**UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

Ahmed (benefits: proof of receipt; evidence) [2013] UKUT 00084(IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination promulgated** |
|---|---|
| **On 19 June 2012** | |
| | **……** |

**Before**

**UPPER TRIBUNAL JUDGE STOREY**
**UPPER TRIBUNAL JUDGE PETER LANE**
**UPPER TRIBUNAL JUDGE WARD**

**Between**

**ENTRY CLEARANCE OFFICER, DHAKA**

Appellant

**and**

**SOHAIL AHMED**

Respondent

**Representation:**

| | |
|---|---|
| **Appellant:** | Mr G Saunders, Senior Home Office Presenting Officer |
| **Respondent:** | Mr T Shah, Solicitor, Taj Solicitors |

*(1) In an entry clearance case involving the issue of adequacy of maintenance, 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.*

*(2) 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. Benefit is usually calculated on a weekly basis but is often paid fortnightly (employment support allowance and income support) or four-weekly (child benefit), while tax credits are calculated on a daily figure and paid in general weekly (child tax credit) or fortnightly (working tax credit). A month under the Gregorian calendar is not the same as four weeks and wrongly taking a four-week period of income as equating to a month risks a potentially significant detriment to an applicant for entry clearance.*

*(3) It is always essential that regard is had to the benefit rates applicable at relevant times; eg in entry clearance cases, the rates in force at the date of decision. The calculation of the benefit threshold figure is an academic exercise, but establishing the benefits which a sponsor and the applicant will actually be receiving on the applicant's arrival is far from it. The most compelling evidence of receipt of income by way of social security is likely to be proof of receipt of funds into a person's bank account. Notices of award are intrinsically less reliable. The position of tax credits is particularly complex.*

*(4) It would assist if entry clearance application forms were to include questions designed to elicit the information described above and if decisions of entry clearance officers included a calculation described in (1) above.*

## DETERMINATION AND REASONS

1. This is the determination of the Tribunal, to which each member of the panel has contributed.

2. The respondent is a citizen of Bangladesh**.** On 30 December 2010 the appellant (hereafter "ECO") refused his application for entry clearance to join his wife and two children in the UK. The respondent's appeal came before Immigration Judge Majid, who allowed it by a determination sent on 5 August 2011.

3. The ECO's subsequent appeal to the Upper Tribunal was successful, in that Upper Tribunal Judge Storey, at that point sitting alone, set aside the determination of Judge Majid, with the result that the decision in the respondent's appeal needs to be re-made by the Upper Tribunal. The two issues requiring to be determined in that regard are the accommodation and the maintenance requirements in paras 281(iv) and 281(v) of Statement of Changes in Immigration Rules, HC 395 (as amended) by which it is necessary to show:

> (by (iv)) that "there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively"; and
> (by (v)) that "the parties will be able to maintain themselves and any dependants adequately without recourse to public funds."

4. Here reference should be made to paras 6A to 6C of the Immigration Rules as they were in force with effect from 31 March 2009 which provide:

> "6A For the purpose of these Rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds because P is (or will be) reliant in whole or in part on public funds provided to P's sponsor unless, as a result of P's presence

in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the regulations referred to in paragraph 6B).

6B Subject to paragraph 6C, a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or section 42 of the Tax Credits Act 2002.

6C A person (P) making an application from outside the United Kingdom will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P's sponsor as a result of P's presence in the United Kingdom, (including those benefits to which P or the sponsor would be entitled as a result of P's presence in the United Kingdom under the regulations referred to in paragraph 6B)."

5. A sponsor is thus entitled to rely on his or her own recourse to public funds to the extent that paragraphs 6A to 6C of the Rules provide.

6. The re-making decision was directed to be listed before a panel comprising judges of both the Immigration and Asylum Chamber and the Administrative Appeals Chamber of the Upper Tribunal, as particularly the latter Chamber deals with matters of social security. It was hoped that as well as dealing with the present case, this might enable guidance to be given which would be useful to members of the public in a similar position to the respondent, those who advise them, the UKBA and others. As will become apparent, there are limits to the extent of guidance which can be given in this case. The complexity of the social security system is such that there is scope for points to arise on which it would not be right for this Tribunal, without the benefit of argument from persons affected by them, to express a view. Nonetheless, some practical guidance can be given.

7. Further, after this hearing was set up and following proposals set out in June 2012 in "Statement of intent: Family Migration" the Home Secretary introduced new Immigration Rules to take effect in relation to, in general, any application made on or after 9 July 2012: see HC194 (9 July 2012) and subsequent amendments. Under the new rules, for some categories of applicant, in assessing maintenance a number of the sources of income to which reference is made in the present decision, such as child benefit, working tax credit and child tax credit, will no longer be eligible to be taken into account. However, for other categories the maintenance requirements are unchanged. Further, the process of determining applications lodged before 9 July 2012 and appeals in relation to them means that primary decision-makers, the First-tier Tribunal, the Upper Tribunal and others are likely to be concerned with the practical application of the existing rule for a while yet.

8. As this was an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 against a refusal of entry clearance, section 85(5) of that Act applied and the Tribunal (and hence the Upper Tribunal re-making a decision on appeal) was required to consider only the circumstances appertaining at the time of the decision to refuse. (It would of course be different in the case of a decision made in-country, where the matter would fall to be addressed as at the date of hearing.)

9. As regards accommodation, that matter had already been addressed by Judge Storey. In his determination of 4 April 2012 he indicated that he was satisfied that the

accommodation requirement was met. Mr Saunders does not seek to challenge that conclusion. In those circumstances we need say no more about it, save to note (as it is relevant to the calculations which appear below) that the sponsor (the respondent's wife) had been paying a sum variously expressed at £50 per week or £200 per month to the respondent's uncle by way of rent.

10. The authorities concerning adequacy of resources were recently reviewed by the Upper Tribunal in Yarce (adequate maintenance: benefits) [2012] UKUT 00425 (IAC). The correct approach is that set out in KA and Others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065, referring to the earlier decision in Uvovo (00 TH 01450), namely:

> "The appropriate method of calculation for comparative purposes is, as explained in Uvovo, to separate maintenance from accommodation, and to look first to see whether the accommodation would be adequate, and then to see whether the income available to the Appellants for maintenance is equivalent to the amount that would be available to a similar family on income support once they have dealt with the costs of their accommodation."

What the Tribunal in Uvovo – and the Tribunal in KA - seeks here to require focus on (and what paras 6A-C require focus on) is the actual financial position on arrival, i.e. income that is or will be available to the applicant and his sponsor upon his arrival in the UK (in the language of para 6, "as a result of [the applicant's] presence in the UK"). Because the calculation is therefore a projection forward to what the income of the applicant and his sponsor is or will be on arrival, we shall employ the expression "projected income".

11. As adequacy of accommodation was out of the picture following the earlier decision, the present hearing was concerned solely with the maintenance requirement. Expressed mathematically, the formula to be fulfilled is

$$A - B \geq C^{1}$$

where:

A is the projected income
B what needs to be spent on accommodation and
C the income support (or equivalent) figure (which we term in this decision "the benefit threshold")

12. Before turning to whether this formula was fulfilled in the present case, whilst we did not receive any argument on the point, in our view we need to address how paragraphs 6A to 6C apply to a case such as this. In doing so, we are mindful that, as was said in Mahad v Entry Clearance Officer [2009] UKSC 16:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

[1] That is to say: A minus B is greater than, or equal to, C

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

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

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

**Income**

16. As in Yarce, the present case requires an examination in the light of the above principles of the effect, if any, of the arrival of an applicant for entry clearance upon a sponsor's entitlement to claim benefits and thus on the resources available. We are satisfied that as at 30 December 2010 (the date of decision), the sponsor's income ("A" in the formula in [11]) was (employing standard rounding principles) as follows:

| **Income source** | **Interval received** | **Equivalent weekly amount** |
|---|---|---|

| | | |
|---|---|---|
| Net salary from employment | Weekly | £161.30 |
| Working Tax Credit | £364.71 every four weeks Divided by 4= | £ 91.18 |
| Child Tax Credit | Weekly | £ 93.99 |
| Child Benefit | £134.80 every four weeks Divided by 4 = | £ 33.70 |
| Total | | £380.17 |

17. We are further satisfied that, as at that date, there was no reason to suppose that the sponsor's employment was other than permanent or that her salary was not likely to continue at at least that level. While there are changes in benefit and tax credit rates from time to time, we consider that it will in general be appropriate to apply rates that were in existence at the date of decision, though the point may need to be looked at further in a case where a party contends for a different rate to apply (compatibly with section 85(5):[8] above).

18. Turning to the effect on the sponsor's benefit income, if the respondent had notionally been here as at 30 December 2010, the answer is that there would have been none. Let us set this out in more detail.

**Tax credits**

19. If the respondent were here, the sponsor and he, as a married couple, would have been entitled to make a joint claim for tax credits. Even though the respondent would have been a "person subject to immigration control" (as defined by section 115 of the Immigration and Asylum Act 1999), the couple's entitlement to tax credits would, so far as relevant, fall to be determined as if the respondent had not notionally been subject to such control: see Tax Credits (Immigration) Regulations 2003, SI 2003/653, reg 3(2).

**Child tax credit**

20. We can see no reason on the facts of this case (and none has been suggested) why the amount of child tax credit should have been any different if the respondent had been in the UK. Without limitation, the "family element" within the child tax credit calculation is unaffected by whether a person is claiming as a single parent (including because their spouse is abroad) or as one of a couple.

**Working tax credit**

21. Similarly, in relation to working tax credit, the sponsor claiming alone was entitled to have taken into account in calculating the amount of working tax credit payable to her the "lone parent element". On a hypothetical joint claim made on 30 December 2010, the sponsor and respondent would instead have been entitled to the couple or "second adult" element. This would be so despite the respondent being a "person subject to immigration control", as the sponsor and respondent would be responsible for a child or qualifying young person: see Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 SI 2002/2005. As the value of the lone parent element and that of the second adult element were the same, the notional arrival of the respondent at the decision date would not have made any difference to the amount of tax credits the sponsor would have continued to receive.

**Child benefit**

22. Nor would there have been any change in the amount of child benefit she would have continued to receive, which is determined by the number of children (or qualifying young persons) for whom a person is responsible and not by the number of adults in the family unit.

23. It follows that the figures in the table above would have been unaffected by the arrival of the respondent and, on the circumstances prevailing at 30 December 2010, were set fair to be provided on an assured basis (cf. Mahad (Ethiopia) v Entry Clearance Officer [2009] UKSC 16.)

**Accommodation Costs**

24. On the unchallenged evidence, the sponsor had to pay £50 weekly on rent and nothing on council tax, thus the figure arrived at for "A – B" in the formula is £330.17 (i.e. £380.17-£50).

**Housing and Council Tax Benefit**

25. Although housing benefit and council tax benefit may require careful consideration in other cases (see the discussion in Yarce at [57] – [61]), they are not relevant in the present case, as the sponsor was not in receipt of them.

**The Benefit Threshold**

26. The calculation of the benefit threshold derived from figures put forward by the respondent's solicitor was as follows (all figures for benefits are, correctly, those for 2010/11, in which the decision under appeal was taken):

| **Element** | **Interval** | **Amount** |
|---|---|---|
| Income Support Rate for a couple | Weekly | £102.75 |
| Each dependent child from birth to age of 20, £57.57 x 2 | Weekly | £115.14 |
| Family premium | Weekly | £ 17.40 |
| Total | Weekly | £235.29 |

27. This calculation in the form put forward is not without its conceptual difficulties, though they may be more theoretical than real. The system of support for families on benefit with children has largely moved on and will continue to do so. The calculations as submitted to us are sufficiently consistent with KA for present purposes, and we are satisfied that other, more contemporary, ways of approaching the calculation (such as using child tax credit figures) would not lead to a materially different outcome when considering the benefit threshold. However, while we are satisfied that the present method of carrying out the calculation is a valid one in the circumstances of this case, we are not intending to hold it out as a model or to exclude other methods of calculation which respect the KA principle while perhaps being more consistent with the reality of the benefit system as it now is or indeed with how it may evolve in the future. The aim always is to effect a comparison between the applicant's and sponsor's combined projected income if the applicant for entry clearance were in the UK on the one hand and, on the other, the amount

required to provide the maintenance "at a level which can properly be called adequate" (KA, para 6) by reference to income support levels or, where applicable, other aspects of the benefit system which may have taken its place (i.e. the benefit threshold).

28. In para 17 of the decision in KA, the Tribunal alluded to the potential for other costs to fall to be taken into account because of the "passporting" effect of income support, such as the cost of prescriptions which might fall to be provided by the National Health Service and the cost of other benefits such as free school meals. In the present case, the children of the respondent and sponsor were aged 1 and 3 at the date of decision, so the latter is not applicable. No specific point about these or other costs has been raised on behalf of the ECO. Further, we note that the definition of "public funds" (see para 6 of the Immigration Rules) does not, in terms, refer to advantages to which income support might be a passport. Suffice it in the present case to say that we are satisfied that at the relevant date, the sponsor had sufficient resources to be able to maintain her family, including the respondent, using only such State resources as the Immigration Rules in force at the material time permitted to be used. Even if other factors such as prescription charges were to fall to be taken into account, the difference in the present case (around £95 per week to the good) between the sponsor's income and what would otherwise be the benefit threshold is on any view likely to prove sufficient and no suggestion has been made otherwise by Mr Saunders.

29. From the above it will be clear that we are satisfied that the respondent's projected income, net of accommodation costs, of £330.17 will be greater than the benefits threshold relevant to his case (£235.29). Accordingly we are satisfied that the respondent merits the benefit of the Immigration Rules HC395 (as amended).

**Submissions in cases of this type**

30. The experience of Judges Storey and Lane, whose home jurisdiction this is, is that parties may be assisted by guidance as to how evidence and submissions in appeals raising these questions might be presented so as to assist the First-tier and Upper Tribunals. In an immigration appeal it is of course the party who seeks to claim the benefit of the Immigration Rules on whom the burden rests of proving, on the balance of probabilities, that the relevant requirements are met. As we observed in Yarce at [46]:

> "It seems to us that, since these issues involve mixed fact and law, an appellant in an immigration appeal must be able to demonstrate to the judicial fact-finder, either that the actual financial position on arrival will be such as to make it unnecessary to rely upon benefits in order to provide a standard of living equivalent to that available on means tested benefits, or that the relevant law bears on the circumstances of the family, in such a way that there will be no additional recourse to public funds in doing so."

31. It will in general assist a First-tier Tribunal, or on appeal, the Upper Tribunal if as part of a submission a calculation is supplied which reflects the comparison summarised in [27] above. Income received and the projection for the figures which the appellant and sponsor have to be able to find should be expressed on a consistent and arithmetically accurate basis. It should not be for the Tribunal to have to do the necessary calculations to achieve this. Benefit is usually calculated on a weekly basis but at present is often paid fortnightly (generally employment support allowance and income support) or four-weekly (child benefit) while tax credits are calculated on a daily figures and paid in general weekly (child tax credit) or four-weekly (working tax credit). A month under the Gregorian calendar is not the same as four weeks and wrongly taking a four-week period of income as

equating to a month risks a potentially significant detriment to an applicant for entry clearance (as occurred in the present case, although on the facts it did not affect the result).

32. Information on benefit rates, including historic rates, can be obtained from a variety of sources. Those who practise in social security or who have colleagues who do will already be aware of the Welfare Benefits and Tax Credits Handbook published by Child Poverty Action Group which contains (among much other useful material) a table of such figures at the beginning and which is published annually, while a table of rates, including for past years, is available online at www.rightsnet.org.uk. It is always essential, of course, that regard is had to the benefit rates applicable at the relevant times, i.e. in entry clearance cases, the rates in force at the date of decision, but in in-country appeal cases, those in force at the date of hearing.

33. The calculation of the benefit threshold figure is an academic exercise, but establishing the benefits which a sponsor and applicant will actually be receiving on the applicant's arrival is far from it. In terms of the evidence to prove receipt of income by way of social security, the most compelling evidence is likely to be proof of the receipt of funds into a person's bank account. Most, though not all, payments are made in such a way. Payments from DWP and HMRC, so far as we are aware, are identified as such on bank statements. Notices of award, while they may have some value, are intrinsically less reliable, because of the wide ranging powers which the Secretary of State for Work and Pensions and in the non-tax credit context HMRC have to change decisions by processes of "revision" or "supersession" and because of the scope for a decision to be changed – sometimes against a person claiming benefits – on appeal, thus any given decision notice may not be the last one in the sequence. The position of tax credits is a particularly complex one in decision-making terms, which may involve the use of estimated amounts and sums paid on a provisional basis, followed by a process of reconciliation and final decision after the end of the tax year.

34. Finally, as for the reasons above it is necessary to establish whether, at the date of the decision under appeal, there would be any effect on the sponsor's entitlement to benefit if he or she were to be joined by the applicant for entry clearance, it is our view that application forms for entry clearance should include questions designed to elicit the information we have described above and that ECO decisions should include a calculation utilising the heads of calculation which we have outlined. In addition, in the context of appeals submissions should, accordingly, include a legal analysis addressed to these matters.

**Decision**

35. The determination of the First-tier Tribunal having been set aside, we hereby re-make the decision as follows:
The respondent's appeal against the decision of the entry clearance officer is allowed.

**C G Ward**

**Judge of the Upper Tribunal**

**Date: 30 January 2013**

# ANNEX


**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/06682/2011

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 10 February 2012**

**Determination Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE STOREY**

**Between**

**ENTRY CLEARANCE OFFICER, DHAKA**

Appellant

**And**

**MR SOHAIL AHMED**

Respondent

**Representation**
For the appellant/ECO: Mr N Bramble, Home Office Presenting Officer
For the respondent/claimant: Mr T Shah, Solicitors, Taj Solicitors

**DECISION AND DIRECTIONS**

1. The respondent (hereafter "the claimant") is a citizen of Bangladesh. On 30 December 2010 the appellant (hereafter "ECO") refused his application for entry clearance to join his wife and two children in the UK. The ECO considered (1) that he fell foul of para 320(7A) of Statement of Changes in Immigration Rules, HC395 as amended for failing to disclose his previous immigration history; (2) that he did not meet the requirements of the substantive immigration rule (paras 281(iv) and 281(v) of HC395 as amended) by virtue of the fact that it had not been shown that adequate accommodation would be genuinely available or that there would be adequate maintenance. The ECO also found that to refuse him entry clearance would not violate his Article 8 ECHR rights. I should clarify that the claimant had been the subject of a previous refusal of entry clearance as a spouse which he had appealed unsuccessfully.

2. The claimant's appeal came before First-tier Tribunal (FTT) Judge Majid. There was no representation from the ECO. In a determination sent on 5 August 2011 Judge Majid allowed the appeal under the Immigration Rules.

3. In grounds seeking permission to appeal the ECO did not dispute the judge's rejection of the para 320(7A) basis for refusal. Nor did she challenge the judge's primary findings of fact (he found the claimant and sponsor credible and genuine). Her challenge was confined to the FTT judge's reasons for concluding that the claimant met the accommodation and maintenance requirements. In relation to accommodation, it was contended that the judge had wrongly taken into account post-decision evidence given at the hearing that the claimant had now moved to a three bedroom flat.

4. I have no hesitation in deciding that the FTT judge materially erred in law. In relation to the accommodation requirement, he gave no reasons whatsoever for his conclusion at para 26 that the accommodation requirement was "fulfilled". In refusing the claimant's application the ECO had considered the sponsor's evidence that she had a new three bedroom flat for which she was required to pay £200 per month in rent, but had concluded that he had failed to provide evidence to demonstrate that the rental commitments were being met. It was also noted that the claimant had failed to address adequately the concerns relating to accommodation expressed by the previous immigration judge. Against this background it was clearly insufficient simply for the FTT judge to find that the accommodation requirement was met because what she said, she said "credibly". That failed to address the respondent's concern at the lack of any evidence to demonstrate that the rental commitments were being met or that she had indeed moved as claimed to the new accommodation. (an address in Headley Drive, Ilford, Essex). As regards maintenance, whilst in this regard the FTT judge did give some brief reasoning, it simply amounts to his finding without any explanation that as she received an increase in her salary in April 2011, so that it went up from £161.30 p.w. to £167.80 p.w., the claimant's arrival was not going to cost anything to public funds (see paras 1-20, 26). Taken together these failed amount to a material error of law and cause me to set aside the FTT decision.

5. In seeking to re-make the only two issues before me concern the accommodation and maintenance requirements.

Accommodation

6. In relation to the accommodation requirement, the ECO in the refusal letter stated that the claimant had "provided no evidence that the rental commitments are being met". But in point of fact (although the FTT judge did not touch upon it) the ECO was wrong about that. In his application the claimant had identified the three bedroom address in Headly Drive as the proposed accommodation and he had also submitted a letter from the claimant's uncle, Mr K H Masud, confirming that he was the owner of this address and that the sponsor had been living at this address with her two children paying £200 per month in rent. The sponsor had also submitted a house inspection report confirming that the property would be suitable for a couple with three children. The sponsor had also stated in her sponsorship declaration that she lived at the three-bedroom property, that Mr Masud was the owner of this property and that the rent she paid was £200 per month. Nothing said at the hearing before the FTT cast doubt on this evidence. Mr Bramble before me sought at one point to raise the fact that the house inspection report described Mr Masud as a landlord, but there was nothing inconsistent with this gentleman being both a landlord and the owner and this was not a point that had been relied upon by the respondent either in the refusal or the grounds seeking permission. Accordingly I am satisfied that the accommodation requirement was met.

Maintenance

7. In relation to the maintenance requirement, however, things are less straightforward. In her grounds seeking permission to appeal the ECO raised a new point not relied upon in her the refusal decision; that new point related to the level of the sponsor's reliance on public funds. However, given that the claimant was put on notice of it in advance of the hearing I do not consider there has been any procedural unfairness and, the new point relates to a mandatory requirement of the Immigration Rules, I am obliged to determine it.

8. In more detail the new point had two limbs. First it was contended that it would be wrong to take into account (as the FTT judge had done) the post-decision level of earnings of the sponsor, which were 167.80 per week. Rather the relevant figure was the amount she was earning at the date of decision in December 2010, which was £161.30 per week. Second, it was argued that even if the new salary level from April 2011 (of £167.80) was treated as the correct figure, that was still not sufficient., as the income support level for a couple with two children (of relevant ages) was £235.29 per week.

9. In his skeleton argument Mr Shah submitted that the ECO's grounds for permission failed to factor in the matter that at the date of decision the claimant was in receipt of (1) child benefit(CB) totalling £34.37 per week and (2) Child Tax Credits (CTCs) totalling £107.66. He referred to p.11 of his bundle which stated that "as the couple rate [for income support] was £459.12.12 [£105.95 x 52 weeks)/12 months] per month, therefore I have a monthly savings of £532.13 per month. It can be noted that I have sufficient savings in my bank account which clearly demonstrates that I can accommodate and maintain the [claimant] without further recourse to public funds".

10. He cited in support the cases of Mahad(Ethiopia) v ECO [2009] UKSC 16 and Jahanara Begum and Others (Maintenance-savings) Bangladesh [2011] UKUT 00246 (IAC) which he said showed that benefits such as CB and CTC were to be disregarded.

**The applicable law**

A. Benefits legislation

11. Section 115 of the Immigration and Asylum Act 1999 sets out which benefits cannot be legally claimed by people who are subject to immigration control.

12. Child and Working Tax Credits were included in s.115 on 1 April 2003 but were not added to the definition of public funds (see below) until 15 March 2005.

B. Immigration provisions

13. Paragraphs 6 of the Statement of Changes in the Immigration Rules, HC395 as amended defines public funds as follows:

> "**public funds**" means
>
> (a) housing under Part VI or VII of the Housing Act 1996 and under Part II of the Housing Act 1985, Part I or II of the Housing (Scotland) Act 1987, Part II of the Housing (Northern Ireland) Order 1981 or Part II of the Housing (Northern Ireland) Order 1988;
>
> (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 Part 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.

(c) attendance allowance, severe disablement allowance, carer's allowance and disability living allowance under Part III of the Social Security Contribution and Benefits (Northern Ireland) 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 Part IX of that Act; income based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995 *or income related allowance under Part 1 of the Welfare Reform Act (Northern Ireland) 2007*.

14. Paras 6A-C of the Immigration Rules explain what the position is when an applicant is not claiming public funds themselves but their sponsor relies on public funds. With effect from 21 December 2010 [this is the relevant set of Rules because the decision was made in this case on 30 December 2010] the relevant provisions read:

"6A. For the purpose of these Rules, 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 sponsor unless, as a result of P's presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the regulations referred to in paragraph 6B).

6B. Subject to paragraph 6C, a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or section 42 of the Tax Credits Act 2002.

6C. A person (P) making an application from outside the United Kingdom will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P's sponsor as a result of P's presence in the United Kingdom, (including those benefits to which P or the sponsor would be entitled as a result of P's presence in the United Kingdom under the regulations referred to in to paragraph 6B)".

15. Complementing the Immigration Rules, there are Immigration Directorate Instructions (IDIs). I only have these in version 5, 19 August 2011 but I am not aware that insofar as they cover benefit issues they were any different in December 2011. These reiterate:

(i) that benefits that are not considered as public funds include: contribution based jobseeker's allowance, guardian's allowance, incapacity benefit, contributory related employment and support allowance (ESA), maternity allowance, retirement pension, statutory maternity pay, widow's benefit and bereavement benefit.

(ii) that a person subject to immigration control is not considered as accessing public funds if it is their partner who is receiving the funds that they are entitled to.
(iii) that child and working tax credits are claimed jointly by couples. If only one member of a couple is subject to immigration control, then for tax credits purposes, neither are treated as being subject to immigration control.
(iv) that child benefit is a tax-free, regular payment made to anyone bringing up a child or young person. It is paid for each child that qualifies and is not affected by income or savings, so most people bringing up a child can get it.
(v)That Child Tax Credit (CTC) is a means-tested allowance for parents and carers of children or young people who are still in full-time, non advanced education or approved training. A person claiming this benefit does not have to be the child's parent to be eligible but they must be the main person responsible for them. Child tax credit can be claimed jointly as a couple but will only be paid to one member of the couple.
(vi) that Working Tax Credit is a payment to top us the earnings of low paid working people.
(vi) it is further stated that if a sponsor needs to claim more public funds to support the applicant, [the decision-maker] under Guidance –Public funds – v5.0, Valid from 19 August 2011 must:

> "refuse the application. For example, if the sponsor claims income-based jobseeker's allowance and this would increase if their dependant was granted leave as their spouse. .."

and that:

> "If the sponsor needs to claim more public funds to support the applicant but these are funds that the sponsor and dependant would be jointly entitled to you must not refuse the application. For example, if the increased funds fall under the tax credits regulations, such as Working or Child Tax Credits, then you must not regard the applicant as having accessed public funds. "

**Relevant case law**

16. KA and Others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065 establishes that it is appropriate to consider savings in the calculation. It has also been established in Mahad (Ethiopia) v ECO [2009] UKSC 16 the Supreme Court observed that the Immigration Rules are not to be construed with all the strictness applicable to the construction of a statute or statutory instrument but sensibly according to the natural and ordinary meaning of the words used. They noted that other forms of assistance and other funds besides the provision of accommodation were accepted to be legitimately available to the parties in satisfying the maintenance requirement, such as DLA, which the settled relative could use as he or she liked. The Court concluded that the natural meaning of the words was in effect that there was a requirement that the family would be able to cope financially.

**My assessment**

17. Having considered the evidence presently before me, I have resolved that I am not in a position to decide the issue of maintenance – the only outstanding issue. It is not in dispute that the baseline for assessing adequacy of maintenance is income support. Nor is it in dispute that the relevant income support figure for the couple involved in this appeal was £235.29 per week. However, there are two conflicting views that have been presented as to what this entails for this appeal. The ECO's view, as presented by Mr Bramble is that the maintenance requirement was not met because the sponsor was not able to show that her

earnings came up to the £235.29 level bearing in mind that some or all of the benefits she received constituted recourse to pubic funds. The claimant's view is that although the sponsor only had earnings of £161.30 at the date of decision all three of the benefits she received, albeit within the para 6 definition of public funds, fell to be disregarded by operation of paras 6A-C of the Immigration Rules; the arrival of the claimant, it was submitted, would not have resulted in any "additional" recourse to public funds.

18. Whilst if the claimant is correct and all three of the benefits she received fell to be disregarded as public funds, there is insufficient evidence before me to establish that they should have been disregarded or if so, what were the precise figures involved.

19. It is said that she received:

£161.30 In earnings
£107.66 in Child Tax Credit (CTC)/Working Tax Credit (WTC)
£ 34.37 in Child Benefit (CB)

20. However, on the basis of information to hand regarding benefits (which may or may not be correct):

    a. whereas it would appear that CB and CTC are unaffected by whether the family has one or two adults, the calculation for WTC has distinct figures;

    b. the applicable CTC figure would appear to have been only £98.94, unless one of the couple was disabled;

    c. it is not entirely clear what the amount in rent the couple would pay. It would seem that the figure of £200 was in relation to the sponsor's previous accommodation. She says in her undated witness statement that at the new accommodation that she pays £325 a month [£81.23 per week?];

    d. it is not clear whether the sponsor's living arrangements amounted to a common household; the sponsor's undated witness statement describes it as "shared accommodation with Mr Saful Alam [her husband's uncle]", with each paying half each of the utility bills.

    e. It is not sufficiently clear what the position was as regards housing benefit/ council tax benefit. It would appear that as a single adult the sponsor was or would have been entitled to a 25% discount on council tax. With the arrival, however, of a second adult (which is the relevant scenario here) the actual council tax liability would be higher (by a third);

    f. the evidence in the file relating to the sponsor's savings refer to a Barclays bank account showing figures consistently below £6,000 but it is not confirmed whether at the date of decision the sponsor had any other savings. If she did, they might impact on income support levels;

    g. the above points illustrate perhaps that the task of assessing the relevant income support levels for the purposes of deciding the adequacy of maintenance as at the date of decision is not a simple matter of reading off the figures for income support for a couple (with children) and that the Tribunal needs assistance with establishing the complete range of relevant variables and figures.

21. In order to reach a decision on the maintenance issue, therefore, it is necessary to hold a further hearing. The case will be heard by a senior panel that will include an Upper Tribunal Judge of the Administrative Appeals Chamber.

22. It is directed that in accordance with Tribunal directions accompanying the notice of hearing (which will follow shortly) prepare written submissions addressing the matters identified in para 20 above.

Signed

Date

Judge of the Upper Tribunal