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

Appeal Number: OA/06235/2013
OA/06233/2013

**THE IMMIGRATION ACTS**

**Heard at North Shields**
**On 21 August, 2014**
**Signed, 22 August, 2014**

**Determination Promulgated**
**On 28 August 2014**

**Before**

**UPPER TRIBUNAL JUDGE RICHARD CHALKLEY**

**Between**

**MR HOSSEIN FARJADNIA**

1st Appellant

**MRS AZARMDIKHT VAFACI**

2nd Appellant

and

**ENTRY CLEARANCE OFFICER, ISTANBUL**

Respondent

**Representation:**

For the Appellants: Mr S Merali, Representative from Visa Trek
For the Respondent: Mr P Mangion, Senior Home Office Presenting Office

**DETERMINATION AND REASONS**

1. The Appellants are both citizens of Iran. Mr Farjadnia was born on the 20 February 1942 and his wife was born on the 19 February 1940.

2. Both applicants made application to the Entry Clearance Officer for leave to enter the United Kingdom as adult dependant relatives under Appendix FM of Statement of Change of Immigration rules HC395 as amended ("the immigration rules"). The application was

considered under Paragraph EC-DR 1.1 and refused. In refusing the application the Entry Clearance Officer said, in respect of Mr Farjadnia's application:

> "You have applied to join your daughter and her husband in the UK as an adult dependant relative. You provide evidence that you are receiving medical treatment in Iran, however I am not satisfied that there are not other relatives, other than your daughter, who could provide care for you. Furthermore, I note that you son-in-law is a doctor in the UK and that care could be provided through financial health from Sponsor. I am not satisfied that you are unable to obtain the required level of care in ("name of country" [sic]). I therefore refuse your application under Paragraph EC-DR 1.1(d) of Appendix FM of the Immigration rules."

That refusal was dated the 21 January 2013. The refusal in respect of the Second named Appellant was in similar form and dated the same date.

3. The Appellants both appealed to the First-tier Tribunal and their appeal was heard by First-tier Tribunal Judge Kempton at North Shields on the 10 December 2013. For some reason which is not apparent, the judge decided to produce two separate but almost identical determinations, rather than deal with both appeals in one determination. Since they are linked appeals I deal with both in this determination.

4. The judge set out the requirements of the immigration rules noting that E-ECDR.2.5 requires that:

> "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."

5. The judge heard evidence from both the Appellants' daughter and son-in-law. who told them that they would wish to look after the Appellants and provide for their every need. The judge records at paragraph 15 that the Sponsors had not actually ascertained the cost of care in Iran, but, she recorded, it would be necessary for 24-hour care to be provided which would necessitate probably two or three people working 8 hours a day. The judge also records that this arrangement would require three full-time salaries to pay to individuals who would not be related to the Appellants, but would be paid employees. The judge points out that this arrangement is likely to cost "a considerable sum", but does not actually give an indication of what sums are likely to be involved. She notes that the Sponsors are working and that their gross income is said to be £200,000. She records that that is misleading, because it does not take account of the nett sum the Sponsors earn. The judge went on to allow the Appellants' appeal both under the Immigration rules and on human rights grounds. There was no Article 8 appeal before her and, I was told by the Appellants' representative, Mr Merali, that he did not address her on Article 8.

6. For the Respondent, Mr Mangion pointed out that the rules require specific evidence. Under Paragraph E-ECDR.2.5., in order to demonstrate that care in the country in which the Appellants live is not affordable, they have to produce evidence. There was no medical evidence form the appellant's own doctors as to the level of care they both required and no estimate of the cost of providing 24 hour care, which appears to be what the judge assumed the appellant's would need. It appears that the judge thought that three workers would be necessary to provide care to the Appellants in Iran, but did not consider the possibility of care being provided by the government or some local health agency. There was no evidence

adduced as to the level of care available for the elderly in Iran and no consideration of the cost of that care. Similarly the judge failed to make a proper assessment of the Sponsors' finances and failed to take into account that apparently there are savings in excess of £90,000 together with savings of the Sponsor.

7. Insofar as the human rights appeal is concerned, the judge makes no reference at all to the rules, merely a reference in paragraph 14 of the determination to their being a clear Article 8 issue in relation to family life. The burden of proof was on the Appellants and it was for them to provide evidence to demonstrate that the requirements of the immigration rules were met. Notwithstanding that the Appellants cannot meet the requirements of the immigration rules the judge went on to allow the appeal under Article 8 without considering the fact that there are no exceptional circumstances which would permit the appeal to be allowed under Article 8.

8. On behalf of the appellants, I was asked to consider page 417 of the bundle of documentation. I expressed surprise that the Appellants' bundle consisted of over 400 pages. Mr Merali referred me to Paragraph 2.3.3. of the Immigration Directorate Instructions, after I had asked him what evidence had been placed before the First Tier Tribunal Judge to show the availability of health care in Iran. He said that it was accepted that healthcare is available in Iran, but no evidence of that healthcare had been provided, because the personal costs of providing full-time care to the Appellants was too expensive. Evidence of the availability of private of state healthcare for the elderly in Iran had not provided because, he suggested, the guidance issued by the Immigration and Nationality Directorate did not call for any such evidence. He accepted that there was no human rights appeal before the judge and told me that he had not made any submission in respect of Article 8. While the judge had not considered Article 8 under the Immigration rules, it was, he urged, implicit from the determination that the judge had considered that there were exceptional compassionate circumstances which justified looking outside the rules to decide whether or not the decision was proportionate.

9. Responding briefly, Mr Mangion pointed out that even if the Appellants' representative was correct and valid, and evidence of the availability and cost of private and, or in the alternative, state healthcare for the elderly in Iran was not necessary in order to prove entitlement under the immigration rules, it is clear that the Sponsor was not in a position to have adequately investigated the cost of the provision of healthcare in Iran. The Appellants' son-in-law is a general medical practitioner in the United Kingdom, but does not practice in Iran. However, even at paragraph 15 of the determination, the judge herself points out that the issue of costs has not been explored.

10. Mr Mangion suggested that the appropriate course, were an error of law to be found, would be for the appeal to be remitted to the First-tier Tribunal for hearing afresh before an Immigration Judge other than Immigration Judge Kempton. Mr Merali agreed. I reserved my decision.

11. The requirements of Paragraph EC-DR.1.1 include a requirement that an applicant must meet all the requirements of Section E-ECDR. Section E-ECDR 2.2 was set out by the Immigration Judge in the determination.

12. It is the Appellants' case that because the Immigration Directorate Instructions do not ask for any evidence to be provided the show that an applicant meets the requirements of the immigration rules, no evidence is necessary. I respectfully disagree. Paragraph 2.3.3 of the Immigration Directorate Instructions says this:

> "**2.3.3. Evidence that the applicant is unable, even with the practical and financial help of the Sponsor in the United Kingdom, to obtain the required level of care in the country where they are living:** Evidence that the required level of care:
>
> a) is not, or is no longer available in the country where the applicant is living. This evidence could be in the form of a central or local health authority, a local authority, or a doctor or other health professional. If the required care has been provided through a private arrangement, the applicant must provide details of that arrangement and why it is no longer available.
>
> b) if it is not or is no longer, affordable in the country where the appellant lives. If payment was made for arranging this care, the ECO should ask to see records and an explanation of why this payment cannot continue. If financial support has been provided by the Sponsor or other close family in the UK, the ECO should ask to see an explanation of why this cannot continue or is no longer sufficient to enable the required level of care to be provided."

13. Immigration Directorate Instructions are instructions addressed to Immigration Officers, nothing more. They do not bind judges. They may, on occasions serve to better inform a judge about an immigration rule, but what the judge is required to have regard to, is the relevant immigration rule under which the application is made.

14. E-ECDR.2.5 requires that it has to be demonstrated that, even with the practical and financial help of the Sponsor or Sponsor's partner, the Appellants are unable to obtain the *required level of care* in the country where they are living because either it is not available or it is not affordable. There was no consideration by the First Tier Tribunal Judge, based on medical evidence from the appellants' own doctors and consideration of other evidence submitted, as to the *required level of care* these appellants need. This part of the assessment of whether or not the requirements of the rules were met was simply not carried out.

15. It was merely assumed by the judge, because it had been asserted on their behalf, that the Appellants would require 24 hour care, which would necessitate the employment of two or three people working 8 hours a day to provide 24 hour cover. This also ignores the possibility that the state or some private organisation in Iran may provide care facilities which would be suitable for the Appellants once their *required level of care* had been established by the judge. Individual care provided by three or more individuals who have to be individually contracted by the Appellants to look after them in their own home, may very well be unaffordable, but there appears to have been no independent evidence before the judge to suggest the level of care which the Appellants require, is not otherwise available from a Government agency such as the equivalent of a local authority in Iran or from a private organisation.

16. I appreciate that the First named Appellant has recently been diagnosed with cancer, but there does not appear to have been carried out any form of assessment of the Appellants' care needs by health professionals in Iran. I should point that I have read and examined their application in which details of their arthritis, disc herniation; spondylodiskitis; sciatalblia and chronic neck and right shoulder pain are detailed and I note that both require assistance with washing, dressing and preparing food. With respect this does not mean that they are in need, necessarily, of 24-hour care.

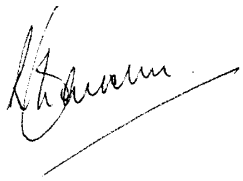
17. The judge points out in paragraph 15 of her determination that the cost of care in Iran had not been explored by the Sponsors, because they believed that 24-hour care would be necessary. The judge did not look at their finances and ability to assist the Appellants and obtained no detailed evidence as to the likely costs.

18. The judge has further erred by failing to consider whether the Appellants might qualify on Article 8 grounds under the Immigration rules and, if they do not, going on to apply ***Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)*** and ***Kabia (MF: para 398 - exceptional circumstances) (Gambia) [2013] UKUT 569 (IAC)*** . I believe that in allowing the appeal under Article 8 the judge has materially erred in law.

19. The making of the decision by the First-tier Tribunal involved the making of an error of law. I set aside the decision.

20. I believe that very careful findings are necessary before it can be established whether or not the Appellants meet the requirements of the Immigration rules. I believe that this is a case where it is appropriate for me under, the Senior President's Practice Statement, to remit this appeal for re-hearing before a First-tier Tribunal Judge other than Judge Kempton.

Three hours should be allowed for the hearing.



**Signed**
**Upper Tribunal Judge Chalkley**