CMS/2009/0002

APPLICATION FOR PERMISSION — applicant with recent conviction for conspiracy to make false instruments and sentenced to 33 months' imprisonment — application refused — application of Compensation (Claims Management Services) Regs 2006, reg 10 — whether refusal correct — yes — appeal dismissed

THE CLAIMS MANAGEMENT SERVICES TRIBUNAL

JOHN OGBEREJEKO EVWIERHOMA

Appellant

and

THE CLAIMS MANAGEMENT SERVICES REGULATOR

Respondent

Tribunal: Colin Bishopp (Chairman)
Christopher Burbidge
Keith Palmer

Sitting in public in London on 12 January 2010

The Applicant in person

Jeremy Hyam, counsel, instructed by, and for, the Respondent

DECISION

1. This is an appeal by Mr John Evwierhoma against the respondent Regulator's refusal of his application for authorisation to act as a provider of claims management services, in accordance with ss 4 and 5 of the Compensation Act 2006. Mr Evwierhoma first made an application for authorisation on about 23 December 2008, in the name of a company, Calafield Limited, which he controlled and of which he was a director, but he later withdrew that application and in its place made another, in his own name, on about 28 January 2009. The application led to a "minded to refuse" letter, sent to Mr Evwierhoma on 28 May 2009. Despite the representations made by Mr Evwierhoma in response to that letter, his application was formally refused by a decision letter of 22 June 2009. It is against that decision that Mr Evwierhoma has appealed.

2. The reason given by the Regulator for the refusal of the application, as it was set out in the letter, was that "on 29 May 2008 at the Inner London Crown Court you were convicted of a criminal offence after you admitted the offence of conspiracy to make false instruments. You were subsequently sentenced to 33 months' imprisonment." Mr Jeremy Hyam, counsel representing the Regulator before us, agreed that this was the only reason relied on by the Regulator when deciding to refuse the application, and that it was the only reason relied on now, save that the Regulator had learned in the meantime that Mr Evwierhoma had also received a concurrent sentence of six months' imprisonment for a similar offence, and that in 2003 he had been conditionally discharged for 12 months for the offence of providing immigration services when not qualified to do so, contrary to s 91 of the Immigration and Asylum Act 1999.

3. Mr Evwierhoma agreed that he had been convicted and sentenced as the Regulator stated. He disclosed the fact of his conviction for conspiracy and the length of the sentence in both the withdrawn and the extant applications for approval. He did not then disclose the conditional discharge or the offence for which it was imposed, but in our view he is not to be criticised on that account since the relevant question on the application form does not invite disclosure of such convictions. In addition, the conviction was spent by the time the applications were made, and neither the 2006 Act nor the regulations made under it, the Compensation (Claims Management Services) Regulations 2006, require the disclosure of spent convictions.

4. The rules governing the grant or refusal of authorisation are to be found in reg 10 of the 2006 Regulations, which, so far as presently relevant, is in these terms:

> "(1) The Regulator must not grant an application for authorisation unless he is satisfied that the applicant is competent and suitable to provide the regulated claims management service to which the application relates.
>
> (2) For the purposes of making a decision regarding the suitability of an applicant, the criteria are the following—
>
> (a) that the applicant does not have a history of committing relevant criminal offences (in particular, perjury or an offence

involving fraud, theft or false accounting, or in relation to financial services, consumer credit or consumer protection) or breaches of any law or rule of practice regulating the provision of financial, legal or other relevant services;

(b) there are no relevant proceedings (whether completed or not) in any court or tribunal, and in particular any proceedings in relation to financial services, consumer credit or consumer protection, against the applicant;

(c) if the applicant holds or proposes to hold clients' money, the applicant has appropriate arrangements or proposed arrangements for holding such money; and

(d) that the applicant has no arrangements with another person that might expose it to any conflict of interest.

(3) For the purposes of making a decision regarding the suitability of an applicant, the Regulator may have regard to—

(a) the applicant's financial circumstances;

(b) the applicant's management arrangements, including—

(i) how financial and other control is exercised or is to be exercised;

(ii) who is responsible for the applicant's financial and other management;

(iii) measures to maintain its solvency;

(iv) the provision of verified, certified or audited accounts;

(v) any previous relationship with a company that has become insolvent, or against which an insolvency petition has been brought;

(c) the applicant's actual or proposed connections or arrangements with other persons, (including, in the case of an applicant that is a body corporate, its relationship with any parent or subsidiary company) and the applicant's arrangements to avoid conflicts of interest;

(d) the applicant's policies and arrangements or proposed arrangements for training, and monitoring the competence of, its staff, and for recruiting staff;

(e) the applicant's practice or proposed practice in relation to providing information to clients about fees;

(f) the applicant's arrangements or proposed arrangements for professional indemnity insurance …."

5. The refusal was based upon reg 10(2)(a), the Regulator being of the opinion that Mr Evwierhoma's conviction for conspiracy to make false instruments was, alone, sufficient to make it impossible to grant the application. It was a recent conviction, it resulted in a substantial sentence, one which could never be spent in accordance with the Rehabilitation of Offenders Act 1974 (see s 5(1)(b), which excludes offences for which sentences exceeding 30 months have been imposed),

and it was for an offence of fraud. Mr Hyam's argument was the essentially simple one that it followed from those circumstances that the Regulator could not be satisfied that Mr Evwierhoma was "suitable", as reg 10 requires. The earlier conviction, leading to a conditional discharge, would not be enough, taken alone, to justify refusal, but it was an additional factor we should bear in mind.

6. Mr Evwierhoma, who represented himself at the hearing, criticised the decision on a number of grounds. He complained that the Regulator had inexplicably delayed in making the decision; that he was biased; that he had "cherry-picked" from the criteria; that he had relied excessively on the conviction; that he was unsympathetic to the mitigation advanced in respect of the conviction, and had failed to take into account that the sentence imposed was much shorter than the maximum possible; that he had misinterpreted the 1974 Act; that he had failed to attach sufficient weight to the fact that Mr Evwierhoma had taken responsibility for his actions; that he had not struck a fair balance between the regulatory objectives and Mr Evwierhoma's future career; that he had applied the wrong standard of proof; and that he had attached insufficient weight to Mr Evwierhoma's qualifications and maturity.

7. There is some substance in the first of the complaints. Although it is not entirely clear precisely when the second application was received, there is little doubt that it was in the Regulator's hands by mid-February 2009 at the latest. The decision was made on 22 June 2009, outside the three-month time limit imposed on the Regulator by reg 11. The decision was based on material which the applicant had himself disclosed—as we have said, the fact of his conviction and the length of the sentence were clearly stated on both of the applications—and it is a matter for surprise and some concern that a decision was not made and communicated to Mr Evwierhoma more promptly. However, although the regulation imposes a time limit, it is not coupled with any sanction for breach and this is not a case in which an application succeeds if it is not refused within the prescribed time. Accordingly this tribunal is unable to do more than express its disquiet.

8. The allegation of bias is unfocussed and, as Mr Evwierhoma accepted at the hearing, does not really add anything of substance to the other criticisms he has made of the decision. He did not produce any evidence that others in a similar position to his had been treated more favourably than he had been, or any other material on which we might conclude that this had occurred, nor was he able to identify any other kind of bias, and we leave this complaint out of account.

9. Before dealing with Mr Evwierhoma's case in respect of his convictions we need to describe the background to them, and something of Mr Evwierhoma's own history. He told us that he is a native of Nigeria, but has lived in the United Kingdom for nearly 30 years, and holds dual citizenship. He obtained an LLB degree in 1986, and a Master's degree in Business Law in 1987. He also became an associate of the Chartered Insurance Institute, according to Mr Evwierhoma at about the same time although the copy certificate he produced was dated November 2008 because, he told us, he had allowed his membership to lapse and had then renewed it. He did not qualify as a solicitor or barrister, but ran his own business offering general legal advice and acting as an insurance broker, though it

seems that more recently his work consisted in large part of the provision of immigration advice, though not of representation. When it became obligatory for immigration advisers to become registered Mr Evwierhoma believed, he told us, that he was exempt from the requirement. Unfortunately he was mistaken, and it was this error which led to the first of the convictions we have mentioned. Despite the conviction he did later secure registration.

10. The convictions for conspiracy to make false instruments related to Mr Evwierhoma's immigration work. He told us that in the course of his business activities he was willing to countersign passport applications, for a modest reward, and his case before us was that he mistakenly thought that he was properly doing so, having known the applicants for sufficient time. We did not see a copy of the indictment on which he was charged, or any other material setting out the substance of the offences of which he was convicted, but it is evident that the prosecuting authorities took a rather different view of Mr Evwierhoma's conduct. The offences were committed either between 2001 and 2003, or between 2003 and 2005—we had conflicting information—and Mr Evwierhoma was arrested and charged in 2007. He was kept in custody pending conviction, on 17 December 2007, and sentencing, finally, on 24 July 2008. Because he had spent so much time in custody before sentence he had already served the bulk of it, after allowing for remission, and Mr Evwierhoma was discharged from prison in September 2008.

11. He pleaded guilty because, he said, the experience of imprisonment had affected him badly and he wanted to have the matter dealt with in the hope of securing an early release; he maintained before us that he might have been able to secure an acquittal had he contested the charges. He was disappointed that he was not released immediately, but argued that the judge had accepted the basis of his plea, imposing much less than the maximum possible penalty. He did not, ultimately, suggest that the Regulator's interpretation of the 1974 Act was incorrect but instead contended that even though the Act provided that the conviction could never be spent, rehabilitation was possible.

12. Mr Hyam argued that we should view the contentions about the conviction and sentence with scepticism, since Mr Evwierhoma had been represented at the time by leading and junior counsel, it was unlikely that he would have offered (or that the court would have accepted) a plea of guilty if in fact Mr Evwierhoma was claiming to be innocent, and that the length of the sentence, even though less than the maximum, was inconsistent with the possibility that the judge was persuaded that Mr Evwierhoma had been guilty of little more than a technical offence. He agreed that after the passage of a suitable period of time without further incident an offender might be regarded as rehabilitated even though his conviction was not spent, but argued that the period since the sentence in this case was far too short for that to have occurred.

13. Those are, in our view, cogent arguments. We had nothing, most usefully a transcript of the judge's sentencing remarks, which might have lent support to Mr Evwierhoma's contention that the judge was of the opinion that these were not serious offences, and we are left to form our own view. The difficulty in Mr Evwierhoma's way lies in Mr Hyam's argument that a sentence of 33 months'

imprisonment is not consistent with a technical offence, or one for which there is compelling mitigation. We agree with him: 33 months is a long sentence, and not one which we can accept would have been imposed if the judge had not considered the offences serious, even if it is less than the maximum possible. We agree also that too short a period has elapsed since Mr Evwierhoma's conviction for it to be possible to say he has been rehabilitated.

14. It is true that the fact that an applicant "has a history of committing relevant criminal offences" is only one of the factors identified in reg 10, and that the Regulator based his decision on that ground alone. We are willing also to accept that, not only did the Regulator not rely on them, but there is also no reason to think that Mr Evwierhoma would be unable to meet the other criteria identified in the regulation. However, we cannot agree with Mr Evwierhoma that this approach amounts to "cherry-picking", or in any other way demonstrates an inappropriate approach to the process of authorisation. An application will not succeed merely because most of the criteria are met; those set out in para (2) of the regulation are plainly cumulative, so that if an applicant fails to meet any one of them in a material way his application must fail.

15. The essential question is whether, as the Regulator decided and argued before us, the conviction outweighs all other considerations and is alone enough to preclude Mr Evwierhoma's authorisation; or whether, as Mr Evwierhoma argued, the other matters he identified, particularly his qualifications, his resolve not to commit further offences and his right to earn a living, eclipsed the importance of the conviction. In considering that question we bear in mind that the objective of the regulations is the protection of the consumer and, as we have said, Parliament must be taken to have intended that all the conditions set out should be met if authorisation is to be granted. Mr Evwierhoma's maturity does not help him; he is of mature years (he is now 59), but so he was when the offences were committed. There does not seem to us to be anything in the argument about burden of proof; as the regulation makes clear, the Regulator and, following the hearing of an appeal, the tribunal must not grant the application unless satisfied that the applicant is competent and suitable. The burden of satisfying the Regulator is plainly on the applicant. In our judgment the Regulator was right not to be so satisfied; Mr Evwierhoma had not overcome the disqualifying fact of his recent conviction for serious offences involving fraud. We too are not satisfied of Mr Evwierhoma's suitability, and for the same reason.

16. The appeal is, therefore, dismissed. Our decision is unanimous.

COLIN BISHOPP
Chairman
Release Date: