Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13986/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision promulgated and sent**
On 17 May 2017	**On 25 May 2017**

Before

Upper Tribunal Judge John FREEMAN

Between

Secretary of State for the Home Department

Appellant

and

Rabbi RAHMAN

Respondent

Representation:
For the appellant: Mr A Chohan, (working under the supervision of Eton Law)
For the respondent: Mr S Kotas

DECISION AND REASONS

1. This is a Home Office appeal against a decision of Judge Kuldip Phull, sitting at Birmingham on 4 October 2016. The appellant was born in Bangladesh in 1994, and in 2013 he arrived here on a visa to join his mother as her dependant, which was valid until 9 September 2015. On 8 September he made a private and family life application which was refused, as it was said he could not meet the requirements of the Rules on various points, the main one for present purposes being the fact that he had not passed the necessary English-language test.

2. The judge noted at paragraph 13 that the requirements of the Immigration Rules were not met, and at paragraph 17 she took note of ss. 117A and 1117B of the Nationality, Immigration and Asylum Act 2002, though without setting out any of the actual provisions, and also noted the

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

general point that the maintenance of immigration control was in the public interest. The judge went on to say, correctly, at paragraph 18 that family life between parents and children does not necessarily finish at the age of eighteen, and she accepted, on the appellant's evidence and his father's, at paragraph 19, that family life between the two of them and the appellant's mother continued to exist.

4. The question the judge had to decide was whether, in terms of this appellant's family life, it would be disproportionate to the public interest to remove him, and she needed to do that in terms of the provisions of s. 117B of the Nationality, Immigration and Asylum Act 2002. This is where the difficulty comes. The judge is criticised for not setting herself a "compelling circumstances"; test but she does note at paragraph 21: "The appellant claims that there are compelling circumstances in his case because …", and she goes on to explain why that is so in her view.

5. It is now clear from *Agyarko and Ikuga* [2017] UKSC 11 that there is no separate test for exceptional or compelling circumstances to be satisfied; but that one would expect to find such circumstances, if it were to be decided that it was disproportionate to remove somebody who could not satisfy the provisions of the Immigration Rules. So the judge needed to explain quite clearly why it was that she found that was so in terms of this case. What she said about it was this: "I am satisfied with the appellant's evidence that his mother is of ill health and as he can read and understand English she relies on him to attend medical appointments with her and ensure she takes her medication on time."

6. It is conceded that there was no medical evidence at all about the appellant's mother before the judge; so it is surprising, to say the least, that she felt able to make this finding on the basis of the appellant's oral evidence and his father's, however truthful that may have seemed. The least one would expect from an experienced judge such as her to require would have been medical evidence saying what the appellant's mother suffered from, and why it provided particular reasons for her to need his help, rather than rely on the National Health Service and Social Services. Some fully-reasoned finding needed to be made, if it were to be regarded as disproportionate to remove him, though he could not satisfy the provisions of the Immigration Rules. Mr Chohan accepted this difficulty, and very frankly accepted that he could not advance anything against it.

7. The other difficulty is this, and it turns on the requirements of s. 117B (3). The judge dealt with this as follows: "In terms of Section 117B I accept that the appellant can speak English and is less of a burden on UK taxpayers and better able to integrate into society. However the evidence is he did not pass his English language test." The judge then engaged in considering his explanation for the circumstances in which he had not been able to do that; but she acknowledges the difficulty that he simply had not passed the test in time to submit results for his application.

8. The real problem comes with what she says there about his means. The requirement of Section 117B(3) is not to be "less of a burden on UK taxpayers", but to be financially independent; and one only has to look at *Rhuppiah* [2016] EWCA Civ 803 to see that it means "financially independent of others". As the Court of Appeal also make clear, at paragraph 62, even if the appellant had been financially independent, that could only be a neutral factor in the proportionality equation.

9. For those two main reasons it seems to me that the judge did go wrong in law on the basis on which she considered the proportionality exercise, and there is no reasonable alternative to a fresh hearing before another first-tier judge.

Appeal allowed: first-tier decision set aside
Fresh hearing in First-tier Tribunal, not before Judge Phull

(Judge of the Upper Tribunal)
Date: 25 May 2017