





Can't buy me love: The New Minimum Income Requirement

Mark Symes and Georgie Rea

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Immigration law's development on maintenance



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Immigration law's maintenance journey

Maintenance and Accommodation (eg *KA Pakistan [2006] UKAIT 00065*, *Yarce [2012] UKUT 425*) (£5,500 + housing costs)

Appendix FM – codifies ECHR Art 8, introduces ‘minimum income’ requirement (“MIR”) & Ex.1 exception-based regime

s117B NIA 2002

GEN 3.2 “unjustifiably harsh” regime



What next?

- Note Appendix FM introduced via December 2011 Migration Advisory Committee (“MAC”) report, Spring 2012 Immigration Rules, July 2012 commencement.
- But, so far, we seem to have had no indication of policy background: MAC Chair Prof Bell has written to SSHD saying that a “rapid review” of the new Immigration Salary List (ISL) (Shortage Occupation List successor) by 24 February 2024 will be such a challenge that usual stakeholder consultation will be waived.



Where we are now: Appendix FM and dispensations



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Appendix FM regime

- Financial target (MIR) £18,600 + £3,800 for 1st child, £2,400 for each extra child (Tier 2 was £20k in 2011);
- Savings alternatively/additionally £16,000 + 2.5* difference between available income & the MIR;
- Also applies to post-flight partners of international protection holders;
- Previous, current or prospective employment/earnings of migrant partners not taken into account for entry clearance stage;
- Specified disability-related benefits/carer's allowance continues under old maintenance & accommodation test.



Specified Income

➤ See Appendix FM GEN.1.4: “specified” income means specified in Appendix FM-SE, unless otherwise stated. Where the applicant has to meet the minimum income requirement, the financial requirement can generally be met in the following five ways:

- 1. Category A or Category B:** income from salaried or non-salaried employment of the sponsor
 - 2. Category C:** non-employment income, for example, income from property rental or dividends from shares.
 - 3. Category D:** cash savings of the applicant’s partner and/or the applicant, above £16,000, held by the partner and/or the applicant for at least 6 months and under their control.
 - 4. Category E:** state (UK or foreign), occupational or private pension of the sponsor and/or the applicant.
 - 5. Category F or Category G:** income from self-employment, and income as a director or employee of a specified limited company in the UK, of the sponsor.
- Other financial support or funds taken into account under paragraph 21A of Appendix FM-SE if GEN.3.1. of Appendix FM applies



Appendix FM regime: the exception

Exception Ex.1

- Genuine and subsisting parental relationship with a British Citizen or 7-year resident child <18 & would not be reasonable to expect the child to leave the UK.
- Genuine and subsisting relationship with a partner + insurmountable obstacles to life abroad.



Section 117B NIA 2002

s117B(3)

It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society

- Places financial independence firmly on the agenda

Rhuppiah v SSHD [2018] UKSC 58

- Definition: *‘an absence of financial dependence upon the state*
- Rejected interpretation of Sales LJ in COA that the section means financially independent from other people.



GEN 3.2 of Appendix FM

GEN 3.2 fills the gap identified by *MM (Lebanon) [2017] UKSC 10*

- There are exceptional circumstances present;
- Such that refusing the application would have unjustifiably harsh consequences;
- For the applicant or for their family;
- Taking into account, as a primary consideration, the best interests of any relevant child (GEN 3.3).



Other Income Appendix FM-SE

If Gen.3.2. met, the Decision maker *must* also consider the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE:

- (a) a credible guarantee of sustainable financial support from a third party;
- (b) credible prospective earnings from the sustainable employment or self-employment of the applicant or their partner; or
- (c) any other credible and reliable source of income, or funds for the applicant or their partner, which is available to them at the date of application, or which will become available to them during the period of limited leave applied for.



Government's Policy Intentions: 2012 and Now



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Government policy intent in 2012

MAC report *Family migration route* identified 3 choices, assessing income by:

- Pay levels;
- Benefits threshold for 2-adult household (£18,600) (which would reduce annual partner visas from 40,500 to 25,000;
- Net fiscal burden, i.e. assessing tax contribution minus benefits consumption (difficult due to changes over migrant's lifetime, assumption heavy).



Government policy intent 2

- MAC also noted housing costs unverifiable, national minimum wage was set at a level requiring taxpayer subsidy.
- ILPA observed that to raise from benefits level would imply UK benefits level were inadequate which was surely unpalatable.



Average earnings in 2011

- UK median full-time gross earnings in 2012 were £26,500 - for men, £28,700, for women, £23,100;
- London & the SE - often earned above the national median, but people in Northern Ireland, Wales, and NE earned considerably below;
- 301 out of the 422 occupations listed had average annual earnings below £18,600;
- 45% of pre-Appendix FM applicants could not meet £18,600.



Announcement of Changes

4 December 2023: the Home Secretary announced future changes to visa rules in what he described as a “five-point plan” to reduce immigration.

21 December 2023: the Home Office issued a revised plan in relation to the salary threshold for family visas.



The New Rules

30 January 2024: The Home Secretary set out a timetable for the changes in the Legal Migration Implementation Update:

- Rules intended to come into force on 11 April 2024: The threshold will be raised to £29,000.
- Potentially later in 2024: A further increase to around £34,500.
- “Early 2025”: A third increase to around £38,700.

Initial announcement that higher threshold would apply to visa extensions

- **But** 21 December 2023: Home Office announced that it would not apply to extensions:

“Those who already have a family visa within the five-year partner route, or who apply before the minimum income threshold is raised, will continue to have their applications assessed against the current income requirement and will not be required to meet the increased threshold”.



MM (Lebanon) & ECtHR Cases



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MM Lebanon 1

- Most claimants challenged the MIR in principle (SS Congo was only statutory appellant)
- *“simple answer to the central issue in the case”*: case-by-case consideration via ECHR Art 8 §60
- ECHR Art 8 cannot *“be fitted into a rigid template provided by the rules, so as in effect to exclude consideration by the tribunal of special cases outside the rules ... this would be a negation of the evaluative exercise required in assessing ... proportionality”* §66
- Not everything in Rules is *“high principle”*: contrast matters going *“to the quality of evidence necessary [which are] ... matters of practicality rather than principle ... judging for itself the reliability of any alternative sources of finance in the light of the evidence before ”* §76, 99



MM Lebanon 2

- Public interest side of scales: system should be “workable, predictable, consistent and fair as between one applicant and another ... damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory” §65
- Pre-GEN 3.2 Guidance unlawful, failed to treat childrens’ best interests as a primary consideration, taking account of Jeunesse factors: “best interests of children of paramount importance ... not ... decisive, [but] must be afforded significant weight”



MM Lebanon 3

- ECtHR starting point: “a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there”
- SS Congo (where FTT accepted no recourse to public funds) was refugee post-flight Sponsor traumatised by miscarriage: rightly decided for reliance on British citizen naturalisation long ago, British citizen children, relationship pre-dated Rules change and would have met old Rules
- But SS Congo wrong to rely on Sponsor earning well above (£17,000) the minimum wage (then £13,400)



Strasbourg's thinking

- Jeunesse: ECHR Art 8 breach unlikely
 - where family life created in precarious circumstances absent exceptional circumstances
 - if Sponsor had limited ties to country of residence (ie short term residence or illegally residing there)
 - Sponsor lacking sufficient independent & lasting income (not welfare benefits) to provide basic subsistence for family
- Konstatinov v Netherlands (Apn 16351/03) - sponsor may have to show sufficient independent and stable income and no benefits recourse to meet basic living expenses of joining family members



ECtHR & disproportionality

Jeunesse: Art 8 breach where several of these factors present:

- Sponsor has settled status or strong ties with host country
- Family life already created when settlement achieved
- Both applicant and Sponsor already resident
- Involvement of children
- Insurmountable obstacles

Decision-making process must be “sufficiently flexible, speedy and efficient” to respect family life



Arguments on proportionality going forwards



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Academic opinion 1

Interesting article on UK Constitutional Law Blog by Chris Rowe *The Legality of the new minimum income requirement*

- (1) should Rules be measured via “all or nearly all” cases test?
- (2) if any MIR would be lawful notwithstanding that it shut out virtually all applicants, as ECHR Art 8 evaluation test fills the gap, where does that leave the policy objective of certainty?
- (3) given that UKSC reminded itself that *Mahad* required cogent, verifiable third-party support to be recognised as relevant to proportionality, it was ironic that applicants with rich relatives to make gifts could demonstrate a disproportionate decision whereas a striving worker on minimum wage couldn't



Academic opinion 2

Chris Rowe continues

(4) Universal Credit policy is to ensure that the presence of non-settled partners can only reduce entitlement to public funds, as whilst their earnings count towards household income, their presence is ignored when assessing benefits entitlement

(5) s117B post-Rhuppiah makes the policy focus independence from public funds recourse rather than reliance on any particular benefit entitlement



Thoughts going forward

- MAC: *“a strong case in principle for including the future earnings of the sponsored migrant as it is the total household income which determines whether they will be a burden on the state”* – also relevant was a job offer to partner or their dependent
- MAC’s emphasis: *“solely on economic considerations and not on the wider legal, social or moral issue”*
- Discrimination? MAC report said half of ILR grants were to female and 27% to male partners
- What is role of housing costs in relevant part of country? Obviously far higher in South East



Thank you

020 7993 7600

| info@gclaw.co.uk

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