Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/18560/2013
IA/18716/2013
IA/47905/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 June and 5 September 2014	**On 15 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR ADNAN MAHMUD – FIRST APPELLANT
MRS SANJIDA MAHMUD – SECOND APPELLANT
MASTER IBRAHIM MAHMUD – THIRD APPELLANT
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Lee (20 June 2014) and Mr Biggs (5 September 2014), Counsel instructed by TSA Law
For the Respondent: Mr Tarlow, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellants appeal to the Upper Tribunal the decision of the First-tier Tribunal dismissing the first appellant's appeal against a refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant. The second and third appellants are his wife and child respectively, and their applications for leave to remain as his dependants were refused in line with the rejection of his application. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. As the first appellant is the main appellant in this appeal, I shall hereafter refer to him simply as the appellant save where the context otherwise requires. The appellant is a national of Bangladesh, whose date of birth is 31 December 1981. He first landed in the United Kingdom on 2 July 2005 with valid entry clearance as a student. His last grant of leave to remain as a student expired on 30 January 2011. On 2 November 2010 he was granted leave to remain until 2 November 2012 as a Tier 1 post-study worker.

3. On 31 October 2012 the appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. In his application form, he said he was part of an entrepreneurial team. His entrepreneurial team member was Mr Saidul Islam, also a national of Bangladesh. At G10, he indicated he was relying on access to a total sum of money of £50,000 in Lloyds TSB Bank. At Q20, he indicated he was relying on a printout of a current appointment report from Companies House showing him listed as a company director.

4. His application was presented with the assistance of a caseworker at Universal Solicitors. In section 7, the representative provided a list of the documents that were being provided in support of the application. This list included the following: job contract agreement; business bank statements for three months; personal bank statements for three months; business website page; business advertising on Gumtree (one page); agreement for accountancy and tax consultancy services; an accountant's cover letter; a CT41GC; a current appointment report; a business registration certificate; representative cover letter; and a business proposal.

5. In the respondent's bundle in my file, which was compiled on 7 May 2013, the following documents provided with the application are annexed: Lloyds TSB Bank statements for IMSI (UK) Ltd; ABC Book-keeping and Accountancy agreement dated 17 August 2012; ABC Book-keeping and Accountancy letter dated 22 October 2012; advertising materials – printout of advert on Gumtree and printout of company website; and business contract between AMSI (UK) Ltd and Mr Zuhurul Islam.

6. The Lloyds TSB Bank statements showed that the appellant had paid the sum of £22,000 in September 2012 into the bank account of AMSI (UK) Ltd held at the Lloyds TSB Branch in Victoria Docks, London E16. The total balance in the account as of 28 September 2012 was £33,308.70.

7. In a letter dated 22 October 2012 Mr Ashraf Pervez of ABC Book-keeping and Accountancy confirmed that the appellant and Mr Saidul Islam each held 50 shares of £1 each in AMSI (UK) Ltd ("the company"). He continued: "From the verification of the company bank accounts (copy of statement enclosed) we also confirm that Mr Islam and Mahmud invested £50,000 in the proposed business, in which Mr Islam and Mr Adnan have equal access".

8. A set of company bank accounts was not included with the application, and it is not clear what he meant by "copy of statement enclosed".

The Reasons for Refusal

9. On 7 May 2013 the Secretary of State gave her reasons for refusing the application, and for making a decision to remove the appellant from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

10. The appellant claimed 25 points for access to funds as required under paragraph 245DD(b) of Appendix A of the Rules. But he had provided insufficient evidence with his application. For invested funds, he needed to provide a company bank statement, audited or unaudited accounts and a letter of confirmation from a regulated accountant.

11. He had provided a company bank statement showing that he had £50,000 of funds. As this was in the company's name, he had also to provide audited or unaudited accounts and also a letter of confirmation from a regulated accountant to show that he and his team member had invested the funds.

12. He had provided an accountant's letter, and the accountant claimed to be registered with ACCA. But it had been confirmed by ACCA that "they" were not. So the accountant's letter was not acceptable evidence to show the funds had been invested.

13. In addition, he had not provided any accounts to show the investment made by the appellant directly. He also did not meet the requirements for non-invested funds.

14. There was also insufficient evidence of business activity. The business contract he provided did not specifically describe the service which was provided by the business, and also did not include the contact details of the other party involved. In addition to this he had not provided sufficient advertising material. As previously stated, this should include his name, business name and business activity. Unfortunately the business activity described in the advertising did not reflect the job title he had provided.

The Grounds of Appeal to the First-tier Tribunal

15. The appellant instructed new solicitors to assist him in his appeal for the First-tier Tribunal. They settled lengthy grounds of appeal on his behalf. They acknowledged that his previous legal representatives had failed to submit unaudited accounts with the application. However on 22 April 2013 the appellant had sent unaudited

accounts, a new advertisement and a revised service agreement in line with the Rules. The respondent failed to consider those relevant documents, and this amounted to an arguable error of law.

16. It was also not true that the appellant's accountant was not registered with ACCA. He obviously was a member of ACCA, as he had given his membership number of 0910859.

The Additional Evidence provided by way of Appeal

17. For the purposes of the hearing in the First-tier Tribunal, the appellant's solicitors compiled a bundle containing a membership certificate for Mr Ashraf Pervez, company bank statement, business contracts, business adverts, and an accountant's certificate, report and accounts. The bundle also included a determination of the First-tier Tribunal (Judge Andonian) allowing the appeal of Mr Saidul Islam against the refusal of his application for leave to remain as a Tier 1 (Entrepreneur) Migrant.

18. Mr Islam's application had been refused on 13 May 2013. The grounds of refusal were identical to those that had been deployed against the appellant. At paragraph 11, Judge Andonian held that the respondent had not properly considered the accountant's details. He found that the Company accountants were members of the FSA and ACCA.

19. Judge Andonian went on to hold that it was very clear from the evidence before him that £50,000 was equally held between the two team members. This was evidenced in the documents provided by the accountants and the company information. In addition, if the respondent was not satisfied with the information that had been provided, she had the option of making a simple telephone call or writing by letter or email to request some clarification in accordance with her evidential flexibility policy.

20. As to the contract, if it was not in the format required by the respondent, then one of her agents could have contacted Mr Islam and advised him as to its deficiencies. The further information could then have been provided. He allowed Mr Islam's appeal under the Rules.

21. The appellant's bundle contained a set of bank statements relating to the Company. The bank statement in the respondent's bundle (see above) was to be found at page 32. At page 31, there was another bank statement in respect of the same account running from 14 August 2012 to 19 October 2012. This showed that as a result of a series of deposits, mainly by an entity called "Eastern" the balance in the account had risen to just over £50,000 on 19 October 2012.

22. At page 52 onwards of the appellant's bundle, there was a management report and accounts for the company dated 31 March 2013. According to these accounts, the appellant and Mr Islam each held 25,000 £1 shares in the company.

23. The principal activities of the company during the year continued to be the import of IT, computer and electronic equipment and resale. The report was approved by the board on 13 May 2013. A profit and loss account for the company for the period 26 July 2012 to 31 March 2013 showed a zero turnover.

The Hearing Before, and the Decision of, the First-tier Tribunal

24. The appellant's appeal came before Judge Lawrence sitting in the First-tier Tribunal at Hatton Cross on 18 December 2013. The appellants were represented by Mr T Aziz of TSA Law, and the Secretary of State was represented by Ms L Baines, Counsel. The appellant was called as a witness, and was cross-examined by Ms Baines on the documents in the appellant's bundle. He accepted that the set of accounts he relied on (at pages 54 onwards) were not approved when they were submitted to the respondent. They were approved on 13 May 2013, which was after the date of decision.

25. He accepted that the advertisements at pages 49 and 50 of the bundle had not been submitted with the application, and he thought he sent them after the date of decision.

26. The appellant was asked about a Technical Support Services Agreement dated 7 March 2013, at pages 44 to 47 of the bundle. This agreement was between the company and Mr Bhuiyan. His address, telephone number and email address were given in the document. He had not submitted this contract to the respondent. The contract with "Islam" was for one year, but Mr Islam had terminated the contract after six months in June 2013.

27. In his subsequent determination, Judge Lawrence records the appellant as having given evidence that the contract at pages 44 to 47 purported to "amend" the contract between the Company and, by implication, Mr Zuhurul Islam. It is convenient to note at this stage that this is not what is recorded in the judge's manuscript note of the proceedings, and clearly the contract at pages 44 to 47 is not with Mr Zuhurul Islam but someone else by a different name.

28. In re-examination, the appellant is recorded as giving evidence that he had submitted "the additional information", including the amended contract, on 22 April 2013.

29. The judge's findings are set out in paragraphs 15 onwards of his determination, promulgated on 7 January 2014. He did not accept the evidence of the appellant that he had submitted additional evidence in the correct form to the Secretary of State before the date of her decision. The burden of proof rested with the appellant to show this, and the post office receipt which he had provided at the hearing was insufficient to discharge this burden of proof. In any event, the judge held that the appellant had to send all the requisite evidence with his application, and not supply it in a piecemeal fashion.

30. The judge went on to deal with Mr Aziz's argument on the application of the evidential flexibility policy. The judge made the following ruling at paragraph 22:

> The Tribunal is not in a position to verify or authenticate information contained in the documents submitted to the Tribunal with the appeal. The Rules require an applicant to submit evidence to the respondent with the application for a good reason. The reason is the respondent has the task and responsibility to verify the information contained in them. The Tribunal has no such task. The Tribunal is equipped, for example, to determine whether a particular document was submitted with the application but has no means of determining whether the evidence contained in any particular document is authentic. It therefore cannot accede to Mr Aziz's submission that I should act on the fresh evidence submitted to the Tribunal.

31. The judge went on to address the assertion by the Secretary of State that the accountant relied by the appellant was not a member of ACCA. He observed that the respondent ought to have provided evidence of any response obtained from ACCA. Mr Aziz relied on the determination of Judge Andonian in support of the contention that the accountant was indeed a member of ACCA. But there was no evidence that Mr Aziz had sought permission from the relevant persons or bodies before he disclosed this information to the Tribunal. Also he did not know what evidence was submitted to the First-tier Tribunal in support of Mr Islam's appeal. So he did not attach any weight to Judge Andonian's determination.

The Eventual Grant of Permission to Appeal

32. The appellant applied for permission to appeal to the Upper Tribunal, raising a number of grounds of appeal. The application was refused by the First-tier Tribunal, but permission was granted by the Upper Tribunal Judge Dawson on 30 April 2014. Judge Dawson's reasons for granting permission were as follows:

> Having found at [10] the applicant was lacking a good command of English, it is arguable that the conclusion at [15] that the appellant reluctantly accepted his application did not contain all the requisite information either because he was evasive or because his English was inadequate required the judge to explain which characteristic undermined the credibility. If the latter, then it is arguable the judge should not have given such weight to what was said at the hearing.
>
> It is also arguable the judge failed to explain how he factored in the failure by the SSHD to provide a bundle in deciding not to accept that further material had not been sent prior to decision.
>
> The other grounds have less arguable merit in them, but permission is granted on all.
>
> It will be for the Upper Tribunal to decide when considering if there is an error, whether, even if the SSHD had received additional material prior to decision, she was required to take it into account.

The Hearing on 20 June 2014

33. At the hearing in the Upper Tribunal, I received some additional evidence that was not before the First-tier Tribunal.

34. I was shown a letter apparently sent by Universal Solicitors to the UK Border Agency in Sheffield on 22 April 2013 in respect of the appellant and Mr Saidul Islam. The solicitors said they were sending the following documents in support of their client's application:

    1. updated marketing material;

    2. sales contracts;

    3. unaudited accounts with details of shareholdings.

35. I was also shown a track and trace document indicating that an item with a designated reference number was delivered from the Sheffield delivery office on 23 April 2013. I have since checked the reference given in the track and trace document with that given in the post office receipt that was before the First-tier Tribunal, and I am able to confirm that the reference number is the same.

36. On behalf of the Secretary of State, Mr Tarlow accepted there were errors in the determination. But he submitted that the errors were immaterial to the conclusion. There were some documents which had to be provided with the application, and at least one of these crucial documents had not been: this was a document saying the amount of money available to each team member.

37. For the appellant, Mr Lee submitted that the errors in the determination were so widespread that the appellant had in effect been deprived of a fair hearing. Alternatively, there was sufficient evidence to show that the refusal decision was not in accordance with the law, and the application should be remitted to the Secretary of State for fresh consideration. He submitted that the favourable determination of Judge Andonian in respect of the other entrepreneurial team member, and the subsequent grant of leave to remain by the Secretary of State to Mr Islam, meant that it was difficult for the Secretary of State to justify the appellant being treated differently from Mr Islam.

Resons for Finding an Error of Law

38. The appellant's bundle contained documentary evidence indicative of Mr Pervez's membership of ACCA. In addition, the judge had before him a determination of Judge Andonian in which the judge had accepted that he was a member of ACCA. Conversely, the respondent had not provided any evidence to support the assertion made in the refusal decision that ACCA had confirmed Mr Pervez was not registered with them.

39. Judge Lawrence addresses the question of the accountant's membership of ACCA in paragraph 24 of his determination. He acknowledges that the respondent has failed to provide evidence to support the alleged response from ACCA in response to an enquiry about the accountant's membership. The judge goes on to refer to the determination of Judge Andonian. But he attaches no weight to the determination for the two reasons referred to in paragraph 31 above.

40. I do not consider that the first reason given by the judge for attaching no weight to the contents of the determination of Judge Andonian stands up to scrutiny. The hearing of the entrepreneurial team member's appeal took place in open court and the determination of Judge Andonian is a public document, albeit that in practice the co-operation of the entrepreneurial team member would have been required in order for the appellant to gain access to it. Since they were supposedly fellow directors in a business which they had set up, it was strongly to be inferred that the determination was being deployed in the appellant's appeal with the express consent of his entrepreneurial team member. So the judge was wrong not to take it into account on the ground that the appellant needed first to show that he had the express consent of the Tribunal or his team member to deploy it.

41. With regards to the second objection, it is of course true that the judge did not know what evidence Judge Andonian had seen. But it was reasonably to be inferred that the same evidence that had been successfully deployed in the appeal of the entrepreneurial team member was also being relied upon in the instant appeal; and prima facie the judge fails to take account of this evidence, which is included in the appellant's bundle. He makes no mention of it.

42. In conclusion, I find that the judge has not given adequate reasons for resolving the issue of the accountant's membership of ACCA against the appellant.

43. With regard to the other deficiencies in the application identified in the refusal letter, the appellant's case before the First-tier Tribunal was that these deficiencies were rectified by the provision of additional documents under cover of a letter from the solicitors dated 22 April 2013. This aspect of the appellant's case raises a number of sub-issues: was anything sent at all? If so, precisely what additional documents were sent? Having identified these, was the Secretary of State required to take into account all the additional documents when making a decision on the application, or some of them or none of them?

44. With regards to the first sub-issue, the appellant relies on the evidence provided by way of appeal to the Upper Tribunal to show that the judge made a mistake of fact in resolving this issue against him. But he has not shown that with reasonable diligence this evidence could not have been deployed before the First-tier Tribunal.

45. Nonetheless, I am persuaded that the judge did not give adequate reasons for his adverse conclusion on the first sub-issue, which he reached upon more limited evidence than is now available to me. Although in the early stages of his determination it looks as if the judge might be minded to make an adverse credibility finding against the appellant, he does not in the event do so. He appears to accept that the appellant's apparent inability to answer clear questions put to him by Ms Baines is at least equally likely to flow from the fact that he has a poor command of the English language.

46. Accordingly, his rejection of the appellant's evidence that he/his previous solicitors sent additional documents on 22 April 2013 is not underpinned by a finding that the

appellant is not a witness of truth. Furthermore, it was not apparently disputed that the PO Box number given on the post office receipt produced at the hearing is the correct PO Box address for communications with the respondent in respect of a Tier 1 (Entrepreneur) Migrant application.

47. Having (wrongly) resolved the first sub-issue against the appellant, the judge did not adequately engage with either the second or the third sub-issues. Of particular significance is the judge's treatment of the question of evidential flexibility. At the end of paragraph 20, the judge finds that the appellant has to send all the requisite evidence with his application. While this is the general rule, the evidential flexibility policy as codified in paragraph 245AA of the Rules does not preclude the respondent requesting in appropriate circumstances additional information or documents; or the respondent taking into account additional information and documents that have been volunteered by a PBS applicant between the date of application and the date of eventual decision.

48. As I explored with Mr Lee in the course of oral argument, there are some specified documents that must have come into existence by the date of application. But this constraint does not necessarily apply to additional contracts and advertising material.

49. If the answer to the second sub-issue was clear to me (what additional documents were provided?) I would be able to perform the exercise envisaged by Judge Dawson, and I would be able to make a finding on Mr Tarlow's submission that the additional material was incapable of salvaging the appellant's position. As it is, this exercise will have to be postponed.

50. In conclusion, I find that the decision of the First-tier Tribunal was vitiated by a material error of law, such that it should be set aside and re-made.

Future Disposal

51. I considered that the Upper Tribunal was the appropriate forum for the decision to be re-made. I did not accept that the appellant was deprived of a fair hearing in the First-tier Tribunal. Furthermore, I did not consider it necessary for the appeal to be re-heard de novo. I considered that the appropriate starting point was Mr Tarlow's concession that the question of the accountant's membership of ACCA should have been resolved in the appellant's favour. So this ground of objection in the refusal decision fell away.

52. The factual inquiry which was outstanding was precisely what, if any, relevant specified documents were posted to the respondent on 22 April 2013; and (from the respondent's perspective) whether they were received; and, if so, why they were ignored.

53. The oral evidence of the appellant was confused and contradictory on the topic of what was sent, and the bundle which was prepared for the hearing in the First-tier Tribunal did not distinguish between documents which clearly came into existence

after the date of decision (such as the approved unaudited accounts) and documents which are said to have been provided on 22 April 2013.

54. I said I would be assisted by the respondent producing all the documents submitted with the application, and any additional specified documents held on the file. For the avoidance of doubt, it did not appear to be the case that the respondent failed to compile a respondent's bundle for the hearing in the First-tier Tribunal. But the respondent's bundle did not purport to contain *all* the documents submitted with the application, and it clearly did not contain any documents provided after the date of application.

The resumed hearing on 5 September 2014

55. For the purposes of this hearing, the appellant's solicitors compiled a fresh bundle of documents containing the documents which the appellant said had been enclosed under cover of the letter from Universal Solicitors dated 22 April 2013.

56. The appellant adopted as his evidence-in-chief his witness statement in the bundle, and he was asked supplementary questions by Mr Biggs. He had personally attended at the offices of Universal Solicitors on 22 April 2013, and had placed the enclosures in the envelope in the presence of his solicitor. He had then taken the letter to the Post Office, and thus had obtained a Post Office receipt. He had submitted the original Post Office receipt to the First-tier Tribunal Judge. The documents which he had enclosed were (a) the online advertisement at page 74, (b) the contract with a customer dated 7 March 2013 at pages 70 to 73, and (c) the unaudited management report and accounts for Amsi (UK) Limited dated 31 March 2013 at pages 77 to 83.

57. The appellant was cross-examined about the following statement at the bottom of page 79: "This report was approved by the board on 13 May 2013 and signed by its order."

58. The appellant agreed with Mr Tarlow that the unaudited accounts provided on 22 April 2013 could not have contained this statement. He was asked when this statement was added. He answered he had kept a photocopy of what he had sent to the Home Office, and he indicated that he had later substituted a new page 79, or that he had substituted the set of accounts generated after the board meeting of 13 May 2013. There were no board minutes approving the accounts.

59. In re-examination, he was asked whether he had kept a copy of what he had sent to the Home Office. He answered maybe it was a mistake by the accountant. He confirmed that no board meeting had been arranged before he had submitted a set of accounts on 22 April 2013. He was asked why he had not provided a copy of the accounts that were actually submitted on 22 April 2013. He said he did not have enough time to submit the accounts. He had obtained the set of accounts at pages 77 onwards from the accountants at a later stage.

60. In his closing submissions on behalf of the respondent, Mr Tarlow repeated his earlier concession about the accountant's qualification and also conceded that some further documents were sent to the Secretary of State under cover of the letter of 22 April 2013. But he did not specify which documents had been sent, and he submitted that what was sent came too late. So the Secretary of State was not in breach of the evidential flexibility principles in not taking them into account.

61. In reply, Mr Biggs referred me to his skeleton argument. He acknowledged that it was a difficulty about the statement at the bottom of page 79, but he submitted that on balance of probabilities the appellant had provided the documents identified by him under cover of the letter of 22 April 2013; and that these documents satisfactorily filled in the gaps in terms of compliance with paragraph 41-SD and paragraph 46-SD (specified documents needed to establish the amount of money that an applicant has already invested). The failure by the respondent to consider the documents therefore fatally undermined the legality of her subsequent refusal decision.

62. The appeal should be allowed on the basis that the refusal decision of 7 May 2013 was unlawful on public law grounds. If there were any defects in the documents submitted, they were minor and within the scope of the evidential flexibility discretion under paragraph 245AA and the respondent's policy. In any event, there was no basis in the Rules for imposing a fixed timeline on the submission of documents, such as those in issue in the instant appeal. The Rules in question are very different from those considered in **Secretary of State for the Home Department v Raju and Others [2013] EWCA Civ 754**.

63. Finally, Mr Biggs relied on Mr Islam's successful appeal, and the fact that the respondent had since granted Mr Islam leave to remain as a Tier 1 Entrepreneur Migrant. In the light of the favourable determination in Mr Islam's case, which the respondent had implemented, the respondent was bound by the principle of consistency to recognise that the appellant's application was genuine and met the requirement of the Rules, because it was identical to the application made by Mr Islam. So the refusal decision of 7 May 2013 was unlawful as being contrary to the principle of consistency. In any event, the Upper Tribunal should treat the findings and conclusions in Mr Islam's case with appropriate respect and deference, and I should be guided by the principles in **Devaseelan [2002] UKAIT 000702**.

Discussion and Findings

64. Although the appellant's position is to some extent salvaged by the concessions made by Mr Tarlow, the evidence as to what precisely was served under cover of the letter of 22 April 2013 remains unsatisfactory and I do not find the appellant to be a reliable witness on this topic.

65. In his witness statement for the First-tier Tribunal, dated 12 December 2013, the appellant said at paragraph 6 that he had submitted all the required documents *at the time of making his application*. If some documents were missed or in the wrong format, that could have been rectified by contacting him or his representative in writing and requesting the correct documents.

66. The fact that he did not mention in this witness statement that he had sent additional documents under cover of letter of 22 April 2013, and he did not complain that they had not been taken into account, tends to undermine the credibility of his assertion that he was personally involved in such a process or indeed that he became aware that any such process had taken place.

67. The second anomaly is that the covering letter refers to sale contracts (plural), but the appellant only claims to have inserted one sales contract.

68. The third anomaly is that the document at page 74, which is a print-out of an online advertisement, does not have any date on it so as to demonstrate that it was printed off on either 21 or 22 April 2013, as opposed to subsequently. The search information at the top of the page, which might have contained a date, is partially obscured by the appellant's business card. Thus the document at page 74 is in fact a photocopy of two documents, the business card being superimposed on the advert. The appellant's explanation for this is that he inserted his business card into the envelope, and when the respondent came to compile the Home Office bundle for Mr Islam's appeal, the case worker concerned superimposed his business card on the advertisement. But there is no reference in the covering letter to the provision of business cards as well as other material.

69. As the document at page 74 bears a page number consistent with it being included in the Home Office bundle for Mr Islam's appeal, I am persuaded that it was provided to the respondent in advance of the refusal decision, and I am prepared to accept that it was provided under cover of the letter of 22 April. However, the presence of page 74 in Mr Islam's Home Office bundle undermines the appellant's case that unaudited accounts were *also* sent with page 74. For if they had been, they are likely to have also been included in Mr Islam's bundle (so that the appellant would have been able to produce them in this appeal) and/or there would not have been the parallel assertion made against Mr Islam that no accounts had been provided.

70. Finally, there is conflicting evidence about the unaudited accounts. I do not find the appellant credible in his assertion that he provided an earlier version of the accounts that are contained in the bundle. The plain implication of the letter from Mr Pervez dated 9 January 2014 (page 55) is that he delivered the accounts to the directors on 15 April 2013 with the statement at the bottom of page 79 included. His justification for doing so was that the accounts were *due* to be approved by the board of directors on 13 May 2013 at a board meeting, "according to our information."

71. However, the appellant confirmed in his oral evidence that no date for a board meeting had been set at the time when the accounts were sent on 22 April 2013. So, on his evidence, it would have been impossible for Mr Pervez to have included such a statement in the accounts. At the same time, the appellant has not produced the version of the accounts which was allegedly sent, and Mr Pervez in his statement of 9 January 2014 does not suggest that an earlier version ever existed.

72. While the covering letter refers to unaudited accounts, on the appellant's evidence the solicitors did not assume responsibility for the enclosures. They left that task to the appellant.

73. The appellant's evidence below was equally unsatisfactory, and having taken all the relevant evidence into account, I find that the appellant is not a reliable witness on the question of what was sent under cover of the letter of 22 April 2013, and I find that the cover letter cannot be taken at its face value. Some documents were sent, including the document at page 74, but the appellant has not shown that accounts were sent.

74. If I am wrong about that, the accounts which were supplied were not accounts which the Secretary of State could reasonably be expected to take into consideration. On the face of it, the document provided was a document which told a lie about itself. It was not a report that had been approved by the board on 13 May 2013 and signed by its order.

75. On the same page, the following is stated in respect of directors' responsibilities: "Under company law directors must not approve the accounts *unless they are satisfied they give a true and fair view of the state of the affairs of the company and of the profit or loss of the company for that period* (my emphasis)". These accounts had not been approved, as the Board had not yet met to approve them.

76. Moreover, the document does not meet the requirements of paragraph 46-SD. Paragraph 46-SD(ii) provides that if the applicant's business is not required to produce audited accounts, unaudited accounts and an accountant's certificate of confirmation must be provided. No such certificate of confirmation was provided with these accounts under cover of the letter of 22 April 2013.

77. Paragraph 46-SD(b) further provides the accounts must clearly show the name of the accountant, the date the accounts were produced, and how much the applicant has invested in the business. The date that the accounts have been produced is not indicated on the document.

78. Paragraph 245AA provides that the UK Border Agency/Home Office will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b).

79. It follows that if a document is not submitted in accordance with sub-paragraph (b) there is prima facie no breach of the Rule in the respondent not taking that document into account. The evidence of business activity provided with the application was deficient for the reasons set out earlier in this determination. The problem identified by the Secretary of State in the refusal letter was <u>not</u> that the documents were in the wrong format. The problem was a lack of mandatory information, such as contact details; and in the case of the business contract, there was an asserted failure to specifically describe the services which were provided by the business. Against this background, the additional evidence of business activity provided in the letter of 22

April 2013 does not come within the scope of sub-paragraph (b) of paragraph 245AA. It is not repackaging the same evidence in the correct format. It is presenting new evidence.

80. The unaudited accounts clearly do not fall within the scope of sub-paragraph (b). For the appellant had not sought to provide this type of evidence with the application. But he should have done, as he was asserting that he had invested the sum of £25,000 in the company prior to the date of application. So the provision of unaudited accounts as evidence of such investment was a mandatory requirement under paragraph 46-SD from the outset.

81. If (contrary to my primary finding) a set of accounts was sent under the letter of 22 April 2013, the respondent was wrong to say that the appellant had not provided any accounts. But there was no breach of evidential flexibility principles or a common law duty of fairness, as the appellant had still not provided a specified document: namely, unaudited accounts which complied with the requirements of paragraph 46-SD. As previously canvassed, the defects in the accounting documentation are not minor, but are highly significant. As of 22 April 2013 they were draft accounts which had not been approved by the board, and in respect of which there was no certificate of confirmation from the accountants.

82. I take into account the fact that Judge Andonian allowed Mr Islam's appeal on evidence which in many respects was, or is likely to have been, identical to that relied on in this appeal. But it does not appear to have been suggested in that appeal that the respondent failed to take into account documents which had been tendered under cover of a letter dated 22 April 2013. The Judge proceeded on the premise that Mr Islam had provided sufficient documents with his initial application, and that the Secretary of State had acted unreasonably in not contacting Mr Islam for clarification in relation to "any matters of mandatory requirement that she thought had not been properly provided, and that she thought were not provided in terms of documents being in the appropriate format."

83. The Presenting Officer at the hearing argued that it was not a question of documents not being in the appropriate format, but documents not being made available at all. Judge Andonian's response to that submission was as follows: "With great respect, I cannot see that from the voluminous evidence before me." So I gain no assistance from his approach to Mr Islam's appeal in determining the discrete issue which has arisen in this appeal.

84. Accordingly, I find that the appellant has failed to discharge the burden of proving that the refusal decision was not in accordance with the Rules or was otherwise not in accordance with the law. I find there was no common law unfairness in the Secretary of State refusing the application on the evidence which had been submitted, and not seeking further documents or clarification from the appellant before making an adverse decision on his application.

85. The fact that the appellant has failed in his appeal, whereas his entrepreneurial team member has been successful, raises the question whether the outcome is perverse, and thus whether the appellant is entitled to any relief in consequence. Thus far, I do not consider there has been any inconsistency on the part of the Secretary of State. The Secretary of State has acted consistently towards both entrepreneurial team members, in that she rejected both their applications on the grounds that they had not provided all the specified documents. So the fact that Mr Islam was successful in his appeal against the refusal decision directed against him does not establish retrospectively that the refusal decision directed towards the appellant was unlawful as being contrary to the principle of consistency. The inconsistency of outcome comes about because of the differing fortunes of the appellant and Mr Islam in the First-tier Tribunal. I have earlier explained in this determination why I have come to a different conclusion from that of Judge Andonian.

86. However, the fact that the Secretary of State has gone on to grant Mr Islam leave to remain fortifies the appellant's position with regard to a fresh application for leave to remain as a Tier 1 Entrepreneur Migrant. The findings of Judge Andonian as to the genuine nature of the business stand unchallenged. Indeed, they were not put in issue in either refusal letter. The appellant is not facing a removal direction, and it is open to him to make a fresh application for leave to remain within 28 days of his appeal rights being deemed to be exhausted, without becoming an overstayer. As this avenue is open to the appellant, I do not consider that the consequences of the refusal decision have such gravity as to engage Article 8(1) ECHR.

Decision

The decision of the First-tier Tribunal dismissing the appellant's appeal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal against the refusal of further leave to remain is dismissed on all grounds raised.

Signed Date

Deputy Upper Tribunal Judge Monson