Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **OA/10851/2013**

THE IMMIGRATION ACTS

At	**Birmingham**	**Determination Promulgated**	
on	**21 August 2013**	**On 21 August 2014**	

Before

Upper Tribunal Judge Pitt

Between

Secretary of State for the Home Department

Appellant

and

Kashmir Kaur

Respondent

Representation:
For the appellant: Mr Dinwycz, Senior Home Office Presenting Officer
For the respondent: Ms Rutherford, instructed by Maya & Co Solicitors

DETERMINATION

1. This appeal was brought by the appellant against the decision promulgated on 8 May 2014 of First-tier Tribunal Judge Snape which allowed the appeal under Article 8 ECHR.
2. For the purposes of this decision I refer to the Secretary of State as the respondent and to Mrs Kaur as the appellant, reflecting their positions before the First-tier Tribunal.
3. The respondent's challenge to the decision of Judge Snape was that it failed to identify why the public interest as expressed in the requirements of the Immigration Rules, here not met, was outweighed by any other factors, nothing exceptional or unduly harsh being identified. The judge had not taken into account that the couple had chosen to live apart for many years and that the appellant could reapply for entry clearance.

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4. It was common ground before me that although the appellant could not meet the financial requirements of the Immigration Rules as of the date of application, as required by Appendix FM, she had shown that she met them by the date of the decision.

5. It was also common ground that the correct date for assessing any breach of her Article 8 EHCR rights was date of decision. As above, the respondent accepted that as of the date of the decision the appellant met the Immigration Rules in full.

6. The First-tier Tribunal found that where that was so, requiring her to make a new application amounted to a disproportionate interference with her family life.

7. My difficulty with that conclusion is that the determination does not show anywhere that the First-tier Tribunal appreciated the correct approach to the Article 8 EHCR, specifically, and as conceded by Ms Rutherford, that the appellant had to show exceptional or unduly harsh circumstances arising from the decision and that the failure to meet the Immigration Rules was a starting point and a factor attracting significant weight; see Haleemudeen v SSHD [2014] EWCA Civ 558. In addition, there was no consideration given to the choice of the appellant and the sponsor to live apart for 20 years which appeared to me to be a factor capable of changing the balance in the Article 8 ECHR assessment.

8. If I might paraphrase, what the judge said here was that it does not matter if the Immigration Rules are not met at the time that they have to be met according to Parliament if an appellant can show that they were met later on.

9. It is not that in some circumstances, such a conclusion could be lead to a sustainable finding of disproportionate interference given other particular facts of a case.

10. Here, with nothing in the determination to show that the First-tier Tribunal took the correct approach to the weight to be given to the public interest in the Immigration Rules being met and the failure to weigh the fact of the couple choosing to live apart for many years and a new entry clearance application taking a relatively short time to be decided, I found that a material error of law arose such that the decision had to be set aside and re-made.

11. For essentially the same reasons, it did not appear to me that the interference arising from the decision could be said to be exceptional or unduly harsh given that the couple have chosen to be apart for many years, the sponsor can visit as he has in the past and the appellant can reapply for entry clearance. I weigh in the appellant's favour that she met the financial requirements as of the date of the decision but that was not sufficient to outweigh the failure to meet the full terms of the Immigration Rules at the required time in the context of the facts of the case as a whole.

12. I did not find a breach of the appellant's Article 8 rights arose from the decision to refuse entry clearance.

Decision

13. The determination of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.

14. I re-make the appeal as dismissed on all grounds.

Signed:  **Dated:**
Upper Tribunal Judge Pitt