



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39701/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5th June 2018

Decision & Reasons Promulgated
On 22nd June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR UMAR JUNAID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel instructed by Gaffrey Brown Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State of 2nd September 2014 to refuse to vary his leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the points-based system. First-tier Tribunal Judge Beach dismissed the Appellant's appeal in a decision dated 20th March 2016 on the basis that the Appellant did not have a right of appeal and accordingly there was no jurisdiction. The Appellant sought permission to appeal against that decision. Permission was refused by the First-tier Tribunal and a renewed application for permission was refused by Upper Tribunal Judge Hanson on 30th March 2017. The Appellant sought permission to apply for judicial review of that decision to refuse permission and in a decision dated 23rd October 2017 the High Court granted permission to apply for judicial review.

2. Permission to apply for judicial review was granted for the reasons set out at paragraphs C and D of that decision where Judge Walker stated:

“C. The criteria for grant of permission to proceed with your claim are set out in sub-paragraphs (a) and (b) of CPR 54.7A(7). I grant permission to proceed because I consider that the requirements of sub-paragraph (a) and sub-paragraph (b)(ii) are met. I am particularly concerned what FTT Judge Fiona Beach appears to have been unaware of *Basnet*, and as a result adopted the wrong legal test. Paragraph 50 of her decision says you ‘applied within 28 days after the expiry of [your] leave to remain’ when I think she is referring to the resubmission of your application. She found that the Secretary of State could not ‘rectify’ the bank’s refusal to comply with your instruction. But this does not address the *Basnet* test of whether you had given a valid authorisation to obtain the entire fee. Moreover, her additional finding that you were not at fault suggests you satisfied that test.

D. Your grounds for seeking permission to appeal to the UT made an assertion, in effect, that Judge Beach was precluded from examining the FtT’s own jurisdiction. On the basis of the material before me I consider the UT Judge Hanson rightly rejected this assertion. However Judge Hanson does not appear to have had the *Basnet* test in mind when reading para 50 of Judge Beach’s reasons.”

3. Following that grant of permission, permission to appeal to the Upper Tribunal was granted in light of the decision of the High Court by Vice President Ockelton.

Error of law

4. The background to this appeal and to the jurisdiction issue is not in dispute. The Appellant was granted leave to enter the UK as a Student until 28th February 2013. On 25th May 2012 he was granted leave to remain as a Tier 1 Post-Study Migrant until 25th May 2014. The Appellant submitted an application on 24th May 2014 for leave to remain in the UK as a Tier 1 (Entrepreneur). However this application was rejected as a result of non-payment of the application fee. The Appellant himself accepted that this was rejected because of non-payment but explained that it was because his bank had rejected the payment to protect him against suspected fraudulent activity. His leave to remain expired on 25th May 2014. The Appellant was notified that the application was rejected because of the non-payment of the fee and he re-submitted his application on 21st June 2014. It is not in dispute that at that stage the Appellant was still entitled to benefit from the Immigration Rules as he was not being treated as an overstayer. However, as set out in the reasons for refusal letter, as his leave to remain had expired, he did not have leave to remain at the time of his application and the Respondent decided that he did not have a right of appeal against that decision.
5. Nonetheless the Appellant lodged an appeal and the duty judge who considered the appeal issued a direction on 26th November 2014 in line with the decision in **Basnet (validity of application – Respondent) [2012] UKUT 00113 (IAC)**. The direction stated that the onus of proof is on the Respondent to show that the correct fee was not paid and directed that the appeal be listed for a substantive hearing, that at that substantive hearing the issue of validity should be decided and that at least fourteen days prior to

the substantive hearing the Respondent was to lodge with the Tribunal and serve upon the Appellant any information showing that the correct fee was not paid. It is not in dispute and is accepted by the Appellant that the payment was not made by his bank because of security measures they had undertaken.

6. At the hearing before me Mr Biggs relied on the decision in **Basnet**. He firstly submitted in accordance with paragraphs 14-16 of **Basnet** that the Appellant had a right of appeal to the Upper Tribunal against the First-tier Tribunal's decision declining jurisdiction. This was not disputed by Mr Lindsay.

7. Mr Biggs relied on paragraphs 16-20 of the decision in **Basnet**. Paragraph 19 states:

"BE was concerned with the terms of the 2007 Regulations, but there is no practical distinction for present purposes. As held in that case, an application is 'accompanied by' a fee if it is:

... accompanied by such authorisation (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. "

At paragraph 20 the Tribunal said:

"... Validity of the application is determined not by whether the fee is actually received but by whether the application is accompanied by a valid authorisation to obtain the entire fee that is available in the relevant bank account."

8. In Mr Biggs' submission that is exactly what the judge found in this case at paragraph 50 where she concluded that it was not the Appellant's fault that the fee was not paid, the money was in his account but the bank was seeking to protect him against possible fraudulent activity. The judge considered that this was not something that could be rectified by the Respondent because by the time he made his application his leave to remain had expired and the refusal of his application was not accordingly an immigration decision for the purposes of the Nationality, Immigration and Asylum Act 2002. Mr Lindsay made no submissions other than it was open to the Upper Tribunal to uphold the findings of the First-tier Tribunal.

9. In my view the circumstances of this case, where it is not in dispute that the Appellant provided all of the correct information to the Respondent, but his bank stopped the payment in order to seek to protect him against possible fraudulent activity, falls squarely within the guidance given at paragraphs 19 and 20 of **Basnet**.

10. In these circumstances I conclude that the judge made a material error of law in deciding that the Appellant did not have a right of appeal in this case.

11. In light of this material error I set aside the decision of the First-tier Tribunal Judge that the Appellant does not have a valid right of appeal.

Re-making the Decision

12. In determining the appeal the judge undertook a full examination of the evidence in relation to the substance of the Rules because the Appellant's appeal was heard along with the appeal of his business partner who also had an appeal against a decision to refuse his application for leave to remain as a Tier 1 (Entrepreneur). The judge accordingly made findings in relation to all aspects of the substance of the Immigration Rules in relation to this case. The judge made it clear that both this Appellant and his business partner fulfilled the requirements of the Immigration Rules. There was no challenge to any of the judge's findings in relation to the substance of the Appellant's appeal under the Immigration Rules.
13. In these circumstances I am able to preserve the judge's findings of fact and to re-make the decision. This was an appeal under the Immigration Rules and, based on the First-tier Tribunal's findings that the Appellant met the substance of the Rules, I allow the appeal under the Immigration Rules.

Notice of Decision

14. The decision of the First-tier Tribunal contained a material error of law in relation to the Appellant's right of appeal and therefore this Tribunal did have jurisdiction in relation to the Appellant's appeal.
15. I set aside the decision in relation to the jurisdiction issue.
16. I re-make the decision by allowing the Appellant's appeal under the Immigration Rules.
17. No anonymity direction is made.

Signed

Date: 18th June 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have considered granting a fee award but I take into account the fee award made by the First-tier Tribunal Judge in relation to the second Appellant in the appeal before her. In line with her decision I have decided not to grant a fee award because it was necessary for the First-tier Tribunal Judge to hear the evidence from the Appellants before reaching a decision.

Signed

Date: 18th June 2018

Deputy Upper Tribunal Judge Grimes