



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

Appeal Number: IA/50430/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 19 December 2014  
Prepared 19 December 2014**

**Decision & Reasons  
Promulgated  
On 23 January 2015**

**Before**

**UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

**AMBER ELIZABETH DUTHIE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer  
For the Respondent: Mr D O'Callaghan, Counsel instructed by Messrs Kilby Jones Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Afako who in a determination promulgated on 27 June 2014 allowed the appeal of Miss Amber Elizabeth Duthie against a decision of the Secretary of State to refuse to vary her leave to remain under the provisions of paragraph 245HD of the Immigration Rules: she was refused leave to remain as a Tier 2 (General) Migrant.

2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly I will refer to Miss Duthie as the appellant as she was the appellant in that tier.
3. The appellant is a citizen of Australia born on 1 July 1974 who entered Britain as a work permit holder in 2007. She was granted leave to remain until 3 December 2012. Having entered Britain she worked as a restaurant manager in a number of restaurants before, in October 2012 making an application for leave to remain for a further period. That application was refused on 27 February 2013 on the basis that she had not provided a valid certificate of sponsorship. The appellant appealed against that decision. That appeal was subsequently withdrawn. The appellant's employers then made a number of other applications which were unsuccessful - it appears that they were given incorrect advice by a company called ICS Limited who had prepared applications for the appellant and her employers. The appellant's employers have now been able to fulfil all the requirements necessary for an application to succeed.
4. When the appeal came before Judge Afako he correctly dismissed the appeal under the Immigration Rules on the basis that the relevant evidence was not before the respondent when the decision was made. He also dismissed an appeal on human rights grounds. Neither of those decisions were challenged. Judge Afako however, noting that a Section 47 decision had been made considered, that he could allow the appeal against that decision. His decision to allow the appeal on that basis was then appealed by the respondent.
5. In the grounds of appeal it was pointed out that Section 82(2) of the Nationality, Immigration and Asylum Act 2002 listed the decisions against which an appeal could be brought and Section 84 of that Act sets out the grounds on which an appeal could be argued. It was pointed out that Judge Afako had considered that he could allow an appeal under Section 47 of the Immigration, Asylum and Nationality Act 2006 on the basis that the Secretary of State had discretion not to remove under that section.
6. The grounds of appeal before me pointed out that the reference to "discretion" presumably referred to an appeal under Section 84(1)(f) which referred to a discretion conferred under the Immigration Rules but that there was no indication how there could have been any discretion to allow this appeal under those Rules.
7. At the hearing of the appeal before me Mr O' Callaghan very helpfully took me through the arguments which had been placed before Judge Afako and correctly accepted that the judge had erred in his decision and that there was no basis on which he could have allowed the appeal under Section 47.

8. He was entirely right to do so. The reality is that the grounds of appeal are correct and the judge was not entitled to allow the appeal on that basis.
9. Accordingly I set aside the determination of the First-tier Judge insofar as he appeared to allow the appeal under Section 47 of the 2006 Act and substitute for his decision my decision that the appeal is also dismissed in respect of that decision.
10. Mr O'Callaghan referred to the fact that this appellant was in the process of taking steps to bring her former advisors to account for the ways in which they had negligently advised her with regard to her application for an extension of stay.
11. It is clear from the determination that the judge who heard the appeal had very considerable sympathy with this appellant. It is also clear from the papers that she is a much needed member of her staff who has much to contribute to the work of her employer. I trust therefore that the respondent will consider, sympathetically, the further representations made.

Signed

Date **19 December 2014**

Upper Tribunal Judge McGeachy