Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02296/2013

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 30 May 2019	**On 13 June 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ANTHONY [M]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission of the Upper Tribunal (UTJ Rintoul) granted on 7 February 2019, against a decision of the First-tier Tribunal (Judge N J Osborne) which dismissed the appellant's appeal against a decision to deport him taken by the Secretary of State on 30 October 2013. The basis of the deportation decision was the conviction of the appellant at the Bristol Crown Court on 19 March 2012 of five offences involving the possession with intent to supply of class A drugs (heroin and crack cocaine) and possession of a class B controlled drug

(cannabis/cannabis resin). He was sentenced to total of 2 years imprisonment.

2. Before the First-tier Tribunal, the appellant relied upon Art 8 of the ECHR and, in particular, the impact upon his spouse and three children if he were deported. In reaching his decision to dismiss the appellant's appeal, Judge Osborne found that the appellant could not establish Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") and para 399(a) and (b) of the Immigration Rules (HC 395 as amended). Judge Osborne found that the consequences of the appellant's deportation would not be "unduly harsh" upon his children or spouse. Further, applying s.117C(6), Judge Osborne was not satisfied that there were "very compelling circumstances over and above" those described in Exceptions E.1 and 2 in s.117C(4) and (5) of the NIA Act 2002.

3. In reaching his finding in respect of Exception 2, Judge Osborne approached the issue of whether the impact upon the appellant's spouse and children would be "unduly harsh" in accordance with the Court of Appeal's decision in MM (Uganda) v SSHD [2016] EWCA Civ 617. As a result, he balanced the seriousness of the appellant's offences against the impact upon the appellant's spouse and children.

4. At the time of Judge Osborne's decision, that was a correct application of the law. However, subsequently the Supreme Court overruled MM in KO (Nigeria) and Others v SSHD [2018] UKSC 53. In granting permission to appeal UTJ Rintoul considered that it was arguable in the light of KO (Nigeria) that the judge had misdirected himself as to the proper approach to Exception 2 and the issue of whether the impact of deportation would be "unduly harsh" upon his family.

5. At the hearing before me, Mr Howells who represented the Secretary of State, accepted that the judge had materially erred in law in taking into account the public interest (in the form of the seriousness of the appellant's offending) in reaching his finding as to whether the impact upon his family of his deportation would be "unduly harsh". Mr Howells accepted that Judge Osborne's decision should, as a result, be set aside and the decision be remade. Further, he acknowledged that as Judge Osborne's decision was almost twelve months ago, it would be necessary at a rehearing to consider the up-to-date position in relation to the appellant's family. He acknowledged that it would be prudent that the rehearing should be *de novo* in order that findings could be made on the present circumstances of the appellant and his family.

6. The respondent's concession was correctly made. I accept that Judge Osborne materially erred in law in dismissing the appellant's appeal by misdirecting himself (albeit through no fault of his own) in accordance with the Court of Appeal's decision in MM (Uganda) in applying Exception 2 in s.117C(5) of the NIA Act 2002. MM (Uganda) has now been overruled by the Supreme Court in KO (Nigeria). As a consequence, his decision cannot stand. I set it aside and it must be remade.

7. It is clear from Judge Osborne's decision that his factual findings were based to a significant extent upon his assessment of the oral evidence given by the appellant and his spouse. In remaking the decision, the judge is likely to have to make his or her own assessment of the credibility of the appellant (and indeed his spouse) in making factual findings as to the family's present circumstances and the impact upon them of the appellant's deportation. I agree with Mr Howells' position that the judge should make the new factual finding unconstrained by those of Judge Osborne and his view of the appellant and his spouse formed when they gave evidence before him. Consequently, I remit the appeal to the First-tier Tribunal for a *de novo* rehearing. None of Judge Osborne's findings are preserved.

Decision

8. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and I set it aside.

9. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing. The appeal should be listed before a judge who has not previously been involved with the appeal, namely Judge Osborne, (and Judge Britton and Judge Davidge who have also previously been involved in the appeal).

Signed

A Grubb
Judge of the Upper Tribunal

Dated 11, June 2019