



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

Appeal Number: IA/39286/2014

THE IMMIGRATION ACTS

Heard at : Field House

**Decision and Reasons
Promulgated**

On : 6 October 2015

On : 12 October 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

RAVINDER PAL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, instructed by Louis Kennedy Solicitors

For the Respondent: Ms H Murphy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India born on 6 May 1983. He has been given permission to appeal against the decision of First-tier Tribunal Judge Cooper who found that there was no valid appeal before her with respect to the respondent's decision of 30 September 2014 to refuse his application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points- based system.

2. The appellant entered the United Kingdom in December 2009 as a student and was granted periods of leave to remain in the same capacity, with the

most recent period of leave from 4 April 2013 to 14 July 2014. On 14 July 2014 he submitted an application for further leave to remain as a Tier 4 (General) Student Migrant. That application was, however, rejected as invalid on 16 July 2014 on the basis that he had failed to pay the correct fee, the fees for such application having increased on 6 April 2014.

3. On 13 August 2014 the appellant re-submitted his application. His application was refused on 30 September 2014, on the basis that he was not in possession of a valid CAS (Confirmation of Acceptance for Studies) and that he had overstayed in the United Kingdom since his application had been made more than 28 days from the expiry of his previous leave. The appellant was advised that he had no right of appeal against that decision, the application having been made after the expiry of his leave.

4. The appellant, however, lodged a notice of appeal, asserting in his grounds of appeal that the second application was submitted during the currency of section 3C leave and within 28 days and that he was thus entitled to a right of appeal.

5. The appellant's "appeal" came before First-tier Tribunal Judge Cooper on 18 May 2015. There was no appearance by either party and the judge therefore determined the matter on the papers before her. The judge noted that the appellant was relying upon the case of Basnet (validity of application - respondent) Nepal [2012] UKUT 113 as authority for the fact that he should be entitled to a full right of appeal and that his second application was made during a period of 3C leave. She noted that directions had previously been issued to the respondent to provide evidence of the correct fee payment not having been made, pursuant to the guidance in Basnet, but the respondent had not responded to those directions. She found, however, that the respondent's failure to respond to the directions did not mean that she was unable to rely on the invalidity of the application. She considered that the circumstances were different to those in Basnet, in that it was not a matter of the bank having apparently rejected the appellant's fee payment but that the appellant had paid the incorrect, pre-April 2014 fee and that the appellant had provided no information as to what fee he had paid and how he had paid it. The judge concluded that the original application was invalid and that the appellant therefore had no right of appeal. She found that even if the appeal was a valid one, the appellant could not succeed since he had failed to demonstrate that he met the requirements of the immigration rules in any event.

6. Permission to appeal that decision was sought by the appellant on the basis that the judge had misapplied the principles in Basnet.

7. Permission was granted by Upper Tribunal Judge Grant-Hutchison on 25 August 2015.

Appeal Hearing

8. At the hearing Mr Richardson submitted that the judge had erred by failing to consider that the respondent had not discharged the burden of proof in

accordance with the principles set out in Basnet, and as confirmed in the case of Ved & Anor (appealable decisions; permission applications; Basnet) (Tanzania) [2014] UKUT 150. The error in relation to the validity of the first application was material and the judge was wrong to consider that the appellant failed in any event on the merits of the second application, given that it was the first application which was relevant and that the appellant had been able, at that time, to meet the requirements of the immigration rules. Mr Richardson submitted that the principles in Basnet did apply in this case, since it was only the respondent who had the relevant page of the appellant's application form and was therefore in a position to answer the question of whether the correct fee was paid.

9. At this point, I asked Mr Richardson if his instructions from the appellant were that he had paid the correct fee and he responded that the appellant did not know whether he had or not.

10. Ms Murphy submitted that the decision of the First-tier Tribunal was correct given that the appellant had failed to provide any details to show that he had paid the correct fee. The respondent only had details of the fee paid in the second application. The circumstances were different to those in Basnet.

11. Mr Richardson reiterated his previous submissions in response.

Consideration and Findings

12. It is plain from her detailed findings that the judge was fully aware of the arguments made in relation to Basnet and that she undertook a careful analysis of the principles and guidance in that case. The grounds challenge the way in which she interpreted the case and assert that she erred by failing to place weight upon the fact that the respondent had not discharged the burden of proof as required in Basnet. However it seems to me that the judge gave detailed and valid reasons for distinguishing Basnet and for finding that the appellant's circumstances differed from those in that Basnet.

13. As the judge found, the particular concern in Basnet which led the Tribunal to conclude that the respondent bore the burden of proof was that assertions made by each party as to the fee payment could be answered only by the respondent who had the relevant information to confirm where the fault lay in processing and taking the relevant fee. In that case the appellant had demonstrated that he had the relevant funds in his account at all times and the only issue, therefore, was why the payment had not been successful. In the appellant's case, however, the appellant had not demonstrated that he had the relevant funds and, more significantly, had not even claimed to have paid the correct fee. Clearly the circumstances were different to those envisaged in Basnet and it could not be said that the appellant did not bear any responsibility or burden of proving his case. Accordingly the judge properly distinguished his circumstances to those in Basnet and was entitled to conclude as she did.

14. Having found, for the reasons fully and cogently given, that the application made on 14 July 2014 was not a valid one, the judge properly found that the subsequent application made on 13 August 2014 was made at a time when the appellant was an overstayer and that he did not have a right to appeal against the decision refusing the application. The appellant, in his grounds of appeal, asserted that the application made on 14 July 2014, having been made prior to the expiry of his leave, extended his leave by virtue of section 3C of the Immigration Act 1971 so that the subsequent application was made at a time when he had leave and thus entitled him to a right of appeal. However that clearly could not be the case where the initial application, albeit made during the currency of his leave, was not a valid one. That is made clear in the case of JH (Zimbabwe) v Secretary of State for the Home Department [2009] EWCA Civ 78, at paragraph 13.

15. Mr Richardson, in his submissions, referred to the respondent's treatment of the first application, without providing the appellant with an opportunity to rectify his error, as being draconian. However, without the full copy of the respondent's letter of 16 July 2014 rejecting the application as invalid (which neither party was able to access), it is impossible to conclude that the respondent did not offer the appellant an opportunity to re-submit his application within a certain period of time. In any event, it is relevant to note that the appellant, by his own evidence in his grounds of appeal to the First-tier Tribunal, left it until the last day of his leave to submit his application. It is also relevant that he did not submit the second application with the correct fee until more than 28 days had passed after the expiry of his leave. Had he submitted the first application earlier he would have been in a position to re-submit the second application with the appropriate fee prior to the expiry of his leave, given in particular the prompt response by the respondent to the first application (two days later). He therefore only has himself to blame for delaying in submitting both applications.

16. Accordingly Judge Cooper was entitled to conclude that the appellant was not entitled to a right of appeal against the decision of 30 September 2014 and to find that there was no valid appeal before her.

DECISION

17. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I uphold the decision. There was and is no valid appeal before the Tribunal.

Signed

Upper Tribunal Judge Kebede

Dated: