



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05186/2019

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 25<sup>th</sup> August 2020

Decision & Reasons Promulgated  
On 2<sup>nd</sup> September 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS NAZIA BEGUM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms E Rutherford, instructed by J R Jones Solicitors  
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a national of Pakistan. She appealed the respondent's decision dated 17<sup>th</sup> February 2019 to refuse her application for entry clearance as a partner. The appeal to the First-tier Tribunal ("FtT") was dismissed by FtT Judge Parkes for reasons set out in a decision promulgated on 4<sup>th</sup> November 2019.

2. The hearing before me on 25<sup>th</sup> August 2020 took the form of a remote hearing using skype for business. The applicant was represented at the hearing by counsel. Neither party objected, and I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

### **Background**

3. The appellant is married Mr Mohammed Shafiq Dad, a British citizen. There is a child of the marriage, [A], born on 27<sup>th</sup> January 2015, who is also a British citizen, but who has lived in Pakistan with his mother, the appellant, since birth. On 24<sup>th</sup> January 2019 the appellant applied for entry clearance as a partner and it was the refusal of that application that was the subject of the appeal before the First-tier Tribunal.
4. The respondent was satisfied that the application did not fall for refusal on grounds of suitability. The respondent also accepted that the applicant meets the eligibility relationship requirement set out in paragraphs E-ECP.2.1 to 2.10 of Appendix FM of the immigration rules and that she meets the eligibility English language requirement. The respondent was not however satisfied that the appellant has provided evidence which establishes that there will be adequate maintenance for the appellant, her partner and their son without recourse to public funds. The respondent said that in order to meet the requirement of 'adequate maintenance', the appellant would have to demonstrate that the family would receive an income equivalent to that which would be received by a family of equivalent size, in the form of income support.

The respondent claimed that the appellant would therefore need to demonstrate a weekly income of at least £199.20, whereas the income received by the appellant's partner in the form of carers allowance, universal credit and from his father, amounts to a weekly income of £166.00.

#### The decision of FtT Judge Parkes

5. At the hearing of the appeal, the appellant claimed that the correct basis for the calculation was to look at what the appellant and her partner would be entitled to by way of income support, as a couple. Their son, who is a British citizen, would be entitled to benefits upon his arrival in the UK as a matter of right. If the child were living in the UK, the appellant's partner would be entitled to receive both child benefit and child tax credit. The entry clearance officer had calculated that the appellant and her partner as a couple, would receive weekly income support of £114.85, whereas the appellant's partner has a weekly income of £164.05 and thus they could adequately maintain themselves in the UK without recourse to public funds.
6. Judge Parkes rejected the claim made by the appellant that in calculating whether the appellant, her partner and their child are able to maintain themselves adequately in the UK without recourse to public funds, the decision maker incorrectly included the child, in the 'income support' calculation. At paragraphs [12] to [14] of his decision, Judge Parkes said:

"12. From the skeleton argument at paragraph 6 it is submitted that the correct basis of the calculation is to look at what the appellant and sponsor would be entitled to as a couple. There is a fallacy in the argument in that the uplift that a family would gain in benefits would only be payable if the appellant is in the (*sic*) lawfully. In other words it becomes circular and is to the effect that the appellant should be permitted to enter thereby increasing the sponsor's entitlement to benefits. I am not persuaded that that is an argument that applies.

13. The appellant is not in the same position as their child. Also as child benefit would be payable if the couple's child was in the UK and is not a listed benefit it cannot be taken into account. As their child is a dependent

the cost of his maintenance is a matter that the evidence has to show can be met from the sponsor's allowable benefits.

14. Having regard to the wording of paragraph E-ECP.3.1 and 3.3 I find that the approach of the ECO to the finances was correct. It follows that as matters stand the appellant cannot show that the sponsor earns sufficient to support her and their dependent child adequately without additional records to public funds."

7. Having found that the requirements of the immigration rules cannot be met, Judge Parkes acknowledged that ordinarily it would be in the best interests of the child to live with both parents, but that often does not happen for many reasons. At paragraphs [16] and [17], Judge Parkes concluded:

"16. The sponsor's circumstances are clearly demanding with his caring responsibilities and lack of support and from his evidence these are issues that are causing him distress exacerbated by the absence of his wife and child in Pakistan. However the fact remains that finances are inadequate to meet what Parliament has decreed is the minimum level required and it cannot be in the best interests of his child to come and live in the UK in circumstances that would be below the minimum acceptable. That would be contrary to his best interests. There is no evidence that the circumstances of the appellant and child in India (*sic*) are inadequate."

17. Although the sponsor's circumstances are clearly difficult and demand considerable sympathy as the circumstances that the family would be living in would not meet the minimum level required the appellant cannot meet the immigration rules. It also follows that although the sponsor's circumstances are difficult they would not permit the entry of the appellant and their child as that would be in breach of the same minimum requirements and that would be contrary to public policy."

#### The appeal before me

8. The appellant claims Judge Parkes failed to engage with the claim made by the appellant that the status of the appellant's son as a British citizen is relevant. It is said the fact that the sponsor would be entitled to receive child benefit and child tax credits upon his son's arrival in the UK, is relevant to the calculation of income that would be available to the family. The additional income that would be available by way of child benefit and child tax credits arises from the child's status as a British citizen rather than recourse to public funds. The appellant claims that where the dependent child is a British citizen, the

appropriate course is to consider what the appellant and her partner would receive by way of income support as a couple, and to disregard from that calculation, the additional elements of the income support that make provision for dependents and the family premium. On that analysis, the appellant claims Judge Parkes erred in his conclusion that the eligibility financial requirement is not met by the appellant.

9. Alternatively, the appellant claims Judge Parkes failed to have proper regard to the best interests of the child and has given inadequate reasons for concluding that it is in the best interests of the child to remain in Pakistan separated from his father. The appellant claims Judge Parkes failed to have adequate regard to the child's status as a British citizen who is being prevented from enjoying the benefits associated with that status. The appellant claims the judge failed to adequately address the Article 8 claim outside the immigration rules, and appears to conclude that the decision to refuse entry clearance is proportionate simply on the basis that the eligibility financial requirement is not met.
10. Permission to appeal to the Upper Tribunal was granted by FtT Judge O'Keeffe on 16<sup>th</sup> April 2020. The matter comes before me to determine whether the decision of Judge Parkes is vitiated by a material error of law, and if so, to remake the decision.
11. Before me, Ms Rutherford submits the dependent child is a British citizen who is living in Pakistan with his mother. As a British citizen, the child is entitled to live in the UK and if he lived in the UK with his father, there would be no issue as to whether the eligibility financial requirement is met. The sponsor would be entitled to child benefit and child tax credit and that income would be taken into account in the calculation of the sponsor's income. The combined income that the sponsor would receive, would be greater than that received by a similar family in the form of income support. Ms Rutherford also submits Judge Parkes has failed to properly consider the best interests of the child as a primary consideration and having found that the financial requirements in paragraph E-

ECP.3.1 are not met, failed to consider whether there are exceptional circumstances which could render refusal of entry clearance disproportionate in all the circumstances, and thus in breach of Article 8.

12. In reply, Mrs Aboni submits Judge Parkes directed himself appropriately and it was open to him to dismiss the appeal for the reasons set out. Mrs Aboni submits Judge Parkes properly considered whether the sponsor is able to maintain and accommodate himself, the appellant, and their dependent child adequately in the UK without recourse to public funds. She refers to the decision of the Tribunal in KA (Adequacy of maintenance) Pakistan [2006] UKAIT 00065 in which income support was held to be an appropriate yardstick to assess whether the income available to the sponsor and his or her family would be adequate. Mrs Aboni submits that in calculating what a family would receive by way of income support, it would be artificial to discount the additional income support to which the family would be entitled because there is a dependent child and the entitlement to a 'family premium'. The calculation of the income support that the family would receive as set out in the respondent's decision is the basic income that a family of three (*i.e. two adults and a child*) would require, to adequately support themselves.
13. Mrs Aboni submits Judge Parkes did, albeit briefly, consider the best interests of the child, and properly acknowledged that families cannot always live together. Judge Parkes effectively found that there would be insufficient income to support the family adequately without recourse to public funds, and, it cannot be in the best interests of the child to live with his parents together in the UK, without sufficient income to support the family. Mrs Aboni accepts that there is no holistic consideration of the Article 8 claim outside the immigration rules, and she accepts Judge Parkes dismissed the appeal because he was not satisfied that the eligibility financial requirement is met.

## Discussion

14. The sponsor is in receipt of carers allowance and the appellant must therefore provide evidence that her partner is able to maintain and accommodate himself, the appellant and any dependents adequately in the UK, without recourse to public funds. Paragraph 6 of the Immigration Rules provides that 'adequate' and 'adequately';

"... in relation to a maintenance and accommodation requirement shall mean that, after income tax, national insurance contributions and housing costs have been deducted, there must be available to the family the level of income that would be available to them if the family was in receipt of income support."

15. I reject the claim made by the appellant that the correct approach is to look at what a couple would receive by way of income support by removing from the calculation, the dependent child, who is a British citizen. A minimum income threshold has been introduced in respect of sponsorship under the family migration route set out in Appendix FM of the immigration rules. A minimum income threshold of £18,600 currently applies, with additional amounts for any dependent children, including a child that is not a British Citizen or settled in the UK. There are some categories within Appendix FM where the minimum income threshold does not apply, and instead, the applicant needs to demonstrate that they are able to maintain themselves and any dependents 'adequately' without recourse to public funds. Entry clearance as a partner whose partner is in receipt of a 'specified benefit' is one such category.

16. In Ahmed (benefits: proof of receipt; evidence) [2013] UKUT 84(IAC), the Upper Tribunal held *inter alia*, that it will in general assist the First-tier Tribunal or, on appeal, the Upper Tribunal if, as part of the submission, a calculation is supplied which reflects the comparison between the applicant's and sponsor's combined projected income if the applicant for entry clearance were in the United Kingdom on the one hand and, on the other, the amount required to provide the maintenance at a level that can properly be called adequate. The Tribunal held that the income received and the projection for the figures which

the applicant and sponsor have to be able to find, should be expressed on a consistent and arithmetically accurate basis.

17. On the authorities, the proper approach is for the Judge to consider whether the income available for maintenance of the family unit is equivalent to the amount that would be available to a similar family unit on income support, once they have dealt with the costs of their accommodation. To entirely disregard the presence of a dependent child, whether that child is a British citizen or not, would be to disregard a member of the family unit and give an entirely artificial figure regarding the yardstick by which the income required for the family to support itself without recourse to public funds, is measured. If a family comprises of two adults and a child, the income they require is not in any way connected to their immigration status. In the real-world context, the income the family needs to support itself is quite simply what a family of two adults and a child require, to maintain themselves. To calculate the income required in the way claimed by the appellant would be to calculate the income needed by the family to establish they can maintain themselves adequately in the UK without recourse to public funds entirely artificially, and without having proper regard to all those that form part of the family unit, and the income that the family unit would need to support itself. For example, if there were three or four dependent children all of whom are British citizens, it could not rationally be said that the presence of those three or four children should be disregarded when calculating the income that the family would require to support itself, and the assessment should be undertaken by reference to the income required applicant and sponsor themselves.
18. However, there must be a fact specific assessment of the income and in my judgement, Judge Parkes erred in his conclusion that the child benefit and child tax credit that the sponsor would be entitled to as a result of the presence of the child in the UK, could not be taken into account.



19. The definition of 'adequate' in this context as set out in paragraph 6 of the Immigration Rules provides that there must be available to the family the level of income that would be available to them if the family were in receipt of income support. The only way of assessing the level of income that would be available to them if the family "was in receipt of income support", is to consider the actual financial position on arrival.
20. Although neither party drew my attention to paragraphs 6A to 6C of the immigration rules I have considered how they apply to a case such as this. According to paragraph 6A, for the purposes of the rules the appellant is not to be regarded as having (or potentially having) recourse to public funds merely because she is (or will be) reliant in whole or in part on public funds provided to her sponsor. In Ahmed (benefits: proof of receipt; evidence), at [13] and [14], the Upper Tribunal considered paragraphs 6A and 6B of the immigration rules and said:

"13. ... As we read para 6A, it is saying that all that counts as recourse to public funds is increased benefit as a result of P's presence and even that does not count if it arises as the result of the matters referred to in para 6B (which includes joint applications for tax credit of the type with which we are concerned, the relevant regulations being made under section 42 of the Tax Credits Act 2002 ("TCA"))....

14. Para 6B then exempts claims by P (as opposed to P's sponsor) to the specified benefits where there is joint entitlement... In principle, where para 6B applies, it appears to allow not only the joint claim at the same amount but, as regards P, a joint claim resulting in a higher amount than would previously have been paid to the sponsor alone..."

21. Paragraph 6C is concerned with applications from outside the UK. The applicant will be regarded as having recourse to public funds where he/she relies upon the future entitlement to any public funds that would be payable to the applicant or their sponsor as a result of the applicant's presence in the United Kingdom, including those benefits to which the applicant or sponsor would be entitled as a result of the applicant's presence in the UK under the regulations referred to in paragraph 6B.

22. Here, the appellant did not rely upon any future entitlement to public funds that would have been payable to her or her sponsor as a result of the appellant's presence in the United Kingdom. What the appellant relied upon was the additional income that they would receive because of the presence of their son, a British citizen, in the UK. In the skeleton argument that was relied upon by the appellant at the hearing of the appeal before the FtT, it was said on behalf of the appellant that:

"5. .... If the couple's son was in the UK Mr Dad would be entitled to receive both child benefit and child tax credit. He would receive child benefit of £20.70 per week and child tax credit including the family element of £62.94 per week. He would also be entitled to the child element of income support..."

23. The sponsor's additional entitlement to the child benefit, child tax credit and the child element of income support set out in the appellant's skeleton argument, would not arise from the appellant's presence in the UK, but the presence of the child, who is a British citizen and is not in any way subject to immigration control. The appellant could not therefore be regarded as having recourse to public funds for the purposes of paragraph 6C in respect of that income.
24. In my judgement, the failure to have regard to the actual financial position that the family would find itself in upon the appellant's arrival in the UK is sufficient to demonstrate a material error of law in the decision of FtT Judge Parkes such that the decision must be set aside. Although I do not need to address the remaining ground concerning the assessment of the Article 8 claim outside of the immigration rules, I simply record that it is in my judgement clear that Judge Parkes failed to have any proper regard to the best interests of the child and to properly address the Article 8 claim.
25. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact

that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the rules. That was plainly not the approach adopted by Judge Parkes at paragraphs [15] to [17] of his decision.

26. In the circumstances I am satisfied the decision of Judge Parkes is vitiated by a material error of law and the decision is set aside.

### Re-making

27. It was common ground between the parties that if the requirement that the sponsor is able to maintain and accommodate himself, the appellant and their dependent child adequately in the UK without recourse to public funds is met, the appeal would succeed on Article 8 grounds.
28. The respondent calculated the sponsor's current income to be £166 per week. On the figures set out in the respondent's decision letter, the sponsor's income is in fact £164.05 per week. The appellant claimed before the FtT that in addition to that income, once the appellant's child is in the UK, the sponsor would be entitled to receive child benefit of £20.70 per week, and child tax credit including the family element of £62.94 per week. It appears that those figures were not challenged before the FtT and Mrs Aboni did not challenge those figures before me. Once that additional income is included in the "income calculation", the sponsor would have a total weekly income of £247.00 per week. That must be considered against the "income support equivalent calculation" of £199.20 set out in the respondent's decision letter. Even disregarding any entitlement to child benefit, it is clear that the net weekly income derived by the sponsor from his income as it is now, together with what he would receive once his son is in the UK, following deduction of housing costs, is greater than the level of income support that a UK resident family of

equivalent size would be entitled to. It follows that in my judgement the appellant has established, on a balance of probabilities, that the eligibility financial requirement set out in paragraph E-ECP.3.1 is met.

29. Mrs Aboni quite properly accepts that although the appeal was on 'human rights' grounds, the appellant's ability to demonstrate that she met the requirement of the Immigration Rules was very likely to be determinative. Although there may be cases where a refusal under the rules is found to be wrong, but a human rights appeal should nevertheless be dismissed, this in my judgment, is not such a case.
30. Article 8 is plainly engaged. I find that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved.
31. I have found that the appellant meets the eligibility financial requirements for entry clearance as a partner. I have had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigrations rule would usually mean that there is nothing on the Secretary of State's side of the scales to show that the refusal of entry clearance could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules.
32. Having regard to the policy of the respondent as expressed in the immigration rules, and in the absence of any countervailing factors in the public interest that

weigh against the appellant, I am satisfied that on the facts here, the decision to refuse leave to enter is disproportionate to the legitimate aim of immigration control. In the circumstances I allow the appeal on Article 8 grounds.

**Notice of Decision**

33. The appeal is allowed and the decision of First-tier Tribunal Judge Parkes is set aside.
34. I remake the decision and allow the appeal on Article 8 grounds.

*V. Mandalia*  
Upper Tribunal Judge Mandalia

Date 28<sup>th</sup> August 2020

**FEE AWARD**

I have allowed the appeal on the basis of the facts as they are as at the date of my decision. Whether an appellant is able to satisfy the respondent and on appeal, the Tribunal, that they meet the eligibility financial requirement is a fact sensitive task. Although I have allowed the appeal, I have rejected the appellant's claim that the calculation should have been undertaken in the way advanced by the appellant. In all the circumstances, I decline to make a fee award in favour of the appellant.