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DH-DD(2013)126

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1164 DH meeting (5-7 March 2013)

Item reference: Communication from the applicants' representatives in Sufi and Elmi against United Kingdom (Application No. 8319/07) and reply of the government.

Information made available under Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1164 réunion DH (5-7 mars 2013)

Référence du point : Communication de l'avocat des requérants dans Sufi et Elmi contre Royaume-Uni et réponse du gouvernement (Requête n° 8319/07) (**anglais uniquement**)

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DH-DD(2013)126 : Rule 9.1 in Sufi and Elmi and reply of United Kingdom.

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31st January 2013

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Our ref: AE/piggott/SUFI/34367-
00008
Your ref: 8319/07 and 11449/07

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URGENT COMMUNICATION ON BEHALF OF THE APPLICANTS IN THE CASE OF SUFI AND ELMI AGAINST THE UNITED KINGDOM (Application No. 8319/07 and 11449/07)

IN RESPONSE TO THE COMMUNICATION FROM THE UNITED KINGDOM dated 19 December 2012

DH-DD (2012) 701

Meeting: 4-5 March 2013



Item Reference: Execution of Judgments of the European Court of Human Rights

Sufi and Elmi v the United Kingdom, Application no. 8319/07 and 11449/07, judgment final on 28 November 2011

Response to information submitted by the United Kingdom Government on 19 December 2012

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Dear Sirs

Re: Mr Abdisamad Adow SUFI, Somali, 1/ 1/1987 and Mr Abdi Aziz Elmi, Somali, 15 May 1969

The following is submitted for the purposes of any review of the execution of the Judgment of the Court made final on 28 November 2011.¹

Wilson Solicitors act for both the applicants and so are in a position to comment on their current situations.

The Applicants' situations

Mr Elmi

The situation with regards Mr Elmi is largely the same as it was at the time of the communication made on behalf of the applicants by ourselves on 21 September 2012.

Contrary to the assertion of the UK Government at [7] of the UKBA letter of 4 December 2012, Mr Elmi is **not** currently serving a custodial sentence of any length at all. He is in fact at liberty and living with his sister in Greater London as the UK Government and the UKBA should well know.

His situation remains that he was notified on 25 May 2012 (through previous Solicitors) that he would be granted a period of Discretionary Leave, the period of leave being unspecified in that letter. A separate notice to his solicitors relating to bail suggested "the applicant has been granted Discretionary Leave until 24 November 2012". However, to date, Mr Elmi has **not** received any form of leave to remain at all. These letters dated 25 May 2012 and 30 May 2012 regarding the proposed grant of leave to Mr Elmi were sent to the Committee in our last communication of 21 September 2012.

A pre-action letter² was sent to the Secretary of State on 12 November 2012 seeking to challenge the failure by the Government to implement the Court's judgment. A response of 14 November 2012 advised that a reply to the pre-action letter would follow "in a few days time". The letter forwarded copies of letters of 22 October 2012 sent to both Mr Elmi and his previous representatives advising that photographs of the applicant received by UKBA shortly after 4 July 2012 had been lost and requesting that further photographs be forwarded. No further response has followed. The letters of 22 October 2012 were forwarded by ourselves to Mr Elmi in early December 2012 asking that the photographs requested be sent to us to forward to the Home Office.

¹ Judgment became final on 28 November 2011 as identified from the judgment, not 1 December 2011, as erroneously stated in the UK Government's Information of 17 July 2012.

² The 'Pre-action Protocol' on Judicial Review is a domestic procedure where prospective Claimants first notify a public authority of any decisions or actions they propose to challenge in an attempt to come to a resolution without having to resort to litigation. Clearly if there is no resolution at the 'pre-action' stage then a Claimant has no choice but to resort to litigation.

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Mr Elmi is not at immediate risk of deportation. However he remains, as at the time of our previous correspondence, in a state of limbo without permission to work, access social welfare entitlements or travel until such time as the Government does grant leave to remain.

Mr Sufi

Mr Sufi's position is more pressing at the present time as we believe him to be at immediate risk of deportation and detention.

The applicant is currently serving the custodial part of a 30 month custodial sentence for a conviction received on 25 August 2011. He is eligible for release on 13 February 2013. In purported execution of the Court's judgment, and subsequent to that conviction, Mr Sufi was granted leave to remain on 7 September 2012 for 6 months, until 2 March 2013 under cover of a letter including a 'warning' in the following terms:

I am writing to inform your client that the Secretary of State has taken note of his conviction on 31 July 2009 at Kingston-Upon-Thames Crown Court for 5 counts of burglary and theft and 2 counts of attempted burglary with intent. The Secretary of State takes a serious view of your client's conduct and, in the light of his conviction, she has given careful consideration to your client's immigration status and the question of his liability to deportation.

I should warn your client therefore that if he should come to adverse notice in the future, the Secretary of State will be obliged to give further consideration to the question of whether your client should be deported. If he commits a further offence, the Secretary of State would also need to consider the automatic deportation provisions of the UK Borders Act 2007. Your client should be aware that under such circumstances, the Secretary of State may be legally obliged to make a deportation order against him.

Importantly, that warning, came after the applicant's conviction of 25 August 2011 of which the Government had full knowledge³.

However, Mr Sufi was on 13 November 2012 notified of his liability to deportation for the offence he is currently serving the sentence for. That notice asked for representations as to why he was not so liable. The UKBA's communication of 4 December 2012 is entirely silent as to this significant fact that they are considering deportation action at the present time – rather than ensuring execution of the judgment.

We submitted a response on Mr Sufi's behalf in terms that (i) the Court's judgement sees him fall within an exception to the automatic deportation regime (where removal would breach a Convention right) and (ii) that the decision to grant six months leave was taken after and with the Home Office having full knowledge of the conviction.

We do not see how it can be lawful to issue a letter asking Mr Sufi whether or not there are reasons that would place him at risk of Article 3 treatment (so as to be

³ The Government's communication of 17 July 2012 referring explicitly to it

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excepted from automatic deportation) when the European Court has very plainly ruled on that point and the Government in their letter do not dispute that he is at risk.

Importantly, the notice of liability to deportation seriously impacts on Mr Sufi in a further two significant respects.

Firstly he would be excluded from eligibility for 'Home Detention Curfew' – which would mean that he would otherwise be released into the community to serve the remainder of his sentence on licence.⁴

Secondly, it means that Mr Sufi is liable to detention under the immigration acts at his release date of 13 February 2013 and for the duration of deportation proceedings.⁵ Whilst Mr Sufi might be entitled to apply for immigration bail he nevertheless remains liable to detention – a situation he should not be in in the first place because the power to detain is predicated on the power to deport which we argue is unlawful.

Mr Sufi is, then, at real risk of deportation. Were he to be detained under immigration powers on 13 February 2013, that would have to be taken as confirming a position held the Government that he is at *immediate risk* of deportation.

We consider that the above situation amounts to an abusive course of conduct.

We are clearly concerned about the UKBA's imminent action as we are given to understand that Mr Sufi has been visited by Immigration Officers apparently in connection with deportation or travel documentation processes and in the light of Mr Sufi's well-documented mental health problems (as the Court in its judgment referred to).

Execution of the judgment of the Court

The most immediate point is that the UK Government is not disputing that either applicants face a real risk of prohibited treatment on return.⁶ Indeed at [1] of their letter the UKBA states:

The UK Government considers that all necessary steps have been taken to implement the findings of the Court with respect to Mr. Sufi and Mr. Elmi by granting them Discretionary Leave under the Discretionary Leave policy. The UK has not been directed to grant indefinite leave or a prolonged period of leave to the individuals but rather to ensure that the individuals are not

⁴ Under the Criminal Justice Act 2003 s.246, as of July 27, 2009, prisoners are entitled to be considered for discretionary release under Home Detention Curfew (HDC) at the half way stage of their sentence. However where the Secretary of State for the Home Department decides that s.32(5) of the 2007 Act applies; a person will not be entitled for consideration for release on HDC.

⁵ The automatic deportation regime gives the Secretary of State the power to detain under s.36 of the UK Borders Act 2007 to detain while the SSHD considers whether the automatic deportation provisions apply **and** if he thinks they do, pending the making of a deportation order.

⁶ Nor would the Government have any grounds for doing so in the light of the finding by the Court that both applicants would face a real risk of ill-treatment under Article 3 ECHR (and correspondingly a risk of serious harm under Article 15c Qualification Directive). They are also required to treat the domestic country guidance case of *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia* CG [2011] UKUT 445 as authoritative. Promulgated 28 November 2011.

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returned to where they may face harm contrary to the UK's obligations under the Convention.

Firstly, and in the light of the matters set out above regarding the situation of the two Applicants, we consider that the UKBA's statement is incorrect and misleading.

Mr Elmi has not been issued with any leave to remain at all. Mr Sufi was issued with a notification of liability to deportation *three weeks before* the date of this letter to the Committee of Ministers; the notification of liability and the statement in the Communication represent an entirely polarised position in respect of this Applicant.

Secondly, the UK Government's contention at [1] and [9] of the letter of 4 December 2012 that the Secretary of State will 'review' any 'ongoing need for protection' is nothing to the point and bears no relevance to the particular facts and legal findings in each of the Applicants' cases.

Thirdly, in Mr Elmi's case, he was recognised as a refugee on 31 October 1989 and granted indefinite leave to remain on that basis on 7 January 1994 (see [20] of the judgment in *Sufi and Elmi*). As we pointed out in our previous communication of 21 September 2012, the execution of the judgment in respect of Mr Elmi should require the restoration of his indefinite leave to remain.

Fourthly, the UKBA relies in Mr Elmi's case on the application of s.72 of the 2002 Act in 2006 and subsequent appeal. This however pre-dated a decision of the UK Court of Appeal in *EN Serbia* [2009] EWCA Civ 630 which struck down a 2004 Order applied in Mr Elmi's case as being unlawful. It also pre-dated the European Court's assessment under Article 3 ECHR and therefore we argue that there are procedural fairness concerns and the UKBA's reliance on its previous decision-making is unsound. We are not aware of any decision (aside from notification of liability) on s.72 in Mr Sufi's case and in any event he would have been entitled to appeal any asylum decision, which did not happen.

Fifthly, as regards the period of leave, individuals qualifying for humanitarian protection are entitled to a leave period of 5 years and in Article 3 cases, 3 years is the appropriate form of leave. The Instruction on Exclusion is a policy document (without the force of law) and the terms are not mandatory or discretionary and depends on the circumstances of the case.

Finally, in Mr Sufi's case, UKBA are plainly not acting lawfully in issuing him with a notification of liability to deportation. Even if UKBA were applying their Instruction on restricted leave of 6 months lawfully – the correct approach (from their point of view) and according to what they have told this Committee – is to place the case under active review and consider an extension of restricted leave (not deport him). Of significant importance to the applicant is that the course the Government has taken is one that triggers a power to hold him at his release date. If the correct approach is followed, there would be no such power.

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Therefore in conclusion we consider that execution of the judgment requires the restoration of ILR for Mr Elmi and a grant of 5 or 3 years discretionary leave for Mr Sufi.

If you require further information, please do not hesitate to contact us.

Yours faithfully

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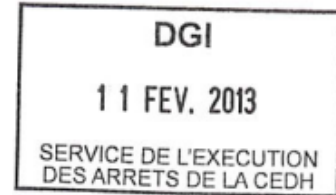
Web www.ukba.homeoffice.gov.uk

Our Ref S1217632 & E1065573

Your Ref

Case ID

Date 08 February 2013



RESPONSE TO COMMUNICATION ON BEHALF OF THE APPLICANTS
DATED 31 JANUARY 2013, Sufi and Elmi V UK: Application Number. 8319/07
and 11449/07

Current situation

Mr Elmi

1. In relation to Mr Elmi, he is not serving a custodial sentence and he is yet to be granted Discretionary Leave.
2. The UK Border Agency have now provided a substantive response to the Pre-Action Protocol letter of 12 November 2012. This explains that the matters raised were addressed in the 4 December 2012 letter of response to the communication on behalf of the applicants dated 21 September 2012. It also explains that the delay in granting Mr Elmi 6 months Discretionary Leave is regretted, but that Mr Elmi had not provided the updated photographs requested on 4 July 2012. The letter explains that the UK Border Agency hopes to use a photograph from their casework system and that should this not be possible they will ask for photographs to be provided.

Mr Sufi

3. Mr Sufi was sentenced to 3 years imprisonment following a conviction on 25 August 2011. He is currently serving his custodial sentence and is due to be released from prison on 13 February 2013. He was granted 6 months Discretionary Leave (DL) on 31 August 2012 and this was communicated in the UK Border Agency's letter of 7 September 2012. His DL is due to expire on 2 March 2013.
4. As a result of his further conviction the Secretary of State notified Mr Sufi of his liability to deportation on 13 November 2012. A response was provided to the Secretary of State on 6 December 2012. Mr Sufi's case currently remains under consideration; this will include the Secretary of State considering whether the Article 3 risk determined by the European Court still remains. The Secretary of State would not seek to deport Mr Sufi if this consideration concludes that the Article 3 risk remains.

5. If the consideration concludes that the situation in Somalia has changed since the promulgation of European Court judgement and the Article 3 risk no longer exists, Mr Sufi would be granted an in-country right of appeal against that decision.
6. Given that no decision has been issued to Mr Sufi in relation to his latest liability to deportation, and that he will receive a new right of appeal if it is decided to pursue his deportation, he is not at immediate risk of deportation.
7. In addition a Judicial Review was lodged on 6 December 2012 in relation to the grant of 6 months DL and of the lawfulness of Mr Sufi's current liability to deportation. At present these legal proceedings also prevent Mr Sufi's removal from the United Kingdom.
8. The power to detain a person who is subject to deportation action is set out in paragraph 2 of Schedule 3 to the 1971 Act, and section 36 of the UK Borders Act 2007 (automatic deportation). The service of a notice of liability to deportation makes an Applicant subject to this power. Any decision to detain in these circumstances is taken in accordance with chapter 55 of the Enforcement Instructions and Guidance.

Execution of the judgement

9. The Secretary of State maintains that all necessary steps have been taken to implement the findings of the Court. Mr Sufi was issued with 6 months DL and as stated above, while the delay is regretted, Mr Elmi will also be granted 6 months DL in execution of the judgement.
10. The consideration in relation the Secretary of State's entitlement to restrict Mr Sufi and Mr Elmi's leave to 6 months was addressed in the UK Border Agency's 4 December 2012 letter of response to the communication on behalf of the applicants dated 21 September 2012. The UK maintains that the Secretary of State is entitled to have a policy to the effect that those who are excluded from Humanitarian Protection will generally obtain Discretionary Leave for a certain period of time. Such a policy enables the Secretary of State to review an Applicant's case at reasonable intervals, so as to consider whether the circumstances that warranted the initial grant of Discretionary Leave remain applicable. The Secretary of State has decided that 6 months is the appropriate period for such leave, however should a case fall for reconsideration for any reason within that period, including renewed liability to deportation as a result of a criminal conviction, consideration will be given to whether the circumstances that warranted the initial grant of Discretionary Leave remain applicable.