



IAC-TH-WYL-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/05563/2013
OA/06608/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 16th October 2014**

**Determination Promulgated
On 27th November 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

and

**R S H (FIRST APPELLANT)
M S H (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Wilding, Senior Presenting Officer
For the Respondents: Mr Scott, of Pickup and Scott Solicitors

DETERMINATION AND REASONS

1. This is the appeal of the Entry Clearance Officer against the decision of the First-tier Tribunal (Judge Ruth) who in a determination promulgated on 10th January 2014 allowed the appeals of the Appellants against the refusal of their applications to enter the United Kingdom as dependent children of the Sponsor, Ms K H, a person holding indefinite leave to remain in the United Kingdom.

2. Whilst this is an appeal by the Entry Clearance Officer, for convenience I shall refer to the parties in this determination as they appeared before the First-tier Tribunal.
3. This appeal is subject to an anonymity direction that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the claimant. Reference to the claimant may be by use of his initials but not by name. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this direction may lead to a contempt of Court. This direction shall continue in force until the Upper Tribunal (IAC) or an appropriate Court lifts or varies it. I have made such a direction as the Appellants concerned are minors.

The background to the appeal:

4. The Appellants are citizens of Somalia born on 27th November 1999 and 30th December 1997 respectively. They are the minor siblings of the Sponsor, Ms KH,, who has indefinite leave to remain in the United Kingdom.
5. On 21st January 2013 the Appellants made applications to enter the United Kingdom for settlement as dependants of the Sponsor.
6. The applications were considered by the Entry Clearance Officer in Nairobi and were refused without interview on 23rd January 2013. The notice of immigration decision in respect of both Appellants were in identical terms. It was stated that whilst it was accepted that both Appellants were related to the Sponsor and that she was their sister, having submitted DNA evidence to confirm the relationship, the Entry Clearance Officer was not satisfied that the family circumstances were as stated. The decision letter went on to state that:-

“You state that you have been living in Ethiopia for one year and it is unclear from the documents submitted who in fact you are living with in Ethiopia. Although you state you do not know where your mother and father are, you have submitted no evidence to satisfy me this is the case. You claim you last saw your Sponsor five years ago and there is no evidence to suggest that she has been a primary carer for you throughout the years. I do not consider your circumstances in Ethiopia are exceptional in relation to those of other children living there. Based on the above information, I am not satisfied you meet the requirements of paragraph 297(i)(f) of HC 395.

As evidence of financial assistance, you have submitted three poor quality, unendorsed money transfer receipts. I am not satisfied these documents show adequate evidence that your Sponsor has been supporting you financially and consider such recent receipts merely an attempt to bolster your application.

I must also take into account the maintenance and accommodation aspect of your application. It is noted you have applied for an entry clearance with another child and your Sponsor in the UK has another two young children to support. Your Sponsor is a cleaner, earning a very modest income and is in receipt of child benefits and working and child tax credits. As a result, I am not satisfied your Sponsor will be able to maintain and accommodate you without extra recourse to public funds (297(iv), (v)).

I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet all of the requirements of the relevant paragraph of the United Kingdom Immigration Rules.”

7. The Appellants sought permission to appeal the decisions of the Respondent and the appeals came before the First-tier Tribunal (Judge Ruth) on 4th December 2013.

The decision of the First-tier Tribunal:

8. In a determination promulgated on 10th January 2014, Judge Ruth allowed their appeals. The judge set out the documentation at [8-10] and the findings and reasons are set out at [14-28].
9. The judge accepted her evidence that she had left her siblings and mother in Somalia when she had left that country to seek asylum in 2005. Following her departure, the Appellants and their mother (the father not having been involved with the family for many years and his whereabouts being unknown) were separated during fighting in Somalia and the Appellants were taken by neighbours to Ethiopia with a large number of the Somalis fleeing the violence at the time. They had not had any contact with their mother since they were separated during the fighting in Somalia and her whereabouts are unknown. The judge further accepted that the Sponsor was not aware of the whereabouts of either of the Appellants until a person she had known when she herself was a refugee in Ethiopia, contacted her to say that she believed her siblings were there with other Somalis. In 2011, around three or four months after the Appellants fled Somalia to Ethiopia, the Sponsor made contact with them over the telephone and arranged for them to live in a room in Ethiopia through the same friend. The judge accepted, contrary to the matter set out in the refusal letters, that the Sponsor sent money regularly to her friend for the Appellants and from that money their rent, daily living costs and a small amount to pay for private tuition was covered as they did not attend school. The amount varied to approximately US\$200 or US\$300 per month.
10. The judge considered the circumstances in which they were living at [17] and found that it consisted of a room with mattresses on the floor and bags for their clothing. It was a room in a house that had five other bedrooms each of which contained a family and that the family shared one toilet and bathroom. She described that:-

“Cooking was done outside the house and water is supplied from a tap outside the house. The house does have electricity and the children are cared for by the Sponsor’s friend, Safi Omar, who cooks for them and generally looked after them. The Appellants have no family members in Ethiopia as far as they know.”
11. The judge at [19] considered the money transfer receipts at page 61 of the bundle and accepted that whilst the Appellants had not provided evidence that they are not in contact with their mother, the judge did not find that there was any evidence they could supply to establish this and the judge recorded that there was no reason to doubt the money transfer receipts even though they were of poor quality.

12. The judge, when dealing with paragraph 297(i)(f) noted that it was not disputed that the Appellants are the siblings of the Sponsor and that the Sponsor was present and settled in the country. The judge made an overall finding at [22] that the current situation of the two children, living with strangers in a crowded accommodation where they shared very limited facilities and do not attend school, and also having no contact with family members at all, made their exclusion undesirable. The judge found at [23] their only known relative was living in the United Kingdom and that she had arranged for her landlord to give them approval for them to live with her and had been financially supporting them since 2011. The judge found that in the credible absence of any contact with the mother or other family members, and given the situation in Somalia at the time of their flight to Ethiopia, that the judge considered there were serious and compelling family considerations which made their exclusion from the UK undesirable.
13. The judge therefore found overall that the Appellants satisfied the requirements of paragraph 297(i)(f) of the Immigration Rules.
14. Dealing with the issue of maintenance, at [18] the judge recorded that at the date of the decision the Sponsor was working as a cleaner with two jobs and was also in receipt of child and working tax credit. She lived in a four bedroomed home for which she paid £200 per week rent and lived there with her own two minor children. The judge recorded that at the date of the decision the Sponsor was earning on average £1,700 per month of a total income of which she sent the equivalent of US\$200 or US\$300 per month to the Appellants. The judge concluded at [27] that having taken into account the documentation that disregarding documents relating to the Sponsor's self-employment as this was not her main source of income until after the date of decision, that her income was on average £1,700 per month from all sources. At [28] the judge recorded:-

"She must be able to establish that after the costs of accommodation she would have the equivalent amount she would receive if entitled to income support. A single parent with dependent children is entitled to income support in the amount of £129.83 per week. After the Sponsor's weekly rental payments are taken out of the calculation, her income remaining is approximately £225 per week. As this amount is more than she would receive in income support, it is adequate."

Thus the judge found that the Appellants could satisfy the maintenance requirements.

15. As to accommodation, at [18] the judge recorded that the Sponsor lived in a four bedroomed home for which she paid £200 per week rent and lived there with her own two minor children. At [19] the judge recorded there was a letter from the Sponsor's landlord and a tenancy agreement and at [23] recorded that the Sponsor had arranged for her landlord to give his approval for them to live with her. At [25] the judge said this:-

"As for accommodation, I note at the date of decision the Appellant was renting a room in a four bedroom property for which the tenancy agreement is in the bundle (in

evidence she referred to a different property which she would rent in the event the children came to the UK but that is postdecision evidence and I do not take it into account). The landlord confirms in his letter that he would have no objection to the Appellants taking over another room in this house and given the tenancy agreement appears to be a rolling tenancy with weekly rent of £200, I am satisfied the accommodation is available and would be occupied exclusively by the children without being overcrowded. The Appellants therefore satisfy the requirements of paragraph 297(iv) of the Immigration Rules.”

16. On 2nd April 2014 the First-tier Tribunal (Judge Heynes) granted the Entry Clearance Officer permission to appeal. The reasons for that decision are as follows:-

“The Grounds of Appeal complained that the judge failed to give adequate reasons for finding that the maintenance and accommodation requirements of paragraph 297 of the Immigration Rules were met.

The issue in relation to maintenance is arguable because the amount required to live on is not income support alone but a figure that embraces the benefits which flow from an award of income support.”

The hearing before the Upper Tribunal:

17. On the 3rd June the appeal came before the Upper Tribunal. At that hearing Mr Scott appeared on behalf of the Appellants and Mr Avery on behalf of the Entry Clearance Officer. The issue related to the findings of fact made in respect of maintenance and accommodation under paragraph 297(iv).
18. On behalf of the Entry Clearance Officer, Mr Avery set out the challenges made by the Respondent to the decision of the First-tier Tribunal. Firstly in regard to the issue of accommodation, Mr Avery submitted that there appeared to be confusion in the determination of the judge and referred the Tribunal to paragraph 25 of the determination where the judge recorded that at the date of the decision the Appellant was renting a room in a four bedroomed property, and therefore was stating that the Sponsor had access to one bedroom in a four bedroomed property. The judge referred to evidence that there was no objection from the landlord to having another room (at paragraph [25]) but at paragraph [18] the judge recorded that she lived in a four bedroomed home for which she paid £200 per week rent and lived there with her own two minor children. Thus there was a contradiction in the evidence concerning the nature of the accommodation at paragraph [18] and [25]. As to page 67 of the Appellants’ bundle, which appear to be the only document from the landlord, this letter did not confirm that another room would be available and thus it was not known where that evidence came from unless it was the oral evidence of the Sponsor. Mr Avery submitted that the judge did not take into account the adequacy of the accommodation and the judge should have had regard to it.
19. In respect of maintenance, Mr Avery submitted that there had been very little reasoning in the determination. At paragraph [27] the judge did not set out what the evidence was and at [28] began with an assumption that was fundamentally flawed. He submitted that the judge had used the figure of £129.83 per week to represent the

figure of a single parent with dependent children would be entitled to income support for that amount. He submitted that there had been no documents placed before the Tribunal to set out what the income support and other benefit levels were and that the figure given by the judge did not accord with the figures given from the DWP for 2013. A single parent would be £71.70 and each dependent child would be £65 giving a total as there would be four children of £331.70 and a family premium of £17 giving a total figure for income support and other benefits of £348.70. As to the income, the judge calculated it to £1,700 per month from all sources. Mr Avery submitted that that was not the figure that he had calculated but in any event she could not succeed when considering the test in **KA and Others (Pakistan) [2006]** relating to adequacy of income.

20. Mr Avery also highlighted a further issue that the income assessment at page 52 of the bundle relating to 2012-2013 was significantly lower than the payslips and on the face of it, it looked as if the figures and the payslips were inconsistent as 2012-2013 gave a figure of £6,657 whereas from the payslips from her two jobs it came to £8,000.28.
21. At this stage in the proceedings, it became clear that despite legal authority from the Tribunal that in an entry clearance case involving the issue of adequacy of maintenance, it would assist the First-tier Tribunal, or on appeal the Upper Tribunal, as part of submissions calculations are supplied which reflect the comparison between the applicants' and Sponsor's combined projected income if the application for entry clearance was in the United Kingdom and on the other the amount required to provide the maintenance at a level that can properly be called adequate (see **Ahmed (benefits: proof of receipt; evidence) [2013] UKUT 00084 (IAC)**). It was plain from the submissions from each advocate that no such schedule was provided before the First-tier Tribunal nor has any such schedule been put before this Tribunal. I therefore invited the parties to provide figures for such a schedule and if the parties could not agree as to the figures then the Tribunal would then hear from each of them as to where the dispute was.
22. At the conclusion of their discussions, Mr Avery presented what Mr Scott agreed were the figures. As to the Sponsor's income, she had two jobs as a cleaner. The first with GM from the payslips she had an income of £185 per fortnight and from her employers C £122 per fortnight which gave a total figure of £153.85 per week. As to her child and tax credits that came to £286.60 per week, therefore income from all sources came to a figure of £440.45 per week giving a monthly income of £1,908.61. This was above the figure recorded by the judge at [27] who found it to be £1,700 per month from all sources. Mr Avery then gave the figure for income support and associated benefits which was £71.70 for a single parent, £65 per child with four children giving a total figure of £331.70 plus family premium of £17 per week to give a total of £348.70. The rent was £200 per week therefore from her income of £440.45 per week would leave a figure of £240.45 per week which was considerably less than the figure of £349 which was said to be the benchmark for the adequacy of maintenance. Thus he submitted, even if it is not clear as to the circumstances

relating to accommodation, the Appellants could not succeed as they could not demonstrate that they would be maintained on the calculations provided.

23. Mr Scott submitted that the judge did not make an error of law and relied upon the Rule 24 response that had been provided as to accommodation, the Rule 24 response said that at paragraph 35 of the determination the judge noted at the date of decision the Sponsor was renting a four bedroomed property for which the tenancy agreement was in the bundle. Whilst the Sponsor had two other children they were very young and shared a room and therefore there would be two bedrooms available for the two Appellants.
24. In his oral submissions he conceded there must have been some confusion on the basis submitted by Mr Avery. He further submitted the Sponsor was renting the property but was living in a different property at the date of the hearing which is what the judge had referred to and he submitted that it was possible that paragraph 25 was based on the Sponsor's evidence that she was moving to a house. However in his submission she did have a four bedroomed property and therefore there was no difficulty with the finding made as to accommodation even if there had been some confusion.
25. In respect of maintenance, it was submitted in the Rule 24 response that the judge did make clear what evidence there was in relation to income noting at [18] that the Sponsor was working as a cleaner with two jobs, in receipt of child and working tax credits and that she was earning £1,700 per month supporting by payslips, bank statements and contracts of employment. The judge confirmed the submissions made on her behalf that the income was £1,700 per month from all sources and that she had more than the amount that she would receive in income support after deducting the rent, and based on the figures given by the judge, she had £100 over the limit as her income was approximately £225 per week and the amount received and income support was £129.83 per week.
26. In his oral submissions, he submitted that Mr Avery had calculated the figure of £1,908 per month which was arguably more than the determination and he also pointed to the fact that on the findings made by the judge, the Sponsor was sending money from her income of US\$200 or US\$300 per month supporting two Appellants on her income and thus in those circumstances the judge was entitled to come to the decision that maintenance was adequate.
27. Mr Scott acknowledged that there was no evidence as to the applicable income support rates placed before the First-tier Tribunal and the judge's finding at paragraph 28 that the figure was £129.83 was not a figure supported by evidence and put before the First-tier Tribunal and therefore must have come from the judge's own knowledge. He further accepted that the figure for the applicable income support rates for 2013 relevant to the date of decision that had been provided by Mr Avery was correct and that in total those benefits came to £349 per week.

28. I enquired of the parties that in the event of an error of law being found, how did each advocate invite the Tribunal to deal with the outstanding issues. Mr Avery submitted that if an error of law was found, the judge had not considered Article 8 and therefore a resumed hearing would be required before the Upper Tribunal. Mr Scott, in his submission was that if an error of law was found then the appeal should be remitted to the First-tier Tribunal.

Decision on the error of law:

29. In a determination promulgated on the 16th June 2014, I found that the First-tier Tribunal Judge erred in law in her consideration of the issues of maintenance and accommodation. The reasons are set out as follows:

- “1. Dealing with the issue of maintenance, the judge at [18] recorded that the income at the date of decision comprised of money obtained from two jobs as a cleaner and that she was in receipt of child and tax credits. The judge also recorded at [19] that he had taken into account the “contact of employment, payslips and bank statements leading up to the date of decision and letter relating to receipt of work and tax credits”. The judge reached the conclusion that overall the income she received was “on average £1,700 per month” (see [18] and conclusion at [27]). However the First-tier Tribunal Judge did not set out in the determination how the figure of £1,700 was reached and whilst reference was made in general terms to the documents, there was no attempt to set out in any particularity how that figure was arrived at. The parties, having done their own calculation today appear to have reached a different figure in excess of £1,700 of one of £1,902 (looking at the income of two jobs and taking into account tax credit) which of itself demonstrates the importance of setting out by reference to the documents how the overall figure is arrived at. It is not clear whether the figure of £1,700 took into account other benefits paid to the Sponsor including child benefits, family premium or benefits relating to dependent children. The figure of Mr Avery of £1,902, took into account her employment as a cleaner with two jobs which was £185 per fortnight and £122 per fortnight giving a total of £153.85 per week and including a figure of £286.60 per week when taking together to give a monthly income of £1,908.61. That does not appear to have taken into account any amount for child benefit.”
2. As to the figures of the assessment of the adequacy of maintenance, as set out in **KA and Others (Pakistan) Adequacy of maintenance [2006] UKAIT 00065**, the level of income and other benefits would be available if the family were drawing income support remain the yardstick. This has been confirmed in **French v the ECO (Kingston) [2011] EWA Civ 35** and **Yarce (adequate maintenance: benefits) [2012] UKUT 00425 (IAC)**. The figure used by the judge at [28] is £129.83 per week and is not particularised by comparison with the benefits applicable and only refers to “a single parent with dependent children is entitled to income support in the amount of £129.13 per week.” The decision of **Yarce** (as cited) makes it clear at [27] that in order to establish that maintenance is “adequate” under the Rule, an applicant needs to show that the resources available will meet or exceed the relevant income support level set by the UK government (“the target figure”). The paragraph goes on to say;

“If the applicant is intending to live with a spouse or partner in the United Kingdom, the income support level that he or she must meet will be such level as being set by the government in respect of the couple. Where children are included, the target figure will be increased by the relevant figure or figures for each dependent child.”

and at [28] stated “**KA (Pakistan)** establishes that the target figure is an ‘objective’ one. It is therefore immaterial that the applicant and/or any relevant family, as just described, can be shown to be more likely than not to live on less than that figure”, and [29]:-

“The present case requires an examination of the effect, if any, of the arrival of an applicant for entry clearance upon the Sponsor’s entitlement to certain benefits, and thus on the ability of the applicant to demonstrate there are available resources at or above the target figure ... only by establishing this can proper findings be made as the actual financial position of the individuals concerned.”

It is accepted by both applicants that the figures set out in the judge’s determination was not provided by reference to any applicable benefit figures therefore it cannot be said what that figure represented, whether it took into account other benefits as suggested by the cases cited above or indeed that was the figure for the income support rate for a single parent at the date of decision which Mr Avery states was £71 per week.

3. As to the issue of accommodation, the decision of the judge reflects some confusion concerning the evidence before the First-tier Tribunal. At [25], the judge refers to the Sponsor renting one room in a four bedroomed property whereas at [18] refers to her living in a four bedroomed home with two minor children. I have not been referred to a tenancy agreement but at page 67 the letter from the landlord refers to a four bedroomed house that “she can stay with her siblings” referring to 59 Turnbull Avenue. It is therefore not clear on what basis the judge considered the issue of adequacy of accommodation either. If it was based on the evidence given orally by the Sponsor there is no record of that in the determination and that has not been able to be resolved before the Tribunal at this stage from any other evidence. The confusion remains.
4. A further issue has been raised by Mr Avery by reference to the Sponsor’s income concerning the inconsistency between the documents and the payslips (see his earlier submissions). This also does not appear to have been taken into account by the judge when looking at the issue of income.
5. The Tribunal has said on a number of occasions that a schedule of benefits and/income should be place before the First-tier Tribunal or on appeal, the Upper Tribunal, to reflect the comparison between the applicant and the Sponsor’s combined projected income and the amount required to prove maintenance at a level that can properly be called adequate. Income received and the prospective figures should be expressed on a consistent and arithmetically accurate basis (see the decision of **Ahmed** (as previously cited)). The First-tier Tribunal did not have the benefit of such a calculation or schedule nor it appears, did not have the benefit of any evidence relating to what the

applicable and relevant benefits were. I have therefore reached the conclusion that the determination discloses errors of law for the reasons given above and therefore the decision relating to maintenance and accommodation should be set aside.

6. Whilst I have been provided with figures from Mr Avery and Mr Scott as to the applicable benefits and comparisons as to income, the calculations given do not seem to accord with my own. On the calculations the figure of income of £1,902 (which was some £2,000 in excess of that found by the judge), consisting of £185 per fortnight from one source of employment and £122 per fortnight from C employment giving a weekly figure of £153.85 does not seem to be consistent with the payslips. The figure for the tax credit is said to be £286.60 but no allowance in the total has been given for any child benefit for the two present children and no arguments have been advanced before the Tribunal as to whether the figure should include that of the two children who would be joining the applicant. Furthermore there is the inconsistency as to the Sponsor's income from the documents at page 52 of the bundle and the payslips which give a larger figure of £8,000.28 rather than the £6,657 taken from page 52.
7. The issue of accommodation as set out earlier is still not clear and for the reasons set out above the judge did not deal with the issue of Article 8 and both advocates agreed that in the event that an error of law is established that the issue was required to be considered at a resumed hearing where Mr Scott indicated he had wished to call further evidence. Whilst Mr Scott invited the Tribunal for the matter to be remitted to the First-tier Tribunal, I prefer the submission of Mr Avery that the Upper Tribunal, having dealt with this issue should consider the appeal at a resumed hearing to remake the decision. In those circumstances, as there still remains uncertainty as to the applicable figure for income and the applicable benefits, the issues relating to accommodation and that in any event the issue of Article 8 remains outstanding, the case will be listed for a resumed hearing."

The resumed hearing:

30. The hearing was listed having given directions to the parties to serve upon each other and the Tribunal, a schedule setting out the Sponsor's income by reference to documents in the bundle and by giving specific figures for each employment and the source of the evidence and providing figures for the benefits received in the United Kingdom at the date of decision. I also directed there should be a corresponding schedule showing the applicable benefit based on the benefit rate applicable at the date of decision and establishing which benefit should be taken into account. I considered this was necessary in view of what had previously happened before the First-tier Tribunal and before myself. A direction was given for any further evidence to be filed no later than seven days before the resumed hearing. The hearing was listed on 3rd September 2014. On that day Mr Tarlow, Senior Presenting Officer appeared on behalf of the Entry Clearance Officer. An application for an adjournment was made by Mr Tarlow on the basis of the additional evidence that had been served on behalf of the Appellants. This referred to a fresh source of income not previously disclosed either before the First-tier Tribunal or before the

Upper Tribunal at the last hearing. Mr Tarlow had not had sight of the documents until the morning of the hearing and were not on his file as being received by the Secretary of State although Mr Scott told the Tribunal that it had been served the week before. However it was served late and not in accordance with the directions. No Rule 15(2)(a) application was made for this fresh evidence. Furthermore there was no statement from the Sponsor to set out that evidence bearing in mind that it had not been disclosed before the Entry Clearance Officer, before the First-tier Tribunal or before the Upper Tribunal at the hearing in June at the error of law hearing. However as I considered it was important evidence, the evidence was admitted but an adjournment was granted and the hearing re-listed for 16th October.

31. At that hearing Mr Wilding appeared on behalf of the Entry Clearance Officer with Mr Scott appearing on behalf of both Appellants as he has done before the First-tier Tribunal and before the Upper Tribunal. At the hearing both parties had produced further evidence. On behalf of the Entry Clearance Officer there was a witness statement from the HMRC, a copy of the 2012/2013 benefit and tax credit rates and a statement relating to earnings and benefit rates (the schedule ordered by way of directions). In addition Mr Wilding produced copies of the following decisions; **AAO v Entry Clearance Officer [2011] EWCA Civ 840, FK & OK (Botswana) v SSHD [2013] EWCA Civ 238** and **VW (Uganda) v SSHD [2009] EWCA Civ 5**. On behalf of the Appellants, further evidence included a witness statement of the Sponsor, copies of payslips with additional employment from L & Co, and a letter from L & Co dated 4th September 2014. There was also a further bundle including a schedule of weekly income of the Sponsor, schedule of appropriate benefit rate at the date of refusal, Sponsor's bank statement dated 13th February 2013, a letter from the Sponsor's landlord and a further copy of the tenancy agreement relating to No 59 and a copy of the Sponsor's payslip with L & Co.
32. I heard oral evidence from the Sponsor. The Sponsor confirmed the statement made on 16th September 2014 and that was adopted as her evidence-in-chief. In that statement she confirmed that she had three jobs; working part-time with G M being paid £185.70 every two weeks and also worked for C and was paid every two weeks £111.42 and also part-time with L & Co as a cleaner. She stated that they paid her weekly in cash but prepared a payslip and gave it to her monthly. She said she worked for L & Co for about three months starting on 28th December 2012. She was asked when she started working for L & Co whether she knew she would be working for them. She said she did not know and that she had stopped working for them when the work had finished. She confirmed that she had been in receipt of tax credits at that time. When asked what basis the tax credits were calculated, she stated that she started work in December and told them this and that the agency told her to tell them how much she earned in April however before April she stopped working. When asked what were the different kinds of tax credits she was given, she said that she did not know.
33. In relation to her brother and sister, she confirmed that they were still living in the same circumstances in Ethiopia as they were in January 2013. Turning to accommodation, she confirmed that they would live at the same address as her.

When asked about the type of property it was she stated that it was a four bedroomed house that had a living room and a kitchen. She stated that the accommodation was adequate for all of them.

34. The Sponsor was cross-examined by Mr Wilding. She was asked in relation to the accommodation whether anyone else was living at that property. The tenancy agreement was produced, where it was stated that the landlord is Mr AG (page 6 of the Appellants' bundle). She was asked if he lived at that property and she confirmed that he did not. It was put to her that if that were right, the letter that he had written to the Tribunal gave his address as the accommodation she claimed to exclusively occupy. Her explanation was that that was a simple mistake and what he meant was that he was the owner of the property and that he did not live there. Clarification was made concerning the place of residence at the date of the decision. She confirmed that at the date of decision and now she was living at another address, a two bedroomed address, paying £60 per week but that she also rents the larger property at No. 59 which she intends to live at should her brother and sister join her in the United Kingdom.
35. Mr Wilding then turned to the issue of maintenance. She confirmed that she had been working at G M since 2011 and that she did twenty hours per week. As to her employment with C she confirmed that she had worked there since September 2011. She was asked if she worked twenty hours per week at C. She said she did twenty hours per fortnight and they paid her fortnightly therefore ten hours per week. She also confirmed that when she was working at L & Co she worked for 25 hours per week. It was put to her that when she claimed benefits, tax credits for example she declared in 2011/2012 that she was only working for twenty hours per week (see pages 46, 52 and 56). She was asked why she did not tell HMRC that she was working in excess of twenty hours per week. Her explanation was that for both jobs she worked ten hours per week and the payslip said twenty hours because it covered a two week period. It was put to her again that she had agreed she had worked for G M for twenty hours per week and she confirmed that she worked for C for ten hours per week and confirmed she did work at L & Co for 25 hours per week and that is 55 hours per week whereas she had told HMRC twenty hours per week. She stated that her work was shown on her payslips and it was twenty hours but in fact she did ten hours per week and worked ten hours. This was further clarified and for G M she said she did ten hours per week, twenty hours per fortnight for C and also did ten hours per week. The HMRC statement (see page 1 of the Respondent's supplementary bundle) was put to her where it was said the only record of any employment was with G M. She stated that she was no longer working for C at that time. It was put to her again that between May 2012 and April 2013 HMRC only had records for G M Ltd. She stated that she had left her employment with C on 18th March 2013 and had only worked for them until that date. She was asked again why it was that HMRC would not know about the period May 2012 to March 2013 with C. She said she had submitted the evidence and paperwork about her two jobs. She said that she had told them that she stopped work in one job and then started another. She was asked if she had told them she only worked twenty hours per week. She stated "At first yes but I started the other job late (L & Co). Those were

the two jobs with GM and C". It was put to the Sponsor that it was hard to piece together the hours she worked because she only submitted some of her payslips however at page 14 payslip 2nd November 2012 it said "Pay for the 30 units work which means 30 hours at a rate of £6.19". She confirmed that that was the hourly rate. Thus it was put to her that for that fortnightly period she worked 30 hours. The Sponsor explained that they were talking about January 2013 when at first she had worked for G M for ten hours per week and then they increased by five hours in October 2012 they added five hours per week. She was asked if she had continued to work for C at that same time (five months) and that she did ten hours per week for C. She confirmed that was right. It was therefore put to her for that period she was working for 25 hours per week between October 2012 and March 2011. She confirmed that she did do 25 hours then. She also agreed that on top of that in December 2012 until March 2013 she did 25 hours per week for L & Co. It was put to her that she was working for 50 hours per week but claiming benefit for declared work for twenty hours per week. She stated that she filled a return in April and later informed them she was working extra hours and had other jobs and that they had told her to declare it in a form the following April including the hours worked but before April 2013 she stopped working for two of the companies L & Co and C. When asked why she had stopped working for C she said that she had found another job and that she had to go to the job early in the morning. She had stopped working and could not find a job and began working as a self-employed person from July 2013. She was asked that when the decision was made in January she was working 50 hours per week and whether she could provide evidence that she had told the HMRC that she was working in excess of the twenty hours declared. The Sponsor stated that she had no written evidence and that it was a telephone conversation and that they had kept saying to her "Tell us everything". She was asked if she had ever told HMRC formally in writing that she was working in excess of what she had told them. She said no she had not.

36. She was also asked if at the time of the application she was working for three jobs however, she did not mention three and had only referred to two. Her explanation for this was that she had recently started the third and thought that the two jobs she had were enough to put on the form.
37. In relation to her brother and sister, she confirmed that the children lived in the Boli area in Ethiopia when the application was made and that they are living with a friend of hers. She confirmed that she was sending money to them and she has not visited them. In relation to the friend, she stated that the friend was Somalian. As to the issue of accommodation she confirmed that when the application was made she was living at an address at No. 10 paying £60 per week rent. She confirmed that she provided a tenancy agreement for the other property renting at £200 per week. Thus it was put to her that at the date of decision she was paying £260 rent for two properties. She confirmed that that was the position and that she had paid for both accommodations living in one (the smaller two bedroomed property) but also renting the other. When asked why she was living in the smaller property and not living in the other property with four bedrooms, she stated that she was planning to move to the other address if the applications were successful. She was asked why

she did not move into the property because she was paying a lot of money for the accommodation. It was put to her that she would have saved £60 per week. She said that she had made a mistake. She confirmed that she had continued renting the two properties.

38. In re-examination Mr Scott asked about her employment and the claiming of tax credits. He asked how long she had been claiming tax credits overall and she confirmed that she had started the first job at C on 17th September 2011 and the other job at G M on 26th September 2011. She thought that she had been receiving tax credits overall between October/November 2011. When asked how the system worked, for example, after having made the first application how many times did she have to fill in a form to make a further application. She confirmed that she filled in a form in April every year. He clarified her answer given previously where she said she had told the HMRC about the changes. She confirmed that she had told them about the new jobs and they told her to fill in a form. She was asked what HMRC had said when she told them about the new job. The Sponsor stated that she had told them that she had wanted to register a new job and they had said they would send a form to declare a new job. And later stopped working. He further tried to clarify that answer by asking the Sponsor that in her earlier evidence she had said that they had told her to notify them in April. She confirmed that was right, to fill in a form for April.

The submissions of the parties:

39. At the conclusion of the hearing I heard submissions from each of the advocates. Mr Wilding made the following submissions. He relied on the original letter of refusal from the Entry Clearance Officer and also relied upon the comments set out at page 9 of the supplementary bundle from the Respondent. Those comments set out that the figures given by the Appellant in the schedule were unreliable. They only figure that could be agreed was £348.36 as the figure representing the benefits to which the Sponsor would be entitled to as at the date of decision in January 2013. He submitted that she could not meet that figure whether or not the figure of £200 in relation to rent was deducted. He went through the schedule relating to her employment. With L & Co that there was a temporary job of three months and therefore it could only have been a temporary job. He submitted the Appellant could not rely on that amount as it would not meet the test of "can and will be" maintained adequately. He submitted this is a future looking event and as it was a temporary job only a figure of £147.52 of the schedule therefore should be taken out. As to C employment that ended in March 2013. He submitted that the same submission applied equally and therefore £55 should be struck out. G M was the only employment that could be relied upon. She had worked there for two years and is the only employment that the HMRC was aware of (see page 1 of the HMRC statement). If taking these figures for C it would be £410.55 excluding rent. The figure of rent is £200 and if that is deducted from that figure it leaves a figure of £210.55 therefore she cannot meet the level of income support necessary of £348.36 on the figures.

40. Mr Wilding's alternative submission was as follows. He submitted that because the HMRC were not aware of the other employment that the tax credits paid were therefore unreliable and that because the Sponsor did not tell HMRC that she was working in excess of twenty hours and/or for multiple employers, the figure was therefore unreliable. Whilst the Sponsor had given evidence to explain this, it is not possible to put a positive gloss on it. He submitted that she had "played the system" for two tax years and even at its highest and with the benefit of the doubt for three months was working for more than twenty hours in the tax year 2012/2013. This is a quarter of the year and she received £14,893 tax credit for 2012/2013. By rough arithmetic that was approximately £4,000 of over claiming and the explanation given by the Sponsor was extraordinary because by April 2013 she was only working one job that she did not have to tell them. The relevant year in relation to HMRC is set out at pages 51 to 54. The total payments made were £14,899 (page 54) and at page 52 it was assessed at twenty hours per week. In the tax year no breakdown of the categories but if the categories are looked at page 46, sixteen to 23 hours, 24 to 29 hours and 30 hours or more it is difficult to be clear about any assessments but for three months of 2012 to 2013 the evidence was that she worked for more than 30 hours per week and therefore the tax credits themselves are tainted and are unreliable as the test "can and will be maintained adequately" if the tax credits are unreliable she has not demonstrated that she can meet that burden. Out of the three jobs that the Sponsor had worked HMRC only knew about one of them and it appears that in relation to the other two no tax was paid on them. Mr Wilding then looked at the calculations on the schedule at page 1 adding they worked together £92.85 and £55.71 and £147.52 gave a total of £296.08 per week multiplied by 52 to give a yearly figure of £15,396.16 which was he submitted well above the income tax allowance. Similarly he submitted the employment amounts were unreliable and it was not known if the Appellant reached or exceeded the tax free hours or not. In any event the tax credits paid are unreliable and it is not known how much tax would be paid in any event.
41. Turning to the question of accommodation, there are no bank statements showing direct debits attributable to rent although there are withdrawals of cash amounts. The figure of £200 per week is for the four bedroomed property. That cost of accommodation has to be taken into account. Thus the figures demonstrate that she cannot meet the income support level of £348.36. As to the accommodation there was limited evidence of whether it is adequate. The evidence from the landlord does not say that the property is empty or that the sponsor has exclusive occupancy and there is no evidence of whether she is in receipt of council tax benefits or not. He pointed out that it was not known who paid the council tax as no documents had been provided.
42. Dealing with Article 8 he observed that both Appellants are minors and that there are two children in the UK affected by the decision. Applying Section 55 of the 2009 Act, he submitted it could not be in the children's best interests to come and live in the UK below the poverty line. He made reference to the decisions of AAO at paragraph 47 and 49 and reminded the Tribunal that in re-making the decision paragraph 117A-D applied to the Article 8 assessment and in particular 117B(iii) that it is in the public

interest that those who went to the UK are financially independent and that this did not exclude children. These were factors and considerations to take into account. He further relied on the decision in **FK (Botswana)** at paragraph 11 and that in this case there was a strong public interest element. As to the circumstances in Ethiopia when those decisions are made Judge Ruth did not take into account the applicant's evidence as to maintenance but in any event the circumstances in Ethiopia demonstrate that they are housed and have facilities and there was adequate living accommodation. There was nothing in the cases suggested that their living arrangements were in a precarious state and that proportionality was in favour of a refusal of the appeals.

43. Mr Scott provided his schedule. He submitted that the Tribunal should take into account all elements of income set out in that schedule given the figure of £613.76. He submitted whilst the letter from L & Co said it was temporary, that was written retrospectively and the Sponsor in evidence said when she started it she was not told it was going to be temporary and received the income. As to her employment with C she stopped working for them after December 2013 and she had been working for them for at least one year since 2011 and therefore that employment could not be classed as temporary. As to the tax credits, he had submitted the Sponsor did explain the circumstances in which he had applied for tax credits filling in a form every April and the tax credits in January 2013 were calculated on the basis of employment for the previous year of 2011/2012 therefore looking at page 5 the payslips of G M 4th November 2011 fortnightly twenty hours (ten hours per week) and page 16 the letter from C 5th November to 18th November two weeks at twenty hours. Therefore the tax credits were correctly calculated based on the income of the previous year. Her explanation should be accepted that she had spoken to the HMRC as to the new employment and told them to notify them in April. He further submitted that at page 53 there was also a reference to a childcare element. He submitted that the increase in tax credits could be accounted for the childcare element. Therefore taking into account all of those elements she was entitled to that income.
44. As to accommodation the landlord had provided a letter. The evidence of the Sponsor was that he had made a mistake as to the address and that she has exclusive occupation. The payment of rent should be £200 and that should be deducted from the figures. Even if the figure of £260 was deducted (which took account of the £200 for the four bedroomed property and £60 for the two bed roomed property) her income is still above the figure of £348.36. Thus she succeeds.
45. In the alternative, Mr Scott relied upon Article 8 that the First-tier Tribunal did make findings as to their circumstances which were not challenged by the Home Office that they were not attending school and that they were dependent on the Sponsor and that she is their only living relative and they are living in Ethiopia temporarily and have no status. The children are still under 18 and therefore the best interests of the children are for them to be looked after by the Sponsor. The Sponsor has shown that she has adequate maintenance and accommodation and therefore in respect of

family life between the children and the Sponsor should be taken into account and therefore proportionality of the decisions require them to enter the United Kingdom.

46. I reserved my decision.

Conclusions:

47. Each party has provided a schedule relevant to the issue of maintenance. The Appellants' schedule is set out at document 1. It gives employment with GM at £92.85, employment with C at £55.71, tax credits paid weekly at £286.60, child benefit paid at £31.10 and employment with L & Co at £147.52, giving a total of £613.78. It is accepted that the figure has to be adjusted to take account of the applicable housing costs. As to this issue, it is now clear from the evidence before the Upper Tribunal that the Sponsor states she is paying rent for two properties; the property she lives in (the two bedroomed property which she has always lived in and continues to do so with her two children at £60 per week) but also is paying for a four bedroomed property at a rate of £200 per week. Thus her housing costs are £260. I make the following observations. Firstly, when the case was before the First-tier Tribunal, the judge recorded the evidence before her that the Sponsor was living in a four bedroomed property paying £200 per week rent and living there with the two children (see paragraph 18 of the First-tier Tribunal decision) and refers to the landlord's letter and the tenancy agreement (paragraph 19; FTT). At [25] the judge refers to her renting a four bedroomed property but that she referred to a different property she would rent in the event the children came to the UK and the judge records that she did not take that into account because it was "postdecision evidence". The judge was therefore not referring to the four bedroomed property at No. 59 but another property and seemed to be wholly unaware that the Sponsor was in fact living in the two bedroomed property with the children. However looking at a statement that was before the First-tier Tribunal there is reference in that statement to the Sponsor giving a current address at No. 10 and also renting the property at 59. I also observe that whilst there is a letter from the landlord, there is no evidence of rent being paid by way of direct debit and the only evidence relates to cash withdrawals from the account in various sums which do not equate with the rent paid but are in various cash sums. No details have been provided for the council tax which is a housing cost that needs to be put in the balance of figures. Despite directions concerning evidence on these issues such evidence has still not been produced. It is not known whether the Sponsor pays council tax on one property or both properties or for none of them. The landlord makes no reference to this nor does the Sponsor. It is therefore not possible to give an accurate figure for the housing costs as the parties have been unable to provide any figures for any council tax payment (if any is such payable). On the basis that she is paying rent at £200 for the four bedroomed property, this being the property that she has identified for herself and the Appellants to occupy, I do not consider that it is right to increase the housing costs to a figure of £260, to include the present property that she resides in but that the more accurate figure is £200, although as I have said the actual figure may be more because no council tax documents have been provided. Taking the figure of £200, and reducing the figure in the Appellant's schedule that provides for a

figure of £413.78 as the total weekly income of all sources including tax credits, employment and child benefit.

48. For the reasons given in his submissions at document 9 and his oral submissions, Mr Wilding submits that the figures in that schedule are not reliable for two reasons. Firstly, the employment at L & Co should be disregarded for the reasons he has given and secondly, that the information given by the Sponsor to the HMRC as to her hours of work and employers was incorrect and that consequently the figures calculated for tax credits are unreliable as they require adjustment for a number of matters. No figures could be given to quantify any adjustments to correct the working tax credit and therefore the Appellants have not proved their case and the burden is upon them to demonstrate that they meet the requirements.
49. Consequently the only figure that can be agreed between the advocates is the figure for the threshold level for the applicable benefits set out at page 8 of the Respondent's bundle showing a total threshold of £348.36 (comprising of income support, payments to the children and family premium).
50. I therefore considered with care the evidence I have heard from the Sponsor and considered it in the light of the documents that have been provided. There is of course no issue concerning the burden and standard of proof; it lies on the Appellants to demonstrate the factual circumstances on the balance of probabilities. I observe that the figure relating to the issue of maintenance and that of income was one that was plainly at issue at the time of the refusal and that proper schedules were not produced before the First-tier Tribunal and despite directions, there is still evidence that has not been either clarified further or in the case of the council tax benefits, is still absent.
51. I deal with the issue of the income of the Sponsor. The evidence before the First-tier Tribunal was at the date of the decision namely 23rd January 2013 she had two sources of employment; working with GM and C & Co. Those two sources of employment were disclosed in the application form of the Appellants. No reference was made to any other employment with L & Co (see [18] FTT determination). Her evidence is that she has been working for GM since 2011, twenty hours per week and from September 2011 for C for twenty hours per fortnight therefore ten hours per week. She sought to clarify this further in her evidence stating that in January 2013 she had worked with GM for ten hours per week then it was increased by five hours and in October 2012 it had been increased by five hours and she did ten hours per week with employer C. Therefore on that evidence she had worked 25 hours between October 2012 and March 2013 for both employers C and GM and therefore on her own account was working in excess of twenty hours (although the Respondent says there was evidence referring to 30 hours for part of this time).
52. The documentary evidence before me is not consistent with the Sponsor's account as to her hours of work. The documents consistently makes reference to twenty hours per week as a total figure (see pages 46-60 the documents relating to tax credits). At page 46 for the year 6th April 2011 to 5th April 2012 it is said twenty hours per week,

at page 52 referring to 6th April 2012 to 5th April 2013 it referred to twenty hours per week and at page 56 for the period 6th April 2013 to 5th April 2014 it says twenty hours a week. It is not possible to make a full comparison with any payslips as there were no complete sets of payslips available. However there are some payslips from her employment with GM showing hours worked of 30 hours (see pages 13 and 15 of A's bundle). One of those payslips is dated 11th January 2013 and therefore is not consistent with the Sponsor's evidence that she worked only an extra five hours. Thus on her own evidence between October 2012 and March 2013 she worked for twenty five hours with C and GM and on top of this worked 25 hours between October 2012 and March 2013 with employment with L & Co therefore giving a total of 50 hours which would be 30 hours in excess of that referred to in the documentation referred to above. None of the documents at paragraphs 42 to 60 make any reference to hours worked in excess of twenty hours.

53. I have considered the explanation given by the Sponsor which is, in essence, that she had disclosed hours in excess of twenty hours in a telephone conversation. She stated that she had filled the form in April and later informed them that she had other jobs and they told her to declare it the following April but by April 2013 she had stopped working for L & Co and C. She accepted that there was no written evidence to support this and she did not tell them formally in writing and that it was undertaken in a telephone conversation.
54. As Mr Wilding points out the documents themselves make reference to the applicant's personal circumstances at page 56 for example, at part 1 under "personal circumstances" it is plain that tax credits are based on the applicant's personal circumstances. It is stated that "please tell us immediately if anything is wrong, missing or incomplete because if you receive more money than you are entitled to, you will have to pay the money back". Under the paragraph entitled "claimant" it makes it plain that tax credits take account of the hours worked and that there are four bands of hours namely less than sixteen hours, between sixteen to 23 and between 24 to 29 and 30 hours a week or more. The document sets out that the claimant should "tell us if your hours changed so you move from one of the above groups into another". This is because deductions and alterations would be likely to be made to payments received as it is calculated on the hours of work which is why the banding of hours is given in the documentation. The Sponsor has provided no evidence of the telephone conversation. Even if she did tell them orally, there is no evidence reflecting this in the documents provided. The documents for the following year 2013-2014 still refer to the hours worked as twenty hours and therefore the submission made by Mr Scott that the statement made by HMRC at page 1 of the Respondent's bundle may refer to the following year, is not supported by the document that relates to the next tax year. The Sponsor has had disclosure of the written statement from HMRC setting out only employment known by GM prior to the hearing but does not sought to clarify any of the figures or the statement which sets out the only one source of employment provided for at a sum of £3,873 with no tax deducted.

55. I am not in the position to make any finding that there was non-disclosure on the part of the Sponsor to the HMRC but on the evidence before me I cannot be satisfied that the figures provided for the tax credits to be reliable figures as to income as they plainly are calculated on the basis of less hours worked and as Mr Wilding submits, there is at least a period of three months between October 2012 and March 2013 where she worked in excess of twenty hours and that, even if she did inform them as she stated, it has not been demonstrated that this has been taken account of in the figures paid or nor has it been demonstrated that it has been taken into account in any other financial year or the applicable sum which would be required to be paid back. Mr Wilding properly stated that he could not put a figure that should be properly deducted but it would make a difference. He refers the Tribunal to the documents at pages 51 to 54 of the bundle. There are no breakdown of the categories set out at page 46 and it is plain that that the banding of 30 hours or more applied as she worked for a period of three months in excess of twenty hours and therefore fell within that band. Therefore the figures are unreliable as they stand and it has not been demonstrated on the Appellants' behalf that they are reliable figures which should be taken into account. The burden is upon the Appellants to make their case and to properly put before the Tribunal evidence that they rely upon. I therefore find that the figure given for tax credits is not reliable and it has not been properly established on the balance of probabilities that she was entitled to those sums set out in the schedule and that the schedule itself properly makes an assessment of her overall financial circumstances. It is plain that any payments that were made in excess of the hours worked would require an adjustment whether now or at some point in the future and no figure has been provided as to what adjustment that would be. Whilst Mr Scott submitted that the tax credit documents referred to a childcare element and that the increase in tax credits could be accounted for the childcare element, the document show that the overall figures have already been broken down into tax credits and child tax credits.
56. However even if I were to accept that the tax credits as set out on the schedule should be taken into account in full and on the basis of the figures as given, I am still required to consider the employment that she had at the date of decision and what is encompassed in "can and will be" the wording of paragraph 297(1)(f)(iv). Looking at the sources of income, I am satisfied that at the date of decision the Sponsor had been working for two employers namely GM and C. She had been in that employment since 2011 and it can be seen as longstanding and employment that reflected her earning capacity. The employment with L & Co was not disclosed by the Sponsor until a very late stage in the proceedings and after the first hearing before the Upper Tribunal in June 2014. The evidence before the First-tier Tribunal referred only to two sources of employment with C and GM and the original application also only referred to those two employers. There is no reference to any source of employment with L & Co in the HMRC document (see statement at page 1). The nature of that employment is set out in the letter dated 4th September 2014 that it was on a temporary basis for three months only. The Sponsor's oral evidence was that she did not know how long she would be working for them but it is plain from the letter that it was only ever temporary employment and shown by not only the terms of the

contract but by its duration. The Sponsor has not referred in her evidence to have taken any employment like that either before in any preceding period or since. The fact that it was not disclosed in the application as a source of employment or before the First-tier Tribunal supports my overall conclusion from the evidence that this was a temporary position and not one that could be properly seen as reflecting either her earning capacity in the past or in the future and therefore it should not properly be taken into account to satisfy the maintenance requirements.

57. The figures given in any event are incorrect. There are three payslips showing sums of £639.28 giving a total of the three months work of £1,917.84 the payslips do not refer to any tax or national insurance contributions being paid. The schedule refers to £639.28 multiplied by 12 to give a yearly figure of £7,671.36 then divided by 52 to give a weekly figure of £147.52. That figure presupposes that she worked for one year at that level which she plainly did not and on the evidence that I have heard, does not demonstrate that she has worked in any employment of that nature for any further length of time nor that she had any potential earning capacity of a similar nature shown by her employment history either before or since that date.
58. Therefore taking into account the applicable income, I am satisfied that it should be considered as follows. The employment with GM at £92.85 and the employment with C at £55.71. Whilst I have not accepted this figure for the working tax credit of £286.60, even if that full amount were added in along with the child benefit at £31.10 that would give a figure of £466.26. The housing cost of £200 per week must be taken into account and that would give a figure of £266.26. The threshold requirement that both parties have agreed is £348.26 and therefore it shows that the Appellants cannot meet the threshold requirement and fall far short of it.
59. Even if an additional sum of money was attributable to the employment with L & Co the figure given in the schedule set out in the preceding paragraph does not reflect the income earned or her own earning capacity. Even if by a rough estimate £1,917.84 was divided to give a weekly figure it would give a figure of £36.88 giving a total of £303.14 but that still falls far below the threshold that is required. Therefore the Appellants have not demonstrated that they can meet the maintenance requirements.
60. I have set out earlier the evidence relating to the issue of accommodation and the inconsistent evidence given as to where the Sponsor has actually been living whether in the two bedroomed property and not the four bedroomed property that she states she is paying rental for. It has not been properly explained why she is paying for two sets of accommodation at the total rate of £260 per week. Whilst I can understand that she is required to demonstrate adequacy and availability of accommodation for them all, it does not explain why she did not simply move to the four bedroomed property and therefore reduce her overall expenditure by £60 per week. Nonetheless accepting the evidence before me that the property is available and adequate for the Appellants and the Sponsor to occupy, the Appellants cannot succeed under the Immigration Rules as they cannot demonstrate that they meet the

requirements for maintenance for the reasons set out above. Therefore the appeals are dismissed under the Immigration Rules.

Article 8 of the ECHR:

61. I now turn to the issue relating to Article 8. The primary facts as found by Judge Ruth in relation to the children's circumstances in Ethiopia have not been challenged by the Entry Clearance Officer. Thus they are my starting point. They can be summarised as follows:
- (a) The judge accepted her evidence that she had left her siblings and mother in Somalia when she had left that country to seek asylum in 2005.
 - (b) Following her departure, the Appellants and their mother (the father not having been involved with the family for many years and his whereabouts being unknown) were separated during fighting in Somalia and the Appellants were taken by neighbours to Ethiopia with a large number of the Somalis fleeing the violence at the time.
 - (c) They had not had any contact with their mother since they were separated during the fighting in Somalia and her whereabouts are unknown.
 - (d) The judge further accepted that the Sponsor was not aware of the whereabouts of either of the Appellants until a person she had known when she herself was a refugee in Ethiopia, contacted her to say that she believed her siblings were there with other Somalis.
 - (e) In 2011 around three or four months after the Appellants fled Somalia to Ethiopia, the Sponsor made contact with them over the telephone and arranged for them to live in a room in Ethiopia through the same friend.
 - (f) That the Sponsor sent money regularly to her friend for the Appellants and from that money their rent, daily living costs and a small amount to pay for private tuition was covered as they did not attend school. The amount varied to approximately US\$200 or US\$300 per month.
62. As to the circumstances in which they were living the judge found that it consisted of a room with mattresses on the floor and bags for their clothing. It was a room in a house that had five other bedrooms each of which contained a family and that the family shared one toilet and bathroom. She described that:-
- "Cooking was done outside the house and water is supplied from a tap outside the house. The house does have electricity and the children are cared for by the Sponsor's friend, Safi Omar, who cooks for them and generally looked after them. The Appellants have no family members in Ethiopia as far as they know."
63. The judge at [19] considered the money transfer receipts at page 61 of the bundle and accepted that whilst the Appellants had not provided evidence that they are not in contact with their mother, the judge did not find that there was any evidence they

could supply to establish this and the judge recorded that there was no reason to doubt the money transfer receipts even though they were of poor quality.

64. There is no dispute that I should consider the questions addressed by Lord Bingham in **(Razgar) v SSHD [2004] UKHL 27** at paragraph 17. Those questions are as follows:-
- (i) Will the proposed removal be an interference by a public authority with the exercise of the Appellant's right to respect for his private or (as the case may be) family life?
 - (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 - (iii) If so, is its interference in accordance with the law?
 - (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others?
 - (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?
65. In respect of the first question, that the refusal in this case to allow the Appellants to join their sister in the United Kingdom is an interference with their Article 8 rights to respect for family life has also not been challenged by Mr Wilding.
66. Considering the second issue of **Razgar** "will the interference have consequences of such gravity as potentially to engage the operation of Article 8", it has not been in dispute before me that the refusal decision amounts to an interference with that life and that it crosses the minimum level of severity to engage Article 8(1).
67. As noted, once Article 8 is engaged, the focus moves to the process of justification to Article 8(2). It is common ground between the parties that the decision made in this case is in accordance with the law and it has not been suggested that the Respondent's decision does not further a legitimate aim, namely proper and effective immigration control. The issue therefore concerns the proportionality of that decision.
68. In determining the issue of proportionality, both Appellants are minors. Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children ... undertaken by ... administrative authorities". And so by Article 3 "the best interests of the child should be a primary consideration". Whilst it is settled law that the statutory duty under Section 55 of the UK Borders Act 2009 only applies to children within the UK, the Secretary of State IDI invites Entry Clearance Officers to consider the statutory guidance issued under

Section 55 (see **Mundeba (Section 55 and paragraph 297(i)(f)) [2013] UKUT 00088 (IAC)**). In considering that issue, consideration needs to be given to the circumstances of the children in the light of their age, social background and development history and will involve enquiry as to whether there is evidence of neglect or abuse, there are unmet needs that should be catered for and whether there are stable arrangements for the children's physical care (see paragraph 37 of **Mundeba** (as cited)).

69. I have set out in the preceding paragraphs the findings of fact made concerning the circumstances of the Appellants. I am not satisfied that there has been any cogent evidence to show that they are at risk of neglect or abuse, that there are any unmet needs that should be catered for and that at the date of decision there appear to be stable arrangements for the children's physical care. Whilst they are not living with a relative, the evidence is that they are living with a friend of the applicant and someone she felt able and confident enough to entrust with their care and upbringing. Whilst the findings of the judge made reference to their living accommodation as set out above, which is not ideal, they could properly be described as those that generally prevail in Ethiopia and it would not be right to compare them with standards in the United Kingdom. I am satisfied that on an analysis of the evidence, including the findings of the First-tier Tribunal, that their present needs can be met in Ethiopia and could continue to be met by the Sponsor who the judge found had provided financial assistance including an amount for private school fees and there is no evidence before me that that could not continue if they were not to enter the United Kingdom. They will be able to maintain their relationship with their sister by way of letters and possibly with visits to the United Kingdom. I take in to account that the sponsor cannot return to Somalia but that does not preclude her from living in Ethiopia. There has been no evidence by way of country materials or evidence to demonstrate that the Appellants are unable to live in Ethiopia even without leave and the factual matrix demonstrates that they have continued to live there for a significant length of time.
70. Article 8 does not entail a general obligation for a State to respect an Appellant's choice of country of their residence and to authorise family reunion in its territory. In the light of the findings set out above, the Appellants cannot meet the Immigration Rules.
71. Thus there is no evidence before the Tribunal that the Sponsor will be able to meet the maintenance requirements and the refusal of entry clearance serves a legitimate aim of economic wellbeing, if not also the maintenance of effective immigration control, as an aspect of the prevention of crime and more particularly here disorder. The jurisprudence of Strasbourg makes it clear that in conducting the Article 8 balancing exercise the State is entitled to attach adverse weight to the inability of an applicant to meet the socio-economic requirements (see **Konstadinov v the Netherlands App 161351/03**).
72. When entry sought is sought for the purpose of family reunion, the Immigration Rules laid before Parliament represents an attempt by the government to strike a fair

balance between the rights to respect for family life and immigration control which includes economic circumstances. The legitimate aims of the “maintenance and the integrity of the UK immigration control” gives a coherent and consistently applied system and in particular that the Appellant would be dependent on public funds and will be entitled to health and other benefits once in the United Kingdom, thus the economic wellbeing of the country is also a relevant issue when considering proportionality and the fact that the Appellant cannot meet the Rules. It is therefore within the states margin of appreciation to set those Rules and generally those Rules are proportionate. In this case the Rules set out the circumstances that must be met for entry clearance to be granted; not only that there exclusion is undesirable but also that they can be accommodated and maintained in the UK by the sponsor.

73. Consequently I am required to have regard to the requirement of predictability and certainty in the application of the Rules. In considering the issue of proportionality the decision of **Huang [2007] UKHL 11**, referred to the general administrative desirability of applying known Rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another and that “the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory”. The legitimate aim under Article 8 in this case is the economic wellbeing of the country expressed as the maintenance of effective immigration control bearing in mind the principle of applying a predictable and consistent application of the Immigration Rules. As identified in the decision of **Shahzad [2014] UKUT 85**, it is necessary to consider not only an assessment at the individual “micro” level but also the “macro level” and that the general aspects of economic wellbeing include the need to limit numbers who have access to public services and the benefits of the NHS and who are able to compete for housing and for employment with those already in the UK (see **FK and OK (Botswana) [2013] EWCA Civ 238**). The public interest takes account of any potential economic burden upon the State by those seeking entry as stated at paragraph 11 of FK and OK (as cited). In the decision of **AAO v ECO [2001] EWCA Civ 840** at [49] Rix LJ stated :

“As Strasbourg and domestic jurisprudence has consistently emphasised (see above), states are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should be maintained without recourse to public funds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens. It is an unfortunate reality of life that states, especially one like the United Kingdom which is generally accessible and welcoming to refugees and immigrants, cannot undertake to allow all members of a family to join together here, even those members who can show emotional and financial dependency, without creating unsupportable burdens.”

74. In this respect, I accept that the factual circumstances were different . However, it remains the case that there is significant weight attached to the importance of the issue of whether an individual may have recourse to public funds as an aspect of the public interest and I take into account that can give way when the facts are sufficiently compelling. Notwithstanding the facts as reached by the First-tier Tribunal judge and taking into account my assessment also of the circumstances, I

consider that the weight to be attached to the legitimate aim and the protection of the economic of the country is a significant factor and I pay appropriate regard and weight to it when carrying out the balancing exercise as I must. Such is made clear now in the amendments made to the 2002 Act by the Immigration Act 2014 set out in 117A - D which applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts – (a) breaches a person’s right to respect for private and family life under Article 8, and (b) as a result would be unlawful under section 6 of the Human Rights Act 1998. The public interest considerations applicable in all cases set out that the maintenance of effective immigration controls is in the public interest and that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons – (a) are not a burden on taxpayers, and (b) are better able to integrate into society. They are, of course, only matters to be considered and put in the balance.

75. Drawing together all of those matters and having considered all of those factors identified above both in favour of the Appellants and those in favour of the Respondent, and having carried out an even-handed application of the proportionality test, on the specific facts of these appeals, I find that the balance of proportionality is in favour of the Respondent and consequently I am satisfied that the decision does strike a fair balance between the Appellants’ interests and those of the Respondent. Consequently, I am not satisfied that the decision would amount to a sufficient interference to outweigh the legitimate aims of maintaining a proper system of immigration control and therefore the decisions are not disproportionate. Such a decision does not preclude the sponsor from supporting a further application if either her circumstances or those of the Appellants change in the future.

Decision:

The First-tier Tribunal made an error of law. The decision is set aside. The appeal is re-made as follows; the appeals are dismissed under the Immigration Rules and on Article 8 grounds.

Direction regarding anonymity - rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

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 26/11/2014

Upper Tribunal Judge Reeds