



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

Appeal Number: HU/12165/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 17 December 2018**

**Decision & Reasons
Promulgated
On 24 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

**MRS ANU THAPALIYA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant in person

For the Respondent: Mr T Lindsay, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nepal, date of birth 11 September 1987, appealed against the decision of the Respondent, dated 22 May 2018, to refuse an application made on 25 July 2017 for indefinite leave to remain arising from her marriage to Mr Prakash Khanal, who was present and settled in the United Kingdom as her partner. Whatever other basis it was thought to be made, the application therefore fell to be considered with

reference to Appendix FM. The application was duly considered thereunder and rejected on the basis that the Appellant had not acquired the necessary period under the Rules to be able to obtain leave. Her appeal against the Secretary of State's decision came before First-tier Tribunal Judge Griffith, who on 16 October 2018 dismissed the appeal, upholding the bases of the Respondent's decision and also refusing a claim under Article 8 ECHR because the Appellant still had leave to remain in the United Kingdom until October 2019 and no steps were being taken or have been taken to remove her.

2. The basis of the law under the Immigration Rules has changed numerous times and been subject to a variety of changes in requirements. This case is a good example of the complexity of the Rules and the relationship to guidance which has rendered making certain applications under the Rules akin to minefields, particularly when there may have been switching or changes arising in the basis on which a person remains. What was said in substance was that the applicant (Appellant) had completed a continuous period of 60 months or five years and as such on a freestanding, independent basis was entitled to succeed in the light of the transitional provisions and law as it applied back before July 2012: Bearing in mind the Appellant had originally been granted leave to enter the United Kingdom as a Tier 1 (Post-Study) Partner Person from 29 June 2012. There appeared to me to have been a fundamental misunderstanding, not least given the complexity of the Rules, that that date and the period of time acquired after it, did not avoid what were the current requirements of the Rules at the date of application.
3. These were correctly set out by the Judge, who accurately summarised the case being put and why the Judge made no criticism whatsoever of the Appellant's conduct or credibility in making the claims of the required period of leave in the UK and why. The Judge explained the conclusion that the Appellant's husband, Prakash Khanal, who has gathered his settlement in January 2017, did not avail the Appellant as the Appellant

had thought. The matter was also, it is fair to say, correctly set out by reference to the requirements of Appendix FM in the Reasons for Refusal Letter, identifying the period required had not for the purposes of Appendix FM been met.

4. The matter was also helpfully repeated in a Rule 24 response sent to the Appellant and a further copy provided today but dated 22 November 2018, in which the Respondent set out the understanding that was being applied by the Respondent to such applications based on long residence in the following terms:

“From 6 April 2014 [bearing in mind that is the date when the transitional provisions came to an end] all those granted leave to enter or remain as a PBS dependant, who then wish to apply for leave as the partner of a settled person (including where their partner who was a relevant PBS migrant gained indefinite leave to remain on the basis of long residence) are required to apply for leave under Appendix FM.

4.5.4. This is because paragraphs 284 and 295D of the Immigration Rules were amended to restrict switching by PBS dependants who have leave as the partner of a relevant PBS migrant. From 6 April 2014, they are not able to switch into the Rules for partners of settled persons under Part 8 [of the Rules]. The PBS dependant will either need to apply for indefinite leave under the points-based system if they can qualify, or apply for limited leave to remain as a partner under Appendix FM.”

5. As the comments note, these aspects and paragraphs cannot be read in isolation. The position therefore was that, most unfortunately, the Appellant and her partner have been confounded by the change in the Rules and its consequences as of April 2014. Therefore the periods in which they have been together, which are obviously of significance, did not count as they thought it would and should. Accordingly, I find the

Judge in the determination cogently set out the arguments and the decision is correct in law.

6. The difficulty that the Appellants have found themselves in, not least due to the complexities of the Rules, means that their next application would best be made with help from a specialist but that is a matter ultimately for them to choose how to proceed.
7. For these reasons therefore, I conclude the Original Tribunal made no error of law.

DECISION

The appeal is dismissed. The Original Tribunal's decision stands.

No anonymity order was sought nor is one required.

Signed

Date 9 January 2019

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

The appeal has been dismissed. Therefore, there can be no fee award.

Signed

Date 9 January 2019

Deputy Upper Tribunal Judge Davey