IAC-AH-SAR-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/50875/2014

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Decision & Reasons Promulgated** |
|---|---|
| **On 3rd February 2016** | **On 13th April 2016** |

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**[ZUFAN T]**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms S Anderson
For the Respondent: Mr M Diwnycz

**DECISION AND REASONS**

**Introduction**

1. This is the Appellant's appeal to the Upper Tribunal, brought with permission granted by a Judge of the Upper Tribunal, against a decision of the First-tier Tribunal (Judge Saffer hereinafter "the judge"), promulgated on 1st May 2015, dismissing her

appeal against the Respondent's decision of 4th December 2014 refusing to vary leave to enter and deciding to remove her from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

**The Factual Background**

2. The Appellant was born on [ ] 1965. She is a national of Eritrea. She is married to one [ZT], who is a naturalised British citizen but who is also from Eritrea. I am not sure precisely when it was that the two married but it was many years ago and at a time when both were residing in Eritrea. However, the Appellant's husband left that country in 2002. It is said that he had been detained by the authorities in Eritrea for political reasons but that he managed to escape. He entered the UK in 2002 and claimed asylum. In due course, in fact on a date in 2007, he was granted indefinite leave to remain.

3. The Appellant and her husband have two children. The eldest, [S], came to the UK with his father (the Appellant's husband) in 2002 when he was aged 12. He has subsequently become a naturalised British citizen and has employment in the UK as a doctor. They have another child, [T], who is also now an adult and who lives in the UK, and there is a further child [Y], who is not the natural child of the couple but who, it is said, has been treated as a child of the family. He was born on 3rd May 2000 and is said to be the Appellant's nephew. It is also indicated that he became an orphan in 2004 and that, thereafter, he has been looked after by the Appellant in Eritrea and, now, by the Appellant and her husband in the UK.

4. As I understand it, applications for entry clearance were made by the Appellant for herself and for [T] and [Y] at the same time. The applications of the Appellant and [T] were successful and they subsequently received a grant of limited leave until November 2014. The application for [Y] was initially refused but that was overturned on appeal, his having successfully relied in that appeal upon Article 8 of the European Convention on Human Rights (ECHR). The intention was, of course, that all of them would eventually settle in the UK and would receive a grant of leave entitling them to do so.

5. The Appellant, in coming to the UK then, was reunited with her husband and [S]. In turn, [T] and [Y] were reunited with [S] and with their father (though of course [ZT] is not the natural father of [Y]). The application for entry clearance which had been made by the Appellant whilst in Eritrea, and which was successful, was considered under the Immigration Rules in the form they were in prior to the substantial changes which were made in July 2012 and which impacted significantly, amongst other things, with respect to the maintenance and accommodation requirements. Ms Anderson indicated to me that that was the position and Mr Diwnycz did not disagree.

6. Having been successful in her initial applications, the Appellant applied for further leave to remain but this led to the decision of 4th December 2014 refusing to vary

leave and deciding to remove her from the UK. The basis of the decision was that the Appellant had failed to meet the English language requirements and the maintenance requirements as contained within the Immigration Rules. The Respondent also considered the application under Article 8 of the ECHR but said that the requirements of the Rules with respect to family life as contained in Appendix FM were not met and nor were the requirements for Article 8 under the Immigration Rules with respect to private life. The Respondent considered whether there were any exceptional circumstances which might warrant consideration of a grant of leave to remain outside the Immigration Rules but concluded that there were not.

7. The Appellant, disappointed with that outcome, appealed to the First-tier Tribunal.

**The First-tier Tribunal's Consideration of the Appeal**

8. There was an oral hearing which took place on 30th April 2015 at which both parties were represented. Oral evidence was given. Some of the arguments before the judge focused upon what was said to be the Appellant's husband's inability to "ever earn £18,600 due to his health" and some related to the particular situation of [Y], still a minor, who had his own outstanding application for leave to remain. As to the English language issue there was evidence that the Appellant was "unofficially attending ESOL classes on an entry 1 level non accredited course".

9. The judge dismissed the appeal and explained why in this way;

> "18. The Appellant has not passed an English language test with an approved provider. There is no cogent evidence, such as from an education psychologist, that she lacks the ability to do so.
>
> 19. The Appellant fails to meet the income requirement. I do not accept that it has been established that [ZT] is not going to be able to earn sufficient to enable her to meet the relevant income threshold in the absence of evidence stating that from an eye surgeon. There is no cogent evidence that once he has had his operation to remove the cataract that he would be unable to find sufficiently remunerative employment.
>
> 20. For both of these reasons the application was correctly refused and could not have succeeded at this hearing. This is not a case where evidential flexibility should be applied as the relevant documents simply do not exist.
>
> 21. Therefore the Respondent's decision is in accordance with the law and the applicable Immigration Rules and I dismiss that part of the appeal.
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> 22. I accept that the decision to refuse leave to remain interferes with the family's right to respect for their family life. It is a decision that can cause consequences of gravity given the low threshold involved and their enforced separation. It would also be lawful given the failure to meet the Immigration Rules and for the legitimate aim of requiring people to comply with those Rules and not be an economic burden on the state and be able to integrate through the ability to communicate.

23. The real issue is whether denying the Appellant leave to remain is a proportionate response to the need to require people to comply with those Rules and policy considerations.

24. My primary consideration is what is in [Y]'s best interest. It is not the only consideration and does not trump other considerations.

25. It is in his best interest to be brought up by and live with the adults who have provided him with parental care since his parents died in 2004 namely the Appellant and her husband. The family has only comparatively recently been reunited following an enforced separation of many years. He is entitled to be here as his application is outstanding. Removal of the Appellant, who has been his primary carer for eleven years, will inevitably be very upsetting. He has only been here for three years. There is no cogent evidence he left Eritrea illegally or does not have family to return to. There is no cogent evidence he does not speak the language used in Eritrea or not understand the culture. He would be with his mother figure if he left with the Appellant. As things stand it would be his choice to do so as he has an application outstanding. [ZT] and [S] were able to travel to Eritrea recently and had no problems. The fact that they travelled on British passports does not mean that he would have any problems by not having one. They could visit him if he chose to go back with the Appellant while she makes her application. In my judgment given these factors it would be reasonable to expect him to follow the Appellant to Eritrea.

26. It has not been established that the Appellant lacks the ability to pass the relevant English language test for the reasons I have already given. I do not accept that it has been established that [ZT] is not going to be able to earn sufficient to enable them to meet the relevant income threshold for the reasons I have already given.

27. I accept that all the family here would be distressed by the separation. They are entitled to support from the NHS. I accept that the Appellant would be distressed by the separation. The length of the separation is entirely in the hands of the family.

28. There is no cogent evidence she would have any problems in Eritrea as there is no evidence she left illegally or has no family there. [ZT] and [S] were able to travel there recently and had no problems. The fact that they travelled on British passports does not mean that she would have any problems by not having one. They could visit her while she makes her application.

29. There is nothing unusual about this case let alone compelling. There will no (sic) 'unjustifiable hardship'. There are no insurmountable obstacles to family life being enjoyed outside the United Kingdom as [ZT] has been there recently and can visit her during the process. [S] is an adult who did not live with the Appellant for ten years and does not live with her now as she is in Leeds and he is in Sutton Colefield and he can also visit her while she applies.

30. Even if she had to return to Eritrea to apply and the rest of the family stayed here, I am satisfied that she has failed to establish that she does not have family with whom she can stay. She speaks the language and understands the culture and has lived there for far longer than she has lived here.

31. Given how she fails under the Rules to meet the relevant financial threshold and failed to establish her ability in English, and the ease with which that can be addressed, requiring her to leave the United Kingdom is in my judgment a

> proportionate response to the need to maintain the economic wellbeing of the country to require her to establish that she meets the Rules and re-apply when she can establish that she can do so".

10. Hence, the appeal failed.

**The Permission Stage**

11. The above was not the end of the matter because the Appellant, assisted by new representatives (her current ones) applied for permission to appeal to the Upper Tribunal. In the grounds it was pointed out that entry clearance had been granted under the "old Rules", that is to say the Rules prior to the July 2012 amendments referred to above. It was pointed out that, on the judge's findings, the Appellant and her husband had been parted for a period of ten years and that this was not by choice. It was suggested, in effect, that the judge had erred in his consideration as to what was in the best interests of [Y], that he had erred in basing his conclusion "entirely on the premise that the Appellant can return to Eritrea and make an entry clearance application", and that he had failed to take account of the fact that she would not succeed under the Rules such that the separation would be for an open-ended period. It was suggested that he should, instead, have asked himself whether there were insurmountable obstacles to the whole family relocating to Eritrea. As to that, it was suggested, in effect, there would be.

12. Permission was initially refused by a Judge of the First-tier Tribunal but was eventually granted by a Judge of the Upper Tribunal on 14th October 2015. The grant reads as follows;

> "It is arguable that, in Judge Saffer's consideration of the question whether it is reasonable to expect the Appellant to return to Eritrea and make an application for entry clearance, he may have overlooked the fact that, as explained in **R (Chen) v SSHD [2015] UKUT 00189 (IAC)**, the guidance in **Chikwamba** is of relevance where minor children are involved. Given that the judge accepts that the Appellant and her husband have provided [Y] (who was 15 years old at the date of the hearing before the judge) with parental care since the death of his own parents, it is arguable that the reasoning at paragraphs 25-31 shows that the judge may have misapprehended **Chen**, in that, he makes no reference to the *proportionality* of separating a minor child from at least one of two adults who is providing him with parental care, although he appears to acknowledge the likelihood of [Y] being separated from the Appellant given that he said that [Y] is entitled to remain in the UK whilst his application is outstanding.
>
> The key issue in this case revolves around consideration of whether it is reasonable to expect [Y] to forego his opportunity of awaiting the outcome of his application for leave and follow the Appellant to Eritrea as opposed to him being separated from the Appellant while she makes her entry clearance application. The other children are adults.
>
> The judge's finding in relation to the income threshold at paragraph 19 does not make sense; there may be an unintentional double negative in the second sentence. Nevertheless, it is clear that the Appellant does not satisfy the requirements for leave

> under the Immigration Rules on the judge's findings. Accordingly, in order to succeed outside the Immigration Rules, the Appellant will have to show compelling circumstances, if [Y] is treated as her child, or exceptional circumstances if he is not: paragraphs 31-33 of **Singh and Khalid v SSHD [2015] EWCA Civ 74**, judgment in which was delivered on 23rd April 2015 (after the hearing before the judge but before his determination was promulgated)".

13. It is clear that the Upper Tribunal Judge was granting permission on the basis of the situation surrounding [Y] but the grant was not specifically expressed to be limited, nobody argued that I should treat it as being limited and I have not, in those circumstances, done so.

**The Hearing Before the Upper Tribunal**

14. There was a hearing before the Upper Tribunal (before me) to decide whether the decision of the judge did involve the making of an error of law and, if so, what should follow from that. It was anticipated, in directions, that if I did set the decision aside in consequence of legal error, I would go on (if appropriate or necessary) to re-make the decision at the same hearing. Attendance at the hearing was as indicated above.

15. Ms Anderson said that she would maintain all the arguments relied upon in the grounds of application for permission to appeal. She submitted that, in particular, the judge had erred in failing to attach sufficient importance to the best interests of the child ([Y]) and that such was a "paramount" consideration. The judge had failed to adequately explain why it was thought appropriate to separate [Y] from the Appellant. It would appear that, contrary to what the judge had found, the maintenance requirements of the Immigration Rules were met. The particular Rules applicable to this Appellant, as the judge appeared not to have appreciated, only required it to be shown that the family would have more by way of income available to it than a family in receipt of income support. The Respondent had appreciated which Rules applied but had undertaken an incorrect calculation. So, had matters been properly considered, the judge would have appreciated that the Appellant only failed to meet the Rules in relation to the English language test and, in any event, she had attempted to retrieve her passport from the Home Office in order to take such a test but had not been able to do so.

16. Mr Diwnycz, for the Respondent, said that he did not object to the decision being set aside and that he would not oppose my so doing. He also said that he agreed with Ms Anderson that the Rules applicable to this Appellant, with respect to maintenance, did not exclude the taking into account of third party support.

17. In light of the arguments and Mr Diwnycz's very conciliatory stance, bearing in mind his position as the representative of the Secretary of State before me, I decided, for reasons which are set out below, to set aside the judge's decision on the grounds of

legal error. I then heard some limited oral evidence with respect to the re-making of the decision.

18. I heard evidence from [S]. He confirmed his relationship to the Appellant and told me that he earns £21,000 per annum after deductions. He provided some information regarding his income and outgoings. He said that he provides the rest of his UK-based family with money. Amounts vary but he is prepared to do that for as long as he can. He is single.

19. I then heard submissions as to how the decision should be re-made. Mr Diwnycz, in addressing me, simply said that he would concede that there is family life between all of the UK-based family members. He said he did not intend to take matters any further than that.

20. Ms Anderson, for the Appellant, submitted that the evidence now showed that the Appellant had only failed to meet one requirement of the Immigration Rules. It would be disproportionate to cause any family separation. It was said that she would not be able to take an English language test in Eritrea because of the lack of a suitable centre. The parties had been apart for ten years. The best interests of the minor child had to be considered. It was in [Y]'s best interest to live in the UK with both of his parents (though they are not his natural parents). If the Appellant returns to Eritrea to apply for entry clearance she will be separated from the rest of her family for an indefinite period. Further, any application for entry clearance will have to satisfy the current Immigration Rules which are significantly more demanding than they were when she made her initial application for entry clearance.

**Did the First-tier Tribunal Err in Law?**

21. It will be apparent from the above that Mr Diwnycz accepted or, at the very least, came very close indeed to accepting that it did. Further, and in any event, it does seem to me that, although the judge correctly indicated that the best interests of [Y] would be a primary consideration (not a paramount consideration as Ms Anderson submits) he did not, in his analysis of the various possible scenarios if the Appellant were to return to Eritrea, consider the impact that a separation from at least one parent would have upon him. That had to be considered, it seems to me, even in circumstances where it might be thought the Appellant would, in due course, be likely to succeed in a future entry clearance application. Further, and in any event, it is apparent from what the Respondent said in the "reasons for refusal letter" that Ms Anderson is correct in stating that the relevant Immigration Rules in the Appellant's particular circumstances, that being paragraph 284(viii) of those Rules, only impose a requirement to the effect that;

> "The parties will be able to maintain themselves and any dependants adequately without recourse to public funds".

22. Thus, the judge was wrong in thinking that the test was one of whether it could be shown that the Appellant and her husband would be able to show earnings of £18,600 per annum plus additions for other dependants. The judge did appear to think that those were the applicable requirements because he appeared to accept uncritically (see paragraph 14 of the determination) an indication on the part of the Appellant that that was the test to be applied. So, the judge concluded that the maintenance and accommodation requirements were not met on a false premise. He did not, as a consequence of his erroneous understanding that the Rules regarding a starting threshold of £18,600 with additions for dependants were not applicable on the facts of this case, enquire into the position or reach a finding, based on a proper understanding, as to whether the maintenance requirements were met or not. Of course, it would nevertheless have been the case that the requirements of the Immigration Rules were not met because of the English language issue but the extent to which the Immigration Rules were not complied with might have been a consideration in an assessment of the Article 8 arguments outside the Rules.

23. In light of all of the above, when taken together, I set aside the judge's decision.

**Re-making the Decision**

24. Nobody suggested that I should remit to the First-tier Tribunal and, indeed, Ms Anderson positively urged me to re-make the decision myself. Mr Diwnycz was content with that course of action. That is what I have done.

25. As to the position with respect to the Immigration Rules, there is no dispute about the fact that the Appellant was required by the applicable Rules to demonstrate that she had passed an appropriate English language test and that she had, in fact, not done so. Ms Anderson makes the point that, since the decision under appeal was made, efforts have been made, albeit unsuccessful ones, to retrieve the Appellant's passport from the Home Office (the Home Office seemingly having taken the passport as a result of her application being refused) so that she can take a test. To my mind, though, she had an opportunity to successfully pass a test prior to her application for further leave being made. She failed to do so. It is right to conclude, that the Immigration Rules, in this regard at least, have been shown not to be met. Accordingly, she simply cannot succeed under the Rules and, if she is to succeed at all, that will have to be on the basis of Article 8 of the ECHR outside the Rules.

26. There is, of course, the maintenance issue to consider although even if I am to decide that the maintenance requirements are met that does not avail her under the Rules because of the English language difficulty. Nevertheless, though, unlike Judge Saffer, I did have the opportunity of hearing some oral evidence regarding the maintenance issue as well as specific argument on the point. I have highlighted the applicable Immigration Rule above and it was Ms Anderson's submission that because the applicable Rule was to be found at paragraph 284(viii) of the Rules, third party support could, in principle, be relied upon. Mr Diwnycz indicated that that was accepted by him as being the correct legal position so it was not necessary, in the

face of such a concession, for me to enquire into the matter further. Ms Anderson also submitted that, on the facts of this case, and on the basis of reliance upon the third party support of [S], the maintenance Rules were, indeed, met. [S]'s evidence was not the subject of any challenge before Mr Diwnycz and I accept, on that evidence, that as a junior doctor he is in stable employment and that he is both willing and able to contribute to maintenance of the Appellant. However, as was explained in **AK and Others (Long-term third party support) Bangladesh [2006] UKAIT 00069**, whilst the evidence needed to establish the availability of short-term third party support may be satisfied comparatively readily, a long-term commitment to third party funding requires more detailed and broader evidence and enquiry and it needs to be established that, in the long-term, whatever the third party's own future family and other commitments might be, he would be willing and able to give funding priority to supporting an Appellant. Whilst I accept the current willingness of [S] to support the Appellant and, indeed, other family members, he is currently single but, looking at a long-term perspective, it is entirely possible that matters might change substantially if, for example, he were to commit to a partner and have children. On the material before me, therefore, whilst I am satisfied as to the short-term, I am not sufficiently satisfied with respect to the long-term to safely conclude, to a balance of probabilities, that he will be both willing and able, in the future, to provide ongoing support.

27. Having considered and decided what the position is under the Rules I have asked myself whether it is necessary to go on to consider the applicability of Article 8 of the ECHR outside the Rules. I have considered that it is entirely appropriate to do so bearing in mind what I find to be unusual circumstances and bearing in mind, in particular, the previous history of enforced separation of husband and wife and the particular position of [Y]. In considering Article 8 outside of the Rules I have reminded myself of the five stage test set out in **Razgar [2004] UKHL 27**. I have also reminded myself that it is necessary to look at Article 8 issues through the prism of the current Immigration Rules, that it is necessary to consider the matters set out in Section 117A to 117D of the Nationality, Immigration and Asylum Act 2002 insofar as they are applicable (certain of them not being applicable because this is not a deportation case) and that if an appeal is to succeed under Article 8 outside the Rules that will only be where there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of leave or the allowing of an appeal.

28. There is no dispute, here, that Article 8 is engaged. Mr Diwnycz did not say very much at all in his closing submissions to me but he did say that he accepted that there was family life, effectively, between each and every UK-based family member who has featured in the arguments concerned with this appeal. Mr Diwnycz did not contend that the interference with Article 8 rights consequent upon the Appellant having to leave the UK would fall short of the necessary gravity which is required to engage the Article. Ms Anderson, for her part, did not contend that the interference would not be lawful or would not be in pursuance of a legitimate aim. The question then comes down to proportionality bearing in mind the particular factors I have set out above. My consideration, therefore, is not simply a freewheeling or unfettered

one but it is informed by the content of the Immigration Rules and the degree of specificity of the requirements now contained in the Rules.

29. The Appellant, I have already decided, does not meet certain of the requirements of the Immigration Rules. Her failure to do so is a matter of considerable significance. The public interest question is a most important consideration. Having regard to the applicable provisions contained within Section 117A to D, I remind myself that the maintenance of effective immigration controls is in the public interest. I remind myself that it is in the public interest that persons who seek to enter or remain in the UK are able to speak English. I remind myself that it is similarly in the public interest that such persons are financially independent. Those are, then, considerations which weigh against this Appellant because she is not financially independent, being reliant upon family members and has not demonstrated that she speaks English to the requisite standard. Having said that, though, I also attach some importance to my finding that, as matters stand, financial support is available from [S]. I attach weight to the fact that [ZT] receives benefits in his own right as a British citizen such that the family as a whole is not receiving public funds simply on the basis of the Appellant's presence here. As to the English language position I note that evidence was previously given to the effect that she is at least making some attempt to learn English and such was not placed in issue before me. So, those considerations ameliorate, to some extent, the damaging nature of the Appellant's failure to show she is financially independent and an adequate English speaker.

30. In looking at matters which might be thought to favour the Appellant, she has what I find to be and what was in fact accepted to be, a genuine and subsisting relationship with her husband who is a British citizen. There is a particularly unusual aspect of this case in that the Appellant and her husband have already been separated for a period of ten years in consequence of his fleeing Eritrea. I accept that that is to be regarded as an enforced separation rather than one borne of choice. Thus, in view of that history, further separation would be particularly difficult to bear. There is also the question of [Y]. Whilst he is not a "qualifying child" for the purpose of the Rules, he is a child and it would, I accept, be in his best interests to remain in the UK rather than to forego his own pending application for further leave and that it would be, similarly, in his best interests not to be separated from either parent. I accept that his position is effectively that of a child of the family. His best interests are not, of themselves, decisive but are a factor of some significance. The Appellant has a number of family members in the UK, as outlined above, and the cumulative impact of separation from all of them or most of them if, for example, [Y] were to return with her, would be significant. I accept that the Appellant would be able to seek entry clearance upon return but, even if in due course such an application was successful which on the facts cannot be guaranteed, there would still be a difficult period of uncertainty and separation from her husband and, quite possibly, from [Y] whom I have already said is effectively to be regarded as a child of the family.

31. In light of all of the above I have concluded, in my judgment, that the Appellant has established that there are, here, compelling circumstances, as outlined above, (I accept compelling circumstances is the correct test) as to why her appeal should

succeed on Article 8 grounds outside the Immigration Rules. Insofar as it is relevant Mr Diwnycz did not seek to persuade me to the contrary but, in any event, I would have reached the same conclusion. Accordingly, therefore, this appeal succeeds on Article 8 grounds.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law. Its decision is set aside. I go onto re-make the decision. In so doing I allow the appeal of the Appellant on Article 8 grounds.

**Anonymity**

I make no anonymity direction. None was sought.

Signed Date

Upper Tribunal Judge Hemingway

**TO THE RESPONDENT**
**FEE AWARD**

I make no fee award.

Signed Date

Upper Tribunal Judge Hemingway