Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01066/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 February 2018	**On 04 April 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR ABDULLA AL-MAMUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim, Counsel, instructed by Legal Rights Partnership
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent on 21 March 2017 First-tier Tribunal Judge Matthews dismissed the appeal of the appellant, a citizen of Bangladesh, against the decision made by the respondent on 18 December 2015 refusing him leave to remain. The grounds are four-fold. They contend that the judge erred (i) by failing to consider the appellant's case outside the Immigration Rules or in treating failure under the Rules as an end rather than a start-point; (ii) by failing to apply the principles set out by the Supreme Court in **Agyarko [2017] UKSC 11** as regards what constitutes insurmountable obstacles and also the meaning given to that term in para EX.1 of the Rules; (iii) in

making irrational findings in respect of the appellant's difficulties with his work, the appellant's return to work, the ability of the appellant's partner to sell their property, the appellant's inheritance and the ability of the appellant's partner to accompany him to Bangladesh; and (iv) by failing to consider s.117 of the NIAA 2002 and the fact that the appellant spoke English and was not a burden on taxpayers.

2. I am grateful to both representatives for their well-presented submissions. Mr Nasim emphasised in relation to (ii), that this ground of challenge also complained of a failure on the part of the judge to take account of the documentary evidence, in particular that relating to his wife's medical difficulties and the couple's ties to the UK.

3. Addressing ground (i) first, it focuses in particular on what the judge said at para 40:

> "40. Taking account of the decisions above, I do not find any compelling circumstances that have no already been considered. A further *Razgar* assessment would require a weighing of proportionality that would mirror the process already undertaken, and would lead in my judgment to the same conclusion, that a decision to return that I have found to be reasonable, would not be a disproportionate interference in the article 8 interests advanced in this appeal."

4. Taking this paragraph in isolation one can see how it comes to be suggested that the judge did not conduct a separate Article 8 assessment outside the Rules. However, the paragraph refers to preceding paragraphs citing case law (paras 37-39) which in turn are prefaced by para 36, which states:

> "36. I must also consider the wider Article 8 position of the appellant and his wife who is closely impacted of course by the present decision. In doing so I have regard to sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 (as amended)."

5. Read as a whole, it is manifest that the judge did conduct a two-stage assessment and did properly understand that the Rules had to be given weight as an expression of public interest factors. The grounds complain that the judge relied on **R (AQ & Others) [2015] EWCA Civ 250**, even though that case was concerned with a foreign criminal case falling under s.117C. However, the proposition the judge drew from **R (AQ & Others)** was a general one voiced in many reported cases on Article 8, namely that assessment outside the Rules has to be made through the lens of the new Rules and the reasons why a claimant fails to meet the requirements of the Rules (see e.g. Pitchford LJ's remarks at [36]). Further, the judge says nothing to suggest that he treated the Rules as determinative: even the curiously worded para 40 is effectively saying that in the appellant's case the wider proportionality assessment would encompass very much the same factors as were addressed under the Rules.

6. I find no arguable merit in ground (ii). In addressing the issue of insurmountable obstacles, the judge did not refer to **Agyarko** nor to the definition contained in para

EX.2 of the Rules, but there is nothing to suggest that the judge construed insurmountable obstacles to mean impossible obstacles. The findings on which the judge relied to support his conclusion that there were no insurmountable obstacles to the couple resuming their family life in Bangladesh were more than a sufficient basis for concluding (to use the wording of EX.2) that there would not be "very significant difficulties" or "very serious hardship" for the appellant or his wife. These findings encompassed the issue of whether he would be the subject of any adverse interest in Bangladesh from anyone (para 20-21), the appellant's wife's medical difficulties (paras 22-24) and the extent of family support the couple would have available in Bangladesh (paras 25-27).

7. Insofar as it is alleged that these findings failed to take into account all relevant matters, I do not find this allegation made out. The judge noted at para 6 that he had taken into account all the evidence as set out in the papers and in submissions; and in para 17 the judge stated that he had given careful consideration to all the documents before him. Mr Nasim sought to submit that there was a clear failure to take into account relevant evidence in respect of the appellant's wife's medical circumstances. I reject this submission. Whilst the judge did not go through the medical reports and letters item by item, he records at para 22 that he had "read with care the medical reports and updates submitted". Mr Nasim helpfully took me through the various letters including those from University Hospital Birmingham confirming that the appellant's wife had had a cadaveric renal transplant in 2013 and needs lifelong medication and expressing confidence that she would not receive the high quality care that she receives in the UK. He also took me to a letter from Dr Williams referring to the wife's psychological problems. I am satisfied that the judge had these and the other medical documents in mind when noting at para 24 that there was no evidence to indicate that she would not receive "appropriate treatment" in Bangladesh.

8. The judge also considered the accessibility of such treatment to the wife given the costs of such treatment and at para 25 gave sustainable reasons for concluding that she could afford the treatment in Bangladesh. The judge did not refer in terms to the letter from Dr Williams, but that did not identify serious psychological difficulties and, as the judge noted, it was the appellant's own evidence that she had been able to return to some work as a teacher (whether she was no longer working at the date of hearing did not negate the fact that she had been able to return to work after her health problems).

9. Ground (iii) amounts in my judgment to a series of disagreements with the judge's findings of fact. I do not therefore propose to go through all the points ventilated thereunder. Mr Nasim argued particularly hard that it was irrational of the judge to disregard the evidence of difficulties the appellant would face from the cousin just because he had not made a protection claim. At the level of abstract theory Mr Nasim is undoubtedly right that difficulties a person might face on return may be relevant even if they do not cross the threshold of persecution or ill-treatment, but looking at the judge's actual reasoning in respect of the appellant's particular circumstances, it is apparent that (1) he considered this evidence (see para 20ff); and

(2) he regarded the failure to claim international protection as relevant to his assessment of that evidence. Given that the appellant's own witness statement averred that he had made an asylum claim on 24 February 2011, but it was not pursued when it was returned for lack of a fee, it is clear that the appellant did at one time consider he faced a real risk of persecution. Yet on broadly the same evidence he was now seeking to say that these were just difficulties. I note also that the appellant's grounds of appeal to the First-tier Tribunal made no reference to difficulties with the cousin.

10. Issue is taken with the judge's assessment of the couple's financial circumstances and the fact that the judge did not specifically check whether the appellant could benefit from his inheritance in Bangladesh and whether his wife's share of a property in the UK could be "realised by a sale". However, it was for the appellant to prove that he would not receive his inheritance and that his wife could not realise some assets from her share in a UK property. The judge's finding on these two matters at para 25 were entirely within the range of reasonable responses.

11. I see nothing in ground (iv); as Mr Nasim accepted, it was really an extension of ground (i). The judge noted at paras 36 and 39 that s.117B considerations had to be taken into account. There is no reason to suppose he failed to weigh in the balance that the appellant spoke English. It is somewhat inconsistent of the appellant to argue that he is financially independent since he does not work and sought to maintain that he and his wife lacked financial resources, but be that as it may, these considerations were ones that the judge was clearly cognisant of and entitled to weigh as he did.

12. For the above reasons I conclude that the judge did not materially err in law. His decision to dismiss the appellant's appeal must accordingly stand.

No anonymity direction is made.

Signed: H H Storey Date: 30 March 2018

Dr H H Storey
Judge of the Upper Tribunal