



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/05918/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 23 April 2015**

**Decision & Reasons
Promulgated
On 27 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**PREM VISWANATH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Ms A Fijiwala of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 22 July 1988. On 24 March 2011 he entered with leave as a student, expiring on 6 January 2013. On 7 February 2013, out of time, he lodged an application for further leave as a

Tier 4 (General) Student Migrant under paragraph 245ZX of the Immigration Rules.

2. On 17 December 2013 the Respondent refused the application on the basis that because the application had been made after the Appellant's leave had expired he no longer had an established presence studying in the United Kingdom and so had to show the higher level of funds required under Appendix C (Maintenance (Funds)) of the Immigration Rules. He had failed so to do and therefore his application was refused. Additionally, the Respondent noted the application had been made out of time and therefore the Appellant did not have a right of appeal from within the United Kingdom.
3. On 29 January 2014 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). It was out of time but time was extended because it was accepted the Appellant had changed accommodation and there had been some delay in his receipt of the notice of decision.
4. The grounds refer to an earlier application made by the Appellant on 3 January 2013 which had been returned by the Respondent because it had not been possible to collect the payment of the fee. The grounds refer to the determination in *Basnet (validity of application - Respondent) [2012] UKUT 00113 (IAC)*.
5. When extending time the Duty Judge C M Bell made directions for the Respondent to file and serve evidence why the Appellant's earlier application had been returned. This direction had not been complied with by the time of the hearing in the Upper Tribunal.

The First-tier Tribunal's Decision

6. The hearing of the appeal had been set for 9 October 2014. The Appellant attended. By a decision promulgated on 17 October 2014 Judge of the First-tier Tribunal Kimnell dismissed the appeal stating at para.13 of his decision that the evidence provided by the Respondent recorded the fee could not be obtained and the Appellant had in fact acknowledged that this was the case. The consequence was that the second application leading to the decision under appeal had been made at a time the Applicant did not have extant leave and so he could not show that he had an established presence for study so as to have to meet the lower funding requirements of Appendix C. He dismissed the appeal.
7. The Appellant through his solicitors sought permission to appeal and on 17 December 2014 Judge of the First-tier Tribunal Lambert granted permission to appeal on the basis that the Appellant had appeared in person at the hearing in the First-tier Tribunal and that little weight could be attached to his acknowledgement that the application fee could not be obtained by the Respondent. The burden as to inability to obtain payment

of the fee was on the Respondent by reason of the determination in *Basnet*.

The Upper Tribunal Hearing

8. The hearing was set for 1400 hours on 23 April 2015. There was no appearance by the Appellant or his solicitors. The clerk telephoned the Appellant's solicitors who stated that they were no longer acting for the Appellant. The clerk reported that the solicitors also said they believed the Appellant had left the United Kingdom.
9. Ms Fijiwala relied on the application for permission to appeal and the grant of permission to appeal, accepting that the Respondent had failed to comply with the directions given on 5 February 2014.

Findings and Consideration

10. I was satisfied that notice of the time, date and place set for the hearing had been properly given to the Appellant in accordance with Rule 36 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended and that it was just to proceed in the absence of the Appellant or any representative for him.
11. The substance of the appeal is against the decision made on Appellant's second and out of time application in respect of which he had a right of appeal which could be exercised only out of the country. In that respect the appeal itself is invalid because at the time of the appeal the Appellant was in the country. This point appears not to have been taken before the First-tier Tribunal.
12. Putting that to one side, the Respondent has failed to comply with the Duty Judge's directions to file and serve evidence to enable the Tribunal to determine whether the first application which had been made in time had been improperly returned and so inadequately considered by the Respondent as invalid because the Respondent had been unable to obtain payment of the requisite fees. The notice of appeal to the First-tier Tribunal was lodged through the Appellant's solicitors. It is reasonable to assume that the Appellant had received legal advice on the grounds for appeal and in those circumstances I do not find it a material error of law that the Judge should have relied on the Appellant's subsequent acknowledgment as to a matter of pure fact (whether or not he had the money in his account to pay the fee) that he did not have the money to pay the fee on the first application. However there was in fact no need for the Respondent in the event to produce that information because as the Judge noted at para.13 of his decision the Appellant acknowledged that the Respondent had been unable to obtain payment of the fees. The Appellant has therefore not shown that the Judge made an error of law in respect of the *Basnet* point.

13. Even if the Appellant were to succeed on the *Basnet* point there has been no challenge to the evidence recorded at paragraph 6 of the Judge's determination that:-

The Appellant has been in the UK for more than three and a half years but has no degree and will be returning to India with nothing. He therefore asks for one last chance. He came to the UK in 2011 to study for a Diploma in Health and Social Care but his college closed six or seven months after his arrival and he has not studied since.

The Respondent's notice of decision of 17 December 2013 refers to para.14 of Appendix C of the Immigration Rules which provides that an applicant will have an established presence studying in the UK if he has current leave and at the date of decision:-

He has finished a single course that was as least six months long within the last period of leave for:

His requirement to study on a single course where he has completed at least six months of that course.

14. On the Appellant's own admission he was not at the date of either of the two applications able to satisfy these requirements for an established presence in the United Kingdom. The consequence is that regardless of the *Basnet* point, his appeal was doomed to fail.
15. In these circumstances the decision of the First-tier Tribunal did not contain a material error of law such that it should be set aside. In any event no differently constituted Tribunal would have reached any other conclusion.

Anonymity

16. There was no request for anonymity and having heard the appeal I find none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not contain an error of law such that it should be set aside and so it shall stand. The effect is:

The appeal of the Appellant is dismissed.

No anonymity direction is made.

Signed/Official Crest
2015

Date 22. v.

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal