



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

Appeal Number: HU/13691/2019

**THE IMMIGRATION ACTS**

**Heard by a remote hearing  
On 19 January 2022**

**Decision & Reasons Promulgated  
On 2 February 2022**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**ANBARA SALAT BALE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Ms. Bond, Counsel instructed on behalf of the appellant  
For the Respondent: Ms. Aboni, Senior Presenting Officer

**DECISION AND REASONS**

1. The appeal was listed for a resumed hearing. It is the appeal of Ms Bale ("the appellant"), who is a national of Somalia living in Germany, who had sought entry clearance to join family members and specifically her son Mr Mohamud, in the United Kingdom.
2. The application for entry clearance was deemed to be a human rights claim, and this was refused by the respondent in a decision taken on 17 July 2019. The First-tier Tribunal (Judge Aldridge) in a determination promulgated on the 16 February 2021 allowed the appeal on human rights grounds. The appeal was allowed on the basis that the appellant's

ongoing exclusion from the UK was in breach of Article 8 notwithstanding her inability to meet the ADR provisions of the Immigration Rules.

3. The Entry Clearance Officer sought permission to appeal that decision and permission was granted by the First-tier Tribunal (Judge Osbourne) on the 21 April 2021 for the following reasons:

“the grounds assert that the judge erred in law for the following reasons: made a material misdirection are relying on wrong case law; failed to consider relevant factors; failed to provide adequate reasons; provided a conflict of fact; engaged in conjecture.

In an otherwise careful and concise decision it is nonetheless at least arguable that the judge in making findings, failed to provide any or any adequate reasons upon the arguably important issues of “unduly harsh” and “proportionality” both of which are material to this appeal.

This arguably material error of law having been found; all the grounds are arguable.”

4. By a decision promulgated on 17 August 2021, I concluded that the First-tier tribunal had erred in law and that its decision should be set aside. My error of law decision is annexed to this decision marked “Annex A”.
5. Whilst I set aside the decision of the First-tier Tribunal, the assessment made by the FtTJ that the appellant met paragraph E-EDC 2.4 was not challenged on behalf of the respondent. That finding was to be preserved.
6. The FtTJ did not make an anonymity order as no grounds were submitted during the hearing for such an order to be made.
7. The ECO was represented by Ms Aboni, Senior Presenting Officer. On behalf of the appellant, Ms Bond, Counsel appeared before the Tribunal.
8. The hearing took place on 19 January 2022, by means of *Microsoft teams*. The advocates attended remotely via video as did the sponsor and his witness. There were no issues regarding sound, and no technical problems were encountered during the hearing.
9. At the hearing on 19 January 2022, Ms Bond informed the tribunal that after having taken instructions there had been difficulties in obtaining the evidence necessary for the appeal to proceed in the light of the appellant living in Germany and the language difficulties the sponsor had to make enquiries with the German authorities. It was said that there had been a misunderstanding as to how the evidence could be obtained and that having spoken to the sponsor further evidence relevant to the remaking was obtainable from him and it would be necessary for this to be submitted to the tribunal and to the respondent in writing for the decision to be remade.
10. Ms Aboni on behalf of the respondent indicated that she raised no objection to the application for an adjournment being made on behalf of

the appellant and she agreed that the evidence referred to was relevant to the remaking of the appeal.

11. In the light of the agreement reached by both advocates and taking account of the basis upon which the application was made, I am satisfied that it is appropriate in the circumstances for the appeal to be adjourned.
12. At the hearing both advocates invited the tribunal to remit the appeal to the First-tier Tribunal rather than relist the appeal as a resumed hearing. Ms Bond submitted that it was not clear how long it would take to obtain the documents necessary and for them to be translated and that in the circumstances she would ask for the appeal to be remitted to the FtT. She also clarified that there would be 2 witnesses giving oral evidence, which may require an interpreter as before and that further findings of fact were necessary in relation to the article 8 assessment. Ms Aboni on behalf of the respondent also indicated that she was in agreement with that course and that it would be a sensible and practical way to proceed.
13. I have reached the conclusion that in view of the further fact finding that is necessary and in the light of the representations made by each of the advocates and on the basis that both of them invite the tribunal to remit the appeal to the First-tier Tribunal, that I am satisfied that the appeal falls within paragraph 7.2 (b) of the joint practice statement concerning disposal of appeals and I therefore having set aside the decision of the FtT I remit the appeal to the FtT for a hearing.

Notice of Decision:

The decision of the First-tier Tribunal discloses the making of an error of law; the decision of the FTT having been set aside shall be remitted to the First-tier Tribunal for hearing. The assessment made by the FtTJ that the appellant met paragraph E-EDC 2.4 was not challenged on behalf of the respondent and that finding can be preserved as set out in the decision of FtTJ Aldridge.

Signed

Date: 19/1/2022

Upper Tribunal Judge Reeds

ANNEX A



IAC-AH-LR-V1

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

Appeal Number: HU/13691/2019

**THE IMMIGRATION ACTS**

**Heard by a remote hearing  
On 30 July 2021**

**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**THE ENTRY CLEARANCE OFFICER**

Appellant

**and**

**ANBARA SALAT BALE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms. Aboni, Senior Presenting Officer

For the Respondent: Ms. Bond, Counsel instructed on behalf of the respondent

**DECISION AND REASONS**

1. The Entry Clearance Officer appeals, with permission, against the decision of the First-tier Tribunal (Judge Aldridge) who, in a determination promulgated on the 16 February 2021 allowed the appeal of the Respondent on human rights grounds. The appeal was allowed on the basis that the appellant's ongoing exclusion from the UK was in breach of Article 8 notwithstanding her inability to meet the ADR provisions of the Immigration Rules.

2. Whilst the appellant in these proceedings is the Entry Clearance Officer, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal. The FtTJ did not make an anonymity order as no grounds were submitted during the hearing for such an order to be made.

The background:

3. The appellant is a national of Somalia, who is living in Germany and has relevant documentation (see application form at page 1 referring to having a German passport). There is no witness statement from the appellant and little by way of background evidence in the witness statements from the sponsor and his witness.
4. The appellant left Somalia in 2004 for Germany where she has humanitarian leave. According to the application form completed, her son, the sponsor, arrived in the United Kingdom in February 1999 and is a British Citizen.
5. The appellant lived with her spouse until 2005 when he died and from that date she has been living alone.
6. According to her application form the appellant has made previous applications to enter the United Kingdom for entry clearance in December 2011 and as visitor in 2018. Both applications were refused.
7. On 29 April 2019 she made an application for entry clearance as an Adult Dependent Relative under Appendix FM of the Immigration Rules (hereinafter referred to as "ADR"). The appellant had sought entry clearance as an elderly adult dependent relative as the widowed mother of the sponsor.
8. The application was refused in a decision made on 17 July 2019. The reasons given for refusing the application can be summarised as follows. The Entry Clearance Officer (hereinafter referred to as the "ECO") considered the application under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules.
9. The ECO stated that the application did not full for refusal on grounds of suitability under section S-EC of Appendix FM but that under paragraph E-ECDR 1.1 she did not meet all of the eligibility requirements. By reference to the application form and that she wished to join her son, it had been indicated on the form that she had a biological son and a stepson in the UK but that she had provided no documentation to evidence that she was related as claimed.
10. The ECO went on to state that in order to meet the rules for Adult Dependent Relatives, the appellant has to be able to demonstrate that due to either age, illness or disability, that she required long-term personal care to perform everyday tasks. It was noted that she was "82 years of age. You stated on your appendix 1 that you are suffering from

poor appetite, lack of sleep, anxiety and mistrust. I am able to wash and dress myself. But I am not able to perform any household chores or prepare food for myself.” The ECO took into account that there was a medical certificate which stated that she suffered from the following conditions arterial hypertension, bronchial asthma, diabetes mellitus type II, coxarthrosis with hip endoprosthesis, Gon arthrosis, chronic pain syndrome and impaired vision. The letter also states that due to the above illnesses the patient is dependent on help. The ECO stated that the document was not on official letter headed paper or certified by medical professional and that they did not medically diagnose an illness or disability that would require long-term personal care. Also whilst it was stated that she was dependent on help it was not stated what help she required or if she was already receiving the help required for her conditions. The ECO refused the application under paragraph E-ECDR 2.4.

11. As to paragraph E-ECDR 2.5 it was stated that the document provided did not indicate the help she required. Furthermore it was noted that she was a resident in Germany and the ECO was satisfied that healthcare was available to her. It was indicated on the application form that her children sometimes financially supported her which would indicate that she could financially support herself in Germany.
12. The ECO accepted that she met the eligibility financial requirements of paragraphs E-ECDR 3.1 to 3.4.
13. As to exceptional circumstances, the ECO consider that she had provided no information or evidence to establish that there are any exceptional circumstances in her case.
14. Thus the application was refused.
15. On the 31 October 2019 the ECM reviewed the application when the grounds of appeal had been submitted and noted that the appellant failed to supply any further supporting evidence. Based on the evidence available, the ECM was satisfied that the ECO had considered the application against the correct provision within the Immigration Rules and that the ECO had applied the balance of possibilities in assessing the application. He was not prepared to exercise discretion. Whilst it was noted in the grounds of appeal that documents would be submitted at a later stage, at present no further evidence had been provided which would indicate that the ECM should depart from the previous ECO decision. The ECM also considered paragraphs GEN 3.1 and 3.2 of Appendix FM as to whether there were any exceptional circumstances which could or would render refusal a breach of article 8 of the ECHR because it would or could result in unjustifiably harsh consequences for the appellant on the appellant’s family. Following a thorough assessment the ECM was satisfied there was no basis for such a claim.
16. The appellant’s appeal against the respondent’s decision to refuse entry clearance came before the First-tier Tribunal (Judge Aldridge) on the 5

February 2021. It is common ground that as a result of the appeal provisions that the only right of appeal against that decision was on human rights grounds. In a determination promulgated on 16 February 2021, Judge Aldridge allowed the appeal on human rights grounds.

17. The FtTJ observed that the appellant had not made a statement in the proceedings but there had been other statements from the appellant's sponsor and other witnesses. The case therefore was summarised in the grounds of appeal and no skeleton argument had been submitted.
18. The judge set out at [6] the issues in the case as whether "the appellant meets the Immigration Rules in respect of the adult dependent route. That the appellant is currently residing in Germany and that she is suffering from medical conditions evidence in a letter dated 29 January 2019 "arterial hypertension, bronchial asthma, diabetes mellitus type II, coxarthrosis with hip endoprosthesis, go arthrosis, chronic pain syndrome and impaired vision... due to the above the patient is dependent upon help" and that the appellant does not have anyone in Germany who can provide the long-term personal care that she needs and that she has relied upon her neighbours for help which is no longer available. Further that as the appellant lives alone in Germany her old age and physical difficulties there are exceptional circumstances in this case which would make refusal of entry unjustifiably harsh for the appellant."
19. At the outset of the case, the presenting officer indicated that having seen the DNA report in respect of the sponsor and the appellant, it was now accepted that the appellant was the mother of the sponsor, and this was no longer an issue in the appeal.
20. The FtTJ heard evidence from the sponsor, who is the appellant's son with the benefit of an interpreter and also from the appellant's stepson. Their evidence is summarised at paragraphs [8]- [10].
21. The submissions of the parties were summarised at [11]-[13].
22. At [18] the FtTJ set out that the issue in the appeal is a "narrow one" and recorded the appellant's case that she met the requirements in the ADR as an adult dependent relative and recited the relevant rules under E-ECDR 2.4 and 2.5 and also by reference to Appendix FM-SE and the specified evidence required to meet the rules.
23. The assessment made under the rules set out at paragraphs [19]-[21]. The FtTJ stated as follows:
  19. I am satisfied that the appellant is the biological mother of the sponsor, relying on the DNA report and the sponsor's evidence on this issue. It was not the subject of challenge.
  20. The appellant has provided one document relating to the medical condition of the appellant. A letter dated 29 January 2019 which reports on the ailments of the appellant and confirmed that the appellant is dependent upon help. I also note the evidence of the sponsor in his

statement that explains the difficulties his mother experiences coping with her medical difficulties. I further note the evidence of the sponsor and his half-brother, Mr Liban, as they answered questions during the hearing. I conclude and find that I am satisfied that the appellant suffers due to age and illness, and, as a result, requires long-term personal care. That this evidence has been provided by medical professional. Therefore, E-ECDR 2.4 is satisfied.

21. However, I must turn my attention to the issue of E-ECDR. 2.5 that it would be unpracticable for the appellant to receive the care required in the country she is living in either because it is unavailable or unaffordable. I was struck during the evidence of the sponsor by his desire to look after his mother in the UK. However, I was not satisfied that every reasonable investigation had been undertaken by the sponsor to find out whether there was assistance available paid or otherwise to provide care for his suffering mother. No documentary evidence whatsoever has been produced to evidence their enquiries and rejections. I do not accept that care cannot be provided either in the public or private sector in a developed country such as Germany. I look to the specified evidence of paragraph 35 and find that the appellant has failed to provide independent evidence a relevant authority or medical professional that confirms that the required level of assistance is unavailable nor that the sponsor is unable to financially afford such assistance. Accordingly, I am not satisfied that the appellant meets the rules.

24. The FtTJ then went on to consider article 8 under the heading “outside the rules” at paragraphs [22]-[25]. After setting out the well-known decision of Razgar and the 5 steps, the FtTJ set out his analysis as follows:

“23. Although not cited to me, I have considered the decision of the Court of Appeal in TZ (Pakistan) v SSHD [2018] EWCA Civ 1109. At paragraph 33 the Court of Appeal said that “a tribunal undertaking an evaluation of exceptional circumstances outside the Rules must take into account as a factor the strength of the public policy in immigration control as reflected by the Secretary of State test within the Rules. The critical issue will generally be whether the strength of the public policy in immigration control in the case before it is outweighed by the strength of the article 8 claim so that there is a positive obligation on the state to permit the applicant to remain in the UK.”

24. The determination of this article 8 claim requires a proportionality assessment. I apply Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 (paras 47 – 53 suggested a balance sheet approach) and Agyarko and others, R (on the application of) v Secretary of State for the Home Department [2015] EWCA Civ 440, which says that decisions must be “unduly” harsh to breach article 8 rights. The immigration rules are within the margin of appreciation of the state and are compliant with article 8. I am satisfied that, considering the accepted ailments of the appellant, her advanced age of 82 and the fact that she has no family that reside in Germany which is not her home country of Somalia, that article 8 is engaged and the appellant will suffer in a manner which could be described as unduly harsh. The strength of the public policy in immigration control is outweighed by the article 8 claim.



25. Considering the appellant's case as a whole, I find that it has been demonstrated that her case is exceptional. I found the evidence of the sponsor and Mr Liban to be both consistent and credible. The issue in this case is proportionality. In balancing the interests of the appellant and her sponsor as against the public interest, I find that the balance in favour of allowing this appeal. The difficulties that would be experienced by the appellant at the age of 82 without full-time care from her family with such significant ailments and lack of mobility make this matter exceptional as well as the unjustifiably harsh consequences to the sponsor if he were to have to give up his employment and settled status to move to the appellant's home. The strength of the public policy in maintaining immigration control is outweighed by the strength of the appellant's article 8 case. I find the refusal of the appellant's application would not be a proportionate measure and a fair balance between the competing interests."

25. The judge therefore allowed the appeal.

26. The Respondent appealed against that decision and permission was granted by the First-tier Tribunal (Judge Osbourne) on the 21 April 2021 for the following reasons:

"the grounds assert that the judge erred in law for the following reasons: made a material misdirection are relying on wrong case law; failed to consider relevant factors; failed to provide adequate reasons; provided a conflict of fact; engaged in conjecture.

In an otherwise careful and concise decision it is nonetheless at least arguable that the judge in making findings, failed to provide any or any adequate reasons upon the arguably important issues of "unduly harsh" and "proportionality" both of which are material to this appeal.

This arguably material error of law having been found; all the grounds are arguable."

#### The appeal before the Upper Tribunal:

27. Thus the appeal came before the Upper Tribunal. The ECO was represented by Ms Aboni, Senior Presenting Officer. On behalf of the appellant, Ms Bond, Counsel appeared before the Tribunal.

28. The hearing took place on 30 July 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the sponsor. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing, and I am satisfied both advocates were able to make their respective cases by the chosen means.

29. I am grateful to Ms Aboni and Ms Bond for their clear oral submissions.

30. Ms Aboni relied upon the written grounds. In relation to ground 1, it is submitted that the FtTJ made a material misdirection in law from

paragraph [22] where the judge applied case law relating to removal from the UK rather than entry clearance.

31. In relation to ground 2 headed “inadequate reasons”, the written grounds state that at [24] the judge found that age, ailments and lack of family in Germany would lead the appellant suffering in a manner which could be described as “unduly harsh” but did not adequately reason why this is so. The appellant has lived in Germany many years, clearly has neighbours, who may not want to provide personal care, but remain interested, probably has friends and receives professional care 3 times per day.
32. In her oral submissions she submitted that it was a “reasons challenge” and that whilst the judge found the appellant could meet the requirements of long-term personal care due to her age and mobility issues the FtTJ found that the appellant could not satisfy the Immigration Rules because she could not demonstrate that adequate care could not be accessed within Germany.
33. Ms Aboni submitted that the judge materially erred in law by allowing the appeal on article 8 grounds by giving inadequate reasons for allowing the appeal. The FtTJ failed to establish why the case was “compelling” or “exceptional” to merit a grant of leave and failed to identify any unjustifiably harsh consequences or that it would be unduly harsh to expect the appellant’s sponsor to relocate to Germany.
34. In this respect she submitted that the medical evidence of the appellant’s care needs was limited and that the appellant in fact did receive care from Germany and their healthcare system 3 times per day. There was no evidence of any care assessment in support of that care, but it was plain that it was arranged and was comparable to the type of support that may be given in the UK and therefore the circumstances were not “exceptional” or “compelling”.
35. She submitted that the judge stated in the decision that the family had made no attempt to investigate care options available in Germany either in the private sector to pay for or additional care that could be provided from the authorities as a resident and wanting to bring the appellant the UK was not sufficient to meet the “exceptional circumstances”.
36. As to proportionality, she submits there was little consideration of the public interest and no consideration of the public purse and that it must be the case for the appellant that she would still require recourse to medical treatment in the UK and that this was a factor that was not taken into account by the judge and therefore there were inadequate reasons given for reaching the decision that the decision to refuse entry clearance was disproportionate.
37. As to ground 3 headed “conflict of facts” the grounds state that the judge set out at [25] that “the difficulties that would be experienced by

the appellant at the age of 82 without full-time care from her family with such significant elements and lack of mobility make this matter exceptional.” The respondent submits that there is no detail of why this is so exceptional and how the appeal having failed under the rules because the judge did not accept that care could not be provided either in the public or private sector in developed countries such as Germany are set out at paragraph 21 could conversely meet article 8 outside the rules. The fact that the family would prefer to have the appellant in the UK, was not sufficient to meet the exceptional circumstances criteria.

38. As to ground 4, this related to the sponsor’s suffering unjustifiably harsh consequences if he were to have to give up his employment and settled status to move the appellant’s home and that this amounted to conjecture in view of him confirming he would not relocate to Germany.
39. Ms Bond, counsel and behalf of the appellant confirmed that there was no rule 24 response.
40. She made the following submissions. By reference to the decision of the FtTJ, a finding was made that the appellant could not meet the Immigration Rules as evidence had not been provided as to the cost of care and it had not been investigated and that was an aspect of the case which was missing. However the judge looked at the case outside of the rules and came to a conclusion that was open to the judge to reach.
41. Whilst the respondent asserts that the wrong case law was cited that made no difference to the test of undue harshness and that the judge accepted all the evidence given by the sponsor and his stepbrother as credible.
42. Ms Bond referred the tribunal to the decision at [20] is that the family had not undertaken any investigations but what the judge said at [24] that when considering the ailments of the appellant and taking into account her age of 82, and that she had no family in Germany which is not her home country that article 8 was engaged and that the appellant would suffer in a manner which could be described as unduly harsh. The judge found that the strength of the public policy on immigration control was “outweighed by the article 8 claim”. She submitted that the grant of permission referred to the decision being “careful and concise” and that the judge had undertaken an evaluation of the evidence having accepted her ailments and that all the factors would demonstrate she would suffer undue hardship and that this was open to the judge to make.
43. Ms Bond submitted it was significant that the judge accepted all the evidence of the 2 sponsors. She referred the tribunal to the witness statement of the sponsor at paragraph 15 where he referred to having visited his mother 3 times in 2019 and that during her stay “I have seen improvement in her condition, she was happy emotionally, she was eating well. She was happy when I was with bedside and talking to her.

After our return to the UK, I have been informed that my mother is not eating well and is emotionally very down. I speak to my mother daily.” At paragraph 17 he said that if his mother stayed in Germany she would be alone and “her health deteriorates drastically. There is no one to look after her daily and speak to her. However, if she is allowed into the United Kingdom, I will be able to provide with all personal care she requires on a day-to-day basis, and this will improve the quality of her life. Emotionally she will be strong seeing me every day and other family members including my half- brother, his children and my other brothers children in the UK.”

44. Ms Bond submits that the judge took into account the emotional side as a relevant factor having accepted the evidence of the sponsor as credible. Therefore the overall assessment as to why the circumstances would be “unduly harsh” properly considered this outside the rules.
45. As to paragraph 25 of the decision she submitted that it was an impeccable direction and there was no inadequate reasoning and whilst the decision was concise the judge had set out what had been taken into account in allowing the appeal.
46. Ms Aboni on behalf of the respondent replied that the judge gave inadequate reasons as to why the circumstances of this appellant were exceptional given that care could be arranged in Germany and therefore denying entry would not be unduly harsh.
47. As to the conflict of fact, the appellant had not demonstrated that she could not access her care in Germany and there was no evidence the appellant addressing this issue. The judge did not accept that adequate care could not be provided and therefore should have been factored into the unduly harsh assessment.
48. In this respect, Ms Bond submitted that whilst not conceding that care would be adequate, the judge looked at the case outside the rules as “exceptional” on the emotional impact of the appellant remaining on her own. The judge made findings on the sponsor’s evidence as credible as to the emotional impact and could not be addressed in the UK.
49. In reference to the S117 public interest considerations, Ms Bond submitted that the only issue would be the charge on public funds, but the rule itself accepted the vulnerabilities and the medical needs. Even if the judge had factored in the public interest consideration of medical health treatment, the FtTJ’s conclusion would still be open to him. The sponsor had stated that the family relatives would support the appellant when the sponsor was at work.
50. At the conclusion of the hearing I reserved my decision which I now give.

Decision on error of law:

## The ADR Rules

51. The appellant relied upon the ADR rules in Section EC-DR of Appendix FM. The relevant provisions, in issue before the judge, are set out in E-ECDR.2.4. and E-ECDR.2.5. as follows:

"E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, 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 can reasonably provide it; or

(b) it is not affordable."

52. Appendix FM-SE sets out evidential requirements at paras 33-37. So far as relevant to this appeal, paras 34 and 35 provide as follows:

"34. Evidence that, as a result of age, illness or disability, the applicant requires long-term person care should take the form of:

(a) independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and

(b) this must be from a doctor or other health professional.

35. Independent evidence that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:

(a) a central or local health authority;

(b) a local authority; or

(c) a doctor or other health professional."

53. These provisions have been considered by the Courts although it does not seem that the FtJ was referred to the relevant authorities. In R (Britcits) v SSHD [2017] EWCA Civ 368; [2017] 1 WLR 3345, a court comprising the Master of the Rolls, Davis LJ and Sales LJ (as he then was) held that the ADR Rules were not ultra vires, unreasonable or contrary to Article 8 ECHR. In so holding, however, the Master of the Rolls (with whom Davis and Sales LJ agreed) emphasised the correctness of a point which had been made by counsel for the SSHD, which was that 'the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant': [59]. The Master of the Rolls

expressed some concern that insufficient attention might have been paid to such considerations in the past. The purpose of the new Rules was said to be twofold: to reduce the burden on the taxpayer for the provision of health and other services to ADRs; and to ensure that those whose needs could only be met in the UK are granted settled status and access to those services: [58]. At [90] of his judgment in that case, Sales LJ (as he then was) had noted that in a significant number of cases where the ADR rules are applied the interference with Article 8 rights would be justified and proportionate.

54. In Ribeli v ECO (Pretoria) [2018] EWCA Civ 611, it was submitted that the Upper Tribunal had erred in law in dismissing the appeal of Ms Ribeli against the refusal of entry clearance as an ADR. She suffered from degenerative back disease, osteoarthritis and fibromyalgia and wished to join her daughter in the UK. The court held that the Upper Tribunal judge had been correct to find that the decision of the FtT was vitiated by legal error, in that it had been wrong, firstly, to dismiss the ECO's concern about the absence of evidence about how exactly the appellant was managing on a day-to-day basis; and, secondly, there was no independent evidence that the appellant was unable to obtain the required level of care in South Africa. Nor had the Upper Tribunal judge erred in proceeding to consider and dismiss the appeal on the merits. The rules were rigorous and demanding and what was crucial was the appellant's physical needs. The UT had been entitled to conclude that the evidence was insufficient to discharge the burden of proof. There was no error of law in finding that the Rules were not met, or that the refusal of entry clearance was proportionate in Article 8 ECHR terms.
55. In summary, therefore, the ADR rules require the individual to establish that as a result of their "age, illness or disability" they require "long-term personal care to perform everyday tasks" and the individual is unable to obtain the required level of care in their own country, even with the practical and financial help of the sponsor, either because it is not available and there is no person in the country who can reasonably provide it, or it is not affordable.
56. The central issues must, as a result of paras 34 and 35 of Appendix FM-SE, be established by independent evidence from a doctor or health professional (in the case of the requirement that the individual cannot, as a result of their condition, perform everyday tasks) and from the NHS, a local authority or health professional (in the case of the requirement that they are unable to obtain the required level of care).
57. On the evidence before the FtT the judge found that the appellant had met the requirements of paragraph E-ECDR 2.4 (at [20]). However the FtT found the appellant could not meet paragraph E-ECDR 2.5. Not only had the appellant failed to provide the specified evidence necessary under paragraph 35 of Appendix FM – SE, in terms of availability of the required level of care needed, but there was no evidence from any source as to the level of the care available to the appellant in Germany. The FtT expressly stated at [21] that he was not satisfied that any

reasonable investigations had been undertaken by the sponsor as to assistance, available paid or otherwise, to care for the appellant. The judge also stated that he did not accept that care could not be provided either in the public or private sector in a developed country such as Germany ( at [21]).

58. From the brief description of the factual circumstances of the appellant it appears that there had been assistance provided by the German state 3 times per week. It had not been stated on behalf of the appellant what provision of care was in fact undertaken by the German state nor how such care had been assessed by them.
59. The need to provide evidence from specified sources ensures that there is concrete and reliable evidence of the lack of availability of the relevant care required by the person seeking entry to the UK. Having found this to be the position under the Immigration Rules, I am satisfied that the FtTJ erred in law by not taking that into account when undertaking the proportionality assessment and in his reasoning that the appellant circumstances were “exceptional” or that the appellant would “suffer in a manner which could be described as “unduly harsh” “ ( at [24]).
60. In my judgement the FtTJ failed to adequately reason why the appellant’s circumstances could be described as “unjustifiably harsh” in the light of the lack of evidence as to what the appellant circumstances actually were. Whilst the FtTJ stated that he found “the difficulties that would be experienced by the appellant at the age of 82 without full-time care of her family with such significant ailments and lack of mobility make this matter exceptional” (at [25]) that finding is made in the absence of any consideration as to what care she currently was receiving in Germany. In other words, the judge has not reasoned why the care she was receiving in Germany was not reasonable or made her exclusion from the UK “unjustifiably harsh”.
61. Whilst Ms Bond submits that the FtTJ found the sponsor and his witness to be credible, I can find no evidence in support of the arrangements made in Germany and it appears no effort to be made to provide evidence to that effect. Whilst there was a reference to former care by neighbours being unavailable, there was no evidence as to any other investigation of the type of care or to assess how her needs could be met other than her living with the sponsor in the United Kingdom.
62. I would accept that it is the nature of the adult dependent relative rule that persons seeking entry clearance with reference to that aspect of the rules are likely to have health conditions and are likely to be elderly. However if the answer to the proportionality question based on those factors alone would always be in favour of the adult dependent relative coming to live in the UK with a UK based sponsor or relative, the rule would be redundant. The need for compliance with the Rule is significant and a weighty factor. As such the rules are the Secretary of State’s view of where the public interest lies and if the appellant, as here, cannot

meet the rules, it is a very weighty consideration in any proportionality balance. It is therefore necessary to take account of all the relevant factors before reaching the decision that a particular case is “exceptional” or that that having weighed up the competing circumstances the decision to refuse entry clearance would be “unduly harsh”.

63. In this context I also accept the submission made on behalf of the ECO that the judge failed to take into account in the proportionality balance the appellant requiring additional NHS care for a significant period of time. The public policy enshrined in the adult dependent relative rule is to protect public funds from bearing the cost of medical treatment. This goes beyond the question of whether a person can be maintained or accommodated. I accept the submission on behalf of the ECO that this factor was not weighed in the balance and therefore the balancing exercise was undertaken without a relevant consideration (see Britcits v SSHD [2017] EWCA Civ 386 at [58-59]).
64. The obligation on a tribunal judge is to give reasons in sufficient detail to show the principles upon which the tribunal has acted and the reasons that have led to the decision. Whilst I accept that appellate courts should not rush to find a misdirection simply because they might have reached a different conclusion on the facts or express themselves differently, in my judgement and on a careful reading, the FtTJ erred in law for the reasons that I have given above. Consequently the decision cannot stand and it should be set aside.
65. At the hearing Ms Bond submitted that in the event of an error of law being found she would seek a remittal to the FtT.
66. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

67. In my judgement and consistent with the overriding objective, the correct forum for re- making the appeal is the Upper Tribunal. The assessment made by the FtTJ that the appellant met paragraph E-EDC



2.4 was not challenged on behalf of the respondent. That finding can be preserved. The re-making of the decision therefore will take place for the Upper Tribunal on a date to be fixed and in accordance with the directions accompanying this decision.

Notice of Decision:

The decision of the First-tier Tribunal discloses the making of an error of law; the decision of the FTT shall be set aside to be remade by the Upper Tribunal.

Signed

Date: 11/8/2021

Upper Tribunal Judge Reeds