



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

**Case No: UI-2022-001482**  
**First-tier Tribunal No:**  
**DA/00139/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 21 September 2023**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**BACAR BAIO**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr A Joseph, counsel instructed by NLS Solicitors  
For the Respondent: Ms A Rushforth, Senior Home Office Presenting Officer

**Heard at Cardiff Civil Justice Centre on 14 September 2023**

**DECISION AND REASONS**

Introduction

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge SL Farmer promulgated on 14 March 2022.
2. Permission to appeal was granted by Upper Tribunal Judge Allen on 30 June 2022.

Anonymity

3. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

4. The appellant is a national of Portugal, aged thirty. His date of entry to the United Kingdom is unknown however he first came to the attention of the United Kingdom authorities when he was arrested on 3 August 2019 and charged with

drugs offences. He was subsequently convicted of possession of class A and B drugs with intent to supply and was sentenced to three years' imprisonment.

5. The appellant was notified that he was liable to deportation and was given the opportunity, which he took, to make representations prior to a decision being made. A decision was made to make a deportation order on 17 March 2021. In that letter, the Secretary of State accepted that the appellant had acquired a permanent right to reside in the United Kingdom but concluded that his deportation was justified on grounds of public policy under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 as well as proportionate under Article 8 ECHR.
6. A supplementary decision letter dated 2 September 2021 was served on the appellant as he was subsequently convicted, on 24 June 2021 of further counts of supplying illicit drugs with intent.

#### The decision of the First-tier Tribunal

7. There was no attendance by the appellant at the video hearing before the First-tier Tribunal and his previous solicitors had withdrawn representation two months earlier. The judge was satisfied that the appellant had been notified of the hearing and proceeded to hear the matter. The appeal was dismissed.

#### The grounds of appeal

8. The grounds of appeal argued that the appellant had not been notified of the date of hearing and that he and his witnesses had been deprived of the opportunity of giving evidence. In addition, the appellant's sister had contacted the First-tier Tribunal prior to the decision being promulgated and explained that an email had gone to her junk mail and this explanation was not taken into consideration.
9. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

It is arguable, for the reasons set out in paragraphs 2 and 3 of the Appellant's grounds, that there has been procedural unfairness in this case, though the Appellant will be expected to substantiate his claim that he was told at the CMR that notice of hearing would be sent to him by letter.

10. The respondent filed no Rule 24 response.

#### The error of law hearing

11. At the outset, Ms Rushforth confirmed that there was no Rule 24 response in this case but that the appeal was opposed. Thereafter I heard detailed submissions from Mr Joseph which covered similar ground to that set out in the permission to appeal application.
12. For her part, Ms Rushforth briefly argued that the appellant's claim that he was told that the notice of hearing would be served by post remained unsubstantiated, that the judge made no error in concluding that the said notice was served by email and she asked me to note that no telephone number was provided by the appellant.

13. At the end of the hearing, I announced that I was satisfied that the judge materially erred in proceeding with the appeal in circumstances when the appellant had shown that he wished to be present, and that the decision was thereby set aside. After hearing submissions from both representatives, I remitted the matter to the First-tier Tribunal for a de novo hearing and give my reasons below.

Decision on error of law

14. While the judge considered whether to proceed with the appeal and directed himself appropriately, with reference to *Nwaigwe* (Adjournment: Fairness) [2014] UKUT 418, there was inadequate focus on whether it was fair to proceed in this case after taking into account all the circumstances. As a result of the appeal proceeding in his absence, the appellant was deprived of right to a fair hearing in that he was unable to give evidence and nor were his family members. The appeal concerned deportation under the 2016 Regulations where the respondent had accepted that the appellant had a permanent right of residence and therefore it could not be said that the appellant's presence or that of his family members was not capable of making a difference to the outcome.
15. The First-tier Tribunal were aware that the appellant's previous solicitors withdrew representation on 21 January 2022 and that thereafter the appellant had represented himself at two virtual Case Management Review Hearings. The preceding facts as well as his correspondence with the First-tier Tribunal amounted to a strong indication that the appellant wished to be involved in the proceedings. Furthermore, while this matter had been adjourned once previously this was not caused by the appellant but the inability of HMP Cardiff to arrange the facilities required for a substantive hearing. Access to the First-tier Tribunal's database had not been possible by the time of the error of law hearing and I was unable to assess whether the appellant was told that the notice of hearing would be posted. I do not reject his claim that this was his understanding of the matter.
16. Judge farmer records that the notice of hearing sent by email on 25 February 2022 did not bounce back as undeliverable, unlike an email sent at 1010 hours on the day of the hearing. Correspondence from the appellant's sister to the First-tier Tribunal acknowledged that an email sent on 7 March 2022 with the CVP joining instructions had been received but that it had gone to her junk email box, and she had not seen it until the evening of 10 March 2023. I find that the fact that the email sent on the day of the hearing was undeliverable ought to have given the Tribunal pause to think, when considered with the appellant's active involvement in the case management of his appeal. Furthermore, as soon as the appellant's sister became aware that the appellant had missed his hearing, she explained the position promptly and in the same terms as set out in the grounds of appeal and followed this up with a telephone call. I have no reason to reject what she wrote or said. The sister was told to wait for the decision, which was signed off by the judge on 11 March 2022 and promulgated on 14 March 2022. I conclude that it would have been reasonable to adjourn and give the appellant an opportunity to attend on next occasion and in failing to do so the judge materially erred.
17. I canvassed the views of the parties as to the venue of any remaking and both were of the view that the matter ought to be remitted. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the

Senior President's Practice Statements. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the errors of law in this case meant that the appellant was deprived of any adequate consideration of his deportation appeal.

18. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal.

### **Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**The decision of the First-tier Tribunal is set aside.**

**The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except First-tier Tribunal Judge SL Farmer.**

T Kamara

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**20 September 2023**