Do you earn enough?—Article 8, section 55 and the minimum income requirement (R (on the application of MM (Lebanon)) v Secretary of State for the Home Department and other cases)

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Immigration analysis: The Supreme Court's decision on the minimum income requirement (MIR) for partners of non-European Economic Area (EEA) nationals seeking leave to enter is considered by Tony Muman, barrister, at 43 Temple Row Chambers.

Original news

R (on the application of MM (Lebanon)) v Secretary of State for the Home Department and other cases [2017] UKSC 10, [2017] All ER (D) 172 (Feb)

The Supreme Court held that the requirement in the Immigration Rules that the sponsoring spouse or civil partner of a non-EEA applicant for leave to enter had to have an income of at least £18,600 per annum was acceptable in principle. But the court decided that the rules and the Immigration Directorate Instruction on family migration unlawfully failed to take proper account of the first respondent Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009) to have regard to the need to safeguard and promote the welfare of children when making decisions which affected them. In addition, there were aspects of the instructions to entry clearance officers, in relation to the circumstances in which alternative sources of funding should or might be taken into account, which required revision to ensure that the decisions made by them were consistent with their duties under the Human Rights Act 1998 (HRA 1998).

What was the background to the case?

The five appellants had all been affected by the MIR, whether as the sponsoring partners of those wanting leave to enter, an interested child or an applicant for leave to enter. The first four appellants maintained that the MIR breached their right to family life under Article 8 of the European Convention on Human Rights (ECHR) and were unlawful under common law principles. Their claims to strike down the rules partly succeeded in the High Court, but that decision was reversed by the Court of Appeal. The fifth appellant's appeal against the second respondent entry clearance officer's refusal to grant her entry clearance was allowed by the First-tier Tribunal, which found that she and her husband could not live together in the Democratic Republic of Congo, where she was a citizen, but from which he had been granted asylum in the UK. The tribunal found that he could not meet the MIR but the refusal of entry clearance breached Article 8 ECHR. The second respondent's appeal failed in the Upper Tribunal but was allowed by the Court of Appeal.

Why did the first respondent introduce the MIR?

The MIR was introduced as part of a package of radical reforms ultimately driven by the government's desire to drive down net migration, from which family migrants are not exempt. The evidence suggested that an MIR set at £18,600, described by the court as 'more precise and stringent than anything which had gone before', could not be met by 45% of recent sponsors and would inevitably reduce family route visas by about 16,100 annually. This means that at least 16,100 families are likely to have been prevented from living together in the UK annually simply because the sponsoring partner does not earn enough. The anecdotal evidence, however, suggests that in reality the MIR has hit families, including children, even harder.

A reduction in net migration was not, however, said to be the primary objective of the MIR, but rather a happy by-product. The official line was that the old system was proving difficult to apply, led to inconsistency in decision-making and was complex to administer. The first respondent identified three aims:

- having an income of £18,600 would ensure that sponsors could support their incoming partner and any dependants independently without becoming a burden on the state

- a higher income would enhance the incoming partner's ability to integrate once in the UK, and
- setting the MIR at £18,600 would prevent those who went on to settle in the UK from claiming benefits over the long term

However, in reality the MIR does nothing to stop this after the incoming partner settles.

The government will claim that the rules are now easier to administer and the MIR has led to consistency in decision-making, which is now objective. Those who act for applicants will say that in reality decision-making under the rules has been reduced to a tick-box systematic exercise which does not permit any room for discretion or an individualised fact-sensitive approach.

What issues arose for the Supreme Court's consideration?

In the main appeals, MM and AF challenged by way of judicial review the MIR and the Home Office guidance as being incompatible with the right to family life protected by Article 8 ECHR, unlawful under common law principles and in breach of the first respondent's statutory duty under BCIA 2009, s 55 to have regard to the need to safeguard and promote the welfare of the children when making decisions which affect them. The challenge was not directed to the imposition of the MIR in principle but rather the level at which it was set, combined with the many restrictions imposed on a couple's ability to demonstrate they met it. SS challenged the second respondent's decision to refuse to grant her entry clearance to the UK because her husband, a Congolese refugee resident in the UK, did not earn the MIR.

What did the court decide and why?

The court allowed SS's appeal in full, overturning the Court of Appeal and restoring the decision of both tiers of the Immigration and Asylum Chamber, which held that the refusal to issue her entry clearance was a violation of Article 8 ECHR. The facts in SS were powerful. Her husband was a refugee and the tribunal had concluded that there was a risk to him on return to Congo. He worked two jobs and earned above the national minimum wage. Ultimately, the court balanced the competing interests. In SS's favour, family life would be seriously ruptured if entry clearance was not granted. Her husband had been living in the UK for a long time and had naturalised as a British citizen—he had extensive ties to the UK, including children—and there were no factors of immigration control or public order weighing in favour of SS's exclusion. The only factor pointing the other way was that the relationship was formed when there was no guarantee that SS would be admitted because of the MIR, but against this was the conclusion that her arrival would not, in reality, create a burden on the state.

The appeals in MM and AF were also allowed to the extent that the court declared the rules and the first respondent's attempts by way of instructions or guidance to caseworkers to fill the gaps in those rules, concerning the best interests of children as a primary consideration, were unlawful. Further, although holding that a MIR in principle was acceptable and that in setting it at £18,600 there could be no criticism of the first respondent, who was adopting the specialist advice tendered to her by the Migration Advisory Committee, the court found that the restrictions in the rules preventing a couple from being able to rely on the prospective earnings of the foreign partner or guarantees of third-party support were difficult to justify under an ECHR approach. The exclusion of third-party support and prospective earnings were not policy choices but issues of practicality. While their exclusion under the Immigration Rules was not irrational it was inconsistent with the holistic approach required under Article 8 ECHR. So, looking at the matter broadly, while the public interest is to ensure that arrival does not lead to a financial burden on the state, balanced against this there is nothing to prevent a couple from showing under Article 8 ECHR alternative sources of finance which demonstrate that, on the evidence, there will be no recourse to public funds after arrival. Alternative sources of finance are not necessarily restricted to just third-party support and/or prospective earnings.

Does the court's judgment clarify the law in this area? Are there any unresolved issues of which practitioners should be aware?

But for the first respondent's moving the target, the appellants would have succeeded in their challenge to the legality of the MIR on common law principles. The government's thinking at the time and the need for a more prescriptive approach in the new rules were based on what the court called a 'distorted account' which, unless corrected, would 'have involved a misdirection in law'.

The court identified the key principles from the leading case of *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 4 All ER 15 that the first respondent had got wrong when devising the rules. Firstly, the then legislative scheme provided for the tribunal to undertake separate consideration of all issues under Article 8 ECHR, without express restriction on the scope of that consideration. Also, this consideration would have to include weighing up the competing interests and 'according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special source of knowledge and advice'. Finally, Article 8 ECHR considerations could not be squeezed into a 'rigid template' provided for by the rules to the exclusion of any and all factors that were relevant to Article 8 ECHR and could be considered by the tribunal separately outside of the rules. The court went on to reaffirm that the rules are only the starting point for consideration under the ECHR.

How does the decision fit in with other developments in this area of law?

The court heard these appeals as part of a trio of test cases starting with *Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] All ER (D) 90 (Nov) and ending with *R (on the application of Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] All ER (D) 168 (Feb) (decided at the same time as this case). These appeals also followed on from the court's decision on the rules governing the pre-entry English language requirement in *R (on the application of Bibi and another) v Secretary of State for the Home Department* [2015] UKSC 68, [2016] 2 All ER 193.

The law is thus this: while the state can formulate rules which reflect in turn its policy as to its right to control the entry and residence of foreigners, that right, and therefore the policy choices which are implemented through the medium of the Immigration Rules, has to be exercised consistently with the obligations of the ECHR, and in particular the duty under HRA 1998, s6. Although, technically speaking, there is a difference between the obligation under Article 8 ECHR that the state owes when, on the one hand, seeking to expel settled migrants with rights of residence in the host country and, on the other, refusing to admit migrants who do not enjoy rights of residence—often referred to as negative and positive obligations—the principles are similar and ultimately regard must be had to the fair balance to be stuck between the individual and the public interest, taking into account all relevant factors identified by the Strasbourg Court, including the significant weight which has to be given to the interests of children. The public interest stated through the Immigration Rules is but one of those factors.

Consistent with its decision in *R (Bibi)*, the court held as a general rule that it was the decision in an individual case which might be incompatible with ECHR rights rather than the rules or policy per se. This was because an incompatibility challenge to the rules would only succeed if the court was satisfied that it was incapable of being operated in a proportionate way and would thus lead to unjustified interferences in all, or nearly all, cases. Given the dual approach in immigration decision-making—namely to apply the rule first, and then to consider human rights issues outside of the rules—even if the rule was couched in particularly onerous terms and therefore could not be met, ultimately the decision could (and should) be saved through the exercise of discretion under Article 8 ECHR outside of the rules. As argued in SS, even though the MIR required the sponsor to be earning £18,600, his failure to do so did not absolve an entry clearance officer from the duty to carry out a full merits-based fact-sensitive assessment outside the rules, and that whatever defects there might be in the decision, it was the duty of the tribunal on appeal to ensure that the end result was consistent with ECHR. For this reason, as in *R (Bibi)*, a challenge to the rule becomes a challenge to the implementation of the rule through the guidance and instructions given to the caseworkers.

What should lawyers take from the judgment?

The despondent reaction to the judgment from immigration lawyers was of considerable surprise. Perhaps it had something to do with the reporting of the case and the headlines. Properly understood, the judgment is positive and opens up considerable scope for tribunals to consider, without fetter, all relevant issues to Article 8 ECHR, and to keep a firm eye on the need to ensure that a fair balance is always struck to allow appeals outside of the Immigration Rules. Dead and buried is the misplaced judicial notion that the rules are the rules and only the most exceptional of cases is worthy of success outside of them, or that the pernicious specified evidential requirements under Appendix FM-SE are somehow akin to the policy choices reflected in the MIR.

This is not the last word on the MIR, however. The court gave strong indication as to which parts of the guidance the first respondent must now amend. She will also have to revise the Immigration Rules to make it expressly clear that decision-

making thereunder treats the best interests of children—both resident in the UK and abroad—as a primary consideration and of 'significant weight' in the balancing exercise. This cannot be done by way of a prescriptive criterion. The court has formally adjourned the question of remedy, allowing the first respondent time to think about how she proposes to make these changes with written submissions to follow and the possibility of a further hearing.

The Court of Appeal has stayed a number of MIR appeals which it will now come on to hear in light of this judgment. We can also expect the Upper Tribunal to grab the baton and develop further guidance on how the First-tier Tribunal should approach questions arising under Article 8 ECHR, not least to promote consistency in decision-making. The tribunal is expected to soon do so in the context of the 'adult dependent relative' rule when it deals with the cross-appeal following its decision on the appeal in *Dasgupta (error of law—proportionality—correct approach)* [2016] UKUT 28.

Tony Muman appeared for MM, AF and SS in this case and also appears in Dasgupta and the stayed MIR appeals before the Court of Appeal.

Interviewed by Robert Matthews.

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