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**Divided Families and the Immigration Rules: A Partial Victory for British Citizens with Foreign Spouses**

In MM and others v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court upheld the Minimum Income Requirement (MIR) requiring an income of at least £18,600 for British citizens (and others) to sponsor a foreign spouse for entry into the UK. The MIR was challenged as incompatible with the rights of the claimants and their partners (and the child of one couple) under the ECHR (principally Article 8), and also that it is unreasonable on common law principles.

While the Court held that the existence of the MIR was acceptable, it found that the Immigration Rules (the rules) and their guidance fail to take proper account of the Home Secretary's duties to children under the Borders, Citizenship and Immigration Act 2009. The Court also held that the approach taken by the Home Office to assess such cases would need to be amended to take proper account of alternative sources of income and support. For the background to this decision, we need to consider the rules in their political context. In 2014, then British Prime Minister David Cameron proclaimed that 'when people's love is divided by law, it is the law that needs to change'. He was talking following the first gay marriages in the UK, following his coalition government bringing the Marriage (Same Sex Couples) Act 2013 into force. Cameron made great play of the importance family had to his policy. Preceding both his General Election victories, he placed family at the forefront; in 2009 stating 'families are the most important institution in our society' and, in 2014, claiming all his policies would need to pass 'the family test'.

At times, though, there was a contradiction between Cameron's rhetoric and the reality of his government's policy on the family, especially when the interests of family came into conflict with immigration. Reforms introduced by then Home Secretary, Theresa May in 2012 markedly restricted the rights of citizens who wanted to bring their foreign spouses to the UK to live with them.

The Home Office (2012 para. 52) in *ECHR memorandum: statement of compatibility with ECHR Article 8* had previously claimed that the rules would ensure that 'those who choose to establish their family life in the UK…should have the financial wherewithal to be able to support themselves and their partner without being a burden on the taxpayer'. As such, the twin – interconnected – goals of the Home Office were to reduce net migration and, thereon, restore public confidence in the immigration system. The evidence provided on behalf of the Home Office here showed they anticipated the rules would reduce family visas by about 16,100 per year, and net migration by 9,000.

Before the MIR, parties were broadly required to be able to maintain and accommodate themselves and any dependents adequately in the UK without recourse to public funds,

which included social housing and most welfare benefits but not the NHS, education and social care. In AM (Ethiopia) v Entry Clearance Officer [2009] Imm AR 254, the Court approved the use of income support as the test of 'adequate maintenance' as the lowest acceptable amount of money to live on.

Confusions around the ambiguous nature of the previous criteria, partly stemming from the lack of a fixed baseline figure but also the diffuse nature by which means would be calculated, meant the government pursued an alternative approach. It required that the sponsoring partner have a gross annual income of at least £18,600, with an additional £3,800 for the first dependent non-EEA child and £2,400 for each thereafter. Alternatively, the couple was required to have substantial savings: £16,000 plus two and a half times the shortfall in the sponsor's earnings. The estimate was that at least 45% of recent sponsors of spouse or partner applicants would have been unable to meet this threshold.

Among the Court's main concerns here were discussions relating that MIR to wider socio-economic trends for which they produced a range of important figures. 40% of the British population earns under £18,600 and 301 out of 422 occupations have average annual earnings below the figure (para. 2). There are significant regional differences (it is more likely those working in London meet the threshold than in Wales), while female and BME sponsors are likely to face a harder time achieving the baseline due to lower average earnings (para. 81). Between 2012 and 2014, 30,000 spouse applications were refused resulting in the emergence of campaigning organisations such as BritCits that led to these appeals (para. 16).

With regards to the MIR, campaigners will feel their arguments vindicated by the judgment acknowledging that the MIR 'has caused, and will continue to cause, significant hardship to many thousands of couples who have good reasons for wanting to make their lives together in this country' (para. 80). The Court recognised those suffering hardships included couples that formed relationships before the changes and those who previously left Britain not anticipating the future restrictions to be placed on their relationship choices.

Distressing to those couples divided by the income requirements, though, was the Court's statement that 'the fact that a rule causes hardship…does not mean that it is incompatible with the Convention rights' (para. 81). The MIR was not seen to prevent a couple marrying. Though it may present a serious obstacle to couples enjoying family life together, the Court considered that the MIR has a legitimate aim of ensuring that the couple do not have recourse to welfare and have sufficient resources to play a full part in British life.

The income threshold chosen was rationally connected to this aim fitting the acceptability in principle of such a requirement in Konstatinov v Netherlands [2007] FCR 194. As such, the MIR's forming part of an overall strategy aimed at reducing net migration was deemed sufficient to justify the interference with, or lack of respect for, Article 8 rights.

While unconvinced about the particular merits of the case involving children under consideration, the Justices took the opportunity to deal with the general position of children under the rules. The judgment considered the Article 8 assessment in Jeunesse v

The Netherlands [2014] ECHR 1036 requiring national decision-makers to give sufficient weight to the best interests of children directly affected in any proposed removal of a non-national parent.

The Court also noted that the UK is party to the United Nations Convention on the Rights of the Child, with Article 3(1) demanding that the best interests of the child should be a primary consideration. Accordingly, Section 55(1) and (2) of the 2009 Act provided a statutory requirement for the Secretary of State to safeguard and promote the welfare of children in the UK in decisions around immigration, asylum and nationality. The rules, as they stand, do not meet this standard, while the guidance given to Immigration Officers does not fill the gap left by the rules. The Court deemed this situation unlawful.

The recommendations for amendments in this area will not help childless couples. Alongside those who cannot or do not want children, will be those without children because they are kept apart by the MIR thus unable to plan a stable home as well as those for whom the financial/time burden of children would be too restrictive as they worked to reach the £18,6000. The finding of unlawfulness might, though, help the estimated 15,000 children, mostly British citizens, separated from one parent as a result of the MIR – *Skype Kids* whose primary source of contact with that parent is through video conferencing software.

The second success for campaigners lies in the Court's expression of concern at the approach taken to alternative sources of funding. While many affected by the MIR do not meet the £18,600 requirement, it may be possible for some to obtain support from other sources. These might include the spouse's prospective UK earnings (frequently higher than their own) or third party support (such as from family members). As it stands, these sources cannot be taken into account.

While the Court found it open to the Home Office to indicate the criteria by which to judge the reliability of such sources, they are not entitled to exclude them altogether. The Secretary of State has been invited to revise the rules to indicate the circumstances in which alternative sources of funding can be taken into account. The Court sought to encourage a wider consideration of other reliable sources of finance to ensure that decisions are compliant with Article 8, which applies whether or not there are children involved.

This decision is potentially an important victory for the campaigners opening up avenues to attain the threshold wrongly denied them; considering both partners' earning is self-evidently of relevance and third party support may be more reliable than employment. While maintaining the principle of the MIR, then, the Court are proposing a boarder approach to satisfying it that it is to be hoped the government follow. It need be caveated that what constitutes reliable is a matter for the government to decide.

The government's crackdown on visas for foreign spouses can be attributed to its populist attempt to be seen as tough on immigration. These changes came before Brexit with non-EU spouses targeted because EU citizens could not be controlled in this way (a

development that perversely gave EU citizens more rights than British citizens under the EEA family permit). Quite how making the process so financially burdensome provides any measure of suitability has never been obvious. There are few who would be better integrated into British culture than those married to (and, perhaps, parents of) British citizens.

In the Conservatives' zeal to be seen as proactive in managing immigration, they have actively undermined the British family values they purport to uphold. The concessions and clarifications required by the Supreme Court are welcome for their likely impact of smoothing down the roughest edges of this approach, holding the prospect of family life for some couples. Couples that do not have children will still be caught out by the rules and must accept the MIR despite it being acknowledged as 'particularly harsh' (para. 80).

That the Court recognised the hardship of the MIR but refused to challenge its veracity no doubt stems from a reluctance to stray into the realm of the political. All the same, its effect is to offer an endorsement of the government's willingness to compromise the right to a family life in favour of a hardline immigration policy. Whether the government has the same incentive to take such a tough approach to non-EU migration following the UK's withdrawal from the EU remains to be seen, but it will be important to monitor immigration policy post-Brexit to understand the ongoing impact on this area of family law. Meanwhile, the Court has created an incentive for couples to have children that seems quite contrary to what the government is hoping to achieve on immigration with these reforms, which may create tension further down the line.