



Case No: JR/5894/2019

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breems Buildings
London, EC4A 1WR

6 November 2020

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

Between:

THE QUEEN
on the application of
(1) JAVED IQBAL
(2) SNOBER SADIQUE
(3) MUHAMMAD IBRAHIM

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr Jayed Sarker
(instructed by Adam Bernard Solicitors), for the applicant

Mr Anthony Lenanton
(instructed by the Government Legal Department) for the respondent

Hearing date: 5 October 2020 (via *Skype for Business*)

APPROVED JUDGMENT

Covid-19: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 4pm on Friday, 6 November 2020

Judge Blundell:

1. The first applicant is a Pakistani national who was born on 1 February 1977. The second and third applicants are his wife and child. Their status has at all times been dependent upon his and they raise no separate complaints in this application for judicial review. In the circumstances, I propose to refer to the first applicant as 'the applicant'.
2. The applicant applies for judicial review of decisions which were made by the respondent on 10 July and 27 August 2019. By the first, he was refused leave to remain as a Tier 1 (Entrepreneur) Migrant. By the second, the respondent refused his application for Administrative Review. Before I explain the basis of the application or the decisions, it is necessary to set out some of the earlier parts of the chronology.

Background

3. The applicant was granted entry clearance as a Tier 4 (General) Student Migrant in 2010. He entered the country in that capacity and studied in London, obtaining a Masters in Business Administration. He was subsequently granted leave to remain as a Tier 1 (Highly Skilled Worker) Migrant and then, in 2014, as a Tier 1 (Entrepreneur) Migrant. On 12 March 2014, a company called B J Business Services was incorporated under the Companies Act. The applicant was and is the sole director of the company.
4. On 19 May 2017, the applicant applied for further leave as a Tier 1 (Entrepreneur) Migrant. Amongst other documents submitted in support of that application there was a letter from a firm of accountants in Tooting, which stated that they acted as accountants for B J Business Services and that the applicant remained the only director of the company. The accountants confirmed that the applicant had invested a little more than £50,000 in the company by way of an unsecured director's loan. Management accounts dated 8 May 2017 were produced, showing the loan in question. As I have said, a number of other documents were also provided with the application, included but not limited to the unsecured loan agreement and company accounts for the preceding years.
5. At all material times, the registered address for B J Business Services was 20-22 Wenlock Road in Hoxton, London N1 and the company's principal activities were said to be business consultancy and telecommunication services. The company traded from 179 Chatham High Street in Kent, however. As printed on 5 August 2017, the company's entry on the Gumtree website stated that it offered the following services (reproduced verbatim):

we offer support to individuals, small to medium businesses in the form of strategic marketing and management consultancy.our business consultancy services geared to take your business to the next level, often tackle difficult markets whilst bringing return on investment (ROI) at an early stage.we can hep define and implement your marketing strategy and client relationship management strategies that

meet your business aspirations. we work on different key market sectors including retail, publishing, online media, telecoms and many more. our business development firm operates as vertically integrated branding, marketing, sales growth and management consultancy provider. our primary services include channel marketing, media planning, buying, creative services, search marketing and search engine optimization, management consultancy and sale growth strategy planning.

6. There then followed a list of sixteen 'business gear up services' which were offered 'at competitive prices'. The advertisement gave the applicant's name and the Wenlock Road address. The map on the website, however, suggested that the company was in Yangon, Myanmar.
7. The respondent decided that a visit to the applicant's business premises was appropriate. At 11am on 10 May 2018, officers attended the premises in Chatham, declaring to the applicant that the purpose of the visit was to enable him to provide further information or to clarify information which he had already provided in support of his pending Tier 1 application. The officers remained for two hours, during which they inspected the premises (which the applicant described as a retail shop selling bags, wholesale mobile phones, phone accessories and SIM cards), in addition to interviewing the applicant at some length in a small office at the rear of the shop which had been 'newly created from plasterboard with a door'. I will return to what was said in that interview in due course. It suffices for present purposes to note that the application was refused on 8 February 2019 because the respondent was not satisfied that the applicant was a genuine entrepreneur. Requests for Administrative Review were refused later that year.
8. On 20 May 2019, the applicant made a further application for leave to remain as a Tier 1 Entrepreneur. He relied again on his position as the sole director of B J Business Services. Oddly, no copy of the application is before me but it is clear from the first decision under challenge that the applicant presented evidence in support of this application which he had not presented with the 2017 application. Four items of additional evidence are listed at pp2-3 of the decision: reports, accounts and financial statements for the company; business bank statements; employee documents and 'other business documents'. There was no further interview before the respondent refused the application.

The Decisions Under Challenge

9. In the decision of July 2019, the respondent gave three pages of reasons for refusing the application. I do not propose to set out the reasons in full. They may be summarised as follows:
 - (i) The applicant had stated in interview that he spent £50-60 per month on advertising, whereas the accounts for the period ending 8 May 2017 showed total expenditure of £1000 on advertising and PR. The discrepancy led the respondent to question the credibility of the financial accounts of the business.

- (ii) The applicant had stated in interview that he had stopped the business development side of his business to focus on mobile phone sales but he had also stated that he intended to turn the premises into a coffee shop or a restaurant. This led the respondent to conclude that the business plans and activities appeared to be 'unfocussed'.
 - (iii) The applicant's website showed that he still offered business development services, whereas he had stated in interview that he no longer did so. The respondent expected a functioning business to have a website showing the services currently offered.
 - (iv) The website had also shown, for four years, a company location in Myanmar. Whilst that had now been corrected, a genuine business would not have had such misleading information on its website for such a time.
 - (v) The applicant stated at interview that he had not carried out any market research and this was of concern, both in relation to the mobile phone business and the potential future franchise of a coffee shop. The respondent noted that the applicant had prior experience in the mobile phone sector but did not accept that he would invest £50,000 without carrying out market research.
 - (vi) There was no signage at the shop on Chatham High Street, in breach of Companies House rules, and the respondent did not expect a genuine business to operate without a sign.
 - (vii) The applicant had been unable to provide any evidence of business activity within the 28 days preceding the visit. Whilst further evidence had been submitted with the more recent application, the respondent had concluded on balance that the applicant had not satisfied the 'genuineness test' in the Immigration Rules.
 - (viii) The applicant had been unable during the visit to produce any evidence of work done by employees and had not known that any employees were entitled to paid annual leave.
10. As a result of these concerns, the respondent refused the application under paragraph 245DD(k) of the Immigration Rules, concluding that the applicant had not 'met the genuineness test' under that paragraph, as expanded by paragraph 245DD(l). These concerns also led to refusals under sub-paragraphs 245DD(b) and (n). (I set out the relevant version of the rule below).
11. The application for Administrative Review was made on 30 July 2019 and refused, as I have already stated, on 27 August 2019. The reviewing officer concluded that there were no caseworking errors, as defined in the Immigration Rules, and the original decision was maintained. A Letter Before Action which was provided to the respondent on 15 November 2019 did not persuade her to take a different view.

Application for Judicial Review

12. This claim was issued on 26 November 2019. The grounds for judicial review were settled by Mr Sarker. The central submission, which Mr Sarker accepts must prosper if this application is to succeed, is that the interview which took place in May 2018 was procedurally unfair due to an overly rigid adherence to a pre-prepared line of questioning which resulted in a failure to 'probe' answers given by the applicant, as in R (Anjum) v ECO [2017] UKUT 406 (IAC) and contrary to R (Mushtaq) v ECO [2015] UKUT 224 (IAC).
13. Permission was granted by Upper Tribunal Judge Kamara, who considered that point in particular to be arguable.

The Immigration Rules

14. It was agreed by the parties that the version of paragraph 245DD of the Immigration Rules which was initially cited by Mr Sarker was not the version in force at the time of the decision under challenge. The correct version, as appended to the Detailed Grounds of Defence which were settled by Mr Lenanton, is materially as follows:

245DD. Requirements for leave to remain

To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) ...
- (b) *The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.*
- (c) - (h) [...]
- (i) *The applicant must provide a business plan, setting out his proposed business activities in the UK and how he expects to make his business succeed.*
- (j) ...
- (k) *Where the applicant has, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant and is being assessed under Table 5 of Appendix A, the Secretary of State must be satisfied that:*
 - (i) *the applicant has established, taken over or become a director of one or more genuine businesses in the UK, and has genuinely operated that business or businesses while he had leave as a Tier 1 (Entrepreneur) Migrant; and*

- (ii) *the applicant has genuinely invested the money referred to in Table 5 of Appendix A into one or more genuine businesses in the UK to be spent for the purpose of that business or businesses; and*
 - (iii) *the applicant genuinely intends to continue operating one or more businesses in the UK; and*
 - (iv) *the applicant does not intend to take employment in the United Kingdom other than under the terms of paragraph 245DE.*
- (l) *In making the assessment in (k), the Secretary of State will assess the balance of probabilities. The Secretary of State may take into account the following factors:*
- (i) *the evidence the applicant has submitted;*
 - (ii) *the viability and credibility of the source of the money referred to in Table 5 of Appendix A;*
 - (iii) *the credibility of the financial accounts of the business or businesses;*
 - (iv) *the credibility of the applicant's business activity in the UK, including when he had leave as a Tier 1 (Entrepreneur) Migrant;*
 - (v) *the credibility of the job creation for which the applicant is claiming points in Table 5 of Appendix A;*
 - (vi) *if the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and*
 - (vii) *any other relevant information.*
- (m) ...
- (n) *If the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A, those points will not be awarded.*
- (o) *The Secretary of State may decide not to carry out the assessment in (k) if the application already falls for refusal on other grounds, but reserves the right to carry out this assessment in any reconsideration of the decision.*
- (p) - (t) [...]

Submissions

15. Mr Sarker prefaced his submissions with the following observations. Firstly, the applicant was an established businessman who had already enjoyed a period of leave as an entrepreneur. Secondly, the core authority on which he would rely was Anjum and the interview in this case was characterised by a lack of follow-up questioning or probing, as in Anjum. Thirdly, the procedural difficulties with the interview were such that the decision was vitiated by public law error, even if it could not be shown that all of the respondent's concerns were erroneous.
16. Developing the points made in his grounds and his skeleton argument, Mr Sarker submitted that three of the respondent's central concerns had not been fairly investigated during the interview. The first related to the applicant's expenditure on advertising. He had only been asked about advertising expenditure in the interview, whereas the relevant accounts related to advertising and PR. Public

Relations was clearly a different category of expenditure. All that the respondent had discovered in interview was that the applicant spent £50-£60 per month on advertising. There was no discrepancy between that sum and the suggestion in the accounts that he had spent £1000 per annum on advertising and PR, since the latter sum clearly took Public Relations expenditure into account. There had been a clear error of comprehension on the respondent's part, brought about by a lack of proper questioning in the interview. I asked Mr Sarker what the PR expenditure had been in the year in question, and how it had been spent. He had no instructions on that issue, and was not able to take me to any relevant documents.

17. Mr Sarker's second submission was that the respondent had failed properly to investigate the applicant's suggestion that he would open a restaurant on the site of the existing business. The applicant had given this answer but there had been no follow-up questions asked by the interviewing officer whatsoever. The respondent had concluded that the applicant's business intentions were 'unfocussed' but the interview provided no proper basis for that conclusion. I asked Mr Sarker whether there was a business plan which detailed the applicant's intentions in this regard. He said that there was not, and he did not understand any business plan to have been submitted with the application. He submitted that it was not a requirement in an application for further leave to remain. Whether or not there had been a business plan, the respondent had failed in her public law duty to conduct the interview in a procedurally fair manner.
18. Mr Sarker submitted, thirdly, that the respondent had failed to consider why the applicant had said that he did not conduct any market research. He had said that he had experience of the SIM card market at a company called Simmax and it was clear that he had been granted leave to remain in order to pursue this business venture. These were both relevant matters for the respondent to consider before criticising the applicant's lack of market research into his business. Had she asked further questions of the applicant, particularly as regards his role at Simmax, she would not have been concerned about the absence of market research. Equally, the respondent had failed to investigate in any meaningful way the applicant's idea of converting the premises into a café or restaurant. The applicant had explained why he wished to change his business (there having been a drop in income from mobile phone sales) and this was a feasible explanation.
19. As to the remaining points taken against the applicant (regarding the signage, the website and the compliance with employment law), the applicant could still have a genuine business even if those points were validly made. On reflection, Mr Sarker was constrained to accept that these points were open to the respondent in public law terms. He submitted, however, that there were serious flaws in other respects and that these points would not suffice, in and of themselves, to sustain the decision.
20. At my request, Mr Sarker helpfully took brief instructions from the applicant and confirmed that the business had been one of business consultancy in 2014 but the applicant had switched to SIM sales (etc) in 2017.

21. Mr Lenanton developed his detailed grounds of defence and his skeleton argument as follows. He began by noting that the applicant had brought his challenge to the first decision beyond the three month 'backstop' for judicial review but he confirmed that the respondent took no point on that. He noted, as I had during Mr Sarker's submissions, that the applicant had apparently failed to comply with the mandatory requirement to provide a business plan with his application. No point had been taken on that in the refusal letter, however, and Mr Lenanton had no instructions to raise the point in defence of the decision. He also noted that the applicant appeared to have been involved in sales before 2017 but that the application for leave to remain in 2014 seemed to have been based on business consultancy alone.
22. As to the merits of the claim, Mr Lenanton submitted that the scope of the duty of procedural fairness was context-specific, citing EK (Cote D'Ivoire) [2014] EWCA Civ 1517; [2015] Imm AR 367. The decision in Anjum was properly to be regarded as one which turned on its own facts. Those facts included a mistake of fact being made by the respondent; a failure to examine the applicant's business plan; and a failure to clarify inconsistent answers. None of those concerns arose in this case. This was the applicant's third application for leave to remain as a Tier 1 Entrepreneur. He knew what he was expected to establish and what he was expected to submit. The purpose of the interview was to assess the underlying application, as had been stated at the outset.
23. It was clear that the respondent's enquiry, and the reasons given for refusing the application, had followed the approach required by paragraph 245DD(1) of the Immigration Rules. There had been no advertising expenditure in the first sets of company accounts but it had been suggested in later accounts that £1000 had been spent on advertising and PR. It was to be noted that Mr Sarker was unable to state on instructions whether any money had in fact been spent on PR in the period in question. Significantly, however, if the applicant had indeed spent £50-£60 per month on advertising during the period considered in the decision, he would have spent significantly more than £1000. In all the circumstances, it had not been irrational for the respondent to attach significance to the discrepancy between what was said in the accounts and what was said at interview.
24. It was accepted, in response to Mr Sarker's second submission, that the applicant had not been 'probed' about his intention to set up a restaurant but it was to be recalled that the onus was on the applicant to establish that he was a genuine entrepreneur. There were opportunities in the interview for him to volunteer further information. The evidence he had given at interview was properly categorised as 'unfocused' and there was no evidence that he had applied for an A3 licence in order to convert the premises into a café or restaurant. The applicant was a man who had purportedly jumped from one business to another and the respondent was perfectly entitled to consider that he was not able to satisfy the requirement of 'genuineness'.
25. As for the applicant's experience of the SIM card market, it was not correct to submit that this had been overlooked by the respondent. It had, in fact, been taken expressly into account. As he had in the skeleton, Mr Lenanton submitted that this

was mere disagreement on the part of the applicant; the respondent had been entitled to conclude that the absence of market research militated against the applicant.

26. There was, in truth, no public law error in the remaining points, as Mr Sarker had ultimately accepted. The decision was to be viewed as a whole and even if there had been a flaw in it, it should nevertheless be upheld when considered holistically.
27. In response, Mr Sarker submitted that Mr Lenanton had misunderstood the respondent's calculations in the decision letter. Her concern was clearly that the amount spent on advertising was less than the amount stated in the accounts, and it was not possible to read the decision in the way suggested by Mr Lenanton. The reality of this case was that matters of concern had not been put to the applicant. The questions were scripted and did not follow on from the answers. The interview failed, just as it had in Anjum, to react to the evolving circumstances which the applicant had described to the interviewing officers. In the event that such a procedural failing was found, the decision could not stand as a whole.

Relevant Authorities

28. As I will come to explain, counsel were essentially in agreement as to the governing principles of procedural fairness and the scope of the disagreement about their application in the present context was rather smaller than it first appeared to be.
29. Both counsel referred, quite rightly, to what was said by Lord Mustill in R v SSHD ex parte Doody & Ors [1994] 1 AC 531. As is well known, those cases concerned the Secretary of State's decisions regarding the penal elements of mandatory life sentences following convictions for murder. The Court of Appeal had held that the Secretary of State was required to give those convicted an opportunity to make representations before fixing the term. The Secretary of State appealed. Lord Mustill was the only member of the Appellate Committee to give a reasoned opinion, with which the remaining members agreed. At p560, Lord Mustill set out six observations requiring the scope of the duty to act fairly. The following are relevant to the applicant's case:
 - (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
 - (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (...)
 - (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

30. EK (Ivory Coast), to which Mr Lenanton particularly referred, was a Tier 4 case in which the applicant's college had withdrawn its sponsorship of the applicant's application for further leave to remain. The respondent had decided the application on the basis that the sponsorship had been withdrawn, without giving the applicant an opportunity to make representations or to find a new sponsor. It seemed that there had been an error on the part of the college, and it was contended that the respondent should have postponed the decision on the application in order to give the applicant an opportunity to correct any such error. The applicant had been unsuccessful before the FtT and the Upper Tribunal, both of which had concluded that the applicant had not had a CAS at the relevant time and that the respondent had been correct, in those circumstances, to refuse the application.
31. Sales and Briggs LJ (as they then were) noted that it was accepted by the Secretary of State that the Immigration Rules did not exclude the general public law duty to act fairly. They concluded, however, that there had been no breach of the duty to act fairly, since the Secretary of State was not responsible for the general unfairness which the appellant had suffered. In so holding, Sales LJ noted that the Points Based System provided a simplified procedure for applying for leave to remain and that it assisted applicants to know what evidence they had to submit in support of their applications: [28] and [33]. Sales LJ contrasted this context with that which was considered in Doody, in which 'what was at stake was the liberty of the subject'. In the context under consideration, what was in issue was 'whether an applicant for leave to enter or remain can persuade the Secretary of State to grant them something in relation to which they have no prior right or expectation, in accordance with a simple and mechanistic points system.': [37]. EK's was not a case, Sales LJ observed, which was comparable with cases such as Patel [2011] UKUT 211 (IAC), in which the respondent had herself brought about a change of circumstances by withdrawing the sponsoring college's licence: [38]. Insofar as a wider principle of fairness had been enunciated in Naved [2012] UKUT 14 (IAC), it was disapproved for failing to consider the 'highly modulated and fact-sensitive way in which the general public law duty of fairness operates.': [39]. Floyd LJ dissented, holding that the respondent had become aware of a material change of circumstances between the date of the application and the date of her decision and should have afforded the applicant an opportunity to correct it.
32. Mr Sarker gave particular prominence to R (Anjum) v SSHD in his submissions. That was a decision of the Upper Tribunal (McCloskey J and UTJ Dawson) in which the respondent's assessment of a Tier 1 (Entrepreneur) Migrant application was held to have been procedurally unfair. The Entry Clearance Officer had concluded that the applicant did not have access to a minimum of £200,000, as required by the Immigration Rules. That conclusion was based on the answers given by the applicant at interview, which the respondent considered were not credible in the

respects listed by McCloskey J at [6]. The reasons were amended following an application for Administrative Review but the refusal was maintained.

33. The Upper Tribunal considered there to be a number of flaws in the conduct of the interview. Amongst other things, it was noted that the applicant was not given an opportunity to clarify two manifestly incoherent responses and the atmosphere of the interview was unfriendly and uncomfortable: [16]. The fact that the applicant was not asked any questions about his business plan was described by the Upper Tribunal as 'striking', at [17]. There had been no probing or exploration of projections in the business plan and their relevance to the answers given by the applicant in the interview: [19]. It was clear to the Upper Tribunal that neither the ECO nor the ECM had correctly understood the business proposal: [19]. Having considered the authorities, including Doody, the Upper Tribunal held that the applicant's challenge to the decision on grounds of procedural fairness was made out because the respondent had failed to probe and clarify answers given by the applicant at interview when those answers 'demanded' such clarification. (I shall not refer to the second ground of challenge, since it is not relevant to the case before me.) The judicial headnote to the decision is materially as follows:

An immigration interview may be unfair, thereby rendering the resulting decision unlawful, where inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given.

34. There was also reference in the documents before me to R (Mushtaq) v ECO (Islamabad) [2015] UKUT 224 (IAC). In the event, there was no reference to it at the hearing and I set out only the first two paragraphs of the judicial headnote:

(i) The common law principles of procedural fairness apply to the decision making processes of Entry Clearance Officers ("ECOs").

(ii) ECO interviews serve the basic twofold purpose of enabling applications to be probed and investigated and, simultaneously, giving the applicant a fair opportunity to respond to potentially adverse matters. The ensuing decision must accord with the principles of procedural fairness.

35. The Secretary of State relied on the unreported decision in R (Taj) v SSHD (JR/04568/2018) at an earlier stage in these proceedings but Mr Lenanton confirmed at [7] that he no longer sought to rely upon it.

Analysis

36. Mr Lenanton submitted that Anjum was a case on its own facts, which included a mistake of fact on the part of the decision maker and an atmosphere of discomfort in the interview. He submitted that it 'also concerned' the failure of the interviewing officer to seek clarification, amplification or comment from the applicant on material matters.

37. It is not correct, in my judgment, to seek to confine Anjum to its own facts. Whilst there were additional sources of concern in that case (the misunderstanding of the business plan being one such concern), the over-riding concern expressed by the Upper Tribunal was the procedural fairness of the interview and, in particular, the fact that the applicant had not been asked to clarify inconsistent answers and had not been 'probed' about various matters which had ultimately been held against him. It was the Upper Tribunal's concern about those aspects of the case which prompted the judicial decision to report the judgment and to issue a headnote in the terms I have recorded above.
38. Anjum was a decision, like Mushtaq, in which the Upper Tribunal sought to apply long-established principles in an immigration context and the resulting decision might, with respect, be thought not to progress matters very far beyond what was actually said by Lord Mustill in Doody. It was expressly accepted by the respondent in Alam v SSHD [2012] EWCA Civ 960; [2012] Imm AR 974 that the Immigration Rules did not exclude the general public law duty to act fairly. That concession was repeated before the Court of Appeal in EK (Ivory Coast). In Mushtaq, counsel for the respondent accepted that the fifth and sixth of Lord Mustill's holdings in Doody (as above) were of particular relevance.
39. Mr Lenanton sought to submit that the scope of the duty to act fairly in the context presently under consideration was to be considered in light of EK (Ivory Coast). I accept that submission to this extent. As was noted by Sales LJ in his judgment in that case, the PBS is administered by a highly prescriptive set of Immigration Rules, detailing what an applicant must demonstrate in substance and how it must be demonstrated by evidence. That level of prescription is necessarily relevant when considering the extent to which an applicant under the PBS can complain that they have not been given proper notice of points which are to be taken against them. It could not properly be said by a Tier 1 (Entrepreneur) applicant, to take a very obvious example, that the respondent had failed to alert him (whether in an interview or otherwise) to the fact that he had not provided a business plan in support of his application as a T1 Entrepreneur. That is a requirement of the Immigration Rules and an applicant could not be heard to submit that he had not had prior notice of the respondent's concern. At the other end of the spectrum will be matters about which the applicant could not have known. In the event that the respondent made enquiries with a third party who cast doubt on some aspect of the applicant's case, for example, an applicant might legitimately complain that there had been no notice of that concern and he had no opportunity to meet it. As Lord Steyn said in R (Anufrijeva) v SSHD [2004] 1 AC 604, at [30]: '[i]n our system of law surprise is regarded as the enemy of justice'.
40. In fairness to Mr Lenanton, he did not seek to submit that the respondent was not under a duty to act fairly during the interview. He accepted my suggestion that a decision would be open to challenge if it contained grounds of refusal on one subject when a completely different subject had been explored in interview. Ultimately, therefore, the advocates agreed that the material question in this case was whether, taking the process as a whole, the applicant had an indication of the case against him and had been given an opportunity to make representations about it before a decision was taken.

41. In answering that question, I must make two observations about context. The first is merely repetition of a point made above. A PBS applicant knows, from the outset, what he is required to demonstrate and how he is required to demonstrate it. To that extent at least, he is aware of the case he has to meet and the subject areas that the respondent is likely to focus upon in her decision-making process. As a result of paragraph 245DD(1), a Tier 1 (Entrepreneur) applicant will be aware, for instance, that there will be particular scrutiny of his financial accounts, his business activity in the UK and the credibility of his 'job creation' in this country.
42. The second point about context is in relation to this particular case. This was the applicant's third application for leave to remain as a Tier 1 (Entrepreneur) Migrant. His first application had been granted. His second application was refused in February 2019. The refusal of the application did not mean, however, that he was unable to secure leave to remain as a Tier 1 (Entrepreneur), however, and he was able to make another application, addressing any concerns which the respondent had expressed in her first decision. It is to be recalled, therefore, that the applicant does not challenge a decision which immediately followed an interview; he challenges a decision which was reached after an interview, a refusal and the submission of further material directed to the first refusal.
43. Taking those contextual points into account, I have no doubt that the decisions presently under challenge were not marred by a breach of the respondent's public law duty to act fairly. I take Mr Sarker's three principal submissions in order.
44. The first relates to the company's expenditure on Advertising and PR. There was a fundamental disagreement between counsel about the meaning of the decision in this respect. For the applicant, Mr Sarker understood the respondent to mean that the amount suggested in the interview (£50-£60 per month) was significantly *less* than the sum claimed in the relevant accounts (£1000 per annum). For the respondent, Mr Lenanton submitted that the concern was actually that the sum of £50-£60 per month was significantly *more* than £1000 per annum when the relevant period was understood. He submitted that the relevant period was considerably longer than a year, and that the applicant would have spent significantly more than £1000 on leaflets if he had been spending £50-£60 per month.
45. As I explained to Mr Lenanton at the hearing, I was rather surprised to hear this submission. Like Mr Sarker, I had read the decision under challenge to mean that the company expenditure on advertising was lower than the sum given in the relevant accounts. Having re-read the decision letter, I am unable to accept the respondent's submission that the opposite meaning was intended. I proceed on the basis that the meaning is as contended by Mr Sarker.
46. Mr Sarker's submission on this ground of refusal is quite simple. He takes me to questions 17 and 18 of the interview, which were asked and answered as follows:

(17) How much have you spent on advertising your business?

Not much, go to the customers. Leaflets - £50-£60 per month. The marketing /business development side of the business is not advertised.

(18) What forms of advertising have you used and where have you advertised?

Leaflets - handed to customers - special deals for those who sell the SIM cards.

47. Based on these answers, Mr Sarker submits that the respondent made two related errors. The first was to misunderstand the expenses quoted in the company accounts, which showed that the relevant expenditure was on Advertising and Public Relations combined. The second was to fail to put the apparent discrepancy to the applicant before it formed the first reason for refusing his application. Mr Sarker submits that there is a fundamental difference between advertising and public relations and that the applicant was entitled, given the way that the questions were framed, to focus solely on the company's expenditure on the former.
48. The difficulty with this submission, as Mr Sarker seemed to recognise during the hearing, is that it has never been said by the applicant that there was another £400 or so spent on public relations. This ground of refusal also featured in the February 2019 and the applicant complained, when he made his application for Administrative Review, that the respondent had failed to enquire whether there were any separate costs for PR. At no stage has the applicant positively asserted that there were such separate costs and at no stage has he provided any documentary evidence of any such costs. Indeed, when I asked Mr Sarker at the hearing whether he had instructions that there had been a separate 'spend' on Public Relations, he confirmed that he had no instructions on the point. Ultimately, therefore, this is a complaint of procedural unfairness which is entirely hollow, in that the applicant merely contends that he should have been 'probed' further about something but he is unable to state that anything material would have emerged if he had been asked.
49. Even if the interview was procedurally unfair in this respect, the applicant had an opportunity to address the respondent's concern when he made his subsequent application. He could have submitted a witness statement, supported with documents showing separate expenditure on PR in the year in question. He did not do so, and the respondent was certainly entitled, when considering the course of events as a whole, to maintain the point which she had originally made in the February 2019 decision, that the answer given was out of kilter with the company accounts submitted.
50. Mr Sarker's second main submission is that the respondent failed to 'probe' the applicant further before concluding that his business plans or activities appeared to be 'unfocused'. Again, it is necessary to bear the entire course of events in mind. The applicant secured leave to remain to run the business described on the website (as above). When he came to make an application for further leave to remain, he had moved away from business development and moved into the business of selling SIM cards, mobile phone accessories and bags from a high street shop. It was questionable, in other words, that the name of the business 'B J Business

Services' even represented the main activities of the company. When the respondent came to visit the premises, however, the applicant said that he was thinking about moving on for a second time. He was recorded as saying this¹, in answer to question 7 of the interview:

(7) What is the nature of your business?

Retail shop – bags, wholesale mobile phones, phone accessories, sim cards (High St Shop). Have applied for A£ licence to open a franchise of Starbucks, Costa or will open a restaurant (Indian cuisine or kebab) in the shop. Marketing, advertising, business development – have stopped this part of the business last month to concentrate on franchise.

51. I do not accept that it was necessary, as a matter of procedural fairness, for there to be any further 'probing' of this answer during the interview. The applicant was on notice – as a result of the Immigration Rules – that the credibility of his business activity would be under scrutiny. If he had moved away from the business model for which he had been granted leave to remain, he should have expected there to be greater scrutiny of his current business model and of any future intentions. He was unable even to state whether he intended to take a franchise for a coffee shop, to set up an Indian restaurant or to create a kebab house in the premises. The respondent was entitled to conclude, without any further questioning, that this was a man whose intentions were unfocussed and therefore incredible.
52. As with the first point, however, Mr Sarker faces a further difficulty when the whole course of the applicant's dealings with the respondent are taken into account. The lack of focus in the applicant's intentions was a point first taken in the February 2019 refusal decision. He was not only on notice as a result of the Immigration Rules, therefore; he was on notice of the respondent's concern because of the prior refusal. He had every opportunity to submit detailed information with his subsequent application, explaining how and why he had made the move from business development to mobile phone sales and why he intended to move on again into the food industry. No such information was provided with the subsequent application, however, and it was rational and procedurally proper for the respondent to conclude that the situation remained as it had been when she reached her earlier decision.
53. At [36] of his skeleton argument, Mr Sarker takes a further point, which he makes by comparison with the facts in Anjum. In that case, the Upper Tribunal had noted the absence of any exploration of the content of the business plan during the interview. Mr Sarker submits that the circumstances in this case were similar, in that there was no exploration of the applicant's future plans by the interviewing officer. This submission only serves to highlight the applicant's difficulty. Unlike in Anjum, there was no business plan which highlighted the future expansion plans for the applicant's business. It appears, in fact, that there was no business plan at all. Mr Sarker was certainly unable to direct me to one, or to any reference to a

¹ I have re-ordered the answer so that it is in continuous prose. The interviewing officer recorded the same answer, although it is out of order, with arrows showing which part of the answer should appear above or below another.

business plan in the papers. The reference to an A3 licence and to a café or restaurant being opened in these high street premises came about for the first time in the interview. This was absolutely not a detailed business idea with which the respondent failed to come to grips; it was aptly described as an 'unfocused' intention, of which the respondent had been given no notice.

54. The applicant's third major submission is that the respondent failed to explore further with the applicant the reasons why he had not conducted any market research into his businesses. The respondent is alternatively criticised by Mr Sarker for failing to take account material matters, in the form of the applicant's experience in the SIM sector and the relevant sections of the guidance in relation to such experience. I have thus far attempted not to set out tracts of the refusal letter, but it is necessary to set out this section in full:

During your interview you also stated that you had not carried out any market research in relation to your current or previous business activity. This causes significant concerns as would expect any business to carry out market research before investing a significant sum of funds into it. Our concerns are further due to your previously stated claims that you were thinking about investing into different areas such as the restaurant industry or coffee shop franchise sector. We do not deem it credible that you would claim to be planning to expand into a business area without carrying out any market research and as such this casts further doubt over the genuineness of your claimed business activity as a Tier 1 Entrepreneur Migrant.

It is noted that when submitting your application for an Administrative Review of your application you referred to market research and claimed that because you have had prior experience in this business and have succeeded, therefore it is reasonable to have *not* undertaken market research. However, we do not find it credible that genuine business would not carry out market research before investing £50,000 into a business.

55. Mr Sarker complains that the respondent mandated market research but there is obviously no merit in that complaint; there is a world of difference between a decision maker 'expecting' and 'requiring' something to be demonstrated. An expectation may be displaced depending on the circumstances, whereas a requirement is absolute. The respondent only expressed an expectation in the paragraphs above.
56. Mr Sarker's principal submission on this point is that the respondent overlooked the applicant's prior experience in SIM sales. He had, he said, been working as a Sales Adviser for a company called SIMMAX for two years, opening accounts for SIM cards (question 4 refers). When the applicant was asked, at question 14, whether he had conducted market research before investing in his company, he said that he had experience of SIM sales and had not conducted market research. Mr Sarker draws attention to the respondent's guidance (Tier 1 (Entrepreneur),

version 24.0), which highlights the possible relevance of 'previous experience in the field and in business'.

57. The applicant's submissions in this regard fail to appreciate the difference between the applicant's experience at Simmax and the business he had created on Chatham High Street. The purpose of market research is to understand whether the proposed business is a viable one, given the area of operation and other such considerations. The uncontested fact that the applicant had worked at a company selling SIM cards did not mean that his own business selling SIM cards would be a viable one. His experience in the field did not obviate the need for market research, contrary to Mr Sarker's submissions. The respondent was entitled, without exploring the point any further in interview, to consider that it was a matter of concern that the applicant was seemingly willing to invest £50,000 in a business when he had undertaken no research to understand the viability of that market in that particular area. The validity of that concern is proven by reference to other parts of the interview. It is clear that the appellant was operating in a specific geographical area, for example, and that his business had taken a significant downturn in recent times (recording, he said at interview, no business activity for the preceding 28 days). Had the applicant undertaken market research, rather than launching as he did, he might have appreciated that national or local competition was likely to be a problem and that the business was not a viable one.
58. Mr Sarker also submits that the respondent focused on the question of market research without taking any, or any proper, account of the fact that the applicant had been running the business on Chatham High Street, as was demonstrated by the additional material submitted with the application. That material does not detract from the validity of the respondent's concern, however. In seeking to decide whether the applicant was a credible entrepreneur, she was entitled to consider the efforts he had made to research the viability of the business. She did not lose sight of the applicant's submission that he had 'prior experience in this business and have succeeded'. Having set that out in the decision, she concluded that it did not obviate her concern about the absence of market research. That was not an irrational stance for the respondent to take.
59. The respondent also expressed concern about the absence of market research in relation to the franchise or restaurant business to which the applicant referred in interview. Mr Sarker submits that the applicant was asked no follow-up questions about this, which Mr Lenanton accepts. As I have explained above, however, any such lack of 'probing' is to be seen in the context of the heavy onus placed on the applicant by the PBS, the way in which he continued to switch from one business venture to another, and the opportunity he had following the interview (as a result of the subsequent application) to address the concerns which the respondent had already expressed in the February 2019 refusal. It would have been open to the applicant, in the face of that refusal, to submit a business plan for a Starbucks franchise or a kebab house, showing that there was likely to be good footfall in the area and that there was limited local competition, amongst other matters. But he took no steps to do so, as a result of which the respondent's concerns remained. In my judgment, there was no public law error in this concern, whether as a result of procedural unfairness, irrationality or otherwise.

60. Under the sub-heading 'Further points' in his skeleton argument, Mr Sarker attempted to take issue with each of the remaining grounds of refusal. When pressed during the hearing, however, he very properly accepted that the respondent was entitled as a matter of public law to reach the remaining conclusions I have summarised at [8] above. Whilst other decision makers might not have concluded that it was a matter of concern that the applicant's business website had a map which showed the company to be in Myanmar, or that he was not aware that employees were entitled to paid annual leave, these were obviously matters which the respondent was rationally entitled to hold against the applicant in considering the credibility of his business and of his claim to have created jobs in the UK. Mr Sarker opted, in the circumstances, not to develop any freestanding submissions against these points, preferring to submit that they were insufficient to sustain the decision in the event that I was with him on his three main points. Since I am not with him on those points, I need not consider that particular submission any further.
61. In the circumstances, the application for judicial review is refused.
62. This judgment will be handed down by email. I invite written submissions from counsel on the form of the order and any other matters.

Postscript

63. This judgment was circulated in draft and typographical corrections were helpfully provided by both counsel. Mr Sarker sought permission to appeal but submitted merely that this was an interesting case which involved important principles. I do not consider there to be any arguable error of law in my decision. Nor do I consider this case to raise any important points which should be considered by the Court of Appeal. Permission to appeal is accordingly refused.
64. Mr Sarker also submitted that there should be no order as to costs because the applicant is reliant on friends and family and is struggling as a result of the pandemic. No evidence of the applicant's impecuniosity has been provided, however, and this case has been advanced (by privately instructed lawyers) on the basis that he is a successful businessman who has invested tens of thousands of pounds in the UK. There is no reason, in my judgment, to depart from the ordinary rule, and I shall order that the applicant pays the costs of the Secretary of State.

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**In the Upper Tribunal  
(Immigration and Asylum Chamber) Judicial  
Review**

JR/5894/2019

In the matter of an application for Judicial Review

The Queen on the application of  
(1) JAVED IQBAL  
(2) SNOBER SADIQUE  
(3) MUHAMMAD IBRAHIM

Applicants

versus

SECRETARY OF STATE  
FOR THE HOME DEPARTMENT

Respondent

**ORDER**

**BEFORE Upper Tribunal Judge Blundell**

**HAVING** considered all documents lodged and having heard Sarker of counsel, instructed by Adam Bernard Solicitors, for the applicant and Mr Lenanton of counsel, instructed by GLD, for the respondent at a remote hearing on 5 October 2020

**IT IS ORDERED THAT:**

- (1) The application for judicial review is refused for the reasons in the attached judgment.
- (2) The Applicants shall pay the Respondent's costs on the standard basis, to be subject to detailed assessment if not agreed.
- (3) Permission to appeal is refused for the reasons at the foot of the attached judgment.

Signed: *M.J. Blundell*

**Upper Tribunal Judge Blundell**

Dated: **5 November 2020**

**The date on which this order was sent is given below**

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**For completion by the Upper Tribunal Immigration and Asylum Chamber**

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 06 November 2020

Solicitors:

Ref No.

Home Office Ref:

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### **Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).