



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/10139/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5<sup>th</sup> June 2014

Determination Promulgated  
On 18<sup>th</sup> June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD MONJURUL ISLAM

Respondent

**Representation:**

For the Appellant/Secretary of State for the Home Department: Mr N Bramble, Home  
Office Presenting Officer

For the Claimant/Respondent: Mr M Islam, London Law Associates

**DECISION AND REASONS**

1. The claimant (whom I shall refer to as the appellant as he was before the First-tier Tribunal (hereinafter "the FtT") is a citizen of Bangladesh and his date of birth is 6 January 1982.
2. On 4 February 2013 the appellant made an application to vary his leave to remain as a Tier 1 (Entrepreneur) Migrant. His application was refused by the Secretary of State in a decision of 15 March 2013. The reasons for the refusal can be summarised:

“The appellant must establish that he has access to £50,000. The letter from the appellant’s accountant states that the appellant and his team member Khalid Hussain have a shareholding of 25,000 ordinary shares each (valued at £1). The unaudited accounts do not demonstrate the value of the shares or the date of purchase or demonstrate the split between the appellant and Khalid Hussain. There were no share certificates. The bank letters from Barclays do not bear the appellant’s name or business account and do not demonstrate business activity. The appellant has not provided sufficient evidence that he was registered as a director of a new business in accordance with the requirements of Appendix A Table 4(d)(iii). The appellant must provide specified evidence namely a current appointment report as specified in Rule 41-SD(c)(iii)(f). In addition the appellant has not satisfied Appendix A Table 4(d)(iv) because he has not submitted evidence in accordance with 41-SD(c)(iii) in relation to advertising and marketing materials.”

3. The appellant appealed and his appeal was allowed by Judge of the FtT Cohen following an oral hearing on 7 February 2014. The respondent applied for permission to appeal and this was granted by Judge of the FtT Cruthers on 8 April 2014. Thus the matter came before me.

#### The Grounds Seeking Permission to Appeal and Oral Submissions

4. The grounds seeking permission to appeal argue that the decision of the FtT was unreasoned. In oral submissions Mr Bramble submitted that the position of the Secretary of State was that the FtT erred in failing to give adequate reasons; however, the error is not material. Mr Bramble made a concession that in his view the appeal should have been allowed under the Rules and the error was not material. However, he was not in a position to apply to withdraw the matter because in his view the Judge had erred because of the failure to give reasons.
5. Mr Bramble relied on the application, refusal and subsequent determination relating the appellant’s business partner, Mr Khalid Hussain. His application was identical to that of the appellant in these proceedings and had been refused by the Secretary of State for the same reasons. His appeal had subsequently been allowed by Judge Dell Fabbro in a decision that was promulgated on 18 October 2013. Judge Dell Fabbro found that Mr Hussain’s appeal should be allowed under the Immigration Rules. The factual matrix was identical to that of the appellant in these proceedings. Judge Del Fabbro found as follows:

On the evidence before me I find that the appellant did submit specified documents purporting to comply with the requirements of the Rules. Taking a necessary overview of the documents actually submitted I find that several of those documents did comply with the criteria. Those that did not comply I find were in the wrong format. As such the respondent was required to request the correct documentation in accordance with paragraph 245AA(b).

The failure to do so renders this refusal as not in accordance with the law. Moreover, I do find that the respondent failed to apply its own policy on evidential flexibility. Paragraph 21. It was common ground before me that the appellant met all the other criteria. The sole issue related to the submission of documentary evidence in accordance with the provision (d) requirements in relation to access to funds and evidence of being involved in a genuine business. I find that the appellant had submitted the required evidence in relation to his shareholding in the company by virtue of the accountant's letter and the share value of the published account. The bank letter did refer to a business account and was addressed to the appellant in his connection with Throne Engineering Limited. Evidence of HMRC registration was contained in a letter to that effect from HMRC. I am also satisfied that the advertising document recorded the appellant's name sufficiently to associate him with the business. In these regards I find that the appellant had satisfied the necessary criteria."

6. Mr Bramble referred me to the archived Immigration Rules, the archived points-based system – evidential flexibility guidance which was valid from 12 March 2013. In addition he referred me to a document entitled "evidential flexibility – documents which it may be appropriate to request for each tier with specific reference to Tier 1 Entrepreneur." In Mr Bramble's view it was so obvious and clear that as a result of the evidence submitted by Mr Hussain that, had the guidance been applied by the decision maker, he would have met the requirements of the Rules, that it was open to the Judge in those proceedings to allow the appeal under the Rules. In his view the same should apply to this appellant.

### **Conclusions**

7. The Judge Cohen's reasons are not clear from the determination; however, I accept Mr Bramble's concession that the error is not material. There were three shortcomings in the appellant's application that were identified in the Reasons for Refusal Letter and I accept Mr Bramble's view that the decision maker should have exercised evidential flexibility in the appellant's favour having considered the PBS evidential flexibility and the documentation submitted. It is of some significance that Mr Hussain's appeal was allowed and he submitted exactly the same documentation as the appellant and the cases are identical. Mr Bramble's view was that it was open to the Judge Cohen in this appellant's case to allow the appeal on the basis that it was in accordance with the Rules.
8. The Judge of the FtT made an error of law but that error is not material and the decision to allow the appellant's appeal under the Immigration Rules stands.

Signed                      Joanna McWilliam  
Deputy Upper Tribunal Judge McWilliam

Date 17 June 2014