



Upper Tribunal
Immigration and Asylum Chamber

Appeal Number:
IA/09760/2013

THE IMMIGRATION ACTS

Heard at Field House
On 25 November 2013

Promulgated on:
On 4 December 2013

Before

Upper Tribunal Judge Kekić

Between

Secretary of State for the Home Department

Appellant

and

Tapasya Duggal

Respondent

Determination and Reasons

Representation

For the Applicant: Mr R Reynolds, Counsel

For the Secretary of State: Mr G Saunders, Home Office Presenting Officer

Background

1. On 13 September 2013 permission to appeal was granted to the Secretary of State in respect of her challenge to the determination of First-tier Tribunal Judge Andonian.
2. In this determination I shall refer to Ms Duggal as the applicant.

3. The applicant is an Indian national born on 12 March 1987. She appealed against the decision of the Secretary of State of 3 March 2013 refusing to vary her leave to remain to that of a Tier 1 entrepreneur and making directions for her removal. The Secretary of State had taken the view that the applicant had failed to provide the required documents under paragraph 41 – SD(C) of Appendix A and so refused the application.
4. The judge noted that the applicant had produced a blank CT41G form from HMRC which had not been completed as required and that she had not submitted a tax return or evidence to show that she had registered as director of a company. Nevertheless he found that the Secretary of State had failed to follow her evidential flexibility policy and that the decision was therefore not in accordance with the law. He found that the missing documents “were now made good” and he allowed the appeal under the Immigration Rules.
5. The Secretary of State challenges that decision arguing that the appeal should have been allowed to the limited extent that a lawful decision was still outstanding rather than being allowed under the rules. It is maintained that no findings were made to show that as at the date of the decision, the applicant had shown that she met the requirements of the rules.

Appeal Hearing

6. The applicant was in attendance for the appeal hearing and I heard submissions from Mr Saunders and Mr Reynolds. It is noted that the Secretary of State was not represented by a presenting officer before the First-tier Tribunal.
7. Mr Saunders submitted that having found that the Secretary of State had failed to make a lawful decision in not applying the evidential flexibility policy, the only option open to the judge was to refer the matter back to the Secretary of State for a lawful decision to be made. It was not open to him to consider the ‘missing’ documents and to make a decision on the substantive merits of the case. It was also submitted that, in any event, it was unclear whether the requirements of the rules had been met.
8. In response, Mr Reynolds accepted that the judge had erred in that respect but submitted that the error was not material as the documents had been considered. They were a tax return (submitted instead of form CT 41G) and a current appointments form and had been included in the applicant’s court bundle. He argued that whilst both documents post dated the

application and the decision, had they been requested by the Secretary of State when the application was considered, the applicant would have been able to produce them. He submitted that if the matter went back to the Secretary of State and she considered the two documents, there would be only one outcome. Meanwhile, the delay would impact upon the applicant and her ability to pursue her business. He submitted that although paragraph 245AA had been raised by Judge Baker in the grant of permission, it had not been relied on by the Secretary of State.

9. Mr Saunders replied. He indicated that he would have been content with a transfer of the matter to the Secretary of State but added that in considering the additional evidence, the judge should have had regard to paragraph 245AA and the admissibility of the documents.
10. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

11. I have carefully considered the evidence before the Tribunal and the submissions that have been made.
12. Despite my own reservations about the applicability of the evidential flexibility policy to the facts of this case, the Secretary of State appears to have accepted that she should have asked the applicant for the missing documents. The two 'missing' documents were, however, only created several months after the application and even after the date of the decision. That is to say they were not in existence at the time of the application.
13. Notwithstanding my concerns, the issue is whether the judge acted improperly in failing to refer the matter back to the Secretary of State. Mr Saunders argues that he did and, whilst Mr Reynolds accepts that, he argues that it is not material.
14. The difficulty, as I see it, is that once the judge found that the Secretary of State had not made a lawful decision, he had no power to ignore that finding and proceed to consider the merits of the application. Indeed, without a lawful decision, it is difficult to see how a judge can undertake any further consideration. This is a scenario where the application, as a result of the judge's initial findings, is outstanding and requires a decision to be made. In that context, I am unable to agree with Mr Reynold's submissions.

15. The decision of the First-tier Tribunal Judge allowing the appeal under the rules is set aside. The decision to allow the appeal on the basis that the decision was not in accordance with the law is upheld.

Decision

16. The First-tier Tribunal made an error of law and the Secretary of State's appeal is allowed. The determination is set aside (see paragraph 16) and the matter is referred back to the Secretary of State for a lawful decision to be made.

Signed:

**Dr R Kekić
Judge of the Upper Tribunal**

25 November 2013