



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

**Appeal Numbers:
UI-2022-003046, EA/14892/2021
UI-2022-003047, EA/14893/2021
UI-2022-003048, EA/14894/2021**

THE IMMIGRATION ACTS

**Heard at Field House IAC
On the 8 December 2022**

**Decision & Reasons Promulgated
On the 28 February 2023**

Before

**THE HON. MRS JUSTICE THORNTON
UPPER TRIBUNAL JUDGE BLUNDELL**

Between

**MRS NAIMA DAUD MOALIN,
MISS MOHAMED AHLAN AWEYS,
MASTER MOHAMED OSMEN AWEYS
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Edward Akohene, solicitor of Afrifa & Partners
For the Respondent: Stephen Whitwell, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellants are nationals of Somalia, a mother and her children (aged eight and five), who appeal against the decision of the First Tier Tribunal, dated 13 May 2022, dismissing their appeals against the decisions of the Respondent, dated 8 May 2021, refusing their applications for EU Family Permits as the wife and dependent children of their sponsor Mr Aweys Mahamed Abdulahi. Mr Abdulahi is an EEA Citizen (a Swedish national by naturalisation) with pre-settled status in the United Kingdom under the EU Settlement Scheme.

The decision of the Entry Clearance Officer

2. The relevant parts of the reasons for refusal are as follows:

"I have considered whether you meet the validity, eligibility and suitability requirements for an EUSS Family Permit, which are set out in Appendix EU (Family Permit) to the Immigration Rules.....

- *Your previous application for an EUSS family permit was refused due to false evidence being provided. You have provided no explanation as to why false evidence was submitted, this raises doubts over the authenticity of the current application and the relationship and documents submitted.*
- *I have considered whether the false or misleading representation provided used in support of the application was material to the decision to grant you entry clearance under Appendix EU (Family Permit) to the Immigration Rules (that is, whether it affects your ability to meet the requirements under this Appendix because discounting that information, representation or documentation means you would not have been eligible for an entry clearance under Appendix EU (Family Permit).*
- *I have also considered whether, in light of all the known circumstances, the decision to refuse your application on this basis is proportionate. In doing so I have considered all of the relevant facts and circumstances of your case, including the seriousness of the deception, whether you were aware of the deception and the likely impact that a refusal decision would have on you and your family members, taking into account your personal circumstances and those of your family members.*
- *I am satisfied that refusal on this basis is proportionate because it is considered that the false representations you have willingly provided cast doubt over the legitimacy of any other claims you have made. Your personal circumstances have been considered, however given that you have supplied false representations regarding your relationship with your EEA citizen sponsor, I am satisfied that you and your sponsor have therefore attempted to*

obtain an advantage and mislead. Furthermore, you have signed a declaration on your application form that the information you have provided is true to the best of your knowledge and belief and you have also acknowledged that if false information is given, your application could be refused.

- *Therefore, your application does not meet the suitability and eligibility requirements for leave under the EU Settlement Scheme family permit..”*

Decision of the FTT

3. The relevant parts of the FTT decision dismissing the appeals are as follows:

“The Evidence

6. Mr Abdulahi gave evidence in Somali, interpreted for the tribunal. Mr Abdulahi confirmed as true and adopted as his evidence in chief his witness statement dated 5 March 2022. He had met and married his wife in Kenya, where she was living with their children. He maintained daily contact by telephone. No false documents had been submitted with the Appellant’s entry clearance applications. Mr Abdulahi produced a copy of his marriage certificate and family photographs.

...

10. On the day of the hearing the Respondent produced a copy of the previous refusal decision dated 8 May 2021 and two Document Verification Reports (“DVR”). The first DVR, dated 13 April 2021, stated that Iftin Express money transfers submitted with the applications were false. The second DVR stated that the HSBC bank statements for the sponsor submitted with the applications were false. There was no application for an adjournment on the Appellants’ behalf, despite the Respondent’s late production.

...

13. It is regrettable that the Respondent served copies of the previous refusal decision and the accompanying DVRs on the day of the appeal hearing. The tribunal thus had not seen them previously as the first refusal decision was not appealed. Nevertheless, those documents had been served on the Appellants at the time of the previous refusal, so there was no element of surprise.

14. The familial relationship was proved comprehensively by DNA evidence. Mr Abdulahi has pre-settled status. It is not easy to see how the Appellant’s could have survived in Kenya without his

support, hence false transfers would have been of no benefit at all. There no suggestion that Mr Abdulahi could not afford to support his wife and children. There was no obvious motive for deception.

15. Notwithstanding those matters, it has to be accepted that both DVRs provide adequate detail to enable them to be understood and responded to by the Appellants and Mr Abdulahi. The Respondent's policy about notification had been followed because the Appellants had the previous refusal notice and the necessary information. They knew which documents had been submitted to the Entry Clearance Officer. They were thus in a position to have provided evidence of their own with the fresh applications, for example, to approach the money transfer agency and the bank to seek proof of error. If the questioned documents had been provided to the Respondent without the Appellants' knowledge by a third party, then the Appellants have had the opportunity of demonstrating that and their own innocence.

16. It cannot be said that the provision of false documents which relate to finances could often if ever be immaterial, especially when the Respondent's evidence indicates that two sets of false documents were provided. It may be that there is an explanation for what has happened. The Appellants and Mr Abdulahi have every appearance of respectability and, as already note above, it is difficult to see why they would have engaged in deception. They had no obvious need to do so.

17. The fact remains, and the tribunal finds, that the Respondent has discharge the burden of proof on her to show deception. The burden then shifts to the Appellants, who have failed to refute the evidence provided. Bare denials of wrongdoing, however sincere, are an insufficient refutation.

18. It follows that the Appellants' appeals must fail."

Grounds of Appeal

4. The grounds of appeal are as follows:

- a) The First Tier Tribunal erred in law in dismissing the appeal based on false material and information submitted with a previous application
- b) The Tribunal failed to make a material finding of fact on whether the Appellants had raised an innocent explanation and whether it is to be rejected

- c) The Tribunal was wrong in law to blame the behaviour of the parents on the children, for whom the decision has profound consequences

Discussion

5. The Entry Clearance Officer's decision is poor. It fails to identify the provisions of the Immigration Rules under which the applications were refused. Given the officer's concern, however, it seems to us that the only candidate provision is FP7.4(a). Before us, the parties had reached the same conclusion.

6. FP7.4(a) provides as follows:

(4) An application made under this Appendix may be refused on grounds of suitability where, at the date of decision, the entry clearance officer is satisfied that:

(a) It is proportionate to refuse the application where, in relation to the application and whether or not to the applicant's knowledge, false or misleading information, representations or documents have been submitted (including false or misleading information submitted to any person to obtain a document used in support of the application); and the information, representation or documentation is material to the decision whether or not to grant the applicant an entry clearance under this Appendix;

7. The First Tier Tribunal Judge appears to have proceeded on the basis that the appeals fell to be dismissed, simpliciter, due to his finding that the respondent had established that forged documents had been submitted in a previous application. However, as Mr Whitwell accepted, on behalf of the Secretary of State, in measured and realistic submissions, this paragraph of the Rules leads to a *discretionary* refusal, and requires (on its face) the consideration of proportionality.

8. Accordingly, therefore, the judge's decision is deficient. It contains no conclusion on proportionality nor any 'balance sheet' assessment of the factors relevant to that question. Nor does it contain any assessment of whether the first appellant was herself aware that false documents had been submitted in a previous application, which question was certainly relevant to the assessment of proportionality. The judge was no doubt hampered by the failure of the Respondent to identify the provision in question, whether in her decision or in the oral submissions advanced by counsel for the Respondent in the First Tier Tribunal.

Relief

9. Having indicated our view at the hearing that there are errors of law in the FTT decision, we explored the question of relief with the parties' representatives.
10. For the Appellants, Mr Akohene urged us to remake the decision ourselves so as to avoid further delay and the cost to his clients in the event the matter returns to the First Tier Tribunal. He submitted that the application in relation to the children could be made by us, irrespective of any issue as to deception, on the basis that children ought not to bear the consequences of any deception by their parents. The familial relationship was resolved in their favour.
11. We have sympathy with the obvious frustration of the Appellants and their sponsor, Mr Abdulahi. They seek to be re-joined as a family unit, are not responsible for the poor decision making to date in this case and have already waited some time for the appellate process to proceed to its current stage. However, our difficulty in acceding to Mr Akohene's request is that the Entry Clearance Officer's decision is so light on detail that we are unable to form a meaningful view on relevant matters. As an example, Mr Akohene made submissions before us as to why the alleged marriage of convenience could not be a marriage of convenience. There is no mention of a marriage of convenience in the respondent's decision letter and Mr Akohene's oral submissions were therefore the first time we understood this to be in issue between the parties. We accept, in principle, that the children should not be saddled with the conduct of their parents and the familial relationship was resolved in their favour. Nonetheless, we do not consider it appropriate to remake the decision in relation to them given our decision making would be based on such deficient foundations.
12. In the circumstances, in order to minimise further time and cost to the Appellants, we suggested to Mr Whitwell, that a realistic and pragmatic course of action may be for the Respondent to withdraw her decision. Mr Whitwell agreed and accordingly sought our permission to withdraw the decision pursuant to Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). We consented to the withdrawal for the reasons set out above and on the basis that it is in the Appellants' best interests for the Respondent to re-examine her decision making in this case and to clarify her position.
13. It might well be that the respondent reviews her decision and decides that some or all of the appellants ought to be granted entry clearance, particularly in light of the DNA evidence which establishes the relationship beyond any reasonable doubt. In the event that she does not, however, there will be a further right of appeal against that decision and the appellants, and the Tribunal will at least have an opportunity to engage with a properly formulated notice of decision.

14. As we observed at the hearing, it is to be hoped that any further decision will be reached promptly, given the respondent's failure to make a clear decision in the first instance and the ongoing separation of the appellants from the sponsor.

Notice of Decision

15. The decision of the First-tier Tribunal involved the making of an error on a point of law and that decision is hereby set aside.
16. Consent is given to the Respondent, pursuant to Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to withdraw her decision dated 8 May, 2021, refusing the Appellant's applications for EU Family Permits as the wife and dependent children of their sponsor Mr Aweys Mahamed Abdulahi.

No anonymity direction is made.

Signed: Mrs Justice Thornton DBE

Date: 12.12.22

The Hon. Mrs Justice Thornton sitting as an Upper Tribunal Judge