Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/07961/2015
OA/07962/2015
OA/07963/2015
OA/07964/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 March 2018	**On 27 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

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(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Ms N Ostadsaffar, Counsel instructed by AA Immigration Lawyers
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Afghanistan born on 19 March 1997, 9 June 2002, 28 February 1999 and 13 November 2007 respectively. They appealed the decisions of the respondent dated 13 April 2015 to refuse the appellants' leave to enter the United Kingdom as the children of parents settled here on the basis that they failed to fulfil the requirements of paragraph 297(v) of the Immigration Rules as it was not considered that there was evidence that the children could be maintained without recourse to public funds. In a decision promulgated on 21 April 2017 Judge of the First-tier tribunal Nightingale dismissed the appellants' appeals.

2. The appellants appealed to the Upper Tribunal with permission on the grounds that:

Ground 1: The First-tier Tribunal erred in the assessment of the maintenance requirement taking into consideration the case law in **KA & Others (adequacy of maintenance) Pakistan [2006] UKAIT 00065** and **Ahmed (benefits; proof of receipt; evidence) [2013] UKUT 00084 (IAC)**.

Ground 2: The First-tier Tribunal erred in the assessment of Article 8 in particular the best interests of the children.

Error of Law – Discussion

Ground 1

3. Ms Ostadsaffar relied on the case of **Ahmed**. It was submitted that the Tribunal had erred in considering the monthly income figure as opposed to the weekly income figure which is the relevant accepted assessment including as set out in **Ahmed** and confirmed in the respondent's guidance. Ms Ostadsaffar relied on paragraph 12 of her grounds of appeal which set out from **Ahmed** as follows:

> "As adequacy of accommodation was out of the picture following the earlier decision, the present hearing was concerned solely with the maintenance requirement. Expressed mathematically, the formula to be fulfilled is –
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> A – B ≥ C where:
>
> A is the projected income
>
> B what needs to be spent on accommodation and
>
> C the income support (or equivalent) figure (which we term in this decision 'the benefit threshold')."

4. It was Ms Ostadsaffar's submission that as the sponsors are settled in the UK they are entitled to the benefits and this should have been taken into consideration by the First-tier Tribunal.

5. Ms Fijiwala submitted that **Ahmed** was not authority for what the appellant relied on and as set out in the respondent's guidance which Ms Fijiwala provided, **Ahmed** is authority for the way in which decision makers should approach the maintenance formula. It was Ms Fijiwala's submission that, as noted by the First-tier Tribunal, it was a matter for the Department of Work and Pensions as to what benefits would be

received and there was no way of knowing what the sponsors would be entitled to. She submitted that **Ahmed** was not authority for the proposition that future benefits were in all cases permitted. Ms Fijiwala further relied on the respondent's guidance at paragraph 3(a), third bullet point, which provided as follows:

> "An entry clearance applicant may say that they will be entitled to claim public funds in their own right in the UK, e.g. under reciprocal arrangements between the UK and their own country and ask for this to be included in their net income. However, any potential future entitlement to benefits after the applicant arrives in the UK does not count towards net income when assessing adequate maintenance."

Paragraph 10 of **Ahmed** provided as follows:

> "The authorities concerning adequacy of resources were recently reviewed by the Upper Tribunal in Yarce (adequate maintenance: benefits) [2012] UKUT 00425 (IAC). The correct approach is that set out in KA and Others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065, referring to the earlier decision in Uvovo (00 TH 01450), namely:
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> > 'The appropriate method of calculation for comparative purposes is, as explained in Uvovo, to separate maintenance from accommodation, and to look first to see whether the accommodation would be adequate, and then to see whether the income available to the Appellants for maintenance is equivalent to the amount that would be available to a similar family on income support once they have dealt with the costs of their accommodation.'
>
> What the Tribunal in Uvovo – and the Tribunal in KA - seeks here to require focus on (and what paras 6A-C require focus on) is the actual financial position on arrival, i.e. income that is or will be available to the applicant and his sponsor upon his arrival in the UK (in the language of para 6, 'as a result of [the applicant's] presence in the UK'). Because the calculation is therefore a projection forward to what the income of the applicant and his sponsor is or will be on arrival, we shall employ the expression 'projected income'."

6. Ms Fijiwala relied on the judge's findings that there was a lack of evidence including in relation to housing benefit and the income which the family judge noted that the P60s did not appear to bear out the claimed amount. Ms Fijiwala noted that the First-tier Tribunal had already adjourned the hearing in order to obtain further evidence but that it still was not adequate.

7. The Upper Tribunal Judge permission, noted that as this was a case where the decisions were made after 6 April 2015 and in line with the respondent's guidance on what constitutes a human rights claim and the Immigration Act 2014 (Commencement No.4, transitional and saving provisions and Amendment) Order 2015, No.371 (C18), the applications under paragraph 297 constituted human rights claims and therefore under the new appeal regime there was no time restriction to the date of decision; it was Ms Fijiwala's submission however that there was no further financial evidence submitted that postdated the decision and therefore any

error by the judge in this respect was not material. Ms Ostadsaffar raised no point and did not rely on this issue. I also note that the Tribunal did properly consider the position of the children to include the position after the date of decision. I find no material error in this regard.

8. In addition Ms Fijiwala conceded that the judge was wrong to look at the maintenance figures from a monthly point of view whereas they should have been weekly but submitted for all the reasons given that this error was not material.

9. Paragraph 297(v) provides as follows:

> "The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as a child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds."

10. The Upper Tribunal in **Ahmed** addressed the issue of public funds including as follows:

> "4. Here reference should be made to paras 6A to 6C of the Immigration Rules as they were in force with effect from 31 March 2009 which provide:
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> '6A For the purpose of these Rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds because P is (or will be) reliant in whole or in part on public funds provided to P's sponsor unless, as a result of P's presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the regulations referred to in paragraph 6B).
>
> 6B Subject to paragraph 6C, a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or section 42 of the Tax Credits Act 2002.
>
> 6C A person (P) making an application from outside the United Kingdom will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P's sponsor as a result of P's presence in the United Kingdom, (including those benefits to which P or the sponsor would be entitled as a result of P's presence in the United Kingdom under the regulations referred to in paragraph 6B).'
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> 5. A sponsor is thus entitled to rely on his or her own recourse to public funds to the extent that paragraphs 6A to 6C of the Rules provide."

11. The Upper Tribunal in **Ahmed** went on to discuss paras 6A-C as follows:

"13. The first question is what does the proviso 'save where' in para 6A apply to? As we read para 6A, it is saying that all that counts as recourse to public funds is increased benefit as a result of P's presence and even that does not count if it arises as the result of the matters referred to in para 6B (which includes joint applications for tax credit of the type with which we are concerned, the relevant regulations being made under section 42 of the Tax Credits Act 2002 ('TCA')). The alternative approach is to say that the joint entitlement cases are carved out from the general rule that only increases in benefit are caught. We can think of no sensible reason for such an interpretation, which appears to go against the structure of s115 of Immigration and Asylum Act 1999 ('IAA') and that of TCA s42.

14. Para 6B then exempts claims by P (as opposed to P's sponsor) to the specified benefits where there is joint entitlement (thus confirming the impression that IAA1999 s115 and TCA2002 s42 have, if anything, a liberalising role and that the first rather than the second of the interpretations of para 6A above is likely to be the correct one.) In principle, where para 6B applies, it appears to allow not only the joint claim at the same amount but, as regards P, a joint claim resulting in a higher amount than would previously have been paid to the sponsor alone (even though, as regards the sponsor, an increase in her entitlement under the (now) joint claim would not be permitted by para 6A if the second interpretation above were to prevail.) It would be nonsense (acting in vain) for para 6B to grant something which as regards a joint claim would – on the second interpretation - be ruled out by para 6A.

15. What then is the effect of para 6C? This applies only to persons making an application from outside the UK (as is the present case). The question is whether para 6C is concerned only with <u>additional</u> funds or whether it also bites where the level of funds remains the same, but because of the joint claim provisions – such as the tax credit one - the applicant for entry clearance will, when he/she comes to the UK, inevitably be involved in the claim and to that extent it will be 'paid as a result of P's presence in the United Kingdom'? Para 6C appears to provide a partial disapplication of para 6B, so that whereas para 6B allows increases in benefit under the provisions (even though they would otherwise have been caught by para 6A) this does not hold good in the case of applications from outside the UK. An example of a situation which would be caught by para 6C would be a spouse and child coming from abroad which would (unlike the present situation where the children are already here) lead to an increase in the amount claimed and so be precluded by para 6C. Indeed, it may be that para 6C is confined to cases where there are at present no entitlements to benefits, which may be the case so far as a hypothetical applicant is concerned in an out of country case (though not necessarily of course where there is a United Kingdom sponsor.) The explanatory notes to HC 314, which inserted paras 6A to 6C into the Rules in 2009, speak at para 7.19 of 6C concerning 'anticipated entitlement to public funds'."

12. Although therefore the Tribunal at [35] indicated that any entitlement to benefits would "clearly be a breach of the principle that there must be no additional recourse

to public funds by the admission of an applicant" as set out in the relevant legislation including as summarised above, and as held in **Ahmed,** this is a question of fact in each case.

13. I am of the view however that, on the facts before it, the Tribunal was correct in its ultimate conclusion, given Paragraph 6C of the Immigration and Asylum Act 1999 that any future entitlement to public funds as a result of P's presence in the UK would amount to recourse to public funds and therefore is not permissible.

14. Even if that were not the case and the appellant had established that the future benefit entitlement was allowed to be taken into account in the assessment of future income (which I am not satisfied was established) as held in **Ahmed** the calculation of benefit figures is an academic exercise and the most compelling evidence of receipt of income by way of social security is "likely to be proof of receipt of funds into a person's bank account. Notices of award are intrinsically less reliable. The position of tax credits is particularly complex".

15. This is echoed to some extent in the findings of the First-tier Tribunal that the awarding of tax credits or child benefits in the assessment of entitlement to funds of this nature is a matter for the Department for Works and Pensions (DWP). Therefore, although the appellant sought to rely on claimed figures of anticipated income from these benefits, even if they could rely on such benefits, the Tribunal made no error in ultimately not taking them into account, including because of the lack of adequate evidence as to the proposed benefits amount.

16. Even though therefore the Tribunal may have erred in looking at a monthly assessment as opposed to a weekly assessment of income as required by **Ahmed** and set out in the respondent's guidance, such error if not material given that the Tribunal's ultimate conclusion that such funds would amount to additional recourse to public funds is ultimately correct in this case.

17. No material error of law is disclosed from ground 1.

Ground 2

18. It was submitted by Ms Ostadsaffar that the Tribunal made no assessment of the children's best interests and Ms Ostadsaffar relied on **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4.** It is not disputed that in assessing Article 8 rights, best interests of the children should be a primary consideration. Ms Ostadsaffar also relied on the Home Office IDIs in relation to the Borders, Citizenship and Immigration Act 2009, Section 55. Ms Ostadsaffar referred to the lack of any reference to relevant case law. She referred to the fact that the first appellant had undergone cancer treatment and that the Tribunal ought to have approached this differently as she was 16 years old at the time. It was submitted that the judge erred in stating that the children had been separated from her parents for some years as there was only a short separation between the application and the

decision and that it was the appeal process that counted in large part for the length of separation.

19. Ms Fijiwala submitted that although the First-tier Tribunal Judge did not specifically mention the term 'best interests', that was in effect what had been considered including at [37] of the decision and reasons. It was submitted that the judge was entitled to reach the findings that she did and consideration was given to all of the children including the child who had been previously satisfactorily treated for suspected ovarian cancer and that she was being monitored. The Tribunal took into consideration there was no evidence the children were not being cared for, that they were in education and in a stable environment and that they were residing with the sponsor's parents and that family life continued to be maintained in the same manner as had been done for the years since the sponsor had left for the UK.

20. It was her further submission that the Tribunal was entitled to take into consideration that at the date of the hearing the time that the children had been away from their parents.

21. Although the First-tier Tribunal Judge may not have made specific reference to the term 'best interests', it was precisely this assessment which took place at paragraphs [37] and [38] of the decision and reasons where the Tribunal considered "the circumstances of these four children" and went on to find that there was nothing compelling to indicate that leave to enter should be granted outside of the Immigration Rules. The Tribunal undertook the required balancing exercise under Article 8 and was satisfied given the failure to meet the maintenance requirements, that the refusal was proportionate to the legitimate aim pursued, the maintenance of fair and effective immigration control to safeguard the economic wellbeing of the United Kingdom. That decision was open to the First-tier Tribunal Judge for the reasons she gave. It was not suggested that those reasons reached the high test of irrationality and the Tribunal gave adequate reasons which are sustainable. I am satisfied that the grounds constitute no more than a disagreement with the judge's reasoned findings.

Notice of Decision

22. The decision of the First-tier Tribunal does not contain an error of law and shall stand. The appeal is dismissed

I continue the anonymity direction made in the First-tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any

member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 23 March 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee was paid or payable so no fee award is made.

Signed Date: 23 March 2018

Deputy Upper Tribunal Judge Hutchinson