



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

Appeal Number: HU/08848/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12<sup>th</sup> February 2019**

**Decision & Reasons  
Promulgated  
On 7<sup>th</sup> March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**MRS INDRA KUMARI GURUNG  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Mr M Uddin instructed by Farani Taylor Solicitors  
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Nepal, appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer dated 19<sup>th</sup> July 2017 to refuse her application for entry clearance as the wife of a former Gurkha soldier who had been granted indefinite leave to remain in the UK on 20<sup>th</sup> October 2006. First-tier Tribunal Judge J Robertson dismissed the appeal in a decision promulgated on 19<sup>th</sup> November 2018. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Pedro on 28<sup>th</sup> December 2018.

2. The Entry Clearance Officer (ECO) considered the application under paragraph 276R of the Immigration Rules along with the discretionary guidance for the spouses of ex-Gurkhas contained in Immigration Directorate Instructions, Chapter 15, Section 2A, Annex A. The application was refused as it was not accepted that the Appellant and the Sponsor were married as claimed. The ECO further considered that there was no evidence that the Sponsor was living in the UK and therefore did not accept that the Appellant had a spouse or partner who is currently present and settled in the UK or who has been admitted at the same time for settlement.
3. The First-tier Tribunal Judge considered the evidence in relation to the marriage and was satisfied that the Appellant and Sponsor are married as required by the Rules. The judge accepted the explanation put forward by the parties in relation to the issues raised by the Entry Clearance Officer as regards the marriage certificate [paragraph 7]. This finding has not been challenged.
4. The judge properly identified that the remaining issue was the question of residence highlighting that paragraph 276R of the Immigration Rules requires that the applicants spouse is “present and settled” in the UK. The judge noted at paragraph 10 that it is not disputed that when the Appellant submitted her application in 2017 her husband was living with her in Nepal and that he did not come to the UK until after the ECO and the Entry Clearance Manager (ECM) had made their decisions. Although he was visiting the UK on a regular basis, the judge did not accept that he was present or settled in the UK at that time. The judge noted that at the date of the hearing the Sponsor had been in the UK for only a few months and accordingly found that the Appellant cannot meet the Immigration Rules which requires the Sponsor to be present and settled in the UK. The judge went on to consider that proportionality of the decision in accordance with Article 8. The judge found the fact that the Immigration Rules were not met was a significant factor in determining proportionality and concluded that the decision to refuse entry clearance was proportionate.

### **Error of law**

5. It is contended in the grounds of appeal to the Upper Tribunal that the judge materially erred in law in deciding that the First-tier was not required to consider whether the Appellant’s application for entry clearance would succeed under paragraph 276R at the date of the hearing. Reference is made to the judge’s findings that the Appellant was married to her husband and that he was living in the UK at that time.
6. At the hearing before me Mr Duffy agreed that the claimed errors had been made out. He accepted that the requirements of paragraph 297R of the Rules were met at the date of the hearing and that the judge erred in failing to acknowledge that the relevant point for assessment of the Rules in this particular case was the date of the hearing.

7. Paragraph 276R sets out the requirements for indefinite leave to enter the UK as the spouse of a person present and settled in the UK under paragraphs 276E to 276Q, or of a member of HM Forces who is exempt from immigration control. Having found that the Appellant and the Sponsor were married, the only issue for the judge to determine was whether the Sponsor was present and settled in the UK. The judge found at paragraph 10, and it is not in dispute, that at the date of the hearing the Sponsor was present in the UK having lived in the UK for a few months and that he had indefinite leave to remain in the UK.
8. Paragraph 276R, unlike other provisions of the Immigration Rules, does not require that the provisions are met at the date of application. This is a human rights appeal and the appropriate time for assessment of the circumstances of the case is the date of the hearing. As accepted by Mr Duffy, having made the findings as to the relationship and the Sponsor's presence in the UK, it is clear that at the date of the hearing the Appellant met the requirements of paragraph 276R.
9. In these circumstances, accepted by Mr Duffy and Mr Uddin, the Appellant met the requirements of the Immigration Rules and this was determinative of the Article 8 issue as these provisions of the Rules assessing family life are compliant with Article 8.
10. In these circumstances I consider that the concession made by Mr Duffy at the hearing was properly made. I find that the judge made a material error of law in deciding that the Appellant could not meet the Immigration Rules at the date of the hearing when it is clear on the evidence before the judge that she did. As there has been no challenge to the findings of fact I preserve those findings and set aside the decision of the First-tier Tribunal.

### **Remaking the Decision**

11. I remake the decision in accordance with the facts found by the First-tier Tribunal Judge. As the Appellant now meets the requirements of the Immigration Rules and the Rules are compliant with Article 8 I remake the decision by allowing the appeal on human rights grounds.

### **Notice of Decision**

12. The decision of the First-tier Tribunal contains a material error of law. I set it aside. I remake the decision by allowing the appeal on human rights grounds.
13. No anonymity direction is made.

Signed

Date: 5<sup>th</sup> March 2019

**A Grimes**

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal I have considered whether to make a fee award. As the information which enabled the appeal to be allowed was not provided to the decision maker I have decided to make no fee award.

Signed

Date: 5<sup>th</sup> March 2019

**A Grimes**

Deputy Upper Tribunal Judge Grimes