



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

Appeal Number: IA/04008/2013
IA/10265/2013

THE IMMIGRATION ACTS

Heard at Field House

On 16th July 2013

Determination

Promulgated

On 17th July 2013

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

**MRS POOJA BHANDARI
MR KRISHNA PRASAD GAIRE**

Claimant

and

SECRETARY OF STATE

Respondent

Representation:

For the Claimant: Mr A H Badar (Farani, Javid, Taylor, solicitors)

For the Respondent: Mr P Nath (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State. She appealed the determination of First-tier Tribunal Judge Somal) who, in the determination promulgated on 24th May 2013, allowed at the Claimants' appeals, to a limited extent, against the Secretary of

State's decision to refuse them leave to remain as a Tier 2 (General) Migrant and her dependent husband.

2. The First-tier Tribunal Judge noted that the basis of the Secretary of State's refusal was that she was not satisfied that the first Claimant had produced satisfactory evidence that she had been in possession of the required sponsorship and salary and therefore had not achieved the requisite number of points under appendix A of the Immigration Rules. The Judge noted that the Claimants' representative had produced a letter from the first Claimant's employer in which they indicated that that they had used a recruitment agency to arrange the Tier 2 sponsorship and an error had been made in the letter sent to the Secretary of State because the letter had given the incorrect employment role and salary. That letter was produced after the Secretary of State's decision.
3. The Judge noted that the representative had sent a letter after the decision to Secretary of State asking for the decision to be reconsidered on the basis of the mistake. The Secretary of State refused. The First-tier Tribunal Judge allowed the appeal for reasons of fairness to the limited extent only and required the Respondent to make a fresh decision in the light of the recently produced letter. She had previously said at paragraph 11 that the letter from the employer should be considered by the Secretary of State in reconsidering the decision as the letter appertained to the matters taken into consideration when making the original decision and shed light on issues and in the interest of fairness should be considered. Then at paragraph 11 the Judge found that the decision of the Respondent was not in accordance with the law.
4. The Secretary of State's grounds seeking permission to appeal argue that the application was refused by the Secretary of State because inadequate evidence had been provided with regard to salaried sponsorship. The First-tier Tribunal judge had failed to consider section 85A of the Nationality, Immigration and Asylum Act 2002 and therefore erred in allowing the appeal even to a limited extent.
5. Before me Mr Badar provided a skeleton argument suggesting that section 85A did not apply as the matter that the Judge was considering was whether the Secretary of State should have considered allowing the application using her discretion rather than under the Rules. He referred to the fairness policy. However, Mr Badar's skeleton argument and submissions were misguided. The Secretary of State received the application as submitted by or on behalf of the Claimants. There were no obviously missing documents which would have, in the interest of fairness suggested further enquiries and she made a decision based on the documents submitted. It was only after the decision was made that the Claimants obtained further information. On that basis it cannot be said, and in fairness Mr Badar accepted, that the Secretary of State acted unfairly. If the Secretary of State had not acted unfairly then it could not be said that the decision was unlawful. That being the case it is quite clear

that the Judge made a material error of law in finding that the decision was unlawful and allowing the appeal even to the limited extent.

6. I therefore set aside the decision of the First-tier Tribunal and for reasons which are clear from what I have already said the Claimants cannot succeed. S85A does apply, this being an application under the Points Based System. The application was properly refused and there was no unfairness on the part of the Secretary of State. Mr Badar quite rightly accepted that there was no evidence to indicate that the decision was disproportionate and the Claimants could not succeed under Article 8. On the evidence submitted with the application the Claimants quite simply could not meet the requirements of the Rules.
7. The appeal to the Upper Tribunal is allowed such that the Secretary of State's original decision is upheld.

Signed

Date 17th July 2013

Upper Tribunal Judge Martin