.

47. Against the cogent public interest in deportation, the importance of which is underlined in primary legislation, the appellant has a rather tenuous degree of family and private life in this country. There is an absence of evidence before me regarding the particular strengths of the appellant's relationship with his children and siblings in particular. Although I am prepared to accept that the appellant derives some support from his relationship with his daughters [T], LD], Annalise and Paiton in particular, and from the contact that he has with his grandchildren, there is nothing whatsoever on the facts of his case which suffices to outweigh the public interest in his deportation.

48. In my final analysis, I find the appellant's protected rights, whether considered collectively with rights of others that he has formed associations with, or individually, are not in my judgement such as to outweigh the public interest in the appellant's removal having regard to the policy of the respondent as expressed in the immigration rules and

the 2002 Act. I am satisfied that on the facts here, the decision to refuse leave to remain is not disproportionate to the legitimate aim of immigration control and I am obliged therefore, to dismiss his appeal on Article 8 grounds.

Article 3 ECHR

49. I then turn to consider whether the removal of the appellant would be in breach of Article 3 by reason of the appellant's mental health and because of the risk of suicide. The appellant claims a decision to remove him to Portugal would violate his Article 3 rights. Mr Osman submits the appellant is seriously ill, having been diagnosed with severe depression and generalised anxiety disorder. He submits the appellant's removal to Portugal creates a real risk that the appellant would suffer a serious, rapid and irreversible decline causing intense suffering or a significant reduction in life expectancy. That is because of the increase in the risk of suicide. Mr Osman submits the increased risk of suicide exists because the appellant would be unable to access appropriate treatment for his conditions in Portugal. Finally, Mr Osman submits the respondent has not discharged its procedural obligation under Article 3 ECHR by failing to adduce any evidence to dispel the doubts raised by the evidence of the appellant or sought individual and sufficient assurances in the appellant's case.

50. As far as the risk of suicide is concerned, it is now well established that what is required is an assessment of the risk at three stages, prior to anticipated removal, during removal, and on arrival. I have carefully considered whether the suicide risk is such that a removal of the appellant to Portugal would be in breach of Article 3 by reference to the test set out in J v SSHD [2005] EWCA Civ 629 as clarified in Y and Z (Sri Lanka) v SSHD [2009] EWCA Civ 362, noting in particular that giving the judgment of the court in Y and Z (Sri Lanka), Sedley LJ said:

> "16. One can accordingly add to the fifth principle in J that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."

51. The appellant draws upon the opinions expressed by Dr Galappathie, in particular. Dr Galappathie is a consultant forensic psychiatrist who was instructed by the appellant's solicitors to address the appellant's mental health and in particular the risk of suicide in light of his mental health. He examined the appellant on 4th January 2022 by video-call in an assessment that lasted one and a half hours without any breaks.

52. Dr Galappathie records a history of alcohol and substance misuse. I have already referred to what Dr Galappathie was told about the appellant's current level of drinking and drug use. In his report, Dr Galappathie refers to the appellant's past psychiatric history and the medication he has been prescribed. He refers to the information available from the

appellant's health records, including records of past suicide attempts and the events leading to those attempts. Dr Galappathie records in paragraph [118] of the report:

> "Mr De Sousa said that he would like to get his life back on track. He said that he will not commit any further crimes as he does not want to be deported. He explained that his last offence was about 2 years ago, and he will not commit any further offences. He is happy to see his GP in the community. He will continue taking his medication including his antidepressant medication. He said that he would like to have psychological therapy and recover from his current mental health problems. He explained that he has support from his siblings, children and friends in the UK. He has not returned to Portugal since he left the country at the age of 4 years old. He fears being deported to Portugal. He fears not having any accommodation or support and not being able to access the mental and physical health care that he requires if he was returned to Portugal."

53. Dr Galappathie confirms that at the time of his assessment, the appellant did not have any thoughts about self-harm or suicide. His predominant thoughts were related to his fear of being returned to Portugal. Dr Galappathie has diagnosed the appellant to suffer from recurrent depressive disorder, and in his opinion, the appellant is currently suffering from a severe episode of depression. Dr Galappathie also diagnosed the appellant to suffer from generalised anxiety disorder, and states that clinically, the appellant presented as an individual suffering from severe symptoms of anxiety. Dr Galappathie states, at [143], that the appellant is currently prescribed antidepressant medication in the form of mirtazapine 45mg per day. He also takes quetiapine 100mg per day which is a low-dose antipsychotic medication often used at low doses for the treatment of depression and difficulty sleeping. He is also prescribed promethazine 25mg per day (antihistamine sleeping medication).

54. At paragraph [147] of his report, Dr Galappathie expresses the opinion that the appellant presents with a high risk of self-harm and suicide. He claims the appellant is likely to suffer from worsening depression and anxiety if detained and this would lead to an increased risk of self-harm and suicide. In his opinion, the appellant's return to Portugal would lead to a severe deterioration in mental state and an immediate and high risk of self-harm and suicide given his fear of being returned. He states, at [149], that if the appellant is threatened with removal from the UK, that is likely to have a significant adverse impact upon his mental state. He is likely to find the prospect of being returned to Portugal highly distressing. He is likely to feel highly destabilised by the threat of being removed from the UK which would worsen his depression and anxiety and increase his risk of self-harm and suicide. Dr Galappathie expresses the opinion that removal to Portugal would impair the appellant's ability to engage with relevant services in order to obtain help. It is said that his depression is likely to cloud his judgement and impair his problem-solving skills. In his opinion, the appellant is unlikely to have the ability to

identify and seek treatment if he is to returned Portugal. Dr Galappathie expresses the opinion that the appellant will benefit from continued community support from his siblings, children and friends in the UK. He states that if the appellant is not able to receive the medical treatment that he requires for his physical health and mental health problems, this would worsen his mental health problems by way of depression and anxiety and increase his risk of self-harm and suicide.

55. Dr Nuwan Galappathie is a Consultant Forensic Psychiatrist, and his expertise and experience are not challenged by the respondent. I accept his opinion that the appellant suffers from a recurrent depressive disorder and is currently suffering from a severe episode of depression. I also accept the diagnosis made that the appellant suffers generalised anxiety disorder.

56. I also accept his opinion that the appellant's current symptoms and mental health problems are long standing and well established. His uncertain immigration status and fear of being returned to Portugal are likely to be significant factors that have caused a deterioration in his mental health. I accept his opinion that the mental health problems that he appellant presents with, are genuine and there is no indication to suggest that he is exaggerating or feigning his current mental health problems.

57. I have carefully considered the evidence before me, and I give due weight to the opinions expressed by Dr Galappathie. Dr Galappathie expresses the opinion that the appellant presents with a high risk of self-harm and suicide, indicated by the number of risk factors for self-harm and suicide that are present.

58. It is clear from the appellant's past psychiatric history as set out in the report of Dr Galappathie that the appellant has had consultations with his GP about feeling low in mood over several years. The review of his records reveals attempts at suicide, but those attempts follow arguments and alcohol and substance abuse. For example, on 22nd May 2018, the appellant presented at the A&E department following a suicide attempt by hitting himself over the head with a brick and attempting to cut his throat. Dr Galappathie noted that "*He had three cans of cider that day, plus diazepam and black mamba. He had an argument with his daughter which triggered his suicide attempt*.". On 30th April 2020, his GP recorded the appellant had taken an intentional overdose. He described using black mamba, diazepam and other illicit street drugs and had taken an overdose of mirtazapine and amitriptyline with alcohol. On 30th April 2020, the appellant was seen at the A&E Department following a suicide attempt, having taken an overdose of 3 mirtazapine 45mg tablets, 6 amitriptyline 25mg tablets and 4 cans of beer. When spoken to, it was noted that there was notable anger towards his father. When asked about the overdose he said he had been having suicidal thoughts for a long time and said he had called 111 himself. In his oral evidence before me, the appellant claimed that he has undertaken courses to address

substance abuse and more importantly, that he is aware what he should do, and how to access and support, when he is struggling. He confirmed that he is regularly taking his medication and takes steps to ensure that his medication does run out.

59. Having considered the appellant's evidence and the opinions expressed by Dr Galappathie, in the end, I do not consider the medical evidence, taken at its highest, demonstrates a real risk that the appellant would commit suicide in the UK. As I have already said, having heard the evidence of the appellant, I am quite satisfied that he has gained an insight into his mental health and that he knows when and how to get help. His evidence was that he takes his medication and that he knows what to do, so that his medication does not run out. He said that he knows how to get help when he feels suicidal. The review of the appellant's medical records establishes that when he has presented with suicidal thoughts, he has been able to receive support, and once he has calmed down, he cooperates with the medical authorities in the UK. When precautionary steps have had to be taken, those steps have been taken. I find that any risk upon the appellant learning of any decision to remove him would be adequately managed in the UK by the relevant authorities. Any risk that manifests itself during removal, is capable of being managed by the respondent.

60. I therefore approach my assessment on the basis that it would be possible for the respondent to return the appellant to Portugal without him coming to harm, but once there, he would be in the hands of the mental health services in Portugal. The risk here, results from a naturally occurring illness. I acknowledge that an Article 3 claim, can in principle succeed, in a suicide case.

61. Dr Galappathie expresses the opinion that the applicant's return to Portugal is likely to lead to a significant deterioration in his mental health. Dr Galappathie opines that the appellant is likely to suffer from a substantial deterioration in his depression and anxiety if removed to Portugal. It is said that the appellant is likely to return to excessive consumption of alcohol and use of illicit drugs such as cannabis, Heroin and crack cocaine which would further destabilise his mental health. He is likely to suffer from a recurrence of intense thoughts about self-harm and suicide and would present with an immediate and high risk of self-harm and suicide upon removal to Portugal.

62. There is no evidence before me regarding the facilities and treatment available in Portugal to establish that the protection the Portuguese authorities might be able to offer, would not be effective in reducing the risk of suicide. The appellant's evidence is that he is motivated to address his substance abuse and he told Dr Galappathie that he would like to get his life back on track and that he has support from his siblings, children and friends in the UK. For reasons that I have already set out, I have found that the appellant's immediate family are all in the UK, but he has some familial connections to Portugal that he would be able to turn

to in the short term. I appreciate that the geographical separation from his siblings and children will not be without difficulty, but I find that the appellant's siblings, children and friends in the UK, will be able to provide some support to the appellant whilst he establishes himself in Portugal, and he will be able to draw upon the comfort of that support. The appellant has gained skills in the UK through employment, and we will be able to draw upon those skills to secure employment and therefore an income, within a reasonable time. Although there is an absence of evidence before me regarding the provision of mental health care in Portugal, Portugal is an EEA member state and I am quite satisfied that medical treatment and assistance would be available to the appellant in Portugal, albeit perhaps not to the standard available in the UK. The appellant clearly has a good relationship with his siblings and some of his children and grandchildren, and he has every incentive to engage with the services available, as he has in the UK.

63. The appellant's subjective fear arises in large part because of the length of his absence from Portugal. There is in my judgment no reason for the appellant not to engage with the treatment available in Portugal. Understandably, Dr Galappathie does not engage with the provision of services in Portugal, but there will undoubtably be services for the treatment of mental health conditions. It is not suggested that the medications prescribed to the appellant are not available in Portugal. Dr Galappathie did not have the benefit of hearing the appellant's evidence regarding the pro-active steps he takes in the management of his mental health. I find that the appellant would, in Portugal, be anxious to seek and engage with the treatment available, as he has in the UK. Even giving due weight to the opinions expressed by Dr Galappathie, I do not accept that the genuine subjective fear held by the appellant, is such that it creates a risk of suicide on return to Portugal.

64. In the end I am not satisfied that the appellant has established that there are substantial grounds for believing that he would face a real risk of being exposed to either a serious, rapid and irreversible decline in the state of his mental health resulting in intense suffering or the significant reduction in life expectancy as a result of either the absence of treatment or lack of access to such treatment. The 'suicide risk' is not in my judgement such that the removal of the appellant to Portugal would be in breach of Article 3.

Notice of Decision

65. The appeal is dismissed on human rights grounds.

Signed **V. Mandalia** Date 16th September 2022

Upper Tribunal Judge Mandalia