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BRIEFING PAPER

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The financial ('minimum income') requirement for partner visas

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Contents:

Contents

Summary

What is the financial ('minimum income') requirement?

Since July 2012 the UK's Immigration Rules have required non-EEA nationals to satisfy a financial, 'minimum income' requirement in order to secure a visa to join a British/settled spouse or partner in the UK.

Available maintenance funds equivalent to a minimum gross annual income of £18,600 are required. A higher amount is required when visas are sought for non-EEA national children.

The requirement can only be met through the sources of income and funding specified in the Immigration Rules. These are subject to conditions. For example, the visa applicant's employment income can only be considered if they are already in the UK with permission to work. The sponsoring partner's overseas employment is not acceptable on its own to satisfy the requirement.

The financial requirement must be met each time the migrant applies for temporary leave to remain as a family member, and when they become eligible to apply for Indefinite Leave to Remain (usually after five years).

Individual exceptions to the minimum income requirement cannot be made, but there can be some flexibility if a visa refusal would breach the couple's human rights. The requirement does not apply if the UK-based sponsor is in receipt of Carer's Allowance or certain disability-related benefits.

Why is it controversial?

The Government contends that the financial requirement supports integration and prevents a burden being placed on the taxpayer.

Various migrants' rights groups consider the minimum income requirement to be unfair, inflexible, disproportionate and counter-productive.

It is acknowledged that in some cases, the financial requirement represents a significant and possibly permanent obstacle to a couple living together in the UK, and that some demographic groups are particularly affected by it due to differences in earnings.

The Children's Commissioner for England has estimated that up to 15,000 British children are growing up in "Skype families" because their parents cannot live together in the UK due to these Immigration Rules.

The threshold for falling within the provisions for cases raising human rights issues is very high. Cases which have been refused in spite of the existence of compassionate circumstances are sometimes highlighted by the media, although it is not always possible to determine their final outcome from the coverage.

Changes made following scrutiny by the Supreme Court

In February 2017 the Supreme Court found that the minimum income requirement is acceptable in principle. However it did require the Government to make some changes to the Immigration Rules and associated policy guidance. This was in order to take proper account of the Secretary of State's duty to have regard to the need to safeguard and promote the welfare of children, and also to take proper account of other possible sources of income and third-party financial support.

Amended Immigration Rules and policy guidance came into effect on 10 August 2017.

Since then, if an application cannot meet the financial requirement through the five sources specified in the Immigration Rules, decision-makers are instructed to consider whether there are "exceptional circumstances" which could or would render a refusal decision a breach of human rights (ECHR Article 8).

If the decision-maker considers that refusal would result in a breach of the Article 8 rights of a relevant party, they must grant the application, even if the financial requirement is not met.

If the decision-maker considers that refusal could breach human rights, the application must still satisfy the financial requirement, but the decision-maker can take a wider range of income sources into account.

Applicants granted on human rights grounds do not have to satisfy the financial requirement again when applying to renew their temporary visa, but must wait longer (10 years) before becoming eligible to apply for Indefinite Leave to Remain.

1. What is the financial requirement?

Summary

Applications for a spouse/partner visa for a non-EEA national must demonstrate available maintenance funds equivalent to a minimum income of £18,600. The income threshold is greater for applications involving dependent non-EEA national children.

Individual exceptions to the minimum income requirement cannot be made. The requirement does not apply if the UK-based sponsor is in receipt of Carer's Allowance or certain disability-related benefits.

Various sources of income and funding can be used to meet the financial requirement, subject to conditions.

The requirement must be met each time the migrant applies for temporary leave to remain as a family member, and when they become eligible to apply for Indefinite Leave to Remain.

The financial requirement is equivalent to a minimum income of £18,600, but higher in cases involving non-EEA/British dependent children

The UK's Immigration Rules require that applications for visas for non-EEA national spouses/partners (including fiancé(e)s/civil partners/prospective civil partners and unmarried or same-sex partners) of British citizens or people who have Indefinite Leave, Refugee Status or Humanitarian Protection in the UK must show available maintenance funds equivalent to a minimum income of at least £18,600 per year.[1] This rule (the 'minimum income' requirement) has been in place since July 2012.

If visas are being sought for non-EEA national dependent children, the income requirement is higher: an extra £3,800 for the first child, and £2,400 for each additional child.

The financial requirement must be satisfied each time the non-EEA national renews their visa (usually twice), and when they apply for Indefinite Leave to Remain (usually after five years in the UK).

Various sources of income and funding can be used to meet the financial requirement, although there are conditions attached to each of these.

For example, the visa applicant's employment income can only be taken into account if they are already in the UK with permission to work (i.e. if they are applying to 'switch' immigration category). If that is not the case, only the visa sponsor's employment income can be considered. Again, the visa sponsor cannot solely rely on income from employment overseas. This condition has prevented some British ex-pats from being able to return to the UK with their partners.

UK Visas and Immigration (UKVI) decision-makers take different considerations into account if an application cannot satisfy the financial

1 Immigration Rules, HC 395 of 199304 as amended

requirement but a refusal decision would or could raise human rights issues (discussed further in section 2.2 of this briefing).

Box 1: Overview of the maintenance requirements before and after 9 July 2012

Before: Must demonstrate ability to adequately accommodate and maintain the applicant without recourse to public funds (with reference to Income Support levels)

A variety of income sources could be considered, for example:

- Sponsor and/or migrant partner's employment overseas and employment prospects in the UK
- Evidence of sufficient independent means
- Support from third parties (such as family members)

The requirement applied to applications for temporary leave to remain (after a two year probationary period, the migrant partner could apply for Indefinite Leave to Remain).

After: Must demonstrate available maintenance funds equivalent to an income of at least £18,600 per year (plus an extra £3,800 for one dependent child and extra £2,400 for each additional child)

Only income sources and evidence specified in the Immigration Rules can be taken into account, such as:

- Sponsor's earnings in the UK, or sponsor's overseas earnings and confirmed job offer in the UK
- Migrant spouses' employment income (if they are in the UK with permission to work)
- Migrant spouse's overseas employment income or offers of employment in the UK, and offers of third party support cannot be taken into account.

The requirement must be satisfied when applying for initial leave to remain, when extending that leave to remain after 2.5 years, and when applying for Indefinite Leave to Remain at the end of the 5 year 'probationary period'.

As with most categories of temporary visa, it has long been the case (i.e. before and after July 2012) that people who come to the UK as partners of British citizens/permanent residents are ineligible for most welfare benefits, tax credits or state housing assistance, due to a 'no recourse to public funds' visa condition.

1.1 Can exceptions be made?

There is no scope to make individual exceptions to the minimum income requirement if the Immigration Rules require that it is satisfied.

Sponsors in receipt of certain welfare benefits are exempt from the requirement

The minimum income requirement does not apply if the UK-based sponsor is in receipt of Carer's Allowance or certain disability-related benefits. Instead, the sponsor must demonstrate that they have "adequate maintenance" funds in place, in line with the approach taken before the minimum income requirement was introduced.[2] But if

[2] Although the guidance states applicants cannot rely on offers of support from third parties. Home Office, *Immigration Directorate Instructions*, Chapter 8 Appendix FM (Family members), Annex FM section FM 1.7A, August 2015

the sponsor's circumstances change, the minimum income requirement would apply in subsequent applications.

Box 2: Benefits which exempt a visa sponsor from the financial requirement

The financial requirement does not apply if the UK-based sponsor is in receipt of any of the following benefits:

- Disability Living Allowance
- Severe Disablement Allowance
- Industrial Injuries Disablement Benefit
- Personal Independence Payment
- Attendance Allowance
- Carer's Allowance
- Armed Forces Independence Payment or Guaranteed Income Payment under the Armed Forces Compensation Scheme
- Constant Attendance Allowance, Mobility Support or War Disablement Pension under the War Pensions Scheme
- Police Injury Pension

Armed forces cases

Applications sponsored by a member of HM Armed Forces personnel have been subject to the minimum income requirement since 1 December 2013, although it is applied in a slightly different way.[3] The main difference is that partners in Armed Forces cases are initially given leave to remain for five years (rather than two and a half years as is the case for civilian cases). This affects the way in which the couple's cash savings are calculated, if they choose to rely on such savings in order to meet the minimum income requirement.

People in receipt of certain payments related to service in HM Armed Forces (under the Armed Forces Compensation Scheme or War Pensions Scheme) are exempt from the minimum income requirement.[4]

1.2 Sources of practical guidance for applicants

The content (and format) of the Immigration Rules for family members of British/settled persons are complex. They are spread between Part 8 and Appendix FM and FM-SE of the Immigration Rules. Paragraphs A277 - A279 of the Immigration Rules set out which parts of the Rules apply to pre- and post- 9 July 2012 spouse/fiancé(e)/partner visa applicants.

The 'Family visas' section on the GOV.UK website has general information for non-EEA nationals about applying to join or remain in the UK with a British/settled partner. It also links to the detailed policy

3 HC 803 of 2013-14; see also Home Office, *Family members of HM Forces statement of intent: Changes to the Immigration Rules from December 2013*, 4 July 2013

4 HC 803 of 2013-14

guidance about the financial requirement and other eligibility criteria which is used by UKVI caseworkers when deciding applications.[5]

The Immigration Law Practitioner's Association has produced several information sheets on the changes to the family migration rules and related developments.

As always, constituents seeking advice specific to their circumstances should consult a suitably qualified professional. The GOV.UK website pages on 'Find a regulated immigration adviser' and the website of the Office of the Immigration Services Commissioner explain about the regulation of immigration advisers and offer online 'adviser finder' services.

1.3 How and why the requirement was introduced

How

The minimum-income requirement was introduced through a Statement of Changes to the Immigration Rules and came into effect from 9 July 2012.[6]

It was part of a broader package of changes to various family visa categories. Prior to making the changes, the then Government had conducted a public consultation and commissioned the Migration Advisory Committee to advise it on introducing a financial requirement.

Why

The Coalition Government's rationale for introducing the minimum income requirement was that family migrants and their British-based sponsors should have sufficient financial resources to be able to support themselves and enable the migrant to participate in society without being a burden on the general taxpayer.[7] It considered that the Immigration Rules in place before July 2012 were insufficient for these objectives. Subsequent governments have continued to explain the policy in these terms.

The rule is intended to ensure that sponsors have sufficient resources to support themselves and their partner without being a burden on the taxpayer

The underlying objective for the broader changes to family visas was to further the Coalition Government's objective of reducing net migration levels from hundreds of thousands to tens of thousands.[8] Again, subsequent governments have continued to pursue this goal.

5 Home Office, Immigration Directorate Instructions, 'Chapter 8 Appendix FM (family members)'. In particular, Annex FM 1.7 'Financial requirement' and Annex 1.7a 'Maintenance' discuss in detail how the minimum income requirement is applied.
6 HC 194 of 2012-13
7 HC Deb 11 June 2012 cc48-50
8 HC Deb 15 October 2012 c90W

Why £18,600?

The threshold was set at £18,600 after the Coalition considered advice from the Migration Advisory Committee (MAC).[9]

£18,600 is the level of gross annual pay at which a couple would not receive income-related benefits

The MAC had identified £18,600 as the level of annual gross pay at which a couple would not receive income-related benefits (assuming weekly rent of £100).[10] The then Government said that it intended to review the level of the financial requirement annually, and that it may be affected by the roll-out of Universal Credit.[11] To date, it hasn't been increased, although the Conservative Party's 2017 General Election manifesto signalled an intention to do so.[12]

The MAC had recommended a minimum gross income threshold of between £18,600 and £25,700 per year. The different thresholds reflected different approaches to calculating "burden on the state". The MAC estimated that around 45% of applicants would fall short of the lower threshold amount and 64% of applicants would not satisfy the upper threshold. The MAC emphasised that its recommendations were purely based on economic considerations, and did not take into account wider legal, social or moral issues related to family migration.

Why a higher amount for applications with dependent children?

The financial requirement is higher if children are also being sponsored (subject to certain exceptions)

The higher income requirement for sponsoring children (an extra £3,800/£2,400) is intended to reflect "the education and other costs arising in such cases".[13] It applies at each application stage until the migrant partner is granted permanent settlement, even if the dependent child turns 18 before this time (unless they have been granted an immigration status in their own right).[14] It applies to biological children, step-children and adopted children (in certain circumstances), and children coming for the purpose of adoption who are subject to immigration control and applying for limited leave to enter or remain under Appendix FM or the relevant paragraphs of Part 8 of the Immigration Rules.

The financial requirement doesn't apply to applications from children who are:

- British citizens (including adopted children who become British);
- EEA nationals (except where a non-EEA spouse or partner is being joined by EEA children of a former relationship who do not have a right to be admitted to the UK under the EEA Regulations);
- Settled in the UK or eligible for Indefinite Leave to Enter; or
- Eligible in a category of the Immigration Rules which is not subject to the financial requirement.[15]

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9 MAC, *Review of the minimum income requirement for sponsorship under the family migration route*, November 2011

10 MAC, *Review of the minimum income requirement for sponsorship under the family migration route*, November 2011, para 4.50

11 Home Office ,*Statement of Intent: Family migration*, 12 July 2012, para 80

12 *Forward, Together*, Conservative and Unionist Party Manifesto 2017 p.54

13 Home Office ,*Statement of Intent: Family migration*, 12 July 2012, para 85

14 If the higher minimum income requirement continues to apply in respect of a child over 18, their income and savings can be counted towards the requirement.

15 Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members)', Annex FM 1.7 'Financial requirement', April 2015

2. How is it satisfied?

Summary

The Immigration Rules are prescriptive about how to meet the requirement, particularly in terms of what sources of income and pieces of evidence can be taken into account.

If an application does not meet the requirement, UKVI staff must consider whether there are "exceptional circumstances" which would or could make a visa refusal decision a breach of the applicant/sponsoring partner's human rights (i.e. because it would result in "unjustifiably harsh consequences" for the applicants).

If they find that there would be a breach, they must grant the application even if the minimum income requirement is not satisfied.

If they find that there could be a breach, the minimum income requirement still applies, but they can consider other sources of income in order to ascertain whether it is met.

2.1 What income sources are permissible?

The Immigration Rules specify which income sources can be used to satisfy the requirement, and what type of supporting evidence must be provided

Only income from sources that are specified in Appendix FM-SE of the Immigration Rules can be considered when assessing whether an application satisfies the financial requirement. Home Office policy guidance summarises the five acceptable income sources:

- Income from salaried or non-salaried employment of the partner (and/or the applicant if they are in the UK with permission to work). (…)
- Non-employment income, e.g. income from property rental or dividends from shares. (…)
- 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. (…)
- State (UK or foreign), occupational or private pension of the applicant's partner and/or the applicant. (…)
- Income from self-employment, and income as a director or employee of a specified limited company in the UK, of the partner (and/or the applicant if they are in the UK with permission to work). (…)[16]

Various combinations of these sources are allowed in order to meet the financial requirement, however certain combinations are not. For example, cash savings can be combined with income from salaried and non-salaried employment in certain circumstances, but they cannot be combined with income from self-employment.

There are specific criteria attached to each of these permitted income sources. For example, as the descriptions for categories A and B indicate, the migrant applicant's employment income can only be taken into account once they are in the UK with permission to work - their overseas employment income, or prospective earnings from a job offer

[16] Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members)' Annex FM 1.7'Financial requirement', April 2015, p.17

in the UK, will not be considered. Therefore, only the sponsor (i.e. the British/settled partner)'s employment income is considered if the applicant is not already living and working in the UK.

Furthermore,

- *If the sponsor is in the UK and relying on their employment income*, they must be in employment at the point of application (with a gross annual salary which meets the financial requirement alone or combined with other permitted sources) and either:
  - have been so continuously for the previous six months or
  - if employed for less than six months, have also received over the previous 12 months the level of income required through gross salaried income and/or other permitted sources.
- *If the sponsor has been living overseas and is returning to the UK with the applicant*, they must have a verifiable job offer or signed contract of employment to start work within three months of their return (with an annual salary which is sufficient to meet the financial requirement on its own or in conjunction with other permitted sources). They must also either:
  - be in employment overseas at the point of application (with a gross annual salary which meets the financial requirement alone or in combination with other permitted sources) and have been so continuously for at least the previous six months; or
  - have received the level of income required over the previous 12 months through gross salaried income and/or other permitted sources.

At least six months' proof of earnings are required if relying on employment income

Making up a shortfall through cash savings

Cash savings must have been held by the applicant, their partner or both jointly and under their control, and for at least the six months prior to the date of application. The first £16,000 in cash savings are not taken into account. This is because £16,000 is the level at which a person generally ceases to be eligible for income-related benefits.

The first £16,000 in cash savings are not taken into account, because this is the level at which a person generally ceases to be eligible for income-related benefits

When applying for temporary leave to remain, the amount of cash savings that can count towards the income requirement is calculated by dividing the amount of savings over £16,000 by 2.5 (this is equivalent to the number of years of temporary leave being applied for). When applying for Indefinite Leave to Remain (after five years), all cash savings over £16,000 can be considered.

In practice, therefore, when applying for temporary leave as a partner:

- **£62,500 in cash savings is required if no other income sources are being used** to meet the income requirement: (62,500-16,000) / 2.5 = 18,600
- **£17,500 in cash savings is required if the sponsor's income is £18,000**, in order to make up the £600 shortfall: (17,500-16,000) / 2.5 = 600[17]

[17] The amounts may differ for family members of Armed Forces sponsors.

Evidential requirements

The Immigration Rules and associated policy guidance also specify what pieces of evidence must be submitted in order to demonstrate income from each of the permitted sources.[18] For example, an application relying on income from salaried employment must provide:

- Wage slips covering 6 or 12 months prior to the date of the application (depending on the length of employment); and
- A letter from the employer(s) who issued the wage slips, confirming the person's employment and gross annual salary; the length of their employment; the period over which they have been or were paid the level of salary relied upon in the application; and the type of employment (permanent, fixed-term contract or agency); and
- Personal bank statements corresponding to the same period(s) as the wage slips, showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

The guidance states that in addition, P60(s) for the relevant period(s) of employment (if issued) and a signed contract(s) of employment may also be submitted or requested by the decision-maker, in respect of paid employment in the UK.[19]

Some changes have been made to the Immigration Rules and policy guidance over the past five years, in response to calls for greater flexibility.[20] For example, some flexibility was introduced about the length of time that cash savings arising from the realisation of an asset must be held, and it has been confirmed that academic stipends or maintenance grants can be counted as income. It has also been confirmed that caseworkers have the discretion to contact applicants to request further information or documentation before making a decision on the application.

2.2 If the requirements are not met: Human rights considerations

If an application does not satisfy the evidential specifications of the financial requirement as set out in Appendix FM and FM_SE of the Immigration Rules, UKVI decision-makers must go on to consider whether, based on information provided by the applicant, there are "exceptional circumstances" such that refusal of the application could or would result in a breach of the ECHR Article 8 rights (qualified right to private and family life) belonging to the applicant, their sponsoring partner, or a relevant child or other family member who would be affected by the decision.

- **If refusal of a visa application could result in a breach of ECHR Article 8 rights**, but the minimum income requirement

18 Immigration Rules, Appendix FM_SE
19 Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members)' Annex FM 1.7'Financial requirement', April 2015, p.35-6
20 HC 1039 of 2012-13; HC 628 of 2013-14

The approach is different is refusal might breach the applicants' human rights, although the threshold for this is very high

> can't be satisfied from the sources specified in the Immigration Rules, **UKVI decision-makers can take a wider range of income/financial sources into account in order to assess whether the requirement is met** (Immigration Rules, Appendix FM, para GEN 3.1).
>
> Applicants granted on this basis do not have to satisfy the minimum income requirement again in future visa extension applications, but only become eligible to apply for permanent leave to remain in the UK after 10 years (rather than 5 years as is the case for other partner visa holders). They can apply to switch to start a 5 year route to permanent settlement during the 10 year qualifying period if they become able to satisfy the minimum income requirement through the usual sources specified in the Immigration Rules.

- **If the decision-maker considers that refusal would result in a breach of Article 8 rights, the application must be granted, even if the financial requirement is not satisfied** (Immigration Rules, Appendix FM, para GEN 3.2).

UKVI caseworker guidance states that applications must satisfy a high threshold in order to come within these provisions, which came into effect on 10 August 2017.[21]

What makes a case 'exceptional'?

Home Office guidance for UKVI caseworkers states that when assessing potential breaches of ECHR Article 8 rights, decision-makers must consider whether refusal could or would result in "unjustifiably harsh consequences" for the applicant or their family.[22] The best interests of any relevant child must be a primary consideration.

"Unjustifiably harsh consequences" are defined as "ones which involve a harsh outcome(s) for the applicant or their family which is not justified by the public interest (…)"

It makes clear that there is a high threshold for a breach of Article 8:

> The case-law makes clear that where the applicant does not meet the requirements of the Rules, and has established their family life in "precarious" circumstances (e.g. when they have limited leave to enter or remain in the UK), something "very compelling" is required to outweigh the public interest in refusal. Likewise, where family life is formed or exists with a person outside the UK who has no right to enter the UK and does not meet the requirements of the Rules for entry clearance, Article 8 does not require that they be granted entry, in the absence of such exceptional circumstances.[23]

Furthermore,

> In the entry clearance context, a key question in the assessment, taking into account as a primary consideration the best interests of any relevant child, will be: why can't the UK partner go or remain overseas to continue or maintain their family life with the

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21 HC 290 of 2017-19

22 Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members' Annex 1.0a Family Life (5 year routes), October 2017, section 13

23 Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members' Annex 1.0a Family Life (5 year routes), October 2017, paragraph 13.3

> applicant? Alternatively, is it proportionate to expect the family to separate or for existing separation to be maintained?[24]

Factors considered by UKVI

All of the particular circumstances of a case must be considered by UKVI decision-makers in order to assess whether there are "exceptional circumstances" which would mean that refusal of the application could or would result in "unjustifiably harsh consequences".

Some potentially relevant factors are identified in the policy guidance:[25]

- The best interests of a relevant child
- Ability to lawfully remain in or enter another country
- The nature and extent of the family relationships involved
- The circumstances giving rise to the applicant being separated from their partner and or/child in the UK (such as whether the family previously lived together overseas and could do so again; whether the couple began their family life together in the knowledge that they would have to meet the immigration requirements of one country or another)
- The likely impact on the applicant, their partner and/or child if the application is refused
- The existence of serious cultural barriers to relocation overseas
- The impact of a mental or physical disability or of a serious illness which requires ongoing medical treatment
- The absence of governance or security in another country
- The immigration status of the applicant and their family members
- Whether there are any factors which might increase the public interest in refusal (such as criminality, use of deception, concerns about character or conduct, or if the applicant does not speak English or is not financially independent)
- Cumulative factors weighing for and against the public interest

The guidance states, for example, that "serious cultural barriers to relocation overseas" might apply to an application involving a same-sex couple who face relocation to a country where they would be at risk of prosecution, persecution or serious harm due to their relationship. However, decision-makers must further consider that:

> … the fact that a country has a law which criminalises same sex sexual acts would not be sufficient to show that a couple would face very significant hardship living together in that country if the authorities in practice do not prosecute cases and there is no real risk of prosecution or persecution. The inability of a couple to marry or enter into a civil union, or to have their existing marriage or civil union recognised, in the country in which they would be

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[24] Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members' Annex 1.0a Family Life (5 year routes), October 2017, p.69

[25] Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members' Annex 1.0a Family Life (5 year routes), October 2017, para 13.5

> required to continue or resume living is not in itself an obstacle to family life continuing or resuming overseas.

Examples of "unjustifiably harsh consequences"

Home Office policy guidance gives some examples of circumstances when the refusal of the application might result in "unjustifiably harsh consequences":

- **The applicant and their partner have a child in the UK with serious mental health or learning difficulties,** and independent medical evidence establishes that good treatment and learning support are in place for the child and would not be available in the country where the applicant resides.
- **The applicant's partner has a genuine and subsisting parental relationship with a child in the UK** of a former relationship, and the particular circumstances of the case mean that it would be unjustifiably harsh to expect the child to relocate overseas with the applicant's partner, or for the applicant's partner to do so without the child. However, the guidance states that it might be reasonable to expect the applicant's partner to choose between their family life overseas and retaining their family life in the UK if they had established their family life with the applicant in the knowledge that they could not meet the UK's visa requirements.

And some examples of circumstances considered unlikely to lead to unjustifiably harsh consequences:

- **Lack of knowledge of a language** spoken in the country in which the family would be required to continue or resume living.
- **Being separated from extended family members**, such as the parents or siblings of the applicant or their partner.
- **A material change in the quality of life** for the family if required to live outside the UK.

It further emphasises that "unjustifiable hardship" involves more than "a significant degree of hardship or inconvenience" for the couple:

> Where the applicant's partner is in the UK, the question of whether refusal of entry clearance could or would result in unjustifiably harsh consequences requires a very stringent assessment. For example, a British Citizen partner who has lived in the UK all their life, has friends and family here, works here and speaks only English may not wish to uproot and relocate halfway across the world, and it may be very difficult for them to do so. However, a significant degree of hardship or inconvenience does not amount to an unjustifiably harsh consequence in this context. ECHR Article 8 does not oblige the UK to accept the choice of a couple as to which country they would prefer to reside in.[26]

When can other income sources be considered?

If, based on information provided by the applicant, the decision-maker considers that refusal could breach Article 8 rights, the Immigration Rules allow UKVI caseworkers to consider whether the applicant can

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[26] Home Office, *Immigration Directorate Instructions*, 'Chapter 8 Appendix FM (family members' Annex 1.0a Family Life (5 year routes), October 2017, para 13.5

satisfy the financial requirement through any other "credible and reliable" sources of income, financial support or funds available to the applicant and sponsor.[27] This could be:

- a guarantee of financial support to the applicant or their partner from a third party;
- credible prospective earnings from the employment or self-employment of the applicant or their partner; or
- 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.

Any credible and reliable source of funding can count towards the requirement if refusal could breach the applicants' human rights

Applicants should be given 21 days to provide such evidence (if they have not already done so).

Paragraph 21A of Appendix FM_SE of the Immigration Rules specifies certain conditions and considerations that apply to these broader categories.

For example, **if an offer of third-party support is being relied on**, UKVI's considerations will include:

- whether the applicant has provided verifiable documentary evidence from the third party of their guarantee of financial support;
- whether that evidence is signed, dated and witnessed or otherwise independently verified;
- whether the third party has provided sufficient evidence of their general financial situation to enable the decision-maker to assess the likelihood of the guaranteed financial support continuing for the period of limited leave applied for;
- whether the third party has provided verifiable documentary evidence of the nature, extent and duration of any current or previous financial support which they have provided to the applicant or their partner;
- the extent to which this source of financial support is relied upon by the applicant to meet the financial requirement; and
- the likelihood of a change in the third party's financial situation or in their relationship with the applicant or the applicant's partner during the period of limited leave applied for.

In terms of assessing **income from the applicant or sponsor's prospective employment or self-employment**, the considerations include:

- whether, at the date of application, a specific offer of employment has been made, or a clear basis for self-employment exists. In either case, such employment or self-employment must be expected to commence within three months of the applicant's arrival in the UK (if the applicant is applying for entry clearance) or

[27] Immigration Rules, Appendix FM-SE, paragraph 21A

within three months of the date of application (if the applicant is applying for leave to remain);

- whether the applicant has provided verifiable documentary evidence of the offer of employment or the basis for self-employment, and, if so, whether that evidence:
  - is on the headed notepaper of the company or other organisation offering the employment, or of a company or other organisation which has agreed to purchase the goods or services of the applicant or their partner as a self-employed person;
  - is signed, dated and witnessed or otherwise independently verified;
  - includes (in respect of an offer of employment) a signed or draft contract of employment;
  - includes (in respect of self-employment) any of a signed or draft contract for the provision of goods or services; a signed or draft partnership or franchise agreement; an application to the appropriate authority for a licence to trade; or details of the agreed or proposed purchase or rental of business premises;
- whether, in respect of an offer of employment in the UK, the applicant has provided verifiable documentary evidence:
  - of a relevant employment advertisement and employment application;
  - of the hours to be worked and the rate of gross pay, which that evidence must establish equals or exceeds the National Living Wage or the National Minimum Wage (as applicable, given the age of the person to be employed) and equals or exceeds the going rate for such work in that part of the UK; and
  - which enables the decision-maker to assess the reliability of the offer of employment, including in light of the total size of the workforce and the turnover (annual gross income or sales) of the relevant company or other organisation;
- whether the applicant has provided verifiable documentary evidence that at the date of application, the person to be employed or self-employed is in, or has recently been in, sustained employment or self-employment of the same or a similar type, of the same or a similar level of complexity and at the same or a similar level of responsibility;
- whether the applicant has provided verifiable documentary evidence that the person to be employed or self-employed has relevant professional, occupational or educational qualifications and that these are recognised in the UK;
- whether the applicant has provided verifiable documentary evidence that the person to be employed or self-employed has the level of English language skills such prospective employment or self-employment is likely to require;

- the extent to which this source of income is relied upon by the applicant to meet the financial requirement; and
- where an offer of employment is relied upon, and where the proposed employer is a family member or friend of the applicant or their partner, the likelihood of a relevant change in that relationship during the period of limited leave applied for.

2.3 Compassionate cases: Scope to grant leave outside the Immigration Rules

Immigration leave can be granted "outside the Immigration Rules" in special cases

If an application cannot meet the requirements of the Immigration Rules, but there are compelling compassionate factors involved, UKVI decision-makers can consider whether to grant permission to enter/remain in the UK 'outside' of the Immigration Rules.

UKVI policy guidance defines "compelling compassionate circumstances" as

> broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of Article 8.[28]

It cites as an example a scenario where "an applicant or relevant family member is suffering from serious ill-health, but which does not in itself render refusal a breach of ECHR Article 3 or Article 8."

In such cases, the length of leave to remain granted would reflect the individual circumstances of the case.

[28] UKVI, *Immigration Directorate Instructions*, Appendix FM 1.0 Family life (as a Partner or Parent): 5-Year Routes, August 2017, p.68

3. Calls to change the policy

Civil society

Various civil society organisations and Parliamentarians have argued that the financial requirement is unfair, disproportionate and counter-productive

Various civil society organisations campaign against the minimum income requirement – see, for example, the websites of the Joint Council for the Welfare of Immigrants, Migrants' Rights Network, and BritCits.

In September 2015 the Children's Commissioner for England published new research examining the impact of the Immigration Rules on the wellbeing of children and their families.[29] It found that:

> Since 2012 it is estimated that 15,000 children have been separated from one of their parents because their British parent could not meet the financial requirements of the Immigration Rules implemented in 2012.[30]

Its recommendations included greater flexibility when calculating income to reflect family support available and local wage levels; and inclusion of a requirement to consider the best interests of every child affected.

Parliamentary scrutiny

The minimum income requirement has attracted considerable Parliamentary interest over the past five years, notably through PQs, EDMs and backbench debates.[31]

In June 2013 a committee of members of the All-Party Parliamentary Group (APPG) on Migration published a report of their inquiry into the impact of the family migration rules changes.[32] The report recommended an independent review of the minimum income requirement and its impacts, to consider whether the policy "represent[s] an appropriate balance between the different interests in this area".[33] The Coalition Government rejected this idea, stating that it was satisfied that the family Immigration Rules "are operating as intended" but that it would keep their impact under review.[34]

Legal scrutiny

In February 2017 the Supreme Court upheld the lawfulness of the minimum income requirement in principle. Litigation challenging its lawfulness had been ongoing since 2013.

- In July 2013 the High Court did not strike down the Rules as unlawful in general, but found that the way they were applied

29 Children's Commissioner for England, *Family Friendly?*, 9 September 2015
30 Children's Commissioner for England, *Skype families*, 9 September 2015
31 See, for example, HC Deb 19 June 2013 cc254-279WH; HL Deb 4 July 2013 cc1385-1406; HC Deb 9 September 2013 c808-810WH
32 Migrants' Rights Network provides the secretariat to the APPG on Migration.
33 APPG Migration, *Report of the Inquiry into new Family Migration Rules*, June 2013, p.35
34 HL Deb 26 June 2013 ccWA147-8

would amount to a disproportionate interference with family life in certain types of case.[35]

- In July 2014 the Court of Appeal allowed the Government's appeal against the High Court's decision.[36]
- In May 2015, the Supreme Court granted permission to appeal against the Court of Appeal's decision. In its judgment of 22 February 2017 the Supreme Court held that the fact that the minimum income requirement may cause hardship to many does not render it unlawful.[37]

The Supreme Court has upheld the lawfulness of the minimum income requirement

The Supreme Court held the minimum income requirement to be acceptable in principle. However it ruled that the Immigration Rules and the Immigration Directorate Instruction (Home Office policy guidance to UKVI decision-makers) unlawfully failed to take proper account of the Secretary of State's duty under section 55 of the *Borders, Citizenship and Immigration Act 2009* to have regard to the need to safeguard and promote the welfare of children when making decisions which affect them.

In order to reflect the judgment, a Statement of Changes to the Immigration Rules, and updated policy guidance addressing cases involving children and assessment of alternative sources of funds took effect from 10 August.[38]

Common criticisms of the Rules, and counter-arguments[39]

Is the requirement justifiable in principle?

The Supreme Court acknowledged that for some couples the Rules would constitute a permanent impediment to their living together in the UK but found that the requirement was a proportionate means of achieving a legitimate aim

Some argue that the minimum income requirement is unfair in principle, for example on the grounds that it can have the effect of indefinitely preventing a British citizen from being able to live in the UK with their family unit. The Supreme Court accepted the requirement presents a "serious obstacle" to couples enjoying family life together, and may constitute a "permanent impediment" where a sponsor will never be able to earn above the threshold and the couple will not be able to amass sufficient savings to make good the shortfall. However the Court emphasised that the fact that a rule causes hardship to many does not

35 R (on the application of MM & Others) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin)
36 R (on the application of MM (Lebanon)) v Secretary of State for the Home Department [2014] EWCA Civ 985
37 R (on the application of MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10
38 HC 290 of 2017-19
39 For relevant sources see, for example, MRN briefing, 'What are the consequences of minimum income requirement for family migrants in the UK?', 28 July 2013; *The family migration income threshold: Pricing UK workers out of a family life*, June 2014APPG Migration, *Report of the Inquiry into new Family Migration Rules*, June 2013; HC Deb 19 June 2013 cc254-279WH; HL Deb 4 July 2013 cc1385-1406; Home Office *Impact Assessment IA No. HO0065 Changes to family migration rules*, 12 June 2012; Home Office, *Letter from Lord Taylor of Holbeach to Baroness Hamwee*, 5 August 2013, DEP2013-1434; R (on the application of MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10

mean that it is incompatible with the European Convention on Human Rights (ECHR) or otherwise unlawful at common law.

Furthermore, the Court noted the minimum income requirement is part of the Government's overall strategy aimed at reducing net migration. It described its particular aims - ensuring that couples do not have recourse to welfare benefits and have sufficient resources to be able to play a full part in British life - as "entirely legitimate". It agreed that those aims are sufficient to justify the interference with, or lack of respect for, the right to family life enshrined in Article 8 ECHR.

Is the threshold set too high?

The threshold is significantly higher than full-time earnings at minimum wage level. A 2012 Home Office Impact Assessment noted that the Annual Survey for Hourly Earnings indicated that around 40 - 45% of UK residents earn less than £18,600.

Around 40-45% of UK residents earn less than £18,600

The Impact Assessment suggested that a proportion of people earning less than this would still be eligible to sponsor a partner visa - for example, if they were in receipt of certain welfare benefits and therefore exempt from the requirement, or if they and their partner had appropriate sources of non-employment income, or if they increased their working hours or skills in order to earn a higher income.

In line with the lower courts, the Supreme Court rejected the argument that there is no rational connection between the legitimate aims of the minimum income policy and the particular minimum income threshold chosen, describing the MAC's approach as "a model of economic rationality."[40]

Should the threshold reflect regional differences?

Some have argued that there should be variable income thresholds to reflect differences in wages and living costs across the UK (and overseas). Research published in June 2014 by the Migrants' Rights Network found 74 parliamentary constituencies where the £18,600 income requirement was higher than the earnings of 50% or more of all residents in employment.[41] Research by the University of Oxford's Migration Observatory, using data from the Labour Force Survey in 2014, showed that while only 30% of British employees in London did not earn enough to sponsor a non EEA spouse, this rose to 49% for those in Yorkshire and Humberside, and 51% for those in Northern Ireland.[42]

Calls for regional variations to the threshold have been rejected on the grounds that a national threshold gives clarity and is easier to enforce

The MAC's report did not consider these arguments in detail, but said that it did not see a clear case for differentiation.[43] The Coalition shared this view. It believed that a single national threshold provided clarity and

40 R (on the application of MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10, paragraph 83
41 MRN, *The family migration income threshold: Pricing UK workers out of a family life*, June 2014
42 The Migration Observatory, 'Love and money: how immigration policy discriminates between families', 17 November 2014
43 MAC, *Review of the minimum income requirement for sponsorship under the family migration route*, November 2011, paras 4.43-4.44

simplicity for applicants and Home Office staff. It also pointed out that the benefit system is not regionalised (with the exception of housing benefits) in spite of regional differences in wages and costs of living. It further argued that regional thresholds would be difficult to enforce, since there would be a risk that some sponsors would temporarily move to an area with a lower income threshold until the visa had been granted. Another concern was that families who had to move for other reasons, or who lived in a relatively poor part of an affluent region (or vice versa) might be unfairly dis/advantaged by differential thresholds.

Does the policy discriminate against particular demographic groups?

It has been acknowledged that certain demographic groups are particularly affected by the minimum income requirement.

Research has found that the requirement has indirect effects depending on gender, ethnicity, education, age and place of residence

The Supreme Court recognised that sponsors who were female or from certain ethnic groups or regions of the UK are "disproportionately affected" by the requirement, but said that this does not mean that it is unlawful.[44]

The Migration Observatory's 2014 research gives some examples of which groups are most affected.[45] While 28% of British males working as employees did not earn enough to sponsor a non-EEA spouse, this rose to 57% for their female counterparts. And while 43% of "white" employees did not earn enough to sponsor a non-EEA spouse, this rose to 51% for "non-white" employees. The research further found that "60% of British nationals in their 20s were unlikely to earn enough to sponsor a non EEA spouse.

The Migration Observatory's research also found "noticeable disparities across educational levels". While 24% of British employees who had completed higher education or a degree did not earn enough to sponsor a non-EEA spouse, this rose to 76% of those who had no academic qualifications.[46]

Are the evidential requirements unduly restrictive?

Although the restrictions on permissible income sources have been relaxed for cases raising human rights issues, there is no flexibility for applications which fall below that threshold.

Some critics have questioned the justification for not allowing all applicants to rely on a wider range of income sources. If the financial requirement can be satisfied through 'credible and reliable' sources, why should it matter what these are?

The different approach to human rights cases reflects the Supreme Court's findings. The Court found that it was not irrational for the Government to prioritise simplicity of operation and ease of verification

44 R (on the application of MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10, paragraph 81
45 The Migration Observatory, 'Love and money: how immigration policy discriminates between families', 17 November 2014
46 R (on the application of MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10, paragraph 83

when deciding which sources are acceptable, but the "rigid restrictions" in the Rules were inconstant with the 'evaluative exercise' required of restrictions imposed on the right to family life enshrined in Article 8 ECHR.

Successive governments have previously resisted widening the range of permissible income sources. They have said, for example, that offers of third party support are vulnerable to changes in circumstances or relationships, and that employment overseas, employment prospects in the UK or promises of employment in the UK may be difficult to verify and are no guarantee to getting a job.

A related concern is how the rules are applied in practice, particularly when dealing with cases which are borderline or involve some compelling or compassionate circumstances.

Local and national media outlets often highlight individual examples of cases which have been refused for not satisfying the financial requirement, often when there are some compassionate circumstances involved.[47] It is not always possible to ascertain the final outcome of the cases from the media coverage.

Is the minimum income requirement saving money or leading to unforeseen costs?

Some families affected by the financial requirement argue that they undermine self-sufficiency and family unity. There have been accounts of families enduring prolonged periods of separation due to not being able to satisfy the minimum income requirement. It has also been argued that some families have needed recourse to public funds, which would not have been necessary if the migrant partner had been able to join them in the UK and share the sponsor's work and caring responsibilities.

Some couples are facing separation of six months or more, due to the nature of the evidence requirements

The Home Office's Impact Assessment estimated the minimum income requirement would bring an overall net benefit of £660million over ten years. This estimate included consideration of the reduction in direct tax revenue from working migrant partners, and savings in healthcare, education and welfare.

There are conflicting estimates of the economic impact of the requirement

Middlesex University argued that the Coalition Government did not take into account the loss of the wider economic benefits of migrant partners' economic activity. Using an alternative model for calculations based on the figures in the Government's Impact Assessment, it has suggested that the changes could cost the UK £850million over ten years.[48] The Coalition did not accept these conclusions.[49]

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47 See, for example, The Guardian, 'Wife of stroke victim who needs 24 hour care must leave UK while he cares for children', 17 October 2017; Independent, 'Home Office splits British man from his wife 10 months after she gives birth to their daughter', 9 October 2017; BBC News, 'British man's heavily-pregnant Chinese wife denied a visa', 23 August 2017; Mail online, 'Soldier lives apart from family after Home Office refused to grant his wife a visa', 6 November 2016

48 Middlesex University, '*The fiscal implications of the minimum income requirement: what does the evidence tell us?*' July 2013

49 HL Deb 24 July 2013 cWA248

4. The requirements for partners of EEA nationals

4.1 Why are the requirements different?

The rights of EU/EEA (hereafter, EEA)[50] nationals and their family members to come to the UK derive from European law (specifically, Directive 2004/38/EC, often referred to as the Citizens' Directive or 'Free Movement of Persons' Directive).[51] For as long as the UK remains an EU Member State it is subject to laws guaranteeing EEA nationals the right to free movement throughout the Union.

EEA migrants do not have to satisfy a financial requirement in order for their family members to join them in the UK; their rights derive from European law

Non-EEA nationals, including family members of British citizens, are subject to the UK's Immigration Rules. The Immigration Rules do not have to mirror European law, and indeed it has long been the case that they have contained more restrictive eligibility criteria for family members than European law. The financial requirement is another example of such a difference - EU law does not specify a minimum income or specific level of resources that the EEA national must have in order for their non-EEA family member to join them in the host Member State.

Various commentators and politicians have highlighted the perceived unfairness of the current situation, in which EEA migrants living in the UK have an easier route to bringing their non-European partners (and other family members) to the UK compared to British citizens and settled non-EEA migrants.[52] Some have argued that the unfairness is simply the result of government policy, whereas others have suggested that the UK should have the freedom to apply a similar income requirement to EEA nationals bringing family members to the UK.[53]

What might happen after Brexit?

Whether or not the UK will gain the freedom to apply a similar income requirement to EEA migrants bringing partners to the UK is one of the issues currently under discussion between the UK and EU as part of the Article 50 withdrawal negotiations.

4.2 Can British citizens use EU law to bring partners to the UK?

British citizens living in the UK cannot ordinarily rely on EU 'free movement' law to bring their non-European loved ones to the UK.

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50 EEA – European Economic Area (comprised of EU Member States plus Iceland, Norway and Liechtenstein). Swiss nationals have similar rights due to bilateral agreements with the EU.

51 Transposed into domestic legislation by the *Immigration (European Economic Area) Regulations 2006*, SI 2006/1003 (as amended). EEA and Swiss nationals have similar rights due to bilateral agreements with the EU.

52 See, for example, Home Affairs Committee, The work of the Immigration Directorates 2014 Q2, 10 February 2015, HC 902 2014-15, Q39

53 Migration Watch briefing 4.22, *Family permits for EU citizens in Britain*, 9 May 2013

This is because EU law does not consider EEA nationals to be exercising their 'free movement' rights whilst they are living in their own country. Therefore, their non-EEA national partners are usually subject to the country's national immigration laws rather than EU law.

There are limited circumstances in which British citizens can use European law to bring their non-EEA family members to the UK without having to satisfy the financial requirement

However, European caselaw (most famously, the 'Surinder Singh' case) has established that where EEA citizens (and their family members) exercise a right to move to another Member State under EU law, their right to return to their country of nationality also comes under EU law.[54] Therefore, the non-EEA national partner of a British citizen who has been living in another EU Member State is eligible to return to the UK under EU free movement law, rather than being subject to the UK's Immigration Rules.[55]

There have been reports that some British citizens who were unable to satisfy the financial requirement have temporarily moved to other EU Member States with their non-EEA national partners, in order to be able to benefit from the Singh caselaw.[56]

The UK government has tightened its regulations to prevent 'abuse' of these provisions, although some experts question the UK's interpretation of relevant EU caselaw

Recent UK governments have considered this an abuse of EU law. In 2013 and 2016 the regulations transposing the EU Free Movement of Persons Directive into UK law were amended in order to prevent such 'abuse'.[57]

Aspects of the UK's amended regulations have been highlighted by some observers as incompatible with the relevant EU caselaw. [58]

For example, the UK regulations specify that couples cannot benefit from Singh if the purpose for living in another Member State was to circumvent the UK's Immigration Rules. EU caselaw has stablished that an EU citizen's motive for exercising free movement rights is irrelevant.[59]

Furthermore, the UK regulations identify various factors relevant to assessing whether a couple's residence in another State was "genuine" which are more prescriptive than EU caselaw.

The European Commission is reportedly investigating the UK's interpretation of the Free Movement of Persons Directive and related case law.[60] However, some commentators have questioned whether these investigations will make much progress before the UK leaves the EU.[61]

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54 ECJ, C-370/90. See also *O and B v The Netherlands*, C-456/12

55 Home Office, *Modernised Guidance*, European Nationals, Free movement rights: Family members of British citizens, 25 October 2017

56 BBC News [online], "The Britons leaving the UK to get their relatives in", 25 June 2013

57 *Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013*, SI 3032/2013 and *Immigration (European Economic Area) Regulations 2016*, SI 2016/1052 (as amended)

58 ILPA, Brexit information sheet 12, *UK regulations on free movement which may breach EU law*, 10 June 2017

59 *Akrich*, C-109/01

60 Free Movement blog, 'EU to investigate UK interpretation of Surinder Singh', 2 September 2014

61 Free Movement blog, 'The Surinder Singh immigration route: how does it work? (updated)', 31 January 2017

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