Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24969/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st December 2015	**On 2nd February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS THATCHANAN CHUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Alexander, Counsel, instructed by Haslaw & Co Limited
For the Respondent: Miss A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Thailand, born on 4 September 1970, and she made an application on 13 May 2014 to remain as the spouse of a person present and settled in the United Kingdom, that being Mr Peter Chung. The application was refused on 13 May 2014 and the appellant appealed to the First-tier Tribunal.

2. The matter came before First-tier Tribunal Judge Nicholls who dismissed the appeal under the Immigration Rules further to paragraph D-LTRP.1.3 and R-LTRP.1.1(d) of Appendix FM. It was accepted that the appellant had a relationship with a British citizen but found that she could not have the benefit of Exception EX.1 because there were no insurmountable obstacles to her family life continuing in Thailand.

3. An application for permission to appeal was made on the basis that it was argued that Judge Nicholls had erred in law in that the judge had failed to take into account the extent to which the appellant had established her private and family life in the UK and failed to take into account the fact that she had entered the UK on a spouse visa valid from 10 January 2012 to 10 April 2014 granting 27 months' valid leave. The visa was granted before 9 July 2012, that is before the new Rules came into place, (demanding that the sponsoring spouse had to prove that he was earning £18,600 per annum) and therefore this requirement under the Rules did not apply. The appellant stated that the new Rule did not apply to her as she was granted her visa on 10 January 2012.

4. She had instructed Malik and Malik Solicitors to submit an application under the old Rules for which she qualified but they negligently submitted an incorrect application LR(FP) for which she did not qualify.

5. It was submitted that on the day of the hearing Counsel attempted to explain this mistake to the judge but the judge failed to take this into account. The appellant was filing a complaint against the solicitors. She submitted that she was married to Peter Chung, a British national, who had spent more than four decades in this country and had got his own restaurant which he and the appellant ran together. If they returned to Thailand they had no resources as she had invested a huge sum of money in a take-away business in the UK. She also noted that she qualified for the requirements of SET.M.

6. In relation to Article 8 the appellant asserted that she had developed a secure life for herself surrounded by family and friends and adopted the British lifestyle. She had not breached any Immigration Rule and her life would be severely interfered with.

7. Previously in this matter, I found an error of law in relation to the decision of Judge Nicholls because in the analysis of Article 8 the judge merely stated "Nevertheless, the evidence I find does not reveal any factors which are not properly assessed within the Immigration Rules". The First-tier Tribunal Judge acknowledged that Counsel argued that there was an exceptional circumstance, because the application submitted by the appellant was in fact on the wrong grounds, and the point was raised that the appellant could have applied for indefinite leave to remain in the UK and that she had been wrongly advised, but the Judge did not take this into account when considering an overall compelling reason to consider the matter outside the rules and in relation to the overall assessment in proportionality. There appeared to be no attempt to incorporate the fact that the respondent did not apply the transitional provisions of Appendix FM to the applicant because she had applied on the wrong form. It would be therefore difficult to discern how the public interest was measured and the balance to be weighed between public and private interest. I

therefore found an error of law which was material in respect of the Article 8 assessment.

8. There was an indication that there had been a change in solicitors since the application for permission to appeal and the solicitors needed time to obtain the file from the previous solicitors in order to present the matter further. I therefore granted an adjournment.

9. At the resumed hearing before me Ms Brocklesby-Weller, very sensibly in my view, agreed that the Secretary of State should not have taken the point that the appellant applied on the wrong form and that the appellant would now fall for limited leave to remain under the previous Paragraph 284 of the Immigration Rules. She conceded that the appeal should be allowed on the basis that the appellant had leave as a spouse prior to the enactments under Appendix FM and she should be able to take advantage of the transitional provisions. I therefore allow the appeal under the Immigration Rules.

10. For the record, Mr Alexander indicated that the appellant had now taken and passed the Life in the United Kingdom test.

Notice of Decision

11. Appeal Allowed under the Immigration Rules.

Signed Date 21st December 2015

Deputy Upper Tribunal Judge Rimington

Fee Award

In the light of the decision to re-make the decision in the appeal, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007). I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). I make a whole fee award as the appellant has been successful in all aspects of her appeal.