Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11445/2018**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decisions and Reasons Promulgated**
On 1 July 2019	**On 30 July 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

Tanzeela Rasheed
(anonymity not directed)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Ahmed (Counsel)
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it sent to the parties on 15 August 2018, and in which it dismissed the claimant's appeal to it.

2. The claimant is a national of Pakistan and she was born on 1 January 1989. She is married to one Kamran Hussain who is present and settled in the United Kingdom and is

her sponsor. She entered the UK lawfully, on the basis of her marriage to the sponsor, in 2015. Leave was given until 25 March 2018. She applied for further leave, again on the basis of her marriage on 14 March 2018 and, therefore, before her initial period of leave had expired. But the Secretary of State refused her application. On appeal, the tribunal decided that the requirements relating to financial standing and evidence of such financial standing as contained in Appendix FM and Appendix FM-SE, had not been met. A particular sticking point was that, although the claimant asserted that she had income from two different sources of employment, she had not, with respect to one of her jobs, been in work for a period of six months up to the date of application and was not, therefore, able to demonstrate by way of evidence that she had been. The tribunal reminded itself that it was permitted under certain exceptional circumstances to take a more flexible approach to the extent it was permitted to because of the content of paragraph 21A of Appendix FM but thought there were no exceptional circumstances permitting it to do so in this case. So, it concluded the requirements of the Immigration Rules regarding finance were not met. It considered the possible applicability of paragraph EX.1 and paragraph 276 ADE (1) but thought the claimant could not succeed under either of those provisions. Putting the two together that was because there were no insurmountable obstacles to the claimant and her husband continuing family life together in Pakistan; because the claimant had spent much of her previous life in Pakistan; because she was familiar with life in Pakistan and because there would not be very significant obstacles to her integration into Pakistani society. The tribunal then turned its attention to Article 8 of the European Convention on Human Rights (ECHR) outside the rules and said this:

> "44. There is nothing exceptional about the appellant's circumstances which requires me to consider Article 8 outside the Rules".

3. So, the tribunal dismissed the appeal but a successful application for permission to appeal to the Upper Tribunal followed. Essentially, although not put quite in this way, the grounds amounted to a contention that the tribunal had not considered or had erred in not applying paragraph 21A of Appendix FM-SE and had not considered, adequately or at all, the case under Article 8 of the ECHR outside the rules. Permission was granted and the matter was listed for a hearing before the Upper Tribunal (before me) so that it could be considered whether or not the tribunal had erred in law and, if so, what should flow from that. Representation at the hearing was as indicated above and I am grateful to each representative.

4. I am satisfied that the tribunal did not err in law with respect to its consideration of the appeal under the Immigration Rules. It is not right to say, as is contended in the written grounds, that it failed to consider paragraph 21A or failed to correctly apply it. That paragraph is available to decision-makers in order to provide a degree of flexibility and was inserted into the Immigration Rules in consequence of what had been said in *MM and others* [2017] UKSC 10 concerning the rigidity of certain of the rules as to financial standing. But as Mr Mills explained at the hearing before me, and indeed as is evident from the terms in which the paragraph is expressed, there is a threshold requirement that the flexibility provisions contained therein will only be applied in exceptional circumstances as prescribed in GEN.3.1 of Appendix FM. The tribunal was aware of that exceptionality requirement. Further, at paragraph 34 and 40 of its written reasons it applied it and concluded, as was open to it, that the prescribed exceptional circumstances were not present. It could have said a little bit more about why it was reaching that view but, in my judgment, in all the circumstances of this case, what it said was adequate. So, it was

required to, and indeed did apply the full rigour of the Immigration Rules with respect to the financial requirements.

5. That leaves the question of whether it erred in not carrying out a full assessment under Article 8 of the ECHR outside the rules. As has already been said, it took the view that there was nothing exceptional about the claimant's circumstances that required it to undertake any such consideration. Was it lawfully entitled to take that view?

6. Mr Mills says it was. He accepts that other tribunals might have found sufficient material to justify a full consideration but says that it was open to this tribunal not to do so. It was implicit in what it said and decided that it had taken the view the claimant could either return abroad and make an application or seek to re-apply once again, whilst in the UK.

7. Mr Ahmed argues that there was much material here which meant the tribunal was required to at least consider the appeal under Article 8 outside the rules and that the approach it took was too dismissive.

8. There were, here, a number of circumstances which might be thought to be worthy of consideration under Article 8 outside the rules. The claimant has been in the UK since 2015. She has a subsisting relationship which underpinned her initial grant of leave. On the face of it there is reason to think that she and her sponsor are and have been supporting themselves financially and have not been a burden on the state. There was evidence which might have suggested that the two were supporting themselves and if called upon would be able to provide documentary evidence of it, as at the date of the hearing before the tribunal. Against that background there might have been a case for saying that the public interest was not necessarily a matter of significance. The tribunal had been urged to undertake a full Article 8 assessment in a skeleton argument filed on behalf of the claimant.

9. In the circumstances I have concluded, on balance, that the tribunal did err because there was material before it which meant a requirement to consider the case under Article 8, incorporating the various factors identified at section 117D of the Nationality, Immigration and Asylum Act 2002, was triggered. So, the tribunal's failure to undertake an assessment in accordance with the well-established principles in the case of Razgar amounted to an error of law. I have decided, therefore, that its decision must be set aside. My having done that I have concluded that the most appropriate course of action is remittal.

10. So, there will be a rehearing of the appeal (which will be a complete rehearing) before a differently constituted tribunal (a different Judge). The tribunal rehearing the appeal will consider all matters raised by the appeal, both fact and law, entirely afresh. Further, it will not be limited to the evidence which was before the previous tribunal. Since I have decided to remit I am statutorily obliged to give directions for the remaking of the decision. However, I need not be detailed or prescriptive as to that. The directions which I do consider to be appropriate are set out below.

Directions for the Rehearing

A. The tribunal's decision which it sent to the parties on 15 August 2018 has been set aside. The case is remitted for a complete rehearing.

B. The case will be reheard by a differently constituted First-tier Tribunal. Nothing shall be preserved from the findings and conclusions of the previous tribunal.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The case is remitted for rehearing by a differently constituted First-tier Tribunal.
I make no anonymity direction. None was sought before me.

Signed: Dated: 23 July 2019

Upper Tribunal Judge Hemingway