

**EXPLANATORY MEMORANDUM TO
THE STATEMENT OF CHANGES IN IMMIGRATION RULES
PRESENTED TO PARLIAMENT ON 20 JULY 2017 (HC 290)**

1. Introduction

1.1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the Instrument

2.1. The purpose of these changes to the family Immigration Rules is to:

- Give effect to the Supreme Court judgment in *MM (Lebanon) & Others v the Secretary for the Home Department* [2017] UKSC 10; and
- Make other minor and technical changes and clarifications to those Rules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

Other matters of interest to the House of Commons

3.2. Since the Supreme Court judgment in *MM (Lebanon) & Others* was handed down on 22 February 2017, the Secretary of State has placed a temporary hold on decision-making in respect of applications falling for refusal under the Immigration Rules, in Appendix FM, with which the judgment was concerned. These are applications which fail to meet the minimum income requirement for entry clearance or leave to remain as a partner or child under Appendix FM or which otherwise fall for refusal under Appendix FM and involve a child under the age of 18 years. As of 30 June 2017, there were around 5,000 such applications on hold. The Secretary of State considers that the changes set out in this statement will enable her to decide those and future applications consistently with the findings of the Supreme Court judgment. Those applications which are refused will normally have a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against that decision.

4. Legislative Context

4.1. The Immigration Rules, as laid before Parliament by the Secretary of State, constitute a statement of practice to be followed in the administration of the Immigration Act 1971 for regulating the entry into and stay of persons in the United Kingdom.

4.2. This Statement of Changes in Immigration Rules will be incorporated into a consolidated version of the Immigration Rules, which can be found under the visas and immigration pages of the GOV.UK website at

www.gov.uk/government/collections/immigration-rules where there are also copies of all the Statements of Changes in Immigration Rules issued since May 1994.

4.3. The changes set out in this statement shall take effect from 10 August 2017 and will apply to all decisions made on or after that date.

5. Extent and Territorial Application

5.1. The extent of this Statement of Changes is all of the United Kingdom.

Other matters of interest to the House of Commons

5.2. The territorial application of this Statement of Changes is all of the United Kingdom.

6. European Convention on Human Rights

6.1. As this Statement of Changes in Immigration Rules is not subject to the affirmative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

What is being done and why

7.1. The Supreme Court judgment in *MM (Lebanon) & Others* upheld the lawfulness under Article 8 (the right to respect for private and family life) of the European Convention on Human Rights of the minimum income requirement for entry clearance or leave to remain as a partner or child under the family Immigration Rules in Appendix FM and of the basis, set out in Appendix FM-SE (specified evidence), on which that requirement must generally be met. However, the judgment found (a) that other reliable sources of earnings or finance, beyond those currently permitted under those Appendices, should be taken into account in circumstances where refusal of the application could otherwise breach Article 8; and (b) that Appendix FM did not give direct effect to the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard, as a primary consideration, to a child's best interests in an immigration decision affecting them.

7.2. The changes set out in this statement are intended to give effect to those findings. In particular, they insert new general provisions in Appendix FM (paragraphs GEN.3.1. to 3.3.) which:

- Require the decision-maker, in the specified circumstances, to consider whether the minimum income requirement is met if the other sources of income, financial support or funds set out in the new paragraph 21A of Appendix FM-SE are taken into account. The specified circumstances are that, firstly, the minimum income requirement is not otherwise met and, secondly, it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of the application a breach of Article 8 because it could result in unjustifiably

harsh consequences for the applicant, their partner or a child under the age of 18 years who it is evident would be affected by a decision to refuse the application;

- Refer to the new paragraph 21A of Appendix FM-SE, inserted by these changes, which makes provision as to the other sources of income, financial support or funds which the decision-maker will take into account in such cases. These are a credible guarantee of sustainable financial support from a third party; credible prospective earnings from the sustainable employment or self-employment of the applicant or their partner; or any other credible and reliable source of income or funds available to the couple. Paragraph 21A also makes provision for particular factors which the decision-maker will consider in determining the genuineness, credibility and reliability of such other source of income, financial support or funds;
- Require the decision-maker, where an application for entry clearance or leave to remain made or considered under Appendix FM does not otherwise meet the relevant requirements of the Immigration Rules, to go on to consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of the application a breach of Article 8 because it would result in unjustifiably harsh consequences for the applicant or their family. This brings the test of proportionality under Article 8 into the Rules. That test was previously applied by the Secretary of State (through guidance) in considering whether to grant leave outside the Rules on Article 8 grounds. The substance of the test was upheld by the Supreme Court in *Agyarko & Ikuga v the Secretary for the Home Department [2017] UKSC 11*. These changes mean that the Immigration Rules now provide a complete framework for the Secretary of State's consideration on Article 8 grounds of applications under Appendix FM by a partner, child, parent or adult dependent relative; and
- Require the decision-maker, in considering applications under the new general provisions in paragraphs GEN.3.1. to 3.3. of Appendix FM, to have regard, as a primary consideration, to the best interests of any child affected by the decision, thereby giving explicit effect within Appendix FM to the Secretary of State's existing duty under section 55 of the Borders, Citizenship and Immigration Act 2009.

7.3. The changes set out in this statement also:

- Make further consequential provision in respect of the changes arising from the Supreme Court judgment in *MM (Lebanon) & Others*. This includes providing that where the new general provisions in paragraph GEN.3.1. or GEN.3.2. of Appendix FM apply, an applicant granted entry clearance or leave to remain as a partner or parent will be on a 10-year route to settlement (Indefinite Leave to Remain), with scope to apply later to enter the five-year route where they subsequently meet the relevant requirements; and

- Make other minor and technical changes and clarifications to Appendix FM. In particular:
 - ensuring that children are granted leave of the same duration and subject to the same conditions as their parent, who is or has been granted leave under these Rules;
 - ensuring that the partner of a person here with refugee leave or humanitarian protection cannot qualify for Indefinite Leave to Remain before that person has done so; and
 - clarifying the drafting of the English language requirement for further leave to remain as a partner or parent.

8. Consultation

8.1. The rules changes in this statement have not been the subject of a public consultation, as they mainly are for the purposes of giving effect to a Supreme Court judgment.

9. Guidance

9.1. Guidance relating to these rules changes will be updated and placed on the GOV.UK website.

10. Impact

10.1. The rules changes in this statement will have limited or no impact on business, charities, the public sector or voluntary bodies, such that an impact assessment is unnecessary.

11. Regulating small business

11.1. The rules changes in this statement will have limited or no impact on small businesses.

12. Contact

12.1. Queries should be directed to the Home Office as per the 'Contact UKVI' section on the visas and immigration pages of the GOV.UK website at <https://www.gov.uk/government/organisations/uk-visas-and-immigration>.

12.2. Specific written queries relating to this Statement of Changes should be directed to StatementofChanges@homeoffice.gsi.gov.uk. Please note that this mailbox is only for Parliamentary use and specific technical queries regarding the drafting of this Statement of Changes. It is not a contact point for general enquiries. Queries to this e-mail address from outside Parliament about other immigration issues, including how these changes affect applications, will not receive a response.

12.3. A copy of this Statement of Changes can be found on the visa and immigration pages of the GOV.UK website at <https://www.gov.uk/government/collections/immigration-rules-statement-of-changes>.

