



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35063/2014
IA/35066/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15 February and 14 March 2016

Decision & Reasons Promulgated
On 30 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

MOHAMMED MAZHARUL ISLAM
MOST KHADIJA AKHTAR FERDUSH
(NO ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel (15 February), Mr A Alam, Counsel (14 March)
For the Respondent: Ms J Isherwood, Home Office Presenting Officer (15 February)
Ms A Fijiwala, Home Office Presenting Officer (14 March)

DECISION AND REASONS

1. The appellants are citizens of Bangladesh born on 21 June 1977 and 1 January 1975 respectively. The second appellant is the partner of the first appellant and appeals as his dependant. The first appellant (hereinafter "the appellant") has been in the UK since September 2006 in order to study and, latterly, as a Tier 1 (Post-Study Work) Migrant. He obtained an MBA from the University of Greenwich in 2011. He and a business partner, Mr Ali Baqar, decided to start up a business. They did not have their own money to invest in the business so they secured the agreement of Nomisma Venture Capital LLP to make available £50,000 for investment in their

new business.

2. On 10 July 2014 the appellant applied in-time for further leave as a Tier 1 (Entrepreneur) Migrant. The respondent did not accept the evidence of investment funding from Nomisma and the appellant was not awarded the 75 points he needed for Attributes: access to funds, funds held in regulated institution and funds disposable in the UK. His application was refused by reference to paragraph 245DD(b) and Appendix A of the Immigration Rules, HC395. The reasons for refusal were confined to the following point. In line with paragraph 41-SD(d)(i)(6) of Appendix A of the rules, the confirmation from the venture capitalist firm that it had the money available to invest in the business must include confirmation that it is regulated by the Financial Conduct Authority (“FCA”) and is listed as permitted to operate as a venture capital firm. A search of the Financial Services Register found no trace of Nomisma. The respondent also reserved the right to verify the documents provided and to carry out an assessment of the genuineness of the business.
3. The appellant appealed to the First-tier Tribunal. After a hearing on 23 January 2015, Judge of the First-tier Tribunal Wright dismissed the appellant's appeal both under the Tier 1 (Entrepreneur) Rules and on Article 8 ECHR grounds. In relation to the former he reasoned that the rules required the body which provided confirmation that third party funding was available must include in its confirmation that it was regulated by the FCA and therefore permitted to operate as a venture capitalist firm. It was not in dispute that Nomisma was not listed as permitted to operate as a venture capital firm and that it was not regulated directly by the FCA. Accordingly the appellant did not have access to funds for the purposes of the rules. Even if he were wrong in finding that indirect regulation through Nomisma’s parent company, Providentia Capital LLP, would satisfy the rules, Judge Wright reasoned in the alternative that Nomisma could still not be said to be listed as permitted to operate as a venture capital firm.
4. The grounds seeking permission to appeal argued the judge’s analysis was flawed because Providentia, which was regulated by the FCA, had permission to operate in the way it did. In fact, the FCA’s own website showed that there was no requirement to register venture capital *firms*. A venture capital firm can only be regulated indirectly, as in the case of Nomisma and Providentia.
5. The First-tier Tribunal found the application was out of time and refused to extend time. Reasons were also given why permission to appeal would have been refused on the basis the judge’s interpretation of the rules was correct.
6. The appellant renewed his application to the Upper Tribunal, having enlisted alternative representation. The grounds essentially made the same point about the relationship between Providentia and Nomisma and suggested the judge did not give sufficiently close attention to the “expert report” which had been provided explaining this.

7. Permission to appeal was granted by Deputy Upper Tribunal Judge Symes. He did not consider the timeliness point but granted permission as follows:

“It seems to me that there is a question of law here as to the proper construction of Table 4 and whether or not direct regulation is the only form of regulatory supervision envisaged by Appendix A, and that there is enough in the report by Daniel Tunkel, a Partner in Howard Kennedy Fsi LLP, to cast doubt on whether the First-tier Tribunal’s reasoning is a conclusive answer to the appeal.”

8. The respondent filed a rule 24 response opposing the appeal.

Adjournment

9. On 15 February 2016 I handed the representatives the result of a Companies House search showing that Nomisma was dissolved on 18 August 2015. I asked Mr Biggs whether he had any evidence that the company was now trading and had funds to invest. He asked for a short adjournment to make enquiries, which I granted. On returning, he said he had been unable to progress the matter and his client was unaware that Nomisma had been dissolved. He requested an adjournment to seek clarification of the current position, which I granted. Plainly, if the company had been dissolved and funds were no longer available from that source, this would be highly material to the outcome of the appeal. However, the appellant had been taken by surprise by this new point and fairness demanded that he have at an opportunity to rebut it.
10. Prior to the adjournment, I mentioned the fact the Upper Tribunal’s grant of permission to appeal had not considered whether the application had been made in time. Mr Biggs said it appeared there had been two applications to the First-tier Tribunal and the first had been in time. In any event, I indicated I would be minded to extend time, if necessary, because the file showed that the First-tier’s decision had not been sent to the appellant personally but only to his then representatives, Immigration 4U.

Error of law

11. At the resumed hearing Mr Alam said he had not been aware that Nomisma had ceased trading. However, I pointed out that his client had been present at the adjourned hearing and Mr Alam did not seek a further adjournment.
12. No evidence has been filed showing that Nomisma is now trading. In the circumstances, any error on the part of the Judge could not be material.
13. Mr Alam argued there had been a breach of procedural fairness and the respondent should grant the appellant further time to secure alternative funding. He argued the circumstances were analogous to those considered in *Thakur (PBS decision – common law fairness) Bangladesh* [2011] UKUT 00151 (IAC) and *Patel (revocation of sponsor license – fairness) India* [2011] UKUT 00211 (IAC). However, as I indicated, I did not consider the circumstances were in any way analogous. The situation in which the

appellant finds himself is not the result of actions by the respondent while considering his application but simply the result of Nomisma going out of business.

14. The Court of Appeal in *EK (Ivory Coast) v SSHD* [2014] EWCA Civ 1517 made this very point, explaining the limits of the public law duty, in paragraph 38 of the judgment of Sales LJ:

“But that requirement was found to arise where there had been a change of position of which the Secretary of State was aware, and indeed which she had brought about, in circumstances in which students were not themselves at fault in any way, but had been caught out by the action taken by the Secretary of State in relation to which they had had no opportunity to protect themselves.”

15. I find Judge Wright’s decision does not contain a material error of law such that it must be set aside. His decision dismissing the appeals is confirmed.

NOTICE OF DECISION

The First-tier Tribunal’s decision, dismissing the appeals, did not contain a material error of law and shall stand.

Signed

Date 14 March 2016

**Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal**