



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/23915/2013

**THE IMMIGRATION ACTS**

Heard at Glasgow  
on 25 March 2014

Determination Promulgated  
on 3 April 2014

Before

**UPPER TRIBUNAL JUDGE MACLEMAN**

Between

**ENTRY CLEARANCE OFFICER, TURKEY**

Appellant

and

**DURMUS ALI ZEYBEK**

Respondent

For the Appellant: Mr A Mullen, Senior Home Office Presenting Officer  
For the Respondent: Ms A Speirs, of Katani & Co, Solicitors

No anonymity order requested or made

**DETERMINATION AND REASONS**

- 1) This determination refers to parties as they were in the First-tier Tribunal.
- 2) On 7 November 2012, the Entry Clearance Officer refused the appellant's application for entry clearance as a partner, under reference to the income requirements of Appendix FM of the Immigration Rules.
- 3) The appellant filed notice of appeal to the First-tier Tribunal. An Entry Clearance Manager maintained the refusal on 11 June 2013, saying that the decision was also in proportion to the maintenance of effective immigration control.
- 4) Judge Balloch allowed the appeal by determination promulgated on 18 December 2013.

- 5) The determination does not set out the submissions made (there is of course no general requirement to do so) and there was no discussion at the hearing in the Upper Tribunal of what submissions were made in the First-tier Tribunal. However, I see from the judge's handwritten record that the Presenting Officer referred to *MM & Others v SSHD* [2013] EWHC 1900 (Admin), and said that it was under appeal, and that the case was relied upon in the submission by Ms Speirs.
- 6) The judge refers to *MM* at paragraphs 25-27 of her determination, noting that it is the subject of appeal by the respondent "... but is current law and I have had regard to it in my overall consideration under Article 8".
- 7) The ECO's grounds of appeal to the Upper Tribunal refer to *MM* as a persuasive authority, but they propose an argument along the lines that this appeal could not have succeeded but by following *MM*; that *MM* usurped the role of the democratic decision maker, and should have come to the conclusion that any interference in Article 8 rights caused by the new Rules was proportionate, striking the balance between the interests of applicants and their families and the wider interests of society as a whole. It is said that *MM* is an unsafe authority, upon which the conclusions of the FtT in this case cannot rest.
- 8) In a written response to the grant of permission, the appellant says that *MM* was not binding but was persuasive and that the judge did not err in relying thereon.
- 9) At the outset of the hearing, Mr Mullen sought an adjournment, saying that *MM* has now been heard in the Court of Appeal, and so its decision may be expected within a reasonably short time. This case should not be decided until the outcome is known, which would provide a degree of certainty not presently available.
- 10) Ms Speirs opposed an adjournment. She accepted that *MM* has been heard in the Court of Appeal, but she pointed out that the date of decision is still not known. The issue is so contentious that whatever the outcome in the Court of Appeal it may go to the Supreme Court. The ordinary rule is that cases should be decided on the basis of the law as it is presently understood, not adjourned for further clarification by case law. The application to adjourn came very late.
- 11) I declined to adjourn. If it was thought correct as a matter of principle to adjourn cases of this nature pending clarification in *MM*, an application could have been made in advance of the hearing. I considered that the ordinary rule should apply.
- 12) Mr Mullen submitted that the judge treated *MM* as virtually determinative of the case before her. That could now be seen to be an error in the light of *Gulshan* (Article 8 - new rules - correct approach) [2013] UKUT 00640 (IAC). The Supreme Court has recently observed that Article 8 is not a general dispensing provision. In principle, the maintenance requirements of the Rules were not a disproportionate interference with the Article 8 rights of those affected. Judge Balloch had not been entitled to ignore the

rules and to strike the proportionality balance as she did. The possible earnings of the sponsor in this case came nowhere near even the minimum wage threshold suggested by Mr Justice Blake in *MM*. The determination should be reversed.

- 13) Ms Speirs submitted that the judge appreciated that *MM* was not binding upon her, but was entitled to find it persuasive in her overall consideration of the case. Further, Ms Speirs submitted that even if reliance on *MM* was an error, this determination could nevertheless be upheld under reference to Article 8.
- 14) I admit to some difficulty in following the latter aspect of the argument. While the significance of *MM* in relation to the minimum income provisions of the Rules is not the only point in the decision, I think that but for applying *MM* the result could not have been to allow the appeal.
- 15) No doubt intricate and extensive arguments, even over and above those deployed before Mr Justice Blake, were put before the Court of Appeal. No such arguments were deployed by the Presenting Officer in the First-tier Tribunal, who appears to have confined her submission to the observation that *MM* was under appeal – which takes matters nowhere. No argument beyond the broad propositions in the grounds has been put to the Upper Tribunal in this case as to whether or not Judge Balloch should have applied *MM*. Neither side suggested that there is any Scottish authority.
- 16) In the circumstances, I am unable to find that Judge Balloch erred in law by being guided by *MM* to the extent she was. The determination of the First-tier Tribunal shall therefore stand.



31 March 2014  
Judge of the Upper Tribunal