Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13513/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 October 2014	**On 20 October 2014**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

SHAKILA AKTAR FATEMA
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, BANGLADESH

Respondent

Representation:

For the Appellant: Mr M Hasan, Solicitor, of KC Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal concerns a spouse entry clearance application, made in Bangladesh on 8 July 2012. The date is significant because it was one day before the Immigration Rules were changed, through the introduction of Appendix FM on 9 July 2012 (as a result of HC 194). It was therefore agreed before us that the relevant law to be considered is the law as it was on 8 July 2012. This was set out in paragraph 281 of the Immigration Rules, and the test for the level of adequate maintenance was that to

be found in **KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065**, and subsequent cases.

2. The appellant and the sponsor, who was present at the hearing before us, were married in Bangladesh in 2009, and they have a daughter, who is a British citizen. She was born on 21 December 2009 and currently remains in Bangladesh with her mother (the appellant).

3. At the time of the refusal there were other issues (subsisting marriage; accommodation; and English language) but by the date of the determination of the appeal by First-tier Tribunal Judge Maxwell, in which he dismissed the appeal, it was agreed before us that maintenance was the only remaining issue. This was because the English language point had been conceded at the hearing, and the judge found in the appellant's favour on the accommodation and subsisting marriage points.

4. The grounds seeking permission to appeal to the Upper Tribunal raised three points. The first was that the judge had erred in taking into account travel costs in the maintenance calculation. Reference was made to the case of **Yarce (Adequate maintenance: benefits) [2012] UKUT 425 (IAC)** as well as **KA and Others** mentioned above. The second ground was that the judge erred in including the appellant's British daughter in the calculations, because she would be entitled in law to claim whatever public funds were due to her, and any such funds would not amount to additional recourse. The third ground was that the assessment of Article 8 had failed to give sufficient weight to the rights and privileges of the appellant's child as a British citizen.

5. Permission to appeal was granted by First-tier Tribunal Judge Ransley on 19 August 2014 on the basis that all grounds may be argued. During the course of the hearing, in hearing from both representatives, the position taken by Mr Wilding developed into an effective concession that the appellant's daughter was entitled to claim benefits, or rather her father would be entitled to claim on her behalf, and that the relevant amounts included in the calculations used by the judge should therefore not have included income support levels for the child. The issue that remained, however, was Mr Wilding's concern about the travel costs. Since the sponsor would have been living in Wales but working in a restaurant in Windsor these would have been considerable. On the sums in the determination, where it was agreed before us that the approach taken to the notional income from savings was correct, the sponsor's actual income from his employment and savings left only an amount of approximately £30 per week for travel, and this could not be regarded as sufficient. As a result Mr Wildings' submission was that the decision should remain undisturbed because any error about the inclusion of the appellant's daughter was not material to the outcome, on the basis that the appeal would still have had to be dismissed because of the travel costs point.

6. On this issue Mr Hasan, for the appellant, relied on **KA and Others**, as well as **Yarce**, and the more recent case of **Ahmed (Benefits: proof of receipt; evidence) [2013]**

UKUT 00084 (IAC). Mr Hasan's submission was that the principles from **KA** and following cases were clear. The calculation to be conducted had been settled as being one involving notional income support level less housing costs. There was no authority for including other ancillary costs, whether travel costs or otherwise, in the calculations. Mr Hasan relied in particular on paragraph 10 of **Ahmed** which referred to both **Yarce** and **KA and Others**, with further reference to an additional case (**Uvovo**). The decision in **Sohail Ahmed** also deals with the effect of paragraph 6A to 6C of the Immigration Rules. These set up the additional recourse rule (6A), but then refer to various exemptions in the case of joint benefits for a couple (6B), although as a result of paragraph 6C these are not to be taken into account in an entry clearance assessment.

Decision

7. We have decided that an error of law has been shown, and that it was material to the outcome.

8. The situation of the appellant's daughter appears to us to be clear. As a British citizen she is not subject to immigration control. She is entitled to live in the UK with her father. On arrival in the UK her father would be entitled to claim child benefit, and there may be tax credits available in addition. Any such benefits would not amount to additional recourse to public funds caused by the presence of the appellant. As a result any entitlement flowing from the appellant's daughter's presence in the UK would not count on the side of the calculation in which it was included by the judge. That is to say that any benefit entitlement flowing from the child's presence would count on the income side, rather than on the side of the notional income support entitlement level that had to be met. In this respect our decision is that the judge erred in law in the inclusion of figures for the child on the notional income support levels.

9. Mr Wildings' submission that this error was not material, because of the travel costs issue, is one that we do not accept for a number of reasons. Firstly it is notable that the judge made no findings as to what the travel costs were. This appears to have been an issue that was not addressed at the hearing itself. The structure of the judge's reasoning in the determination was to raise the matter as a concern, but then conduct all of the calculations leaving that concern unquantified, and in the background. As a result of the structure of the calculations, which we have already said involved an error, the judge concluded that the appellant and the sponsor failed to meet the level required even if travel expenses were ignored. If the judge's determination had included findings as to the amount of the travel expenses, which it did not, then Mr Wildings' submission might have rested on firmer ground, but as it is the travel costs issue appears never to have been the subject of evidence, and was never quantified at any stage. If the judge had attempted to quantify it, it not having been raised in evidence, there would have been an obvious concern both on fairness grounds, and in relation to speculation.

10. The above points are specific to the evidential position in this appeal, but there is a more general point, and on this we accept, in broad terms, the submissions put forward by Mr Hasan. The formula that was developed from **KA and Others**, and maintained in other cases, was a simple one. This was an important virtue. If it had been necessary, in every case, to produce a comprehensive list of projected income and expenditure, then this would have been complex and time-consuming. The simple formula of income support level less housing costs, on the other hand, was manageable as a yardstick, and did not involve the types of calculation that would require detailed knowledge of the complexities of the benefits system. We accept the submission by Mr Hasan that there is nothing in any of the cases referred to suggesting that further costs should be added to the formula in individual cases, based on ancillary expenses for travel or any other matters.

11. The complexity, if there were to be an attempt to cover all items, would also cut both ways. What would be required would be a detailed projection of benefits that would be available, as well as income support, and a differentiation between those benefits that would amount to additional recourse, and those that would not. Whilst we can see some virtue in the more comprehensive approach, of assessing income and expenditure in detail in every individual case, we can also see virtue in the simplicity of the formula that emerged and remained in use until the introduction of Appendix FM in 2012. On the general legal point, therefore, we accept the submission that there is nothing in the relevant case law to support the idea that additional ancillary expenses should be taken into account as an addition to the basic formula of income support less housing costs.

12. For both the specific and general reasons set out above, therefore, we have decided that the error of law was in fact material to the outcome. We therefore set aside the decision.

13. Before the end of the hearing we gave both representatives an opportunity to make any further submissions as to how we should remake the decision if we were to decide that there was a material error of law. Both representatives were content to rely on the submissions already made.

14. In turning to remake the decision we have decided that the remaining findings in the judge's determination are sufficient to establish that the appeal falls to be allowed under the Immigration Rules. When the amounts factored in for the appellant's daughter are removed from the calculations what remains is that the appellant and the sponsor would have had to establish an income in excess of £111.45 per week (the income support amount for an adult couple). At the date of decision, although the sponsor had been earning at a higher level earlier, his net income had fallen to £123.80 per week. It was agreed that it had been correct to allocate the sponsor's savings, which were then around £2,000, to produce an additional income of £17 per week over the probationary period. This produced an income figure of just over £140 per week. This was approximately £30 over the income support level, after

taking account of the fact that there were effectively no housing costs because of the provision of accommodation by a relative.

15. Although it could be said that, because of the reduced income level (and we do not know whether this remains the case) the figures are quite close to the income support level, nevertheless they are above that level, and therefore meet the test set out in **KA and Others**.

16. As we have already said that was the only remaining issue, since the other points were decided in the appellant's favour, or conceded, and no challenge has been made to those aspects of the determination.

17. The decision in the appeal therefore falls to be remade on the basis that the appellant did establish that, at the date of decision, she would have been adequately maintained on arrival in the UK, in accordance with the relevant legal test as it was on 8 July 2012, before the introduction of Appendix FM.

18. It was not suggested that there was any need for anonymity in the appeal. We make no such order. The First-tier Judge, in dismissing the appeal, made no fee award. The issue of a fee award was not mentioned by either side before us. It is not entirely clear, but the appellant has not established that the outcome of the appeal did not rest on matters presented after the application was made. On that basis we have decided, despite having remade the decision by allowing the appeal, not to make any fee award.

Decision

19. The judge erred in law in a manner material to the outcome. The decision dismissing the appeal on maintenance grounds is set aside. The following decision, in remaking the appeal, is substituted for it.

20. The appeal is allowed under the Immigration Rules.

TO THE RESPONDENT
FEE AWARD

Despite having allowed the appeal we have decided, for the reasons given above, not to make any fee award.

Signed Date

Deputy Upper Tribunal Judge Gibb