



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

**Appeal Number HU/16413/2019
HU/16415/2019**

THE IMMIGRATION ACTS

**Heard at George House, Edinburgh
On the 10 November 2021**

**Decision & Reasons
Promulgated
On the 22nd November 2021**

Before

UT JUDGE MACLEMAN

Between

NMA & AMA

and

ENTRY CLEARANCE OFFICER

Appellants

Respondent

For the Appellant: Mr P G Farrell, Solicitor

For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Somalia, living in Kenya. They applied to join their father in the UK. Their cases turned on whether he had sole responsibility for their care and upbringing. It was alleged that their mother abandoned them in or around April 2018.
2. The ECO's decisions of 12 September 2019 do not mention any application by the appellants' mother.

3. The decisions were reviewed by an Entry Clearance Manager on 25 November 2019. The reviews both say, “It is noted that the appellant’s mother has had her application refused. Her case has also gone to appeal.”
4. FtT Judge J C Grant-Hutchison dismissed the appellants’ appeals by a decision promulgated on 24 September 2020. At [16] she records that she asked the sponsor about an application by the mother. She declines to accept his evidence, because he did not give a direct answer, and did not deny the making of the application.
5. The appellants applied to the FtT for permission to appeal. Their grounds say that the respondent erred by referring to an application and appeal by the appellants’ “mother” which should respectively have read “brother” and “sister” and that the presenting officer could and should have cleared this up at the hearing.
6. The FtT refused permission. In renewed grounds, the appellants assert that the matter was drawn to attention at the hearing, and that the presenting officer took a neutral position, saying she was unable to comment. The UT granted permission on 17 November 2020.
7. On 23 April 2021 the respondent filed a rule 24 response to the grant of permission, which states that “the mother’s application for entry clearance formed part of the evidence” and the FtT was right to take it into account.
8. Assertions in grounds do not prove themselves. Ideally, they should have been accompanied by evidence, e.g., from the representative at the hearing.
9. Mr Diwyncz accepted that the presenting officer in the FtT had been “unable to assist”. That is unsatisfactory. The respondent should have put this point beyond doubt.
10. The rule 24 response suggests that the mother of the appellants had made an application. Mr Diwyncz explained that was based on sight of the FtT’s decision, not on examination of the respondent’s records. Having asked colleagues to check those records, he confirmed that nothing had been found relating to the mother (although the search might not be 100% reliable). He acknowledged that if the Entry Clearance Manager made a slip, as suggested in the grounds, there had been procedural unfairness.
11. Mr Farrell was equally candid, conceding that if it emerged that the mother of the appellants applied for entry clearance, and appealed, at or around the same time as they did, that was damning to their case.
12. As Mr Farrell observed (accepting that this was with the advantage of hindsight) representatives and the Judge in the FtT should not have allowed the hearing to end without resolving the issue.

13. In a case based on alleged abandonment by the appellants mother, it appears extraordinary that if her alleged circumstances were known to the ECO, the decisions would not say something about that.
14. In terms of the law on new evidence, the matter might perhaps, with a high degree of diligence, have been explored in advance of the hearing in the FtT; but the point was rather hidden away. Its significance did not emerge until probed by the Judge. The information as it now appears is not incontrovertible, but it would probably have had an important influence on the result.
15. Lack of focus on the point at the hearing has unfortunately led the FtT into an apparent error on a matter of fact, amounting to procedural unfairness.
16. I am obliged to both representatives for their assistance in efficiently identifying the crucial point.
17. The decision of the FtT is set aside and stands only as a record of what was said at the hearing. Under section 12 of the 2007 Act, and under Practice Statement 7.2, the case is remitted to the FtT for a fresh hearing, not before Judge Grant-Hutchison.
18. An anonymity direction is maintained at this stage.



11 November 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
 2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
 3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
 4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email.