Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18244/2012

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 9 October 2013	**On 15 November 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

TIMIRO NOUR OSMAN

Appellant

and

THE ENTRY CLEARANCE OFFICER - RIYADH

Respondent

Representation:

For the Appellant: Mr G Hodgetts instructed by South West Law
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Somalia who was born on 1 January 1946. On 23 August 2012, the appellant applied for entry clearance to join her son Abdulkadir Mohamed Dahir in the UK. That application fell to be decided under Appendix FM, section EC-DR ("Entry clearance as an adult dependent relative") of the Immigration Rules (HC 395 as amended). On 8 September 2012, the Entry Clearance Officer in Riyadh refused the appellant's application on the basis that the appellant did not meet the

requirement in E-ECDR 2.4. First, he was not satisfied that she was related to the sponsor as claimed. Secondly, she had failed to establish that she required long-term personal care to perform everyday tasks. The ECO also did not accept that the sponsor was the appellant's son as she claimed. That decision was upheld by an Entry Clearance Manager on 5 November 2012.

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 4 April 2013, Judge Powell dismissed the appellant's appeal under Appendix FM and under Art 8 of the ECHR. On 15 July 2013, Upper Tribunal Judge Craig granted the appellant permission to appeal to the Upper Tribunal. Thus, the appeal came before me.

The Relevant Rule

3. The relevant provisions of Appendix FM are E-ECDR 2.4 and 2.5 which, so far as relevant, provide as follows:

> "2.4 The applicant… must as a result of age, illness or disability require long-term personal care to perform everyday tasks.
>
> 2.5 The applicant… must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because -
>
> (a) it is not available and there is no person in that country who could reasonably provide it; or
>
> (b) it is not affordable."

4. It is not suggested that any of the other requirements in Section EC-DR are relevant in this appeal. It is not (now) suggested that the appellant cannot meet those other requirements.

The First-tier Tribunal's Decision

5. In his determination, Judge Powell made a number of findings. He accepted that the sponsor was indeed the appellant's son which had not been contested before him because of DNA evidence establishing the family link.

6. In para 10 of his determination the Judge identified the sole issue to be decided, namely:

> "Whether the appellant has shown that she requires long-term personal care to perform everyday tasks by reason of age, illness or disability."

7. In evidence before the Judge was a medical report from Dr Michael Nelki dated 22 March 2013 (at pages 31-34 of the appellant's bundle). Dr Nelki's report was based upon four documents: a prescription for the appellant; a photograph showing the appellant with her son; and two medical reports. In addition, Dr Nelki had seen the witness statement of the appellant's son, the sponsor.

8. In that report, Dr Nelki identified a number of drugs which were being prescribed for the appellant. One drug, "Olanzapine", Dr Nelki stated is used for schizophrenia and mania and particularly for the control of aggression and disturbed behaviour in schizophrenia and mania (para 4 of the report). Another drug "Depakine", Dr Nelki stated is used for epilepsy and bipolar disorder, the latter condition formerly being known as manic-depressive psychosis (see para 5 of the report). Finally, Dr Nelki identified another drug prescribed for the appellant, namely "Quetiapine" which again he stated is used for schizophrenia and mania (para 6 of the report).

9. Dr Nelki identified a number of typical side effects of these drugs including, drowsiness, hallucinations and weakness and a Parkinson's disease-like syndrome the symptoms of which include hand tremor, muscular rigidity and slowness of movement. At para 8 of his report Dr Nelki concluded that the side effects of this combination of drugs is "unpredictable" but it is "very unlikely" that the appellant does not have significant side effects assuming she is taking the drugs prescribed.

10. At paras 11-13 of his report, Dr Nelki identified, on the basis of the medical reports from Saudi Arabia, that the appellant suffers from knee and back pain and that she suffers from osteoarthritis of both knees with osteopenia (bone thinning). The condition is a degenerative joint disease and causes immobility and pain. At paras 14-17 Dr Nelki under the hearing "Opinion" set out his understanding of the appellant's medical condition in the light of the documents he had seen as follows:

> "14. My inference from the information given in these documents is that of Tamiro Nour Osman; a 67-year-old woman from Somalia, now residing in Saudi Arabia, illegally.
>
> 15. She has symptoms and findings of osteoarthritis confirmed by Xray. The stated immobility is confirmed by the osteopenia also shown on Xray.
>
> 16. Although psychiatric disease is not my field of expertise, from my long experience in General Practice dealing with such problems, feeling "trapped" and isolated in a hostile community, real or perceived, is highly consistent with inducing agitated and paranoid thoughts.
>
> 17. She is on very considerable, antipsychotic medication typical of a prescription for very severe symptoms; such as severe agitation and loss of touch with reality. A typical explanation from the above information is that of an elderly woman living alone whose immobility will have trapped her in her room. She is scared and has become so agitated and confused that very high doses of two medications and a low dose of a third is required. The typical side effects of these medications is to make her more drowsy, confused and weak thus aggravating her immobility, sense of isolation and paranoid thoughts."

11. At paras 18-22, under the hearing "Conclusion" Dr Nelki expressed the following views:

> "18. In conclusion Tamiro Nour Osman is a 67-year-old woman from Somalia living alone in Saudi Arabia, effectively confined to one room. She is immobile from painful arthritis. She is mentally disturbed, highly consistent with being in pain, "*trapped*" and alone.

> 19. She is on high doses of medication, which urgently needs to be reviewed and simplified and, almost certainly, reduced. It is very likely that she has side effects from the medication which might, actually, be aggravating her condition.
>
> 20. Her osteoarthritis immobility and pain need to be addressed. This is best done by her becoming progressively more active with physiotherapy and analgesia. Mobility cannot be achieved in her present circumstances.
>
> 21. Getting out and about, lovingly cared for by someone she knows, would almost certainly help her physical and mental state enormously.
>
> 22. Spending her remaining years in the tender, loving care of her son is to be recommended."

12. Judge Powell accepted the uncontested medical evidence that the appellant had been diagnosed with osteoarthritis in both knees with osteopenia and that they cause her pain and limit her mobility (see para 18 of the determination). He accepted that she had "difficulties in walking and ascending stairs". He also accepted Dr Nelki's evidence regarding the likely conditions suffered by the appellant that required the prescription of anti-psychotic drugs (see para 19).

13. However, in para 19 of his determination, the Judge went on to state as follows:

> "19. I do not accept his subsequent description of the appellant's likely circumstances. He has not examined the appellant and has only a prescription to go on, not a medical report or description of her mental health."

14. At para 20 the Judge accepted that despite her illegal immigration status in Saudi Arabia that the appellant was "able to receive treatment for her physical and mental conditions."

15. The Judge accepted that that treatment was on-going and, then in respect of Dr Nelki's report, he stated that:

> "Whilst Dr Nelki may prefer to (sic) different treatment regimes, there is no evidence, as opposed to opinion, to show that the appellant's health is adversely affected by the treatment she receives."

16. One of the grounds of appeal challenges the Judge's rejection of Dr Nelki's opinion as not amounting to "evidence" when it was, in fact, his expert opinion. I will return to that shortly.

17. Turning back to the Judge's decision at para 21 he made a finding in respect of E-ECDR 2.4 of Appendix FM:

> "21. I take into account what the sponsor told me; however, it is clear that the appellant has considerable help with her daily living. On one hand, this suggests that she does indeed need such help with day-to-day living. On the other hand, it also shows that her needs are being met or could be met in Saudi Arabia."

18. The sponsor's evidence was that the appellant was cared for by a member of the Somali community. His evidence was, however, that she was awaiting a visa to join her husband in the United States of America. The Judge dealt with this evidence at para 22 as follows:

> "The sponsor tells me that her mother's carer is a member of the local Somali community. He suggests that she is waiting to join her husband in the United States and therefore a continuing assistance cannot be guaranteed; however, the appellant has produced no evidence to confirm this."

19. Rejecting, it would seem, the sponsor's evidence on the basis that no supporting evidence was produced, the Judge set out E-ECDR 2.5 of Appendix FM at para 23 and then concluded that the appellant could not meet the requirements of that Rule as follows (at paras 24-25):

> "24. It is apparent that the appellant has the required help to perform long-term personal care to perform everyday tasks. She receives treatment and has access to medical care. Her care needs are currently being met by the concerned and able carer from her local community.
>
> 25. As such, the appellant does not meet the requirements of the relevant immigration rule on the date of decision. It may well be the case that if there is clear evidence that the carer is not able to continue to provide care and there is no other person who can do so, the appellant will meet the requirements."

20. As a consequence, the Judge dismissed the appeal under Appendix FM, Section EC-DR

21. In addition, at paras 26-31, the Judge went on to find that the respondent's decision was a proportionate interference with the appellant's private life under Art 8 of the ECHR.

The Submissions

22. On behalf of the appellant, Mr Hodgetts made two principal submissions.

23. First, he submitted that the Judge had been wrong to reject parts of Dr Nelki's report simply on the basis that it was not evidence but only opinion. He submitted that medical opinion was evidence and it was not necessary for Dr Nelki to have seen the appellant although that was a matter which might go to the weight of the evidence. In support of his submission, Mr Hodgetts relied on Miao v SSHD [2006] EWCA Civ 75 at [17] where Sedley LJ stated that it was wrong to dismiss a psychiatrist's prognosis on the ground that it was "opinion":

> "A medical expert witness's function is precisely to give an opinion on the basis of his clinical knowledge of the patient and of his field. That is what [the psychiatrist] had done. He could do no more, and in the absence of some good reason for doubting his expertise or the factual or logical foundation of his opinion, the Immigration Judge was wrong to dismiss it as merely an opinion, much less to treat it as speculative or conjectural. Like any prognosis it might turn out to be wrong, but the uncontroverted evidence the Immigration Judge had – and it was none the worse for being opinion evidence – was that if the son was deported the father's state, and with it the risk of suicide, would markedly worsen."

24. Mr Hodgetts submitted that the Judge in this case had fallen into the error identified by Sedley LJ at [17] of his judgment in Miao.

25. Secondly, Mr Hodgetts submitted that by rejecting Dr Nelki's evidence the Judge had failed to identify that the required "long-term personal care" needed for the appellant, as Dr Nelki identified in paras 21 and 22 of his report, was the personal care from someone whom the appellant trusted, namely a family member who was able to lovingly care for her. Mr Hodgetts submitted that, therefore, the Judge had failed to identify the level of care that the appellant required and to find, in accordance with E-ECDR 2.5, that such care was not available and there was no person in Saudi Arabia who could reasonably provide it.

26. Mr Richards submitted that the Judge had been entitled to reject Dr Nelki's evidence for the reason he gave. Dr Nelki had not examined the appellant and his conclusions were only based upon documentation. In any event, Mr Richards submitted that all Dr Nelki was saying was that the appellant would be happier in being cared for by a family member rather than another carer. Mr Richards submitted that the Rules only required that the appellant be provided with "long-term personal care" and the evidence accepted by the Judge, was that a carer provided that on a daily basis. He submitted that the Judge was entitled to find that, whilst the appellant required such care to perform everyday tasks, she was receiving it.

Discussion

27. I begin with the requirements of E-ECDR 2.4 and 2.5.

28. First, the applicant must establish that he or she requires "long-term personal care to perform everyday tasks".

29. Secondly that need must arise as a result of "age, illness or disability". Consequently, even if the need for the personal care is established, if it does not arise from one or more of the three stated conditions of the individual, then the requirements of the Rule are not met.

30. No definition of "long-term personal care to perform everyday tasks" is contained within the Immigration Rules. The reference to "personal care" is to be distinguished from "medical" or "nursing" care and would appear to mean that the care that has to be provided is "personal" rather than, for example, support provided by mechanical aids or medication. The need is for "personal" care, in other words, care provided by another person. The "personal care" must be required "long-term" rather than on a temporary or transitional basis. And, further, the provision of care must be necessary in order that an individual may perform "everyday tasks".

31. The relevant IDI (dated 13 December 2012) at para 2.2.1 gives by way of example of "everyday tasks" that an individual is incapable of "washing, dressing and cooking". Those are obviously aspects of an individual's life properly described as "everyday tasks" but that phrase has a wider meaning which would include, for

example, the management of an individual's bodily functions, difficulties with mobility and communication. Other activities of daily living will also be included within the phrase "everyday tasks".

32. Thirdly, E-ECDR 2.5 requires an individual to establish that the "required level of care in the country where they are living" cannot be obtained even with the practical and financial help of the sponsor because either it is not available or there is no person in that country who could reasonably provide it or it is not affordable. Consequently, if the sponsor can provide a relative with the finances which will deliver the "required level of care" in the relative's own country then the requirements of the Rule will not be met unless the "long-term personal care" is not available and no one in the individual's country can reasonably provide it.

33. This latter requirement undoubtedly imposes a significant burden of proof upon an individual to show that the required level of care is not available and no one can reasonably provide it in the individual's country. An example where that latter requirement might well be satisfied would be where the "required level of care" needed requires a particular type of carer, for example a close family member, none of whom live in the individual's country. The evidence would have to establish, in such a case, the need for a particular type of carer such as a family member and not simply that the individual required personal care from someone. In many circumstances, the "required level of care" to perform such everyday tasks as cooking, washing, and to assist mobility are likely to be capable of being performed not just by family members who do not live in that individual's country. But, it is equally possible to contemplate, having regard to cultural factors, that needed "personal care" involving intimate or bodily contact may require a gender-specific carer from the individual's family. What is the "required level of care" and who may appropriately provide it will depend upon the circumstances and the evidence in any given case.

34. Turning now to this appeal, I begin first with the Judge's rejection of Dr Nelki's "opinion" that the appellant's health is adversely affected by the treatment she receives.

35. It is of course true that Dr Nelki did not examine the appellant. However, he had two medical reports relating to her and a record of medication prescribed for her. In his report, Dr Nelki assessed that evidence and, at para 19, concluded that she was on "high doses of medication which urgently needed to be reviewed and almost certainly reduced." It was very likely, in Dr Nelki's opinion, that she had side effects from the medication which could aggravate her condition. In my judgment, even though Dr Nelki had not examined the appellant, he had material before him which entitled him to reach his opinion in para 19 and, indeed, elsewhere in his report. That opinion was his expert opinion. As Sedley LJ pointed out in Miao at [17], that could not be dismissed as "merely an opinion". Dr Nelki was performing his function as a medical expert witness of giving an opinion based on his clinical knowledge of the appellant. The Judge was wrong in para 19 of his determination to doubt Dr Nelki's assessment of the appellant on the basis that he only had a

"prescription to go on" and "not a medical report or description of her mental health". As is clear, Dr Nelki had two medical reports concerning the appellant's osteoarthritis and there was also evidence from the sponsor as to her condition and presentation.

36. For these reasons, I accept Mr Hodgetts' submission that the Judge erred in law in failing to place any weight upon Dr Nelki's evidence of the appellant's likely circumstances in Saudi Arabia and that her current treatment was adversely affecting her health.

37. That said, to the extent that Dr Nelki's opinion is that the appellant would receive different and better or more efficacious treatment in the UK could not, in itself, lead the Judge to conclude that the appellant met the requirements of E-ECDR 2.4 and 2.5. Those provisions focus exclusively upon the individual's situation in their own country. If an individual does, in fact, require "long-term personal care to perform everyday tasks" and that "personal care" is available (and affordable) in their own country, it is not relevant that they would receive better or more efficacious care or treatment in the UK. The only issue under the Rules is whether their needs in their own country are in fact met.

38. In this case, the Judge concluded that the appellant's need for "personal care to perform everyday tasks" was met in Saudi Arabia through a carer from the local Somali community. Unless this finding is unsustainable, the appellant could not succeed under the Rules. In my judgment, it is not sustainable for two reasons.

39. First, the Judge appears to have concluded that whatever the needs of the appellant, the carer met them. However, in reaching that finding the Judge failed to take into account Dr Nelki's report and, indeed, the evidence of the sponsor that the appellant was as a result of her mental illness "trapped" to use Dr Nelki's word, or "a prisoner", to use the sponsor's term, in her room. The sponsor's evidence (at para 10 of his statement) was that his mother did not leave the room where she lived where she was a prisoner. In part, Dr Nelki stated that schizophrenia – a condition for which the appellant takes medication – has as one of its consequences a fear of going outside and as a result effectively being imprisoned or "trapped" in her room. The sponsor's evidence was also that the appellant's lack of mobility was very severely impaired by chronic arthritis to her knees and back. In para 20 of his report Dr Nelki concluded that the appellant's physical and emotional state would almost certainly be helped enormously if she was able to get "out and about" lovingly cared for by someone whom she knows.

40. It is readily apparent that the Judge did not take this evidence into account in assessing the "required level of care" needed by the appellant as part of her "long-term personal care to perform everyday tasks". In my judgment, "everyday tasks" includes mobility and, as a matter of common sense, to include the ability to leave one's home and interact with the world outside engaging in everyday living activities. In my judgment, the Judge failed to take this into account when he found

that the appellant's needs were, in effect, provided for by the carer of the appellant's mother from the local Somali community. As a result, that finding cannot stand.

41. Secondly, in any event, the Judge's finding in para 23 that the carer was available at the date of decision, and thereafter, to provide care to the appellant's mother is inadequately reasoned.

42. The sponsor's evidence (in para 6 of his statement) was that the carer was "waiting for her visa to come through" to join her husband in the United States of America. In para 22 of his determination, the Judge appears not to have accepted that evidence on the basis that the appellant "has produced no evidence to confirm this". At no point in his determination did the Judge make any finding that the sponsor's evidence was unreliable. It is difficult, therefore, to conclude that the Judge rejected the sponsor's evidence.

43. Instead, it may be that what the Judge was saying in para 22 was that in the absence of any other evidence the sponsor's evidence was insufficient to discharge the burden of proof on the civil standard of a balance of probabilities. I have considerable doubt whether, in the absence of expressly rejecting the sponsor's evidence for good reasons, the Judge was entitled to find that despite that evidence, in the absence of confirmatory evidence it had not been established that the mother's carer would shortly be leaving Saudi Arabia and that the appellant would in the foreseeable future lose her carer.

44. In any event, I am persuaded by the grounds that the Judge's finding on this matter was unfair as the issue was not raised before the Judge. A witness statement by Derek McConnell (the solicitor who had conduct of the appellant's appeal before the Judge) dated October 2013 states that the Presenting Officer indicated that the only issue before the Judge was whether the appellant required long-term personal care and that the evidence was related to that. The Presenting Officer's submission was that the appellant had failed to show that she required long-term personal care to perform everyday tasks and the issue of whether that care would be provided under E-ECDR 2.5 was not relied upon by the Presenting Officer. That is the substance of ground 1 of the grounds of appeal and the respondent's rule 24 reply dated 31 July 2013 does not dispute what is said. I note that the grounds state that Mr McConnell's witness statement was attached to the grounds of appeal.

45. In these circumstances, I am satisfied that the Judge's finding that the appellant's carer will be available to continue to provide care for the appellant cannot stand.

46. For these reasons, the Judge's decision to dismiss the appeal under Appendix FM cannot stand and must be remade.

Re—Making the Decision

47. I invited both representatives, at the end of the submissions in relation to error of law, to make submissions on remaking the decision.

1. The Rules

48. Mr Hodgetts emphasised the link between the appellant's mental and physical health and her needs in order to perform "everyday tasks" not just in her home but outside also. These needs, Mr Hodgetts submitted, could only be met, as Dr Nelki suggested, by her family who were in the UK.

49. Mr Richards submitted that Rules only required personal care, that is that the appellant be, for example, clothed and fed and suchlike. It did not require, as Mr Nelki's report suggested, that the appellant would be better off in the UK.

50. While I accept Mr Richards' submission that the focus of E-ECDR 2.4 and 2.5 is upon the appellant's circumstances in Saudi Arabia, I do not accept his submission that the evidence establishes that her "long-term personal care" required "to perform everyday tasks" are met in Saudi Arabia.

51. In my judgment, I am entitled to give weight to Dr Nelki's opinion as to the impact upon the appellant of her current circumstances resulting from her physical disability (namely her osteoarthritis) and her mental illness. In that latter regard, I accept Dr Nelki's evidence, based upon the documents dealing with the appellant's prescription drugs, that she is suffering from schizophrenia and, in all likelihood, bipolar disorder. I accept that her conditions require that she, despite the medication, needs "long-term personal care" in order for her to perform everyday tasks such as cooking, washing and results in severe mobility difficulties because of her physical condition which results in considerable pain.

52. Further, I accept that the appellant's physical and mental condition (in particular her mental illness) has resulted in her being "trapped" or "imprisoned" in her home which she does not leave. That debilitating feature of the appellant's daily life is the direct result, I accept on the basis of Dr Nelki's report, of her mental illness and the absence of the care of a close family member. It is, as I have stated above, part of the appellant's "everyday tasks" to be able to leave her home and engage with the world outside. To do that, in my judgment, the appellant requires "long-term personal care" which can only (if her needs are to be fully met) be provided in an environment where she is supported by a close family member such as her son. The "personal care" provided by her carer at the date of decision did not, plainly, fully meet those needs in order for the appellant to be able to perform "everyday tasks" because she remained "trapped" or "imprisoned" in her home.

53. I accept the sponsor's evidence that her current carer was, at the date of decision, awaiting a visa to join her husband in the USA. It was, therefore, foreseeable at the date of decision that the appellant would lose the support of her carer upon which she currently relies. Even if there was another person in Saudi Arabia who could provide the same support as her current carer, that person would not be able to provide the "required level of care" to meet the appellant's need to perform the everyday tasks as I have described above which can only be fully provided by a

close family member. Any replacement would, of course, likely be a stranger to the appellant.

54. For these reasons, I am satisfied on a balance of probabilities that the appellant requires "long-term personal care to perform everyday tasks" (E-ECDR 2.4), and that even with the practical and financial help of the sponsor, the "required level of care" is not available and there is no person in Saudi Arabia who could reasonably provide it (E-ECDR 2.5). There is no evidence that the appellant has any family (whether as close or otherwise) in Saudi Arabia.

55. For these reasons, having set aside the Judge's decision under Appendix FM, I remake the decision allowing the appeal under Section EC-DR on the basis that the appellant met the requirements in E-ECDR 2.4 and 2.5 at the date of decision and it is not suggested that she did not meet any other requirements of the Rules.

2. Article 8

56. In the light of that finding, it is not necessary to deal with the Judge's decision to dismiss the appeal under Art 8 in any detail. The Judge's reasoning as to proportionality was based upon the premise that the appellant could not meet the requirement of Appendix FM. As I have already found, the appellant did meet the requirements of the Rules and for that reason alone, the Judge's finding that the respondent's decision is a proportionate interference with the appellant's right to respect for her private and family life is necessarily flawed and cannot stand. The Judge accepted that the appellant enjoyed family life with the sponsor (para 26). Further, in the light of my findings above I am satisfied that by remaining in Saudi Arabia the appellant's private life, in the sense of her mental and physical integrity, is compromised despite the treatment that she receives. In my judgment, the respondent's decision interferes sufficiently seriously with the appellant's private and family life so as to engage Art 8. There is no suggestion that the appellant's son could live with the appellant in Saudi Arabia and there is no suggestion that they should live in Somalia. It would be wholly unreasonable to expect the sponsor to relocate to either country.

57. Accepting that a legitimate aim, namely that of effective immigration control is engaged, in the light of my finding that the Immigration Rules are met, the refusal of entry clearance was "not in accordance with the law". In any event, balancing the implications for the appellant's health and wellbeing, set out in Dr Nelki's report above which I accept, I am satisfied that in all the circumstances, the appellant's continued exclusion from the UK is a disproportionate interference with her right to respect for her private and family life (and that of the sponsor).

58. For these reasons, I also set aside the Judge's decision to dismiss the appeal under Art 8 and I remake the decision also allowing the appeal under Art 8 of the ECHR.

Decision

59. The First-tier Tribunal's decision to dismiss the appeal under the Immigration Rules and Art 8 involved the making of an error of law. Its decision is set aside.

60. I remake the decision allowing the appeal under the Immigration Rules and under Art 8 of the ECHR.

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable on the basis that he appellant has succeeded in establishing her entitlement to entry clearance.

A Grubb
Judge of the Upper Tribunal