



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2024-000234**  
**First-tier Tribunal No:**  
**EA/01887/2023**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 20 March 2024**

**Before**

**UPPER TRIBUNAL JUDGE OWENS**

**Between**

**Entry Clearance Officer**

Appellant

**and**

**Mohamed Mohamud Abdirahman**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mrs Nolan, Senior Presenting Officer  
For the Respondent: Unpresented

**Heard at Field House on 26 February 2024**

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Gibbs sent on 12 December 2023, allowing Mr Abdirahman's appeal against a decision dated 30 March 2023. to refuse him entry clearance under Appendix EU Family Permit.

**The Background**

2. Mr Abdirahman is a citizen of Somalia. He applied on 24 December 2022 for a family permit pursuant to Appendix EU Family Permit on the basis that he is a "family member of a relevant EEA citizen". The relevant EEA citizen is his father, the sponsor, who is a Swedish national. The application was refused on 30 March 2023 on suitability grounds on the basis that Mr Abdirahman had submitted

fraudulent documents in a previous application dated 14 February 2020 and in the current application, Mr Abdirahman had failed to disclose this. Further there was no explanation as to why he previously provided fraudulent documents. On this basis, the Entry Clearance Officer found that there was insufficient evidence that Mr Abdirahman is the son of the sponsor as claimed.

3. By the time of the appeal, the issues in the appeal had moved on in that it had been accepted subsequent to the provision of DNA evidence that Mr Abdirahman was related to the sponsor as claimed. The main issue before the judge was now the refusal on grounds of suitability. The judge found that evidence submitted in support of the previous application was unreliable and that Mr Abdirahman had given misleading information in his current application by failing to acknowledge that he had previously given false information when applying for a visa. The judge then turned then to the discretion conferred under EU16 and decided that the decision to refuse the application on the grounds of suitability was not proportionate and that the Secretary of State should have exercised discretion in favour of Mr Abdirahman and the suitability requirement did not apply. She allowed the appeal on the basis that Mr Abdirahman meets the requirements for an EU Settlement Scheme Family Permit.

### **Grounds of Appeal**

4. The grounds of appeal are set out together under one heading which is “making a material misdirection of law, inadequate reasoning and misapplication of the law. The grounds assert:
  - (a) The judge has given inadequate reasons to support the finding that the decision is not proportionate.
  - (b) The previous application was refused on eligibility and suitability grounds because the evidence submitted in respect of the sponsor’s employment was false and did not show that the sponsor was resident in the United Kingdom at the date of the application. It was irrational for the judge to find that pay slips were unreliable and that Mr Abdirahman had provided misleading information in his current application and then go onto accept that Mr Abdirahman was a minor at the time and could not be held responsible.
  - (c) Mr Abdirahman did not provide any explanation for the matters raised in the refusal.
  - (d) There was no merit in applying discretion on the sole basis that the sponsor and the appellant are related, given that the sponsor provided no reasons to explain the misdemeanour. The judge has misapplied the discretionary power of the Tribunal.

### **The hearing**

5. Mr Abdirahman was unrepresented but his father, the sponsor, attended the hearing. A Somali interpreter was present to translate the proceedings to the sponsor. Mrs Nolan made various submissions amplifying the grounds. She said that the judge had failed to make an explicit finding of dishonesty. She submitted that there were inconsistencies in the judge finding on the one hand that it was not in dispute that Mr Abdirahman had submitted false documents in a previous application, but then finding that he was a minor at the time and did not intend

to mislead. It is not explained why Mr Abdirahman did not intend to mislead. It was submitted that the finding at [13] is irrational in the light of the findings at [10] and [11]. The finding at [15] was irrational because the current employment was not in issue. The issue was that the pay slips previously submitted were unreliable and the judge accepted that this was the case. She submitted that the judge had failed to give adequate reasons why it was disproportionate not to exercise discretion in Mr Abdirahman's favour.

### **Discussion and Analysis**

6. I note firstly that the basis of the refusal had moved on somewhat by the date of the appeal. The initial refusal focused heavily on the fact that the submission of false documents in a previous application had not been disclosed in the current application cast doubt over the relationship between Abdirahman and his father. By the date of the appeal hearing, this issue had been resolved in the favour of Mr Abdirahman.
7. Before the judge, it was firstly submitted that the respondent had not made out the burden in respect of the allegation of dishonestly submitting fraudulent documents in the previous application. This argument was run on the basis that the respondent did not initially provide the document verification report on which he relied. However, the appeal was adjourned and reconvened for this document to be served. By the time the appeal came before the judge at the reconvened hearing, that document was before her.
8. The false documents in question are asserted to be the sponsor's wage slips covering the period from 29 September 2019 to 29 January 2020.
9. The judge reminded herself that on an assertion of fraud the burden of proof was on the Entry Clearance Officer and the standard of proof is the balance of probabilities. It was said in the document verification report that HMRC did not hold any "real time" information in respect of the work carried out by the sponsor. The judge went on to take into account at [9] the weaknesses in the document verification report, including discrepancies in the names and dates of birth. However at [10], having found that the sponsor's correct national insurance number was used and that there were inconsistencies in the payslips which the sponsor was unable to explain at the hearing, (for instance the wage slips record that he was paid by BACs but his evidence what that he was paid in cash; and his gross pay to date did not increase with time), the judge went on at [11] to find:

"I am satisfied based on the totality of the evidence before me that these payslips are unreliable".
10. Ms Nolan's first submission was that the judge had erred by not making an explicit finding of dishonesty. The guidance states "The requirement for false or misleading information, representations or documents to be deliberately and dishonestly given or made is derived from the ruling in [AA \(Nigeria\) v SSHD \[2010\] EWCA Civ 773](#), which found that the interpretation of 'false' requires deliberate dishonesty or deception to be used in an application although not necessarily by the applicant.
11. I am satisfied from [11] that it is tolerably clear that the judge found that deception had been used in the previous application which is also apparent from her reference to fraud at [7]. She manifestly meant that the payslips were unreliable and did not reflect the sponsor's employment or misleading documents

had been submitted. I do not agree with Mrs Nolan that there is no specific finding of dishonesty in respect of the previous application.

12. At [11] the judge goes on to state: “Further, it is not disputed that the appellant gave misleading information in his failure to acknowledge the previous refusal of entry clearance in his current application.” This is a clear finding that in Mr Abdirahman’s current application there was no reference to the previously submitted false information. It is tolerably clear that the judge found that this information had been dishonestly omitted in the current application. On this basis, the judge had clearly found that EU16(a) applied because false or misleading information, representations or documents were submitted and the information, representation or documentation was material to the decision whether or not to grant the applicant indefinite leave to enter or remain or limited leave to enter or remain. (In fact, no submissions appear to have been made in respect of materiality and it appears that the omission to mention the previous application has no bearing on the substantive eligibility requirements of the rules). I am satisfied that ground 1 is not made out.
13. I turn to consider whether the judge’s observation at [13] that there was “some force” in the submissions that Mr Abdirahman did not submit the 2020 application himself and did not complete his current application and did not intend to mislead is inconsistent with her finding that the “appellant gave misleading information” and therefore irrational. I am satisfied that it is tolerably clear that the judge found that false information was provided in the appellant’s previous application but that this application had not in fact been completed by Mr Abdirahman himself because of his age and that she accepted Mr Abdirahman’s evidence that it was a friend who assisted him in making the current application and the information in that application was dishonestly misleading but there were mitigating circumstances as he was not advised to address the issue of deception in the previous application. The wording is slightly clumsy, but it is clear from the structure of the decision that at paragraphs [7] to [11] the judge is addressing the question of dishonesty and from [13] onwards she is looking at the issues which are relevant to the proportionality assessment. I am not satisfied that these findings are inconsistent and therefore irrational.
14. The issue of proportionality was a separate issue as pointed out by the judge at [12]. The judge had before her the entry clearance guidance on the application of the discretionary ground of refusal which states:

“When considering whether to refuse an application on the basis of rule EU16(a), you must also consider whether that refusal would be proportionate, in light of all the known circumstances of the case. Factors to consider in assessing the proportionality of your decision include:

- the seriousness of the dishonesty or deception
- whether the applicant knew about the dishonesty or deception
- the impact on the applicant and their family member(s), in particular any children under the age of 18, of a refusal decision under the EUSS
- the applicant’s response to the notification in writing given to them (in any case where you are thinking of refusing the application based on false or misleading information, representations or documents) setting out exactly what the allegation is in this regard

15. At [13] to [15] the judge then went on to make a holistic assessment of the factors relevant to the proportionality assessment. She was manifestly able to take into account that in the previous application, the false wage slips were not submitted by Mr Abdirahman himself because he was a minor at that time and could not therefore be held responsible. At the date of the original application, he was 16 years old. The deception was deliberately dishonest, but the application was completed by a third party. This is one of the factors set out in the guidance above. She also took into account his explanation for the current omission. At that time Mr Abdirahman was 18 but still a young person.
16. The judge then returns to another consideration which must be taken into account in consideration of proportionality which is the impact on the relationship between Mr Abdirahman and his father. The judge was manifestly entitled to take into account that the dispute about the relationship had been determined in favour of Mr Abdirahman and that the decision would separate a father and his son. The judge also took into consideration that the sponsor's evidence that his previous employer did not properly record his employment or pay him in a way that was consistent with his wage slip.
17. The judge took into account that there was no challenge that the sponsor was currently employed in the United Kingdom and that he was able to care for his son at [15]. I am not satisfied that this is an immaterial consideration as submitted by Mrs Nolan. The proportionality assessment is not limited and involves a holistic assessment of all the relevant factors which is what the judge did. Having considered all of the circumstances, the judge decided that notwithstanding the dishonest omission of information regarding the previous dishonesty, the decision to apply the suitability requirement at 16(a) was not proportionate, and that the discretion should be exercised in Mr Abdirahman's favour. Mr Abdirahman therefore met the requirements of the Appendix EU Family Permit and the appeal fell to be allowed. This finding was open to the judge.
18. I am satisfied that none of the grounds are made out and I dismiss the appeal of the Entry Clearance Officer. The original decision allowing the appeal against the decision of the entry clearance officer stands.

**R J Owens**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**15 March 2024**