Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00025/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2020	**On 16 March 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSHUA [A]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Presenting Officer
For the Respondent: Ms Ahmed, instructed by Lincoln Lawrence Solicitors

DECISION AND REASONS

1. Joshua [A] is a Nigerian national who was born on 9 May 1999. On 11 September 2019, First-tier Tribunal Judge G Clarke allowed his appeal against the Secretary of State's decision to deport him from the United Kingdom. The Secretary of State was

subsequently granted permission to appeal against that decision. We shall refer to the parties as they were before the FtT.

2. We need not set out the appellant's immigration history in any detail. It suffices to state that he came to the UK as a young child in 2003; he was issued with an EEA Residence Card in 2010; and that he was issued a Permanent Residence Card on 18 February 2014. His entitlement to these documents arose a result of his father's French nationality.

3. Nor is it necessary for the purposes of this decision for us to set out in full the appellant's extensive offending history. The Police National Computer printout which was before the First-tier Tribunal documents ten theft and kindred offences; six offences relating to police, courts or prisons; six drug offences; and one offence relating to firearms, shotguns or offensive weapons. The earliest offence was committed on 7 March 2013. The most recent offences were committed on 22 November 2017, when the appellant was found to be in possession of Crack Cocaine and Heroin with intent to supply. For those offences, he was sentenced by Inner London Crown Court to a total of 28 months' imprisonment in a Young Offenders Institution. It was during the appellant's sentence for these offences that the respondent initiated deportation action under the Immigration (EEA) Regulations 2016. Ultimately, the respondent decided to make a deportation order under those Regulations on 27 November 2018 and it was against that decision that the appellant appealed to the First-tier Tribunal.

4. The appeal came before Judge Clarke ("the judge") on 26 July 2019. His reserved decision runs to fifteen pages of single-spaced type. For reasons which will shortly become apparent, we need not rehearse the structure or the contents of it in detail. The judge reminded himself that the Regulations contain three levels of protection against removal or deportation: [64]-[67]. He also reminded himself that it was for the respondent to justify her decision to deport: [68]. The judge considered that the appellant was able to avail himself of the middle level of protection against deportation, such that the respondent was required to establish serious grounds of public policy or public security justifying that course: [69]-[70]. The judge set out the relevant provisions of the regulations before he turned, at [73]-[76], to consider in some detail the appellant's offending history. At [77], he noted the appellant's claim to be completely rehabilitated as a result of his time in custody and the 'wake up call' this had provided.

5. At [78]-[87], the judge considered the evidence adduced by the parties which bore on the question of the appellant's rehabilitation. At [88], he noted that there was no up to date OASys assessment before him. At [89], he said this:

> I made directions for Ms Corina Oliver, the Appellant's Probation Officer, to file an updated assessment on the Appellant's risk of offending and risk of harm. This was completed by one of Ms Oliver's colleague, Ms Jennifer Connell, and sent through a few days after the hearing. I appreciate the time spent by Ms Connell and Ms Oliver preparing this report. It is apposite to set it out in full:

6. The judge then set out in full the Probation Officer's assessment. He went on to state that he attached 'great weight' to it: [90]. He concluded that it was 'cogent and compelling evidence, in my view, that the Appellant is making strident efforts to achieve his rehabilitation.' In the remaining paragraphs of his decision, the judge made findings about the extent of the threat posed by the appellant and the proportionality of his removal. The final substantive paragraph is in the following terms:

> [95] On the specific circumstances of this case, I find that there are no serious grounds of public policy requiring the appellant's deportation to Nigeria. I rely on the fact that the appellant accepts responsibility for his crimes and his custodial sentence has made him determined that he does not wish to continue along a route of offending. Since his release on 31st January 2019, he had made strident efforts towards his rehabilitation. I attach weight to the fact that while in prison he kept in touch with Mr [A] who saw something in the appellant's motivation to change and promoted him to return to the organisation. Mr [A] is a strong professional role model for the appellant, as is recognised by the Probation Service. The appellant has continued to engage with Probation, with Mr [A] and hold down his job. The appellant is not a present threat to one of the fundamental interests of society. Given the evidence before me of rehabilitation, I find that the appellant's deportation would be disproportionate.

7. Permission was initially refused by the First-tier Tribunal but was granted, on renewal, by Upper Tribunal Judge Coker. The respondent advanced three grounds of appeal against the judge's decision. It was submitted that the judge had failed to

provide adequate reasons for his findings as to the risk posed by the appellant; that he had materially misdirected himself in law by conflating the separate questions of risk, rehabilitation and proportionality; and that he had in any event made inadequately reasoned findings on proportionality.

8. We heard submissions from Ms Cunha, who took us deftly through a number of domestic and European authorities. During the course of her submissions, we asked to see a copy of the letter from the Probation Officer, Ms Connell, to which the judge had attached great weight in allowing the appeal. Ms Cunha was unable to find the letter in her file. She helpfully offered to return to the Presenting Officers' Unit to conduct a more thorough search of the records. We asked Mr Ahmed whether he had been provided with a copy by those instructing him. He had not. We put the matter back in the list in order to give Ms Cunha time to locate the letter.

9. On resuming after the short adjournment, Ms Cunha stated that she had been unable to locate the letter. Mr Ahmed stated that his instructing solicitors did not have a copy. These submissions chimed with the provisional view we had formed when reconsidering the contents of the Tribunal's file in light of the fact that neither representative had access to a copy of the letter from the Probation Service.

10. It is apparent from the Tribunal's file that the judge was at pains to make appropriate directions to address what he considered to be an evidential lacuna. On the day of the hearing before the FtT, he made directions for the appellant's solicitors to file and serve any further evidence from the Probation Service by 4pm on 31 July 2019. He also directed that both parties were at liberty to make written submissions about any such evidence by 4pm on 2 August 2019. He concluded his directions by stating that he would proceed to determine the appeal if nothing further was received in compliance with the preceding directions. At [60] of his decision, he stated that he had given the representatives 'the option to submit further submissions after receipt of this report but nothing has been received'.

11. It is apparent from the Tribunal's file that the judge's directions were sent to the appellant's representatives (solicitors and counsel) and to the respondent. After that, there is no further relevant material on the Tribunal's file. There is no correspondence from the appellant's solicitors, enclosing the letter from Ms Connell. There is no indication whatsoever that the letter was filed (by either party) or that it was served by

either side on the other. It appears to us, as it did to both representatives, that the letter was sent directly to the Tribunal by the Probation Service, without either party having an opportunity to comment upon it. No copy of it was retained in the Tribunal's file, seemingly because it was received by email.

12. We suggested to Mr Ahmed that this seemed to us to be a serious procedural failing and that we were willing, in the unusual circumstances of this case, to consider this point despite the absence of a specific ground of appeal by the respondent. Mr Ahmed did not oppose that course. Nor, on reflection, did he feel able to submit that the judge's decision was sound. He was constrained to accept, with commendable frankness, that the decision could not stand in the face of such a serious procedural error.

13. We agree. It was perfectly understandable, in light of the limited evidence before him, for the judge to seek the views of the Probation Officer on the appellant's claim of rehabilitation. It was unobjectionable, in our judgment, for those views to have been sent directly to the Tribunal by the Probation Service. It was absolutely necessary, however, upon receipt of that valuable evidence, to provide both parties with an opportunity to make submissions upon it, whether orally or in writing. The judge plainly recognised that, as is clear from the directions he made on the day of the hearing, but it is clear that neither side received a copy of the letter and that the respondent was never given an opportunity to consider it. That error, which occurred despite the judge's care, vitiates his assessment as a whole, and we must set aside his decision. We order that the appeal be remitted to the First-tier Tribunal for hearing de novo before a judge other than Judge G Clarke.

Notice of Decision

The decision of the First-tier Tribunal was erroneous in law and cannot stand. The decision of the FtT is accordingly set aside and we order that the appeal be remitted to the FtT for rehearing *de novo.*

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

13 March 2020