



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/11362/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 21 December 2017

Decision & Reasons Promulgated  
On 03 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

AINURA DZHUNUEVA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Andrew Otchie, Counsel instructed by Syed Shaheen Solicitors  
For the Respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Anstis sitting at Hatton Cross on 17 February 2017) whereby the First-tier Tribunal dismissed her appeal against the decision of the respondent made on 5 November 2015 – when the appellant had Section 3C leave following a decision in her favour by Judge Aziz promulgated on 20 April 2015 – to refuse to grant her leave to remain on account of her having established family life as an unmarried partner with a fellow national of the Kyrgyz Republic, who had settled status in the

UK on the basis of long residence. Judge Anstis found that the appellant did not qualify for leave to remain under EX.1 of Appendix FM and also that she had not shown that she met the minimum income requirement (“MIR”) as she had not provided all the mandatory evidence specified in Appendix FM-SE to show that her partner was earning at least £18,600 per annum. With regard to a claim outside the Rules, Judge Anstis held that he was bound to find on the current state of the law that there were no compelling circumstances, and that in any event the refusal was proportionate.

### **The Reasons for the Grant of Permission to Appeal**

2. On 18 October 2017 Deputy Upper Tribunal Judge Taylor granted the appellant permission to appeal for the following reasons:

It is arguable that the judge, who accepted that the substantive requirements of the immigration rules at appendix FM were met, albeit not in the way prescribed by the respondent, ought to have engaged with the arguments made on the appellant’s behalf that the appeal should have been allowed on article 8 grounds.

The grounds rely on the decision in *MM & ors v SSHD* [2017] UKSC 10.

It is arguable that to say that there were no compelling circumstances and that in any event interference with the appellant’s right to respect for her family life was proportionate was insufficiently reasoned.

### **The Rule 24 Response**

3. In a Rule 24 Response dated 13 November 2017, a member of the Specialist Appeals Team said that the application for permission to appeal was not opposed, and he invited the Tribunal to determine at a fresh (oral) continuance hearing whether the appellant “succeeds under the Rules”.

### **Discussion**

4. The Judge did not err in law in finding that the appellant did not qualify for leave to remain under Appendix FM. Although the Judge indicated at paragraph [24] of his decision that it was likely that the MIR was met through the partner’s earnings, he rightly directed himself that he could not allow the appeal under the Rules in circumstances where the evidential requirements of Appendix FM-SE were not met. Thus, the proposal put forward in the Rule 24 Response is misconceived, as Mr Avery agreed.
5. The sole issue is whether the Judge erred in law in his disposal of the Article 8 claim outside the Rules. The Judge may not have had the benefit of the **Chikwamba** line of authorities being drawn to his attention, and it does not appear that the appellant’s representative cited to him the passage at paragraph [76] of **MM** which is relied on by way of appeal. However, the law always speaks and the Judge misdirected himself in holding that he was constrained by authority to find that there were no compelling circumstances justifying the appellant being granted Article 8 relief outside the Rules. Given his earlier finding that the MIR was probably met, it was arguable that requiring the appellant to return to her home country to make an

application for entry clearance constituted a disproportionate interference with the right to respect for family life, as she was likely to succeed in such an application under the Rules on financial grounds; and, in view of the fact that she was not an overstayer, there was no good reason for enforcing the requirement that she should go back to her home country in order to be allowed back in again. In short, the Judge's finding on proportionality was inadequately reasoned.

6. Accordingly, as I ruled orally at the hearing, the decision of Judge Anstis is erroneous in law - for the reasons given in paragraph 5 above - such that it must be set aside and remade.
7. So the only issue left to be resolved was the forum in which the decision should be remade. Mr Otchie, who did not appear below, invited me to remit the appeal to the First-tier Tribunal as he wished to give the appellant the opportunity to serve on the Presenting Officer's Unit and on the Tribunal all the mandatory evidence specified by Appendix FM-SE in order to show that the MIR is met. Mr Avery was in agreement with this proposal.
8. Having heard from both representatives, I was satisfied that this was not an appropriate case for retention by the Upper Tribunal, but that it should be remitted to the First-tier Tribunal for a fresh hearing, due to the extent of judicial fact-finding that was going to be required to remake the decision.
9. Although no error of law is alleged or made out with respect to the Judge's findings on EX.1, Mr Avery did not request that these findings should be preserved. However, while they are not formally preserved, the First-tier Tribunal can treat Judge Anstis' findings on EX.1 as a starting point, in accordance with the guidance given in Devaseleen.

### Conclusion

10. The decision of the First-tier Tribunal contained a material error of law, such that it must be set aside and remade.

### Directions

11. **The appeal is remitted to the First-tier Tribunal at Hatton Cross for a de novo hearing before any judge apart from Judge Anstis. None of the findings of fact made by the previous Tribunal shall be preserved.**

### Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Signed

Date 29 December 2017

Deputy Upper Tribunal Judge Monson