Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20329/2019**

THE IMMIGRATION ACTS

Heard at Manchester (via Skype)
On 6 April 2021

Decision & Reasons Promulgated
On 20 April 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

GOLAM MUSTAFA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A McVeety Senior Home Office Presenting Officer
For the Respondent: Mr Symes instructed by Diplock Solicitors.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Randall ('the Judge') promulgated on 9 April 2020, in which the Judge dismissed the appellant's appeal on human rights grounds.
2. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

"1. The Appellant seeks permission to appeal in time, against a decision of First-tier Tribunal (Judge Randall) dated 09/04/2020, whereby it dismissed the Appellant's appeal against the Secretary of State's decision to refuse his application for leave to remain on the basis of 10 years continuous residence.

2. It is argued that Counsel at the hearing before IJ Randall wrongly conceded Article 8 grounds, without instructions. This is misleading. Counsel did not concede Article 8 grounds. Counsel did not pursue them, which is a different matter. Different counsel has drafted a permission application.

3. None of the grounds is arguable, save that the Tribunal may have misinterpreted/misapplied the decision of Basnet 2012 UKUT 113 and/or Ahmed 2018 UKUT 00053 (see para.32). The Tribunal may have wrongly distinguished those cases on the basis that an incorrect fee had been paid rather than no fee. The issue was not only whether the Respondent had discharged the burden of proof as to whether the correct fee had been paid given the previous decisions of the First-tier and Upper Tier, to which no reference is made in the grounds. No consideration was given as to whether the Respondent given the Appellant the opportunity to pay the shortfall and his evidence was that he believed the correct fee had been paid.

4. Only the ground stated is arguable. There is an arguable material error of law."

Error of law

3. Directions were given by the Upper Tribunal providing an opportunity for the parties to file written submissions in relation to the proposed method of disposal and in support of their respective cases. No response was received from the Secretary of State. The relevant parts of the written submissions received behalf of the appellant from Mark Symes of Garden Court Chambers, dated 5 August 2020, are in the following terms:

'**Purported restriction on the grounds granted permission**

3. The FTT permission decision purports to restrict the grounds upon which permission to appeal was granted. However, it is submitted that the asserted restriction is ineffectual. The head note to *Safi* [2018] UKUT 388 (IAC) states

> "(1) it is essential for a judge who is granting permission to appeal only limited grounds to say so, in terms, in the section of the standard form document that contains the decision, as opposed to the reasons for the decision."

4. However, here

- The Decision is plainly that part of Judge Fords notice of 4 May 2020, which is above the sharp emboldened line: "permission to appeal is granted."
- Whereas the Reasons for the decision are plainly, the words beneath the same line.

5. Thus the stated restriction of the permission granted, illegitimately found within the reasons rather than the decision element, is ineffectual. Permission to appeal should be accepted as granted on all grounds.

Submissions on the merits

6. In the premise A submits that FTTJ Randall's decision dated 9 April 2020, dismissing his appeal is flawed by material error of law and should be set aside.

Submissions on The First Ground

7. Although the FTT decision is relatively long and elaborate, the real issue is a short one.

8. A's material immigration history is essentially as follows (the correct interpretation of the events at (a) is contested):

   (a) A entered the UK on 10 September 2009 as a student; his lead was extended until 7 April 2013. Three applications in short succession beginning with one on 6 April 2013 with untreated as failing by R: the first two were rejected for invalidity, the third refused on its merits.

   (b) A lodged an appeal against the third refusal (3 September 2013), which was allowed on 31 January 2014 by Judge Wiseman, applying the principles in CDS Brazil [2010] UKUT 305 (IAC), which showed that the refusal was disproportionate, in that it arose from essentially technical reasons which interrupted the legitimate studies of a person of good character who should be allowed to complete his education in the UK (AB39 [30]);

   (c) A was granted leave to remain from 2 May 2014 to 1 July 2014, in recognition of Judge Wiseman's decision: however A was unable to find a new Sponsor during this period, and his application of 1 July 2014 was refused on 19 January 2015, carrying a right of appeal, which he duly exercised: that appeal was allowed by Judge Mill for the FTT on 25 May 2016, on the basis that R had acted unfairly in allowing A too little time within which to find a new Sponsor and complete the related immigration formalities (AB50-51 [10-15]). R pursued an appeal against this decision to the UT, Judge Mailer accepting on 12 May 2017 AB59 that Judge Mill had been wrong to suggest he could give effect to his thinking by requiring a grant of leave of the 120 days: the period of leave was a matter for the SSHD although Judge Mills substantive reasoning on unfairness was upheld.

   (d) R then deliberated on the outstanding July 2014 application for some time, before writing to A on 11 September 2019 AB61-62 to inform him that his application's reconsideration would now be suspended for 60 days.

   (e) On 4 October 2019 A made the application for indefinite leave to remain AB65ff, the refusal of which, on 27 November 2019 AB75ff leads to the present appeal.

9. The dispute between the parties as to the First Ground is as to the consequences of events in Spring 2013.

   (a) A submits that he has held leave to remain at all material times: R bears the burden of proof and does not establish that A's application of 6 April 2013 was invalid. Accordingly A has held leave from 10 September 2009 until the present date. He held his original student leave from September 2009 until April 2013; as the SSHD is not established that the April 2013 rejection was lawful, that application remained outstanding thereafter, bringing with it the concomitant extension of leave under s3C IA 1971 that applies to any timely outstanding application. Thereafter at all material times A has had either an application or an appeal outstanding.

   (b) R's case in the November 2019 refusal, essentially upheld by Judge Randall in the FTT on appeal, is that A's April 2013 application was invalid leaving him with a break in his leave from when his prior leave expired on 7 April 2013 until 2 May 2014 when he was granted further leave with a view to implementing Judge Wiseman's decision.

10. *Khan* [2017] EWCA Civ 424 explains the paradigm case for the purpose of analysing invalidity decisions and section 3C leave - i.e. one where asserted technical invalidity (such as the lack of the appropriate fee) in a first application ("A1") causes the SSHD to treat a person as an overstay, and thus not to consider it appropriate to notify them of appeal rights regarding a second applications refusal ("A2"):

> "Section 3C (1)-(2) of the Immigration Act 1971 provides that, where an application to vary leave to remain is made during the currency of existing leave, leave is automatically extended until that application is finally disposed of: I refer to this as "3C leave". Accordingly, if the Secretary of State was indeed

> not entitled to reject A1, [the appellant] still enjoyed leave to remain at the point that he lodged A2 and is entitled to a right of appeal after that. The result is that whether there is a right of appeal against the refusal of A2 depends on the validity of the rejection of A1".

11. The burden of proof in establishing invalidity is on the SSHD where the missing information as to the payment history is within the SSHD's knowledge:

    (a) The President in <u>*Basnet*</u> [2012] UKUT 113 (IAC0 {27}:

    > "We turned to the question of who bears the burden of proving that an application has been validly made. This would normally fall on the applicant, who would discharge it by producing evidence of acknowledgement of receipt or proof of postage. Here the application was received in time, but the question of whether it was accompanied by accurate billing data can be answered only by the respondent. In those circumstances, we conclude that the evidential burden of demonstrating that the application was not "accompanied by such authorisation (of the applicant or other person purporting to pay), as will enable the respondent to receive the entire feeding question" must fall on the respondent."

    (b) The head note to another Presidential panel decision states in *Ahmed* [2018] UKUT 53 (IAC):

    > "(3) Whether the Secretary of State ultimately discharges the legal burden of proof will depend on the nature and quality of evidence she is able to provide, having regard to the timing of any request for payment details and the reasons for the delay, balanced against any rebuttal evidence produced by an appellant."

12. A's case before the FTT was that the April 2013 application was a valid one with appropriate payment authority (see e.g. the summary of his witness statement 6(ii)). Notwithstanding the *Basnet* clearly places the burden of proof on all issues on A [39].

13. There were several respects in which the evidence before the FTT was uncertain. The evidence overall was "*somewhat contradictory*" [41], neither party, provided the original application form [42], the SSHD failed to produce the GCID notes for the vital application [42] (or the other material mentioned [32]); and all of this arose in a context where R's advocate did not cross-examine A on how much he authorised to be taken from his bank account [43].

14. All those are factors which would tend to prevent the party bearing the burden of proof from vindicating their case. Yet there is no indication that the FTT was alive to the potential lack of clarity in the evidence being more of a problem for the SSHD than for A. So plainly the misdirection is a material one.

15. Indeed R has twice failed to provide evidence to discharge the burden where it was in issue (see [22] of the 27 January 2014 appeal at AB38, which was in the 18 months where payment records are retained). This led to a finding of fact at [10 (iii)] in the second appeal AB50 that A had discharged his burden.

16. As submitted before the FTT [28], notably A was permitted to pursue an appeal against the decision of September 2013 notwithstanding that, on the SSHD's present case, A, would then have been an overstay since April 2013. Section 82 NIAA 2002 read over this period:

    > "82 Right of appeal: general
    >
    > (1) Where an immigration decision is made in respect of the person he may appeal to the tribunal.
    >
    > (2) In this Part "immigration decision" means - …

(d) Refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain.

17. Accordingly A would have only have been able to pursue an appeal against the September 2013 refusal of his June 2013 application, at he held leave at that time, prior to September 2013, terminating it: otherwise it would not have been his applications refusal, but his prior status as an overstay, which resulted in his lack of leave. So the acceptance of both SSHD and FTT that there was jurisdiction to bring the appeal, culminating in Judge Wiseman's decision strongly supports A's submissions that he intrudes should have been treated as holding section 3C leave given the nature of the April 2013 "rejection". Thus the existence of the earlier right of appeal was itself a relevant factor: yet the FTT left it out of account.

Submissions on The Second and Third Grounds

18. A's advisers confirm in their letter (immediately following the UT grounds under the covering letter of 22 April 2020, providing the IAF-4 form) that their counsel below, Mr Malik, was not instructed to concede any issues generally arising under the Human Rights Convention.

19. A notes that the FTT purporting to refuse permission on this point to a distinction between the concession of a ground and its non-pursuit. A submits that this is a distinction without a difference. Either way, the conduct of counsel, rather than an advised tactical decision, led to A's claim only partially being put before the FTT. As is clear from the statement provided by those instructing counsel at the relevant time, unfortunately Mr Malik went beyond (or, more accurately, fell short of) his instructions in failing to pursue A's case beyond the argument on which Ground 1 above is founded.

20. The FTT erred in law in failing to consider the propriety of the concession for itself. It simply repeats the concession [57] and adopts it. The terms in which it does so are rather unclear due to the incompleteness of the phrase "*or any other of the rules re article…"* in the FTT's final sentence.

21. The Presidential decision in *Carcabuk & Bla* cited in *IM (Pakistan)* [2018] EWCA Civ 626 notes that it is "*important to identify the precise nature of any so-called concession*". Yet there is no indication here that the FTT applied its own mind to the ambit of the propriety of the concession.

22. A submits that this was a material error of law. If accepted as such, then clearly the heads of claim that went unventilated below should be considered now. They were matters that should not have been conceded and which the FTT should have at least considered taking of its own motion under its own *Robinson* jurisdiction to apply its mind to obvious points arising under the Human Rights Convention. Further and alternatively, there are matters which the UT should consider taking of its own motion under the *Robinson* principles; and/or because the concession was made without authority. Given one of A's appeals had previously succeeded on *CDS Brazil grounds,* the self-evident nature of the point is readily apparent.

23. Those grounds essentially raise two distinct avenues by which the appeal could have succeeded on Human Rights Convention grounds even were the First Ground rejected:

    (a) On via the *CDS Brazil* avenue: i.e. that a student of good character whose educational and professional connections are such as to constitute "private life" in the UK, and whose course of studies is frustrated, for reasons outside their control, should have a reasonable and effective opportunity to complete their studies in the UK, and a decision on technical grounds to the contrary is likely to be disproportionate to the interference with their private life that will otherwise ensue;

    (b) One via the line of authorities from *AG Kosovo* [2007] UKIAT 00082 to *MM (Lebanon)* [2017] UKSC 10, holding that the policies of the SSHD are a relevant benchmark by which to measure the proportionality of interference with private life, and thus that the failure of the SSHD to consider exercising discretion by reference to the discretion

found in the Long Residence guidance, viz a viz the break of leave from April 2013 until May 2014 was relevant to the proportionality of the decision. The Guidance stated in the version in force at the time of the November 2019 decision:

> [Vis-à-vis] "*an applicant who had overstayed by more than 28 days before 24 November 2016 … you must consider any evidence of exceptional circumstances … The threshold for what constitutes 'exceptional circumstances' is high, but could include the delays resulting from unexpected or unforeseeable causes.*"

As noted by Briggs LJ in *EK (Ivory Coast)* [2014] EWCA Civ 1517 [59], a decision is more likely to be materially unfair where the SS HD is responsible for the alleged unfairness. In any analysis, it seems that the most likely cause for the feet mix-up in April 2013 was the change in fees on the day of A's application, a matter for which the SSHD arguably, or responsibility. Indeed, these days (though not in April 2013) the SS HD's published policy is to give a second opportunity to pay a fee: see Guidance *Applications for leave to remain; validation, variation and withdrawal* (Version 2.0; 30 November 2018):

> "If an applicant has not paid the correct fee, you must write to them …, And give them 10 working days to rectify their mistake."

This policy change suggests that over time the SSHD has come to recognise the potential for unfairness within the previous system.

24. These aspects of A's private life (which should have been seen as *Robinson* obvious) went unconsidered by the FTT - it is accordingly submitted that the UT should, in the interests of justice, it mixed them to be raised now, by granting permission to appeal and determining them. As noted in *Davoodipanah* [2004] EWCA Civ 106, it is appropriate to permit the withdrawal of the concession that should never have been made. The Court of Appeal. In that case, went on to hold [22]:

> "Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. What the tribunal must do is to try and obtain a fair and just result."

25. It is submitted that there would have been no prejudice to the SSHD had this matter be raised before the FTT - the arguments are perfectly standard ones which Presenting Officers encounter regularly. And there is no prejudice now, given that A's original grounds of appeal, glossed over by these written submissions, provide notice and the opportunity for R to state her own case on the issues raised.

26. For these reasons it is submitted that the arguments at [23(a) and (b)] should be permitted to go forward to form part of A's case if the UTC finds an error of law in the decision and finally determines the appeal for itself.

4. Mr Symes' oral submissions to the Upper Tribunal were in accordance with his written pleadings to which Mr McVeety was able to reply. All the material provided has been considered with the required degree of anxious scrutiny even if not specifically referred to in the body of the decision

Discussion

5. The above pleadings rise a number of issues which shall be considered in order.
6. The first of these relates to a preliminary issue concerning the status of the grant of permission to appeal, which the First-tier Tribunal Judge purported to limit. In Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 (IAC) the Tribunal held that:

(i) In deciding an application for permission to appeal the UT a judge should consider carefully the utility of granting permission only on limited grounds. In practice, such a limited grant is unlikely to be as helpful as a general grant, which identifies the ground or grounds that are considered by the judge to have the strongest prospect of success.

(ii) Where the judge nevertheless intends to grant permission only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision and by ensuring that the Tribunal's administrative staff send out the proper notice, informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal;

(iii) If an applicant who has been granted permission to appeal to the UT on limited grounds only applies to the Upper Tribunal on grounds in respect of which permission has been refused, the Upper Tribunal judge considering that application should not regard his or her task as merely some form of review of the First-tier Tribunal's decision on the application;

(iv) In the IAC the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 is unlikely to be advanced by adopting a procedure whereby new grounds of appeal can be advanced without the permission of the Upper Tribunal under rule 5 of those Rules.

7. This guidance was further refined in Safi and others (permission to appeal decisions) [2018] UKUT 00388 (IAC) in which it was held that:

(i) It is essential for a judge who is granting permission to appeal only on limited grounds to say so, in terms, in the section of the standard form document that contains the decision, as opposed to the reasons for the decision;

(ii) It is likely to be only in very exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all the grounds accompanying the application for permission, regardless of what might be said in the reasons for decision section of the document.

8. The judge who granted permission, in the body of the grant of permission in this case, the reasons section, clearly set out that it was a limited grant on one ground only, even though the section of the standard form containing the decision does not expressly state this is so. In Alvi the Upper Tribunal found a clear requirement that a judge granting permission on limited grounds not only made this clear in the grant, but also to the tribunal administrative staff to enable them to communicate this fact to the appellant. In this appeal following the grant of permission, a form IA68, was sent to the appellant, his representatives, and the Secretary of State's Presenting Officers Unit by email on 24 June 2020, stating:

"This is to inform you that the First-tier Tribunal has granted your application for permission to appeal to the Upper Tribunal, on limited grounds.

The reasons for the decision are enclosed here with.

> You may apply to the Upper Tribunal for permission to appeal on a point of law arising from the First-tier Tribunal's decision on any ground on which permission has been refused.
>
> Please see the enclosed form (which includes important information about time limits).

9. The parties were clearly aware of the limited nature of the grant and of the opportunity to renew an application to the Upper Tribunal to seek permission to appeal those grounds on which permission was initially refused.
10. Directions was issued by the Upper Tribunal following the grant of permission sent to the parties on 24 July 2020 in reply to which the appellant's representatives sent an email dated 25 July 2020 in response stating "*It seems that permission was previously granted on a limited grounds. We however have not received any decision yet since we made an application for permission on 22 April 2020. We will be very grateful if you could provide us with the decision of granting the permission at your earliest convenience as we have to submit further submissions by 6 August 2020 as per above direction*." A copy of the grant was sent to the solicitors on 28 July 2020.
11. Further directions issued by the Upper Tribunal on 30 December 2020 included the following paragraph:

> "The appellant applied for permission to appeal the FtT's decision. Permission to appeal was granted by a Judge of the First-tier Tribunal, Judge Ford, on 4 May 2020. While in the reasons there is reference to a limitation of the grant of permission, there is no such limitation in the decision itself."

12. The grant of permission whilst clearly setting out the intention of the judge who granted it falls foul of the specific requirements set out by the Upper Tribunal in Safi to make this clear in the decision section of the grant and must therefore be treated as a grant of permission to appeal on all grounds.
13. In relation to the appellants claim:

Ground 1 – Burden of Proof

14. The appellant's contention before the Judge was that although the appellant bore the burden of making a valid application it was for the respondent to establish that the application was not valid in the circumstances of this case. It was argued the respondent had not provided any evidence to suggest that the application was not validly made, let alone produce evidence that could justify from departure from the earlier findings of another First-tier Tribunal.
15. There are a number of cases dealing with the relationship between a valid application and payment of the required fee including R (on the application of Da'Costa) v Secretary of State for the Home Department [2010] EWHC 2259 (Admin) in which Judge Pelling QC said that the Secretary of State had no discretion in regard to an application that did not comply with the requirements relating to fees under paragraph 21 of the Immigration and Nationality (Fees) Regulations 2007. Furthermore, the Immigration Directorate Instructions drew a clear distinction between an application which was invalid because of non-compliance with a requirement imposed by the Immigration Rules and invalidity arising from non-payment of fees which was subject to the 2007 Regulations. An in-time application not accompanied by a fee could only

be treated as valid if payment of the fee was waived. If an application was rejected, as in the instant case, then it could only be valid if it was resubmitted with the fee.

16. In R (on the application of Mine and others) v Secretary of State for the Home Department [2011] EWHC 2337 (Admin) Simons J said that where a specified fee had not been paid the application was invalid under regulation 2(1) of the Immigration and Nationality (Fees) 2007 Regulations (paras 25 – 27).
17. In BE (Application of Fee: Effect of Non-Payment) [2008] UKAIT 00089 the tribunal held that an application was accompanied by a fee if it was "accompanied by such authorization (of the applicant or other person purporting to pay) as will enable the respondent to receive the entire fee in question, without further recourse having to be made by the respondent to the payer".
18. In Basnet (validity of application - respondent) [2012] UKUT 00113(IAC) the Tribunal held that (i) if the respondent asserts that an application (not an appeal) was not accompanied by a fee, and so was not valid, the respondent has the onus of proof; (ii) The respondent's system of processing payments with postal applications risks falling into procedural unfairness, unless other measures are adopted; (iii) When notices of appeal raise issues about payment of the fee and, consequently, the validity of the application and the appeal, Duty Judges of the First-tier Tribunal should issue directions to the respondent to provide information to determine whether an application was accompanied by the fee.
19. In Ahmed & Ors (valid application – burden of proof) [2018] UKUT 00053 in which it was held that (i) Central to the analysis in Basnet (validity of application – respondent) [2012] UKUT 113 (IAC) is the existence of a further procedure undertaken by the Secretary of State in order to process payment in relation to which applicants are not privy and over which they have no control. As such, it remains appropriate for her to bear the burden of proof. (ii) The fact that an invalidity decision was not immediately challenged may be relevant in determining whether the legal burden, including an initial evidential burden requiring the Secretary of State to raise sufficient evidence to support her invalidity allegation, has been discharged. (iii) Whether the Secretary of State ultimately discharges the legal burden of proof will depend on the nature and quality of evidence she is able to provide, having regard to the timing of any request for payment details and the reasons for any delay, balanced against any rebuttal evidence produced by an appellant.
20. In Ved and another (appealable decisions; permission applications; Basnet) [2014] UKUT 00150 (IAC) it was held that the findings of the Upper Tribunal in Basnet (Validity of application – respondent) [2012] UKUT 00113 (IAC) depended upon there being an appealable immigration decision, which in that case can only have been a refusal to vary leave to remain within section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002. The Secretary of State's rejection of an application for leave as invalid is not an immigration decision within section 82 of the 2002 Act and cannot as such be appealed to the First-tier Tribunal.

21. In R (on the application of Woodward) v SSHD [2015] EWHC 470 (Admin) it was held that when an incorrect fee was paid the application was invalid under Reg 7 of the Immigration and Nationality (Fees) Regulations 2012. It did not therefore extend leave under section 3C of the 1971 Act.
22. In Das (paragraph 276B – s3C – application validity) [2019] UKUT 354 the Upper Tribunal opined that s3C could not apply during a period in which the application was struck out for want of fee payment even if later reinstated.
23. There is no real dispute as the to the law in this case, the issue being the impact of the same on the facts of the case.
24. It is unarguable that the appellant was not aware of the reasons why the application of 6 April 2013 was rejected by the respondent. That application was for further leave to remain prior to the expiry of his previous period of leave, which ran out on 7 April 2013. A letter written by the UK Border Agency to the appellant dated 10 April 2013, which the appellant does not claim he did not receive, contains the following relevant text:

> "Thank you for the attempted immigration application. Please read this letter carefully as you have not currently made a valid application.
>
> The fees for immigration applications are prescribed in Regulations. On 6 April 2013, most fees were subject to an increase for both main applicants and any accompanying dependants. The new fees prescribed for each type of application are set out on our website. The correct fee, as in force at the date of application, must be paid in order for an application to be valid.
>
> Unfortunately, the appropriate new fee has not been received with this application. We do not consider that an exception to the requirement to pay the fee applies in this case, and therefore this application cannot be considered as it is invalid.
>
> We are unable to process your application (due to the old fee being paid), we are returning your application form and all supporting documents.

25. There was no application by way of judicial review to the rejection of the application as invalid and as all the documents provided were returned to the appellant the Secretary of State cannot be criticised for not providing copies of the same in relation to either this application or any earlier proceedings.
26. Mr Symes in his submissions stated the appellant had been consistent in claiming he had paid the correct fee or enabled the respondent to collect the correct fee, which if such fee had not been capable of being taken from the appellant's bank account may have created a 'Basnet' type situation where the Secretary of State would have been required to have provided evidence to support the contention the application was not valid.
27. I do not find the assertion the appellant has been consistent in his claims or provided the means to collect the correct fee to be made out. There is merit in Mr McVeety's submission that the appellant has not been consistent in his claim that he always paid the correct and there is no earlier judicial finding confirming this is so.
28. In a decision promulgated on 31 January 2014 First-tier Tribunal Judge Wiseman when referring to the application of 6 April 2013 wrote:

> "24. The appellant made his first application in time; by an unfortunate coincidence it was made on precisely the same day that the fee for this kind

> of application went up from £394 to £406. I believe that he sent a cheque for the lesser figure having not appreciated that the change had taken place. I presume he sent in a cheque (I have not seen it) because somewhat confusingly I was addressed by Mr Ahmed on the case of Basnet, the main point of which appeared to be some of the difficulties that can arise when authorisation is given to the respondent to take fees by way of credit card. That is not however what I think the appellant did in this case. However he also did not supply one of his English language qualification results because he had not been able then to take it, although he shortly did."

29. Judge Wiseman notes that the appellant made a further application on 3 May 2013, in which he sent a cheque for £406 and all the necessary supporting documentation, including the English language certificate which had not been available when the first application had been made [25].
30. The chronology shows that rather than challenging the reasons the application of 6 April 2013 was declared invalid, which if incorrect one would have thought the appellant or his representatives would have done to prevent him becoming an overstayer, the appellant made a fresh application, this time providing the correct fee.
31. In the decision under challenge when discussing this issue, Judge Randall wrote:

> "41. The evidence about what occurred in that 6 April 2013 application is central therefore to this appeal, but remains somewhat contradictory. However, it does not appear to be in dispute that the fee changed on the day of the Appellant's application, and that the higher fee was applicable. Amongst the sources of evidence I note the following:-
>
> (i) The Respondent's letter dated 10 April 2014, in response to the application, refers to the fact that the fees had changed, and that too low a fee had been proffered. It states in terms that no valid application was made, and that section 3 C doesn't apply to extend any leave. The letter is silent as to what payment method was used, and the amount of the shortfall.
>
> (ii) In IJ Wiseman's determination, which arose from the third application, there are a number of references to the first application, which are unfortunately inconsistent as to the method of payment, on which no clear finding is made:-
>
> (a) the grounds of appeal are said to assert that credit/debit card details were provided (paragraph 7)
>
> (b) the Appellant's appeal statement, as summarised, states that the Appellant issued a cheque for the required fee (paragraph 12)
>
> (c) IJ Wiseman presumed that the Appellant sent a cheque for a lesser figure (paragraph 24)
>
> (iii) In IJ Mills determination, he finds that the first application was returned notwithstanding the fact that adequate payment details and information were provided (paragraph 10 (iii)).
>
> (iv) In Deputy Upper Tribunal Mailer's determination, IJ Mills finding at paragraph 10 (iii) is recited (at paragraph 7)
>
> (v) In the decision letter now under appeal, it is maintained that the incorrect fee was offered.

(vi) In the grounds of appeal for this appeal, there is reference to the fact of an 'incorrect fee being submitted' not being in dispute.

(vii) In the Appellant's appeal statement for this appeal, he refers to providing his correct bank details and states that the Respondent was authorised to take the requisite fee.

(viii) In his evidence to me he stated that he paid the correct fee.

42. Clearly not all of these accounts can be correct. These accounts are not even consistent as to whether this was a cheque card payment. For instance, correct bank details (as asserted, were given by the Appellant at (vii) in the immediately preceding paragraph), are not relevant or required if in fact a cheque was sent. Indeed, the Appellant's own account, appears to have shifted from (ii) (b) above to (vii) above. The application form itself has not been provided to me by either party, unfortunately. Nor was I provided with any GCID notes by Ms Akhtar for this transaction, although she did provide them for the second application (stating that the cheque was not paid by the bank). However, none of the accounts provided suggests that the 6 April application was a case of a bank refusing to honour a cheque or rejecting a card payment (as in *Basnet)*. In addition, I have been provided with no evidence that suggests that the form as completed gave the Respondent authorisation to take whatever was the requisite fee at the relevant time - it would be very curious if it did. On any of the accounts, (except the Appellant's oral evidence to me, and perhaps his recent statement), too low a fee was offered by the Appellant, whether by cheque or by card.

43. The Appellant asserted in his statement that he completed the correct application form and provided his correct bank card details. He also asserts that he checked them. He also asserts that there were enough funds in the bank account. However, even if that is true, (and it runs counter to IJ Wiseman's summary of his earlier appeal statement, the important question is how much he authorised the Respondent to take from the bank account. His statement is silent on that point. I therefore find that Ms Akhtar's failure to cross examine him on that point, has less traction in the circumstances.

44. In oral evidence before me, the Appellant asserted that he sent the right application with the right fee, but they told him to resubmit. He repeated this when I put it to him in terms that the amount that he offered to pay was too low. I have not been provided with corroborative evidence that the Appellant's account of paying the correct fee is true. This is not what the Respondent's (almost contemporaneous) letter of 10 April states. There is no other material before me, that suggests that this is the case. I find that the Appellant is not telling the truth about this. The grounds of appeal, in any event, accept that the fee offered was too low. Of course, Mr Malik's submissions as to validity rely on me accepting the Appellant's statement and oral evidence that he paid the correct fee (by which I mean the higher) fee.

…

49. I am thus satisfied on the balance of probabilities, that the Appellant did indeed authorise the payment of the fee as part of his application dated 6 April 2013, but unfortunately it was a fee that was £12 less than what by then was required. This renders his application invalid. If the application is invalid, then section 3C cannot assist in extending his leave; rather, he started to overstay on 8 April 2013. Furthermore, Mr Malik's subsequent

careful submissions about continuity don't assist the Appellant, as they rely on the validity of the 6 April application as a pre-requisite.

32. It is not made out the Judge's finding that too low a fee was paid with the 6 April 2013 application, some £12 less that required by the Fees Regulations, or that as a consequence the application was invalid is a finding outside the range of those available to the Judge on the evidence. No material legal error is made out in relation to these findings.
33. Regulation 7 Immigration and Nationality (Fees) Regulations 2012 reads:

> '**Consequences of failing to pay the specified fee**
>
> **7.** Where these Regulations specify a fee which must accompany an application for the purposes of the 2011 Order, the application is not validly made unless it is accompanied by the specified fee.'

34. I reject the appellant's contention this is a Basnet type case in which the burden of proof passed to the Secretary of State requiring the production of evidence beyond that which was made available to the Judge in establishing the correct factual analysis and the failure of the appellant to provide the correct fee. As the application as invalid for the reasons stated in the contemporaneous 10 April 2013 letter there would have been no attempt to collect the fee.
35. Whilst there is reference in the appellant's pleadings to the fact the fee increase came into force on 6 April 2013, which is not disputed, this is not a case in which it has been established a fairness argument arises on the basis the increase was a matter of which the appellant had no knowledge and that he had effectively been "ambushed" by the increase of which he had no prior notification as such information was in the public domain.
36. On 25 February 2013 Mark Harper the Minister of State for Immigration announced proposals to change the fees for immigration and nationality applications made to the UK Border Agency and services provided by the Agency for 2013-14 to come into force from April 2013 in a written ministerial statement laid in the House of Commons on 25 February 2013 and House of Lords by Lord Taylor. The written statement included a table of the proposed fees which subject to parliamentary approval (which was subsequently given) the government intended to bring into force from 6 April 2013. The correct fee the appellant should have paid was available on the internet, yet the fee submitted with the application was the fee applicable for a 2012-13 application and not a post 6 April 2013 application which this was. If this arose as a result of a failure by the appellant to check the correct fee payable that is not a matter for which the respondent can be held responsible.
37. I do not find the appellant has made out his first Ground. I do not find it made out on the facts that the burden of proof shifted to the Secretary of State. It remained upon the appellant at all times to establish he had made a valid application which he had not.
38. On considering the specific context of this case, the appellant was aware a fee was required as he purported to provide the same. The amount of the required fee was in the public domain following publication of the increase to take effect from 6 April 2013. The correct fee was not paid as confirmed in the letter from

UKBA dated 10 April 2013. The applicant was correctly rejected as being invalid for non payment of the correct fee in accordance with the Regulations.

Grounds 2 and 3

39. Grounds 2 and 3 can be classed as the human rights grounds. In relation the same it is important to consider the actual findings made by the Judge.
40. The appellant was represented before the Judge by a very experienced member of the bar, who has recently taken silk, and who has a deserved reputation as an advocate with a good knowledge of relevant legal provisions and their applications to the facts of a particular appeal.
41. It is not disputed that in the original grounds of appeal the appellant asserted that the decision was contrary to his human rights.
42. The Judge notes at [9]:

> "It was agreed between the parties that the only issue between them was continuity of the Appellant's residence and therefore whether the requirements of the long residence rules were met. As indicated, Mr Malik stated that he would not be arguing that there were very significant obstacles to the Appellant's integration in Bangladesh."

43. At [37] the Judge, when recording submissions made by Mr Malik, writes:

> "I should therefore allow the appeal on human rights grounds on the basis that a provision of the human rights compliant Immigration Rules, namely long residence provisions had in fact been satisfied on the balance of probabilities, and that pursuant to the case of *TZ (Pakistan)* on that basis, the appeal should succeed."

44. It is not made out that Mr Malik conceded that there was no Article 8 issue to be argued, as alleged, but rather structured his arguments to reflect the fact that if the appellant succeeded under the Immigration Rules on the long residence provision he would also be entitled to succeed on human rights grounds.
45. On this issue at [57] the Judge writes:

> "As to the other facts of this appeal, Mr Malik did not seek to argue that the Appellant could otherwise succeed on Article 8 grounds; he could only succeed by way of his submission re: the satisfaction of the rules for a permanent residence, which rely first on the validity submission discussed above. For the avoidance of doubt, given my conclusion on validity, the Appellant has not satisfied me, on the balance of probabilities, that he meets the requirements of the Article 8 compliant rules about permanent residence, or any of the other rules re Article, or that his removal would be disproportionate."

46. It is clear from reading the decision that as a result of a typographical error the number 8 has been omitted from the last line of the sentence of [57] and no confusion or legal error arises.
47. It is suggested in the grounds that the Judge was wrong to proceed on this basis and should have done more but proceedings before the First-tier Tribunal are adversarial by nature and no arguable legal error is made out in the Judge relying upon arguments and submissions made by an experience advocate as to the case they are seeking to rely upon. The Judge was not required to set out findings in relation to each and every aspect of the evidence and clearly considered the material made available with the required degree of anxious

scrutiny which would have included the appellant's witness statement setting out the impact upon him of not being able to proceed with his further studies.

48. Mr Symes submitted that the appellant could have succeeded on human rights grounds on the basis of the case of CDS Brazil, in which a course of studies was frustrated for reasons outside the control of the appellant who was denied a reasonable and effective opportunity to complete their studies in the United Kingdom, but such factual matrix does not accord with the facts of this appeal. The right to study does not engage Article 8 per se, and the reason the appellant was unable to succeed and complete his studies is as a result of his own failure in not providing the required fee, such that the application of 6 April 2013 was valid, which meant he became an over stayer. As Mr McVeety submitted, if the appellant was a genuine student why had he done nothing in the intervening period to continue his studies. It is accepted the appellant may have wanted to obtain a degree in engineering, but he had no basis for been able to do so lawfully in the United Kingdom and could have returned to Bangladesh to make an application to re-enter the United Kingdom with lawful leave or to have continued his studies overseas. Whilst Mr Symes in reply indicated that this was because the appellant had spent the intervening years trying to resolve his status as a finding he had overstayed could have repercussions in the future, there is merit in the assertion a genuine student would have done all he could to have continued with his studies, elsewhere if required.

49. In relation to the second issue, the submission relating to the line of authorities from AG (Kosovo) and beyond, at [23 (b)] of Mr Symes written submissions, reference to policy or guidance in force in November 2019 does not establish that the same was in force at the relevant date of April 2013, or that there was a policy the failure of which would assist the appellant. The assertion that the most likely cause for the fee mix-up in April 2013 with the change of fees on the day of the appellant's application was a matter for which the respondent arguably bore responsibility is without merit. There is no basis for finding there had been a mix-up of fees. There had been advance publication of the change of fees and the new fee rates which had been published in tabular form and on the internet and were available to all applicants at the relevant time. It is the appellant's failure to pay the correct fee which is the reason for the situation in which he finds himself.

50. It is not made out the Judge erred in law in not for himself considering the human rights elements beyond the submissions made by Mr Malik. Further, in undertaking a detailed analysis of the nature of the private life and consequences of the refusal upon the appellant it is also not made out that in light of the circumstances as found, there are reasonable prospects of the appellant succeeding with a human rights claim. The appellant's time in the UK has always been precarious warranting little weight being attached to it. The acceptance by Mr Malik that no insurmountable obstacles existed was relevant, as is the fact that the evidence failed to establish before Judge Randall there was anything of sufficient weight to outweigh the public interest in his removal, which is the basis of the Judge's finding that his removal will be proportionate.

51. In relation to the jurisdictional point taken by Mr Symes, it appears an appeal against a decision of September 2013 proceeded notwithstanding on the basis of the respondent's case and the case as found by the Judge, the appellant had been an overstayer since April 2013. The argument that the acceptance by the Secretary of State and First-tier Tribunal there was jurisdiction to bring the appeal, culminating in Judge Wiseman's decision, strongly supports the appellant's submission that he should been treated as holding section 3C leave is noted, but given the nature of the April 2013 rejection and failure to take into account that in Virk v Secretary of State for the Home Department [2013] EWCA Civ 652 it was said "Statutory jurisdiction cannot be conferred by waiver or 120 agreement; or by the failure of the parties or the tribunal to be alive to the point", a decision followed in MS(Uganda) v SSHD [2014] EWCA Civ 50, the failure to raise the issue of jurisdiction does not confer statutory jurisdiction and a mistake by the Secretary of State's representative and/or Judge Wiseman in considering the appeal without the jurisdictional issues adds no weight to the appellant's case. On the facts there was no right of appeal at that time on the law as it then stood as identified by Mr Symes in his written submissions.
52. I do not find it made out that the respondent was required to exercise discretion and decide otherwise, especially in the case where the gap in lawful residence was not the Secretary of State's fault, but a consequence directly attributable to the appellant's failure.
53. I do not find it made out the Judges erred in law in a manner material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

54. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

55. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……. Dated 9 April 2021
Upper Tribunal Judge Hanson