IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002207
UI-2023-002208
First-Tier Number: EA/08118/2022
EA/08121/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7th of December 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Ghulam Ishan Qasemi
Hafiza Rafi Qasemi
(no anonymity order made)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr M. Ilahi, Counsel instructed by Pearl Valley Solicitors
For the Respondent: Ms Z. Young, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 1 November 2023

DECISION AND REASONS

1. The Appellants are both nationals of Afghanistan. They are respectively a husband (born 20th February 1963) and wife (16th July 1966). They seek permission under the EUSS to be able to enter the United Kingdom as the family members of their daughter Mrs Beshta Toryalai, a Norwegian national with pre-settled status.

2. All the material facts in terms of the substantive requirements of Appendix EU are accepted. The only reason that these applications were refused was because the Respondent was not satisfied as to the Appellants' suitability for entry clearance. It is his case that in an earlier application for a family permit, made on the 31st December 2021, the Appellants submitted a series of money transfer receipts purporting to have been issued by 'Small World' money transfer agents, and that investigations showed these documents to be fraudulent.

3. The Appellants were first put on notice that this was the Respondent's conclusion on the 23rd March 2022, when the decisions were made on the December 2021 applications (these decision letters were served notwithstanding that the Appellants had indicated that they wished to withdraw their applications some weeks earlier). They had not appealed against those decisions. They had instead made fresh applications, on the 28th March 2022. These second applications did not directly address the allegation of fraud made in response to the first. The second applications were refused in decisions dated the 12th August 2022.

4. The Appellants appealed and elected to have their linked appeals determined on the papers. When the appeals came before First-tier Tribunal Judge Bunting he was unable to discern from the appeal papers what the Appellants' positions were on the allegation of fraud. He noted that they had not expressly denied that the money transfer receipts were forged; nor had they challenged the Respondent's evidence that this information had come from Small World itself. Assertions were made to the effect that Small World was placed in difficulty when the Taliban took over Afghanistan in August 2021, but this did not, in Judge Bunting's view, adequately explain why the first set of applications had been supported by forged documentation. He dismissed the appeals on grounds of suitability.

5. The Appellants now appeal on the grounds that the First-tier Tribunal has misunderstood the relevant provisions of the rules.

Error of Law: Discussion and Findings

6. There is no allegation here that the Appellants submitted false documents in support of these applications. Having set out the Respondent's position about the money transfer receipts filed in the earlier applications the refusal letters then say this:

> You have not acknowledged or accepted the false information/documentation stated above or given an explanation in this application.
>
> I have considered whether the false or misleading information 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 considered the evidence provided in relation to your family relationship and have decided that the false or misleading information, representation or documentation was material because on your application form when asked- Have you ever:

> • entered the UK illegally remained in the UK beyond the validity of your visa or permission to stay
> • breached the conditions of your leave, for example, worked without permission or received public funds when you did not have permission
> • given false information when applying for a visa, leave to enter, or leave to remain
> • breached UK immigration law in any other way
>
> You responded "No, I have never had any of these", however as part of standard checks by the Home Office it has been determined that you do in fact have one or more of the points noted above, so by declaring "No, I have never had any of these" you have provided false information.

7. This, then, was the basis of the refusals. The relevant rules are to be found in *Appendix EU- Family Permit* which sets out the requirements for entry to be authorised to the family members of relevant EEA citizens. Section FP7 is concerned with refusals on the grounds of suitability. I have here edited it for brevity, and highlighted the pertinent parts in bold:

> FP7. (1) An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:
>
> (a) The applicant is subject to a deportation order or to a decision to make a deportation order; or
> (b) The applicant is subject to an exclusion order or exclusion decision.
>
> (2) An application made under this Appendix will be refused on grounds of suitability where the applicant's presence in the UK is deemed not to be conducive to the public good because of conduct committed after the specified date.
>
> (2A) An application made under this Appendix will be refused on grounds of suitability where at the date of decision:
>
> (a)(i) The applicant is an excluded person…
>
> (ii) The entry clearance officer is satisfied that the refusal of the application is justified on grounds of public policy, public security or public health…
>
> (b) The applicant is an excluded person…
>
> (3) An application made under this Appendix will be refused on grounds of suitability where at the date of decision the applicant is subject to an Islands deportation order.
>
> (3A) An application made under this Appendix may be refused on grounds of suitability where at the date of decision the applicant is subject to an Islands exclusion decision.

> **(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**; or
>
> (b)(i) The applicant:
>
> (aa) Has previously been refused admission to the UK in accordance with regulation 23(1) of the EEA Regulations; or
>
> (bb) Has previously been refused admission to the UK in accordance with regulation 12(1)(a) of the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020; or
>
> (cc) …
>
> (5) …

10. The First-tier Tribunal does not refer to FP7 in its decision. It does however summarise the Respondent's position:

> 8. The decision letter from that application was also included. This is expressed in similar terms, although it is also said that those remittances were used as evidence of dependency. Further, without those remittances, the appellants would not have been able to show the required dependency.
>
> 9. For those reasons, the receipts were material. In light of that, the decision maker considered whether the refusal would be proportionate, and concluded that it would be.

11. Mr Ilahi submits that these passages are illustrative of how the First-tier Tribunal erred. The ECO's refusals were based on the allegation that false information had been provided in *these* applications. That false information was the applicants ticking 'no' when they are asked if they have ever given false information when applying for a visa. Paragraph FP7 requires the decision maker to undertake a two part assessment. The first question is to ask whether false information has been supplied. Here that would require some consideration of whether the applicants were providing false information when they ticked 'no': that in turn would require some analysis of whether the money transfer receipts were indeed false. The second question is then whether that false information, provided in *these* applications – ie ticking 'no' – was a proportionate basis upon which to refuse them. That, Mr Ilahi submits, would require the decision maker to consider the

inverse situation: had the Appellants ticked ‘yes’, and admitted an earlier attempt to deceive, would the applications have properly been refused on that basis? Mr Ilahi points out that nowhere in the suitability section of FP7 is there any provision for the refusal of an application because an applicant used deception in an earlier one. The First-tier Tribunal has not undertaken this analysis. Instead it has directed and confined itself to whether the alleged deception in the original applications was material. That was not the question it had to ask.

12. I begin by noting that the grounds of appeal do not in fact challenge the conclusions reached in the document verification report (DVR). Nowhere is it asserted that those money transfer receipts were genuine. I conclude that there can be no error on the part of the First-tier Tribunal in concluding that the money transfer receipts were indeed faked. The Appellants have not offered any cogent explanation to meet the clear terms of the DVR. I agree with the First-tier Tribunal that the explanation that is offered – that Small World had problems operating in lockdown - has no logical bearing on the production of the receipts, or the DVR.

13. It follows that there was false information supplied in the current applications when the Appellants ticked ‘no’ when asked if they had ever supplied false information before.

14. Mr Ilahi submits that even if that finding was a good one, the materiality of the current deception is what is at stake. I agree with his analysis of FP7, and to that extent I accept that the First-tier Tribunal appears to have misdirected itself in the manner he describes. I do not however agree that the way to test the materiality of the current deception is by asking myself whether entry clearance would have been granted had it not occurred. If the Appellants had ticked ‘yes’ it would appear, having regard to the accepted facts and the scheme presented in FP7, that the Appellants would indeed have succeeded. That is because FP7 is not designed to forever bar the once-deceptive applicant. It makes no such provision. On the face of it, the once-deceptive applicant can be redeemed by admitting his mistake, offering an explanation and moving on. But here they did the very opposite. They denied having ever relied on false or misleading information, when in fact they had.

15. That is not of course the end of it. Paragraph FP7(4)(a) requires not just an assessment of materiality, but of proportionality. Mr Ilahi accepts that the First-tier Tribunal did, between its paragraphs 37 and 40, consider proportionality, but submits that the analysis therein was flawed because it was predicated on the same misdirection I refer to above. I say this because the discussion is concerned not with the ticking of ‘no’ but with the original submission of the receipts:

> 37. That is not the end of the matter, and it is necessary to consider the respondent’s discretion.
>
> 38. Here, the appellants had notice of the refusal on 23 March 2022, and have had plenty of opportunity to respond. It is unclear why the application was withdrawn and what material it was said was missing. There is a clear inference that the appellants were, or became aware, that false documents were lodged and, instead

> of confronting this with the Home Office and explaining it, an attempt was made to withdraw the application.
>
> 39. Again, the appellants have not explained why this is incorrect or how it came to be that they submitted the documents.
>
> 40. In those circumstances, I consider that it could not be said that the decision to refuse the appellants on the basis that it was made was disproportionate.

16. I accept Mr Ilahi's submission that this was an error. I am unable to find, however, that it was a material one. As the First-tier Tribunal decision makes clear, the real difficulty for the Appellants in this case was their failure to provide relevant information in support of their appeals. They elected to have the appeals heard on the papers, and the Sponsor did not therefore attend. False information had been supplied, and with no attempt to mitigate or contextualise it, and no information about the family's wider circumstances, I do not accept that the Tribunal's decision could have been other than what it was. Applying the framework in FP7, which appears to provide for the admission of past mistakes, the decision to refuse was here clearly proportionate.

Decisions

17. The decision of the First-tier Tribunal is upheld.

18. The appeals are dismissed.

19. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
22nd November 2023