



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

Appeal Number: HU/18468/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 April 2019**

**Decision & Reasons Promulgated  
On 09 May 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HILL QC**

**Between**

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

Appellant

**and**

**MR MASUD AHMED  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Counsel

For the Respondent: Mr Waheed, Counsel

**DECISION AND REASONS**

1. This is an appeal from the decision of First-tier Tribunal Judge Freer which was promulgated on 22 February of 2009. The appeal is brought by the Secretary of State.
2. The appellant before the First-tier Tribunal is a national of Bangladesh who brought his appeal under the Immigration Rules, paragraph 276ADE. For convenience I will identify him as the appellant hereafter
3. The appellant entered into a religious marriage with a young woman, Miss [A], who is an EU national. The judge made a number of findings in relation

to that marriage and the family life but came to a conclusion at paragraph 67 that the appellant “does not yet satisfy the Immigration Rules but it is quite possible that he may do so in the future”. There is no cross-appeal on this finding.

4. The judge then went on to consider human rights considerations outside the Immigration Rules, carrying out a proportionality exercise under the well-known principles enunciated in **Razgar**.
5. First-tier Tribunal Judge Pickup, in granting permission to appeal, said this  
“It is arguable that the decision of the Tribunal is flawed in several respects. It reads as rushed if not garbled and several sentences are left incomplete. The reasoning is peculiar and confused. Weight is given to family life with a large extended family described as ‘intense and vivid’. I fail to follow the sense of paragraphs 73 and 74 of the decision, discounting the public interest because the appellant is married to an EEA national and that the judiciary are required to seek to uphold subsisting and genuine marriages that they examine. The judge fails to appreciate that the appellant is not legally married to his partner and that their relationship had existed for less than two years. Some of the reasoning is contradictory such as the negative findings between 63 and 67 are relied on later in the decision in the proportionality assessment as factors in the appellant’s favour. The conclusion at 78 that having performed the **Razgar v Secretary of State for the Home Department [2004] UKHL 27** proportionality assessment the appellant has met the very high threshold of very substantial difficulties or exceptional circumstances”.
6. The Secretary of State appeals on three discrete grounds. Ground 1 reads as follows  
“The respondent submits that the First-tier Tribunal Judge has materially erred at paragraph 72 when he finds that “the family life includes daily dealings with a large extended family including his wife and his mother who all live together”. In fact as clearly recorded at paragraphs 12, 24 and 30 of the determination the appellant and his wife do not live with his mother. This clearly affects the judge’s findings that the family lived as a large extended family as clearly they do not.
7. Ms Isherwood, for the Secretary of State, submits that factor was something on which the First-tier Tribunal Judge clearly placed great weight as evidenced at paragraph 75 where the First-tier Tribunal Judge finds the appellant’s mother requires a male guardian in the form of the appellant.
8. Further at paragraph 74 the First-tier Tribunal Judge records that  
“the judiciary are required to seek to uphold the subsisting and genuine marriages that they examine.”
9. At no point has the First-tier Tribunal Judge recognised that an Islamic marriage is not accepted in UK law and therefore the appellant and Miss

[A] are not in fact married as a matter of law. At the date of the hearing, their relationship had not existed for two years and therefore the appellant also did not qualify as an unmarried partner.

10. Mr Waheed, for Mr Masud Ahmed, reminds me that the First-tier Tribunal Judge in considering a permission hearing only has the Secretary of State's submissions to rely on and that in the Upper Tribunal one must approach the matter afresh, which of course I do. He concedes that there is a factual error in the recitation of the evidence by the judge in recording that the appellant lives with his mother.
11. Mr Waheed submits that notwithstanding this error, it is not one which goes to the heart of the decision and is not one which was relied on by the judge in this particular instance. He takes me to the manner in which the judge determined this case and points to three significant factors which it is said push this case into the compelling circumstance outlined in the **Razgar** decision. He talks first of there being a history of domestic violence involving the appellant's mother and her partner. He talks of the appellant having witnessed this and there being a shared history and he relies on the appellant being said to be the only the person who can comfort the appellant's mother in the circumstances. These are factors, he says, took the matter beyond mere emotional anguish allowing the judge to allow the appeal on human rights grounds.
12. Mr Waheed's submission, which is forcefully made, is that there is no reliance in any of those three factors on the appellant's mother residing with him and therefore the human rights assessment is not predicated upon the misstatement or misunderstanding as to the domestic circumstances of the appellant.
13. Despite the force with which Mr Waheed argued the point, I cannot accept it. I am troubled by the content of this decision overall and particularly of the **Razgar** human rights assessment which seems to take a view which is entirely at variance with the findings of fact to which the judge came when dealing with the matter under the Immigration Rules. The fact that so fundamental a piece of the factual matrix is misstated gives rise to the clear indication that this is a case which for whatever reason did not receive anxious scrutiny by the judge.
14. I heard submissions from both Ms Isherwood and Mr Waheed as to the extent to which any part of the decision might be preserved in the light of my conclusion and they were each of the view (and it is one which I share) that were I to be satisfied that that error of law was material, then it would not be appropriate to preserve any part of the decision.
15. There is a clear error of law. It is undoubtedly material to the decision which must in consequence be set aside. It is unnecessary for me to deal with the other grounds. This appeal by the Secretary of State must be allowed.

## **Notice of Decision**

- (1) The Secretary of State's appeal is allowed and the decision of the First-tier Tribunal is set aside;
- (2) The matter is remitted to the First-tier Tribunal for there to be a fresh hearing, not before Judge Freer;
- (3) No findings of fact preserved.
- (4) No anonymity direction is made.

## **IMPORTANT PROCEDURAL NOTE**

- (5) The Home Office reference in this appeal has been wrongly recoded as that for the appellant's partner. The Upper Tribunal records need to be amended as will those of the First-tier Tribunal, to ensure the correct file is brought to the re-hearing by the Home Office representative. **The correct Home Office reference is A1925094.**

Signed *Mark Hill*

Date 7 May 2018

Deputy Upper Tribunal Judge Hill QC