



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI 2022 004804
First-tier Tribunal No: HU/58091/2021; IA/17748/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On the 5th December 2022**

**Decision & Reasons Promulgated
On the 30th January 2023**

Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SYMES**

Between

**RUMELA KHANOM
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hossain, Counsel, instructed on a Direct Access basis
For the Respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

1. This is the appeal of Rumela Khanom, a citizen of Bangladesh born 6 February 1985, against the decision of the First-tier Tribunal signed on 1 July 2022 to dismiss her appeal against the refusal of entry clearance (of 8 November 2021) as the partner of her British citizen husband, Mukthar Ali

Chaudhury, who she had married on 22 November 2012; they had two British citizen children, presently residing with the Appellant abroad.

2. On 19 August 2021 the Appellant sought entry clearance as the partner of a person present and settled here; her application was refused on 8 November 2021, the Respondent accepting that all aspects of the Immigration Rules were satisfied save that of adequate maintenance. The Respondent assessed the available income as £187.68 having regard to the Sponsor's earnings and the Carer's Allowance, and a few pence worth of Universal Credit also appearing in his bank statements. This fell below the notional income support entitlement for a family of this size which was £254.60.
3. Whilst this is an appeal brought on human rights grounds rather than via narrow satisfaction of the Immigration Rules, these financial issues are nevertheless central to its determination, as an entry clearance applicant's ability to satisfy them is central to the public interest side of the balance when assessing proportionality. The parties before us were agreed that the question of maintenance would be determinative of the human rights appeal.
4. The Sponsor's witness statement before the First-tier Tribunal contended that the Respondent was wrong to have treated the British citizen children as dependent on the Sponsor when it was only his wife who was not entitled to public funds upon her arrival in the UK; were their costs to be relevant to the maintenance question, then it should be recognised that their own future benefits entitlements should also be included in the application's favour. It was apparent from the Respondent's refusal calculations that his actual weekly net income would comprise the employment earnings, Carer's Allowance and Child Benefit as set out above; but additionally Working Tax Credits of £73.74 and Child Tax Credit of £120.06, giving a weekly foreseeable income of £416.55, well in excess of the notional income support entitlement representing the benchmark for adequate maintenance. The family would incur no accommodation costs as they would join him living free of charge in his parents' home.
5. Supporting evidence included
 - (a) A DWP letter of 7 May 2021 confirming entitlement to Carer's Allowance of £67.60 weekly;
 - (b) Confirmation of the Sponsor's earnings from the restaurant trade;
 - (c) The Sponsor's bank statements.
6. The First-tier Tribunal noted that the purpose of the Respondent's Guidance was to ensure that migrant families enjoyed at least the minimum income that a British family would have to support itself. Noting that the Respondent's Guidance identified Child Tax Credit as well as Child Benefit as eligible to be included in the calculation, the Tribunal identified

the critical issue on the appeal as being whether benefits not yet in payment were eligible to meet that threshold.

7. Turning its mind to whether those entitlements *should* be affirmatively included in the calculation, the First-tier Tribunal accepted the eligibility to future Child Benefit, as that was a fixed amount that was not means tested to which the Sponsor would without doubt be entitled based on the British citizenship of her children, not due to any additional recourse to public funds attributable to a person subject to immigration control. However, the situation regarding Child Tax Credit was more problematic. The Sponsor referred to receipt of £73.74 weekly, a different sum to that identified in the application form and inconsistent with the receipt of Universal Credit (it seems that the application form asserted receipt of slightly more Universal Credit, which the First-tier Tribunal believed to be £3.56 weekly). There was no confirmation from the DWP to confirm that Universal Credit was being paid and no evidence whatsoever of any entitlement to Working Tax Credit, itself a gateway to receipt of Child Tax Credit. Accordingly the Sponsor had not established himself as entitled to Child Tax Credit, which in any event would be part of a payment whose total could vary as part of the Working Tax Credit element of Universal Credit. Thus the Appellant could not satisfy the Partner route within the Immigration Rules.
8. Moving on to consider matters more broadly, the Appellant could satisfy the English language requirement of the Rules which was a neutral factor when the public interest factors identified as relevant by s117B NIAA 2002 were considered. This was the second unsuccessful entry clearance application, a state of affairs foreseeably impacting on the children given it was generally accepted that it was in childrens' best interests to be raised by both parents, and as British citizen children were in principle entitled to enjoy the benefits of that citizenship. However, there was no evidence of any compelling factors preventing family life abroad (the Sponsor's care commitments in the UK being extremely vague) and the public interest was in favour of the immigration decision standing.
9. Grounds of appeal to the Upper Tribunal argued that the Sponsor was eligible for Child Tax Credit because the receipt of Universal Credit so entitled him. His weekly earnings were accordingly more than required by a family of the size in question under the Universal Credit Regulations 2013. The Sponsor would receive Universal Credit each week by way of a standard element of £121.32 with extra allowances for two children of £112.88. As per *Ahmed* [2013] UKUT 84 (IAC), a migrant family was entitled to rely on projected income, including tax credits, because their entitlement would be treated as not involving someone subject to immigration control pursuant to Reg 3(2) of the Tax Credits (Immigration) Regulations 2003. Similarly, the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 provided for a similar outcome in relation to Working Tax Credit as the family would receive a "second adult" element despite the Appellant being subject to immigration control due to their responsibility for children. The Respondent's Guidance could not prevail against the ruling in *Ahmed*.

10. Judge Hatton granted permission to appeal on 18 August 2022 on the basis that the First-tier Tribunal had arguably not adequately analysed the difference between the income available to the Sponsor alone, and that available following the arrival of the Appellant, which was arguably a material error of law given that the Respondent's own Guidance continued to cite the approach in *Ahmed* as accurate.
11. A Response from the Secretary of State set out the position that the family could only demonstrate sufficient income to maintain themselves against the benchmark of the income support level by including future benefit entitlements, contrary to the Immigration Rules and Guidance.
12. Before us Mr Hossain developed the grounds of appeal orally, responding to our questions to the best of his ability, whilst Mr Tufan relied on his colleague's written Response.

Decision and reasons

13. Before us the parties were agreed (as noted below, from their own perspective) that the First-tier Tribunal was correct in its arithmetic, in so far as
 - (a) The weekly available income, taking aside the contested element on which this appeal turns, was £222.85, comprised of £120.00 earnings from the Appellant's employment, £35.15 Child Benefit, and his Carer's Allowance of £67.60.
 - (b) The notional income support entitlement for a family of this size was £254.60.

That of course left the Appellant facing a deficit in available income which he argued should be made good via the future entitlement to Child Tax Credit.

14. This appeal's determination has been made more difficult by the arcane manner of its presentation. It appears that differing versions of the asserted available income have been advanced at each stage of the application and appeal process. The entry clearance officer was advised of the existence of Universal Credit of a tiny amount; the First-tier Tribunal found a slightly larger entitlement in the bank statements. The core submission for the Appellant before the First-tier Tribunal was that the British citizen children were entitled to Child Tax Credit as well as Child Benefit (or the Sponsor was so entitled on their behalf) and thus these sums should be included in the available funds. Universal Credit having been unmentioned in the skeleton argument before the First-tier Tribunal, it was then seen of central importance to the draftsman of the grounds of appeal to the Upper Tribunal.
15. Before the Upper Tribunal, the Appellant sought to adduce fresh evidence by way of a letter from Brothers Accountants dated 24 November 2022, which stated that Child Tax Credit payment in November 2021 for this

family would have been £6,235 based on the relevant elements for a family and two children, or £119.90 weekly. However that letter, itself comprised of assertion rather than explanation, is not admissible, representing post-decision evidence that cannot be relied upon to show any material error of law (absent special circumstances such as alleged unfairness or material error of fact for which the Appellant was not responsible, neither being argued as here in play).

16. Not greatly assisted by the parties' submissions, we have made what we can of the issues. It seems to us that there were two distinct errors of law in the First-tier Tribunal's approach.
17. The first is that in reality, Universal Credit and the predecessor tax credit system are mutually exclusive. This is because Reg 5(1) of The Universal Credit (Transitional Provisions) Regulations 2014 provides (subject to exceptions at Reg 5(2) which none of the Appellant's drafting or supporting documents suggest is relevant) provides:

“Exclusion of entitlement to certain benefits

5.- (1) Except as provided in paragraph (2), a claimant is not entitled to—

- (a) income support;
- (b) housing benefit;
- (c) a tax credit; or
- (d) state pension credit

in respect of any period when the claimant is entitled to universal credit”

18. Thus tax credits are simply not available, absent ostensibly irrelevant exceptions, to a recipient of Universal Credit; and a person whose documents indicated they were in receipt of Universal Credit should not have been asserting any future entitlement to tax credits. This is not apparent from the case as put to the First-tier Tribunal; one might have expected the Secretary of State to have been alive to the issue, but in truth neither Appellant nor Respondent cited the appropriate law.
19. The second is that the legal framework for eligible income is set out in the Immigration Rules at rule 6. These Rules were not drawn to the attention of the First-tier Tribunal, save via the indirect route of reliance on the Tribunal decisions in *Ahmed* which cited materially similar rules (then rules 6A-6C). Instead, it seems that the parties referred to the Respondent's Guidance *Family Migration: Appendix FM Section 1.7A - Adequate maintenance and accommodation* (Version 10.0 - 7 December 2021), which states at p.9 that:

“any potential future entitlement to benefits after the applicant arrives in the UK does not count towards net income when assessing adequate maintenance.”

20. That statement may be true so far as it goes, but it is only a partial account of the legal situation, as it fails to make any distinction between an applicant arriving without any entitlement to public funds themselves (because they are subject to immigration control) and the arrival of British citizen children who may well have their own entitlement. Mr Lindsay’s reply for the Secretary of State aggravates the confusion by stating, of the Rules cited in *Ahmed*:

“As there is no equivalent provision in the current Immigration Rules, this part of the guidance in *Ahmed* should no longer be followed.”

21. Unfortunately that is not correct. It is unsurprising, though still regrettable, that the Respondent’s own senior staff are unable to keep up with the endless restructurings and changes to her own Rules. In fact analogous Rules to those cited in *Ahmed* continue to exist (located between the definitions for “Public funds” and “Recreational Course” in the overarching Interpretation provisions at Rule 6) and provide that

““Public funds” means: ...

(b) attendance allowance, severe disablement allowance, carer’s allowance and disability living allowance under Part III of the Social Security Contribution and benefits Act 1992; income support, council tax benefit and housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under art IX of that Act; income based jobseeker’s allowance under the Jobseekers Act 1995, income related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance) state pension credit under the State Pension Credit Act 2002; or child tax credit and working tax credit under Part 1 of the Tax Credits Act 2002;

...

For the purpose of these rules,

(i) a person (P) is not to be regarded as having (or potentially having) recourse to public funds merely because P is (or will be) reliant in whole or in part on public funds provided to P’s family sponsor unless, as a result of P’s presence in the UK, the family sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the family sponsor’s joint entitlement to benefits under the regulations referred to in subparagraph (ii) below; and

(ii) subject to subparagraph (iii) below, a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under subsections (3) and (4) of that section or section 42 of the Tax Credits Act 2002; and

(iii) a person (P) making an application from outside the UK will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P's family sponsor as a result of P's presence in the UK (including those benefits to which P or the family sponsor would be entitled as a result of P's presence in the UK under the regulations referred to in subparagraph (ii) above)."

22. To summarise those provisions, firstly it is only *additional* recourse to public funds which is barred. Secondly, entry clearance applicants may not rely on any public funds, whether or not subject to the proviso at (ii), if they are attributable to the future arrival of the applicant alone. However, that does not rule out entitlements generated by the arrival of accompanying British citizen children. Those Rules provided the framework by which the First-tier Tribunal should have conducted its analysis.
23. The First-tier Tribunal accordingly made material errors of law. Those errors are hardly surprising given the presentation of the case below.
24. We recommend that the parties give careful consideration to the need to present a full and accurate picture of the relevant legal framework to the First-tier Tribunal when it re-hears this matter. In particular, it will be necessary to demonstrate the Appellant's present entitlement to and receipt of public funds, and the change occasioned by family unit's arrival in the UK - ie tracking the change in circumstances between being a single claimant who is a carer (before his wife and two children arrive) and as a single claimant who is a carer (his partner being excluded for these purposes) with two British citizen children. Always bearing in mind that the notional benchmark now needs to be calculated via the applicable amount under the Universal Credit regime. As noted in *Ahmed*, there are reliable sources to which specialist benefits lawyers routinely have regard such as the periodically updated "benefits poster" maintained online by www.rightsnet.org.uk/.
25. We have noted above that the parties before us were agreed as to some of the available funds, and to the target notional income, but we have no confidence in the accuracy of that agreement given the considerations identified above. The introduction of the Universal Credit system may well have muddied the waters in recent years, but that does not discharge representatives from the need to explain the factual reality and a comprehensible basis for any asserted future legal entitlements, taking account of the impact of present earnings upon any entitlements which are means-tested or earnings-related (for example www.gov.uk at the

heading Universal Credit states “Your Universal Credit payment will reduce as you earn more. For every £1 you or your partner earns your payment goes down by 55p)” - and how any such entitlements are compatible with the Immigration Rules cited above. Given the history of this appeal, the Appellant may see the advantage of instructing specialist counsel with relevant experience of the modern benefits system, but that is a matter for him.

26. In conclusion, we find that there is a material error of law in the First-tier Tribunal’s decision and that the matter must be re-heard. Whilst these errors are not, strictly speaking, matters of fairness, we consider that adjudicating on the appeal via the wrong legal framework, without proper assistance from the representatives, amounts to such a wholesale failure of the appeal process that remittal for a re-hearing is appropriate.

Decision:

1. The making of the decision of the First-tier Tribunal involved a material error of law.
2. We set aside the decision of the First-tier Tribunal dismissing the appeal and remit the matter to the First-tier Tribunal for re-hearing afresh.



Signed:

Deputy Upper Tribunal Judge Symes

Date: 12 January 2023