Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32841/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th November 2017	**On 17th January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MAHENDRA KARUNANAYAKE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Martin, Counsel
For the Respondent: Ms N Willocks-Briscoe, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge E B Grant dismissing his appeal against the refusal of his application for leave to remain as a Tier 1 (Entrepreneur) Migrant that was refused on 23rd September 2015. The decision dismissing that appeal was promulgated on 13th March 2017. The Appellant

appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Boyes. The grounds upon which permission was granted may be summarised as follows:

> "The grounds assert that the Judge did not comprehend correctly the complex factual matrix.
>
> It is rare that errors of fact will ever manifest themselves as errors of law but in this instance I find that the grounds are arguable."

2. I was provided with a Rule 24 response from the Respondent which was considered by all parties before the hearing commenced.

Error of Law

3. At the close of submissions I reserved my decision which I shall now give. I do find that there is an error in law in the decision such that it should be set aside. My reasons for so finding are as follows.

4. Although the grant of permission speaks of mistakes of fact, Mr Martin crystallised his grounds under the headings of fairness and the decision of the First-tier Tribunal being unsustainable on the evidence put forward by the Respondent.

5. Dealing with those arguments in turn it is alleged that the judge has failed to deal with an issue raised by the Appellant, namely that he did not have the opportunity to provide evidence in response to the issues raised in the refusal, namely as to the availability of funds from Equinox Venture Capital LLP. In that respect I note that the decision of Judge Grant does unfortunately fail to examine the ground of appeal in terms of the decision not being in accordance with the law and a consideration instead is made only in respect of whether the decision is in accordance with the Immigration Rules. Thus there is an omission on the face of the First-tier Tribunal's decision.

6. In respect of whether that omission is material or not, I note from the history of the Appellant's challenge of the various decisions that his application was initially refused in January 2014 and in that refusal he was awarded full points under all of the appendices but was only refused as the Secretary of State said his leave had been curtailed and the application was made more than 28 days later. It was only after a successful judicial review challenge to that decision was that the decision was withdrawn and a fresh refusal was issued dated 24th September 2015.

7. Albeit Ms Willocks-Briscoe said that the Appellant would have been in a position to address the Secretary of State on the attributes to his points-based application, given that the previous decision was made on the basis that he had scored points and the second decision following the judicial review was made on the basis that no points were then awarded for Appendix A but were awarded for Appendices B and C, there is foundation for the argument that the decision may have not been in accordance with the law given that the Appellant was not provided with an opportunity to make

representations upon this issue prior to the refusal of 24th September 2015 being framed in those *different* terms to the previous decision of January 2014.

8. In reaching this view I have considered the decision of the Supreme Court in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 wherein at paragraphs 100 and 178 to 179 of the decision of Lord Neuberger (formerly the President of the Supreme Court) the authority of *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 was affirmed and in particular Lord Mustill's pronouncements of common law fairness which include the principle that:

> "…Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations ... either before the decision is taken ... or after it is taken, with a view to procuring its modification…".

9. In my view that *dicta* applies here and as such the error in not considering this argument and whether the decision is in accordance with the law is a material one.

10. Before turning to the second ground, I also note that the Appellant could, if he had been asked by the Respondent, have put forward evidence of availability of funding in the form of a letter dated February 2017 at AB/123 of the Appellant's bundle which alleges that funds were still available to the Appellant from Equinox Venture Capital. I observe that this letter is dated after the involvement of the maligned executive officers in Profectus/Providentia ended in May 2015 and consequently that the availability of funds cannot necessarily be connected to the previous activities of the company when it was under different directorship and/or leadership. As such, this is evidence which goes to the materiality of whether the First-tier Tribunal should have considered whether the decision was in accordance with the law or not, although not as to whether the funds were available to the Appellant at the date of application given the prohibitions on new evidence in a points-based appeal pursuant to Section 85A of the Nationality, Immigration and Asylum Act 2002.

11. In respect of the second ground and whether the decision was unsustainable on the evidence put forward by the Respondent, Mr Martin carefully took me to the evidence in the Respondent's bundle which, at its highest, consisted of a piece of Home Office Guidance entitled "Operation Slipknot: Equinox Cases" at Annex F which in particular stated at Annex F3 under a heading "Implications for Equinox cases" that the conclusions reached by the First-tier Tribunal in a November 2014 unreported determination, *Dusane & Ors v SSHD* IA/08058/2014, had implications for the Equinox cases as a whole. However, under a further sub-heading entitled "Consider each application" it was stated that the guidance given was merely intended to provide guidance and should be augmented and developed for each case and that it was essential that each application thoroughly developed grounds for refusal that are specific to the case being considered.

12. In that light Mr Martin highlighted that the Respondent's guidance itself revealed that the guidance and reliance upon the determination of *Dusane* alone, in of itself

would not be enough to warrant a refusal. Indeed it appears that the unreported determination (which was not even produced by the Respondent before the First-tier Tribunal) was the sole basis upon which there would have been 'implications' for Equinox cases according to F3 of the Respondent's bundle. Mr Martin also directed my attention to Annex G of the Respondent's bundle which contained abbreviated and unaudited accounts and an exemption from an audit which was accepted as valid at F4 of the Respondent's bundle, and also directed my attention to Annexes H and I which show that, taking the Respondent's case at its highest, there were individuals involved in Equinox Venture Capital whom were also involved in Profectus – that company being the subject of the reported determination of the Upper Tribunal in *Arshad & Ors (Tier 1 applicants - funding - "availability": Pakistan)* [2016] UKUT 334 (IAC).

13. Indeed, having looked at the determination in *Arshad* it is clear that the determination only goes so far as to assess the funding available from Profectus Venture Capital which is the trading name of Providential Capital ("Providentia"). As such the Upper Tribunal's findings at paragraphs 70 to 78 are not conclusive in relation to whether funding was available from Equinox Venture Capital LLP ("Equinox"), *not* Providentia. Indeed I note that there is no mention of Equinox anywhere in the reported decision of *Arshad & Ors* at all.

14. Thus, given the evidence before the First-tier Tribunal, in my view I am only *just* persuaded that the decision is unsustainable given the paucity of evidence in the Respondent's bundle.

15. I make clear that I form no view as to the availability of funds from Equinox, and I observe that there appears to be material which is referred to in the refusal letter such as a 'statement' in September 2013 of Providentia's CEO, Gulamabbas Lakha, whom allegedly confirmed to the Respondent in writing that Equinox was, at that time, committing a total of £1,400,000 across a large number of businesses set up by Tier 1 (Entrepreneur) applicants. If that is indeed so, then that is material which the Secretary of State ought to put before the First-tier Tribunal where she seeks to persuade the Tribunal that the position of Equinox is indistinguishable from that of Providentia/Profectus. There is a stark contrast that can be seen between the quality and quantity of evidence put before the Upper Tribunal in *Arshad & Ors* and between that served by the Secretary of State in this appeal.

16. Thus, although the Secretary of State's case is premised on a basis similar to that seen in *Arshad & Ors*, the evidence in my view was not of a similar quality as that put forward in that reported decision, such that the consideration by the First-tier Tribunal of the funds available from Equinox should naturally follow without the production of any further evidence other than the mutuality of senior members of both companies. This observation is, of course, specific only to the instant appeal before me and the contents of the Respondent's Bundle before the First-tier Tribunal.

17. In light of the above findings, I set aside the decision of findings of the First-tier Tribunal entirely.

Notice of Decision

18. The appeal to the Upper Tribunal is allowed.

19. The making of the previous decision involved the making of an error on a point of law and is set aside.

20. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

21. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Saini