Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10663/2019 (V)**

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 14 January 2021	**On: 27 January 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MEHADI HASAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Pinder, instructed by JKR Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The appellant is a national of Bangladesh whose date of birth is given as 1 January 1989. He entered the UK on 23 March 2014 as a Tier 4 student with leave to enter valid until 24 August 2015. That leave was extended to 24 December 2018 but was subsequently curtailed to expire on 31 August 2018

when he was considered to have academically withdrawn from his university course.

3. On 31 August 2018 the appellant made a human rights claim in an application for leave to remain on the basis of his family/private life with his partner Dhalia Zaman whom he stated was residing in the UK as the family member and dependent child of her father Mr Zamal Hossein, an EEA national exercising EEA treaty rights as a worker in the UK. The appellant's claim was refused and certified as clearly unfounded on 13 March 2019, but was subsequently reconsidered and re-refused with a right of appeal, on 6 June 2019. In the decision refusing the claim the respondent considered that the appellant was not eligible to apply as a partner under Appendix FM because his partner was not British, settled in the UK or in the UK with refugee or HP leave; that he could not meet the criteria in paragraph 276ADE(1) of the immigration rules on the basis of his private life; and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

4. The appellant's appeal against that decision was heard in the First-tier Tribunal on 16 October 2019 by First-tier Tribunal Judge Bibi, and was allowed on Article 8 human rights grounds, outside the immigration rules.

5. The respondent sought, and was granted permission to appeal to the Upper Tribunal.

6. The matter was listed for a hearing to determine the error of law issue, but in light of the need to take precautions against the spread of Covid-19, the hearing was vacated. Following directions from the Upper Tribunal and submissions made in response by both parties, the matter was decided on the papers without a hearing and, in a decision dated 19 May 2020, I found that Judge Bibi had materially erred in law and I set aside her decision on the following basis:

> "12. I am entirely in agreement with the assertions in the Secretary of State's grounds and submissions, as well as the view of the judge granting permission, that Judge Bibi's findings in regard to family life go nowhere near the Kugathas test. There is a lack of any proper reasoning as to how the appellant's input into the family, as detailed at [43], [46] and [47], meets the test for dependency over and above normal emotional ties between family members, in particular where the appellant is not directly related and where he had only been part of the household for 18 months. Ms Pinder, in her submissions, accepts that the judge failed to make any findings on whether the family could be assisted by other relatives, or other means of support, in the UK, a point made by the respondent in the grounds. Contrary to Ms Pinder's view at [8], it seems to me that that is a further and relevant matter when considering the level of dependency relied upon to meet the Kugathas test and the fact that the judge did not appear to consider the matter is a material error. In the circumstances I agree with the respondent that the judge materially erred in law in her findings on family life for the purposes of Article 8.

> 13. I also find merit in the second ground of appeal, in regard to the judge's assessment of proportionality. I am entirely in agreement with Mr Avery's submission that the judge's approach to section 117B of the 2002 Act was superficial and failed to give weight to the fact that the appellant did not meet the requirements of the immigration rules. Whilst the judge had regard to section 117B and to the matters referred to by Ms Pinder at [12] of her submissions, the judge's decision fails to give any material appreciation of the weight to be accorded to the public interest and to the inability to meet the requirements of the immigration rules. The grounds accordingly establish that the judge failed to conduct a full and proper proportionality assessment.
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> **Decision on the Error of Law**
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> 14. For all these reasons the judge's decision is unsustainable and cannot stand. The judge's findings on family life and proportionality for the purposes of Article 8 are therefore set aside and the decision has to be re-made in those respects. "
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> **Directions for the Re-Making of the Decision**
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> 15. As regards the re-making of the decision, I note that there is, quite properly, no challenge to Judge Bibi's decision that the appellant is unable to meet the requirements of the immigration rules in Appendix FM and paragraph 276ADE(1), and no challenge by the Secretary of State to the judge's basic findings of fact. Accordingly, there is no reason why the decision cannot be re-made in the Upper Tribunal on the basis of further submissions and, if relevant, further evidence from the appellant.
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> 16. Having regard to the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal from the Senior President of Tribunals dated 19 March 2020 and the UTIAC Presidential Guidance Note No 1 of 2020 dated 23 March 2020, I am provisionally of the view that the re-making of this decision can be undertaken without a hearing."

7. In response to further directions made by the Upper Tribunal, the appellant opposed the re-making of the decision without a hearing and made a request for the matter to be remitted to the First-tier Tribunal to be heard afresh. It was decided, however, to retain the case in the Upper Tribunal and the matter was listed for a resumed, remote hearing on 25 November 2020. That hearing was adjourned at the request of the appellant's representatives and came before me today.

8. Unfortunately the matter could not proceed, once again, as the Home Office network was down and, whilst Mr Lindsay was able to dial in by telephone, he did not have access to any of the documents and requested an adjournment.

9. Having considered the fact that the matter could not proceed today, when taken together with Ms Pinder's previous request for the matter to be remitted to the First-tier Tribunal, the fact that the appellant was pursuing the European aspect of the case which had not specifically been argued previously before the First-tier Tribunal, and the delay in the re-hearing of the appeal such that oral

evidence was required in regard to the appellant's current circumstances, it seemed to me to be appropriate, at this stage, for the matter now to be remitted to the First-tier Tribunal for a fresh hearing. Mr Lindsay had no objection to that course. Accordingly, I remit the case to the First-tier Tribunal to be heard *de novo*, with no findings preserved.

DECISION

10. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judge Bibi.

Signed S Kebede
Upper Tribunal Judge Kebede Dated: 14 January 2021