



22 February 2017

PRESS SUMMARY

R (on the application of MM (Lebanon)) (Appellant) v Secretary of State for the Home Department (Respondent)

R (on the application of Abdul Majid (Pakistan)) (Appellant) v Secretary of State for the Home Department (Respondent)

R (on the application of Master AF) (Appellant) v Secretary of State for the Home Department (Respondent)

R (on the application of Shabana Javed (Pakistan)) (Appellant) v Secretary of State for the Home Department (Respondent)

SS (Congo) v Entry Clearance Officer, Nairobi (Respondent) [2017] UKSC 10

On appeals from [2014] EWCA Civ 985, [2015] EWCA Civ 387

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Reed, Lord Carnwath, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEALS

In July 2012 the Immigration Rules (“the Rules”) were amended to establish new entry requirements for non-EEA applicants to join their spouses or civil partners in the United Kingdom. These included a minimum income requirement (“MIR”) of at least £18,600 per annum with additional sums for dependent children, to be satisfied by the sponsoring spouse or civil partner.

In four appeals the appellants claim that the Rules themselves, and the Immigration Directorate Instruction on family migration giving guidance to entry clearance officers (“the Instructions”), are incompatible with the rights protected by the European Convention on Human Rights (ECHR), principally the right to family life in article 8, and unlawful under common law principles. One of the appellants is a child, and it is contended that the Rules fail to take account of the Secretary of State’s duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (“the s 55 duty”) to have regard to the need to safeguard and promote the welfare of children when making decisions which affect them. The fifth appeal, brought by SS, is against the refusal of entry clearance because of a failure to meet the MIR on the facts of her case.

The claims to strike down the Rules partly succeeded in the High Court, but this decision was reversed by the Court of Appeal. SS appealed successfully against the refusal to grant her entry clearance to the First-tier Tribunal, which found that she and her husband would not be able to live together in the Democratic Republic of Congo, where she was a citizen, but from which he had been granted asylum in the UK. He could not meet the MIR but the refusal was found to be a breach of article 8. The Entry Clearance Officer’s appeal failed in the Upper Tribunal but was allowed by the Court of Appeal.

JUDGMENT

The Supreme Court unanimously (i) allows SS’s appeal, restoring the decision of the Upper Tribunal in her case, and (ii) allows the other four appeals to a limited extent. The court holds that the MIR is acceptable in principle but that the Rules and the Instructions unlawfully fail to take proper account of the s 55 duty. The Instructions also require amendment to allow consideration of alternative sources of funding when evaluating a claim under article 8. Lady Hale and Lord Carnwath give a joint judgment, with which all the other Justices agree.

REASONS FOR THE JUDGMENT

Challenge to the validity of the Rules under the Human Rights Act 1998 ('HRA')

- The Secretary of State is bound by s 6 HRA to exercise her powers under the Immigration Act 1971 compatibly with the ECHR. In a challenge to the legality of the Rules as such, as well as to their application to individual cases, it is legitimate to follow the four stage proportionality test to decide whether the Secretary of State has struck a fair balance between the individual and public interests, taking into account the relevant factors identified by the European Court of Human Rights (ECtHR) and the significant weight to be given to the interests of children [52, 56].
- The general provisions of the Rules envisage a two-stage process, the second involving a fact-sensitive consideration of any human rights issues outside the Rules. The duty of the tribunal hearing appeals against any adverse decision of the Secretary of State is to ensure that the ultimate disposal of the application is consistent with the ECHR. This means that there is no basis for challenging the new Rules as such under the HRA [58, 60].

The principle of an MIR

- The fact that the MIR may cause hardship to many does not render it unlawful [81]. It has the legitimate aim of ensuring that the couple do not have recourse to welfare benefits and have sufficient resources to play a full part in British life. The income threshold chosen was rationally connected to this aim [83] and the acceptability in principle of an MIR has been confirmed by the ECtHR [86].

Treatment of children

- The Rules assert that the Secretary of State's s 55 duty has been taken into account but nothing in the relevant section gives direct effect to it [90]. The Instructions in their current form do not adequately fill the gap left by the Rules. They are defective and need to be amended in line with the principles established by the ECtHR. The s 55 duty stands on its own and it should be clear from the Rules themselves that it has been taken into account. In this respect the Supreme Court grants a declaration that the Rules and the Instructions are unlawful [92].

Treatment of alternative sources of funding

- There are restrictions in the Rules on taking into account the prospective earnings of the foreign spouse or partner or guarantees of third party support when deciding whether the MIR has been met. Although harsh, it is not irrational for the Secretary of State to give priority in the Rules to simplicity of operation and ease of verification [98]. Operation of the same restrictive approach outside the Rules is a different matter and inconsistent with the evaluative exercise required by article 8. A tribunal on an appeal can judge for itself the reliability of any alternative sources of finance and it makes little sense for decision-makers at an earlier stage to be forced to take a narrower approach [98]. In this respect aspects of the Instructions require revision to ensure that decisions are taken consistent with the duties under the HRA. It will be a matter for the Secretary of State to decide if it is more efficient to revise the Rules themselves to achieve this [101].

Appeal by SS

- In the light of the crucial finding by the tribunal that there were insurmountable obstacles to the couple living together in DRC, any errors in the tribunal's judgment did not after this long delay require the appeal to be remitted for rehearing. Applying the correct test, the extreme interference with family life would not be found to be justified on the facts of SS's case [106].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>