



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

Appeal Number: HU/18291/2019 (V)

THE IMMIGRATION ACTS

Heard on 19 January 2021

Via Skype for Business

**Decision & Reasons
Promulgated
On 3 February 2021**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BERNARD NJENGA

Respondent

Representation:

For the Appellant: Mrs Pettersen, Senior Home Office Presenting Officer

For the Respondent: None

DECISION AND REASONS (V)

Introduction

The SSHD has appealed against a decision of the First-tier Tribunal ('FTT') promulgated on 19 December 2019 allowing Mr Njenga's appeal on Article 8 grounds, against the SSHD's decision dated 24 October 2019 to refuse his human rights claim and refuse to revoke a deportation order against him.

Background

Mr Njenga entered the UK with his mother in December 2012, when he was 16 years old. He was granted indefinite leave to enter upon arrival and then given a no time limit ('NTL') stamp on 13 April 2017.

On 6 October 2017 Mr Njenga was given a community order, having been convicted of possession with intent to supply a Class A drug. On 22 October 2018 he was given a conditional discharge having been convicted of assaulting an officer when he was arrested for this drugs offence. The pre-sentence report written for the hearing on 6 October 2017 recommended a community order in the light of a number of mitigating factors. These are succinctly set out at [8] and [30] of the FTT's decision and perhaps explain the relatively low sentence for a drugs offence.

On 15 March 2018, 22 October 2018, 4 April 2019 and 6 June 2019 Mr Njenga was convicted of failing to comply with the terms of the 2017 community order. After the fourth breach he was sentenced to seven months imprisonment on 6 June 2019. This activated a suspended sentence order of nine months, suspended for 12 months imposed on 4 April 2019 when the community order was varied.

On 13 August 2019 the SSHD made a deportation order against Mr Njenga under s. 5(1) of the Immigration Act 1971 ('1971 Act'), in which she deemed his deportation to be conducive to the public good. Mr Njenga made fresh submissions to remain in the UK on the basis of Article 8 but this was refused in a decision dated 24 October 2019.

The FTT heard the appeal on 18 December 2019. Mr Njenga was not legally represented but gave evidence and was cross-examined. The FTT accepted his evidence and allowed the appeal.

Appeal to the Upper Tribunal ('UT')

At the beginning of the hearing before me Mrs Pettersen clarified the following matters:

- (i) The SSHD did not contend that Mr Njenga was a 'foreign criminal' for the purposes of the Immigration Rules or s.117C and s.117D of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act').
- (ii) The SSHD deemed his deportation to be conducive to the public good under the 1971 Act.
- (iii) It followed that the FTT was not required to address the considerations at 398 to 399 of the Immigration Rules or s.117C

of the 2002 Act. In the circumstances, reliance was no longer placed upon [3] to [7] of the SSHD's grounds of appeal.

- (iv) Although s. 117B of the 2002 Act was relevant, the failure on the part of the FTT to explicitly refer to the public interest considerations was not a material error of law and therefore not pleaded as such.
- (v) The only narrow ground of appeal relied upon was that included at [2] - the FTT failed to resolve the difference between the observations made by the sentencing judge and Mr Njenga's evidence before the FTT, prior to accepting his evidence.

Mrs Pettersen invited me to find that there were clear unresolved discrepancies between the sentencing remarks and the FTT's findings and the FTT did not adequately explain why it was prepared to depart from the sentencing remarks.

Mr Njenga clarified that when he attended the court for sentencing on 6 June 2019 he did not have any legal representation. His case was stood down to enable Counsel to represent him. He only spoke to Counsel for about 15 minutes prior to the sentencing hearing.

Mrs Pettersen did not wish to respond to this. Having heard from both parties I indicated that I would be dismissing the SSHD's decision for reasons I now provide.

Error of law discussion

As set out above, Mrs Pettersen accepted that the SSHD relied upon one narrow ground of appeal. She summarised this as follows: the FTT erred in law in accepting Mr Njenga's explanation for failing to comply with the terms of his community order when that was inconsistent with the sentencing remarks. Before considering this further, it is important to clarify that which Mrs Pettersen did not rely upon. The submission at [2] of the grounds of appeal that Mr N "*has clearly shown a persistent disregard for the law*" carries with it an implication that this made him a 'foreign criminal' for the purposes of the Immigration Rules and s.117C and s.117D of the 2002 Act. Mrs Pettersen confirmed that this had never been the basis of the SSHD's deportation order and she continued to simply rely upon s.5 of the 1971 Act. I now address the findings of fact that have been challenged by considering the sentencing remarks and then the FTT's decision.

In her sentencing remarks, Recorder Jones noted that Mr Njenga accepted his failure to attend appointments as part of his community order sentence, and commented that this was a point in his favour. The Recorder reduced the sentence from nine to seven months imprisonment and said this:

“...in light of the fact that you did admit the breach here and there has been at least some attempt to comply at least, I am going to order that the suspended sentence be varied.”

The Recorder however also noted that: (i) he only attended three out of eight appointments; (ii) with an excuse given for one of the five he did not attend; (iii) although he said letters were not sent to the right address, probation service tried to stay in touch including by text; (iv) he claimed that he was working at the time but did not provide evidence of this.

The FTT was clearly impressed by Mr Njenga and described his oral evidence at [32] as “*entirely credible and consistent*” and reached the following conclusion at [39]:

“Assessing all these factors I conclude that this is a fundamentally decent individual who lost his way at the time of the death of his mother [in July 2017], and who has a realisation that what he did was wrong, has insight and will try to live a worthwhile life in the future. The sentencing remarks do not indicate that the drug offence of the sale of drugs [played a key role in the sentence]. The sentence supports that. The [drug] conviction did not lead to any wish to deport him, and is not converted into good reason because of a subsequent failure to meet conditions of a community order. The failure to comply with those conditions (separately or added to the initial offence) does not warrant deporting him.”

The FTT heard detailed oral evidence from Mr Njenga and who was cross-examined. The documentary evidence before the FTT contained a number of letters written by Mr Njenga (who has been self-representing presumably because of a lack of funds). This explained that he spiralled into a very bad state for a lengthy period after his mother died of cancer in June 2017. It led to his sister going into care and him having no accommodation such that he was ‘sofa surfing’ and living a chaotic lifestyle. He also had difficulties attending the appointments in Northampton because he was living in London. That explanation for not attending the community order appointments is not inconsistent with the explanation available to the Recorder (as summarised at [13]). It is important to note that before sentencing, the Recorder did not hear from Mr Njenga and only from Counsel who was appointed to him shortly before the hearing. The sentencing remarks make no reference to that Counsel who is only referred to as ‘unknown Counsel’.

In any event the FTT was aware of these sentencing remarks and clearly took them into account having referred to them at [32] and [39]. Indeed, the FTT not only accepted Mr N’s account as true but observed that “*it accords with the sentencing remarks and other documents...*” at [32]. Although there are some differences between the sentencing remarks and explanations before the FTT, I am

satisfied that the FTT was entitled to find broad consistency. In particular:

(vi) Mr N accepted that he failed to attend at the appointed times;

(vii) There was at least some attempt to comply with appointments;

(viii) (i) and (ii) were deemed sufficient mitigating factors to lead to the reduction of the sentence.

The FTT was entitled to consider these broad consistencies in the context of the pivotal evidence it fully accepted – Mr Njenga was leading a chaotic lifestyle in the immediate aftermath of the loss of his mother and home. That evidence and the findings that flow from it have not been disputed. Yet that evidence does not appear to have been before the Recorder.

The fact that Mr Njenga no longer claimed to be working as an explanation for non-attendance of appointments before the FTT, in circumstances where, as the Recorder noted he was unable to provide evidence of this, was a minor point. I do not accept the assertion in the grounds that Mr Njenga gave a “*totally different reason*” to the sentencing judge. The reasoning was broadly similar with some differences, but those difference were minor given the particular circumstances.

In any event, the FTT’s ultimate conclusion at [39] was entirely open to it. The FTT found that (whatever the explanation) the failure to attend the appointments together with the initial drugs offence was insufficient to outweigh the private life in the UK developed in compelling and compassionate circumstances since childhood. That ultimate conclusion has not been challenged by the SSHD.

It follows that the SSHD has not identified a material error of law in the FTT’s decision.

Decision

The decision of the FTT does not contain a material error of law and is not set aside.

Signed:
Ms Melanie Plimmer
Upper Tribunal Judge Plimmer

Date:
20 January 2021