Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29122/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 September 2013	**On 10 October 2013**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR SIVAKUMAR AMIRTHALINGAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Ms K Pal, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Sri Lanka, was born on 1 September 1983. While in this country lawfully as a student, with permission to remain until 30 June 2011, he

applied for further leave to remain as a Tier 4 (General) Student Migrant under the points-based system. The application was made on 26 June 2012.

2. This application was deemed by the respondent to have been invalid because the correct fee had not been paid. It is the appellant's case that there is no reason why the requisite fee would not have been paid, because there were sufficient funds in the account of the bank on which his payment had been drawn.

3. After being notified by the respondent that his application had been rejected as invalid because the appropriate fee had not been paid (which the appellant disputes) the appellant re-submitted his application, enclosing (the appellant would say again) the relevant application fee. This application was refused by the respondent on 5 December 2012. The refusal letter is dated the same date.

4. The basis on which the application was refused this time was that the appellant had not provided sufficient evidence that he had the funds necessary for his maintenance under the requirements of the PBS. This was because the respondent considered that the renewed application was a fresh application, which had been made after the appellant's existing leave had expired. For this reason, he could not be treated under the Rules as having an "established presence" and therefore had to show that he had sufficient funds for his maintenance for the entire period of the course, in addition to the funds necessary to pay that part of the tuition fees which was outstanding. That meant that the appellant had to demonstrate that he had available a total of £10,000, being nine months at £1,000 per month together with outstanding tuition fees of £1,000. It is agreed that if the appellant had been treated as having an "established presence" (which he would have had if the application had been made while he had leave to remain) he would only have had to show that he had £,3000 available, being two months at £1,000 plus the outstanding tuition fees of £1,000. The respondent accepted in the refusal letter that the appellant had established from the fixed deposit certificate submitted with his application that he had available to him £5,799.

5. The appellant appealed against this decision, and his appeal initially came before First-tier Tribunal Judge Jessica Pacey, sitting at Birmingham on 27 March 2013, for the purpose of determining a preliminary issue on the papers. The preliminary issue had arisen in this way. If the respondent had been entitled to treat the second application as a fresh application, the appellant would not have a right of appeal, because he would not lawfully have been in this country at the time the application was made. However if the application fell to be treated as merely a continuation of the original application, which had been made while the appellant was in this country lawfully, then he would have a right of appeal. Directions had been given on 28 December 2012 that there should be a hearing on this preliminary point which was how this appeal came to be listed before Judge Pacey.

6. Judge Pacey had regard to the decision of this Tribunal in *Basnet (Validity of application - respondent)* [2012] UKUT 00113, in which the Tribunal had held that in circumstances where the respondent asserts that an application was not accompanied by a fee, and so was not valid, the respondent had the burden of proving this. The

Tribunal in *Basnet* had also held that the respondent's system of processing payments of postal applications risked falling into procedural unfairness unless other measures were adopted, and that the appropriate way of considering whether in a particular case the respondent had established that the application had not been accompanied by a fee, was to issue directions to the respondent to provide information to determine whether or not this application had been accompanied by the fee.

7. In accordance with the guidance given in *Basnet*, Judge Pacey directed that the appeal should be relisted for a direction on the papers in 21 days, but that the respondent should lodge with the Tribunal and serve on the appellant any information on which she intended to rely showing that the correct fee had not been paid. Judge Pacey noted in her decision that the respondent had not ticked any of the boxes on the standard letter which would have given further details as to how it was said that the fee had not been paid, and that accordingly the appellant had not been given a chance to address this issue.

8. Subsequently, after the 21 days specified in Judge Pacey's order, but before the appeal came before the Tribunal for further consideration, the respondent notified the First-tier Tribunal that she was unable to specify how it was that the fee came to be not paid because the records containing such information were not retained beyond six months. The appeal was then listed for hearing on the papers and came before First-tier Tribunal Judge Mogridge, sitting at Birmingham on 10 May 2013.

9. In a determination promulgated on 24 May 2013, Judge Mogridge dismissed the appellant's appeal. Insofar as the appellant had also purported to make a simultaneous decision to remove the appellant under Section 47 of the Immigration, Asylum and Nationality Act 2006, following the decision in "*Ahmadi* etc", Judge Mogridge found this decision to be invalid, and directed that it should be remitted to the respondent.

10. Notwithstanding that the respondent had not provided the evidence which she had been directed to supply by Judge Pacey, and that, following *Basnet* the respondent had the burden of establishing that the specific fee had not been paid, Judge Mogridge still found that the original application had been invalid. Her reasons are set out at paragraphs 5 to 7 of her determination as follows:

> "5. The hearing of this appeal on the papers began on 27.03.2013 and was adjourned on Direction that the respondent specify how it was that the fee came to be not paid in order that the appellant could properly address the issue. The respondent responded by letter dated 08.05.2013 that she was unable to do this because records containing such information were not retained beyond 6 months.
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> 6. It seems to me from both the appellant's grounds of appeal at p.16 of his bundle (para. 9) and his witness statement at p.12 of his further bundle (para. 9) that the appellant knew how it was that fee came to be not paid,

namely that the respondent could not withdraw the money from the account given.

7. I'm afraid my view is that it was for the appellant to ensure that adequate funds were in place to meet the fee payment. He did not do so at the time of his initial application. It is clearly stated in the respondent's letter of acknowledgment of the application dated 03.07.2012 that if there was 'an issue with the fee ... the application will be rejected'. There was an issue, namely that the respondent could not obtain payment of the fee, and the application was rejected. The appellant's application was only made by his second application on 17.08.2012 which was after expiry of his leave to remain."

11. Judge Mogridge then went on to find at paragraph 8 that the appellant therefore did not have a right of appeal and the appeal was dismissed.

12. The appellant has appealed against this decision and was granted permission to appeal by First-tier Tribunal Judge Frances on 13 June 2013. In giving her reasons for granting permission to appeal, Judge Frances stated as follows:

"2. The grounds submit that the judge failed to have regard to the decision of First-tier Tribunal Judge J S Pacey dated 27th March 2013. The burden of proof was on the respondent to show why the fee had note been paid following Basnet (validity of application – respondent) [2012] UKUT 00113. The judge erred in law in finding that the appellant's application was only made by his second application after his leave had expired.

3. The judge took into account the previous decision and the respondent's evidence that she was unable to specify why the fee was not paid because records containing such information were not retained beyond six months. It is arguable that the judge erred in law in failing to apply the correct burden of proof and misinterpreted the appellant's evidence in his grounds of appeal and witness statement. The appellant maintained he had sufficient funds in his account. It is arguable that the respondent has failed to show otherwise. ... ."

13. The appeal was then listed for an oral hearing at Field House before Deputy Upper Tribunal Judge Davidge, on 23 July 2013, but the appellant did not attend. Judge Davidge considered that the appellant had not wished to attend (taking into account that previously he had asked for the appeal to be dealt with on the papers) and so continued in his absence. However, it subsequently appeared that the appellant had wished to be here and had made an application for an adjournment, but this application had not been put before the judge. Accordingly, the appeal was relisted for hearing before me on 30 September 2013.

The Hearing

14. Before me, again the appellant did not attend and was not represented. The respondent was represented by Ms Pal, who considered that it might be the case that the appellant had already left the jurisdiction, because his course had ended in July 2013, although she had no information to this effect. I ascertained that the appellant had been notified of the hearing, and considered that I could justly deal with this appeal in the absence of the appellant and proceeded to do so. As I make clear below, in fact the appellant was, unknown to the Tribunal, present in the building at the time, but was not present at the hearing due to a misunderstanding for which he was not at fault. However, in the circumstances that are set out below, this did not result in any prejudice to the appellant.

15. On behalf of the respondent, Ms Pal set out what the respondent considered was the factual background of this appeal. The appellant had made an application for further leave to remain at a time when he was still here lawfully, but although the respondent had attempted to take payment, this was rejected. The appellant had then made a subsequent application after his leave had expired. Although this application was accompanied by the correct fee, it was refused essentially because he did not have an "established presence" because his leave had by then expired.

16. On behalf of the respondent, Ms Pal accepted that the precedent fact regard the taking (or rather inability to take) the payment had to be established by the respondent, but the appropriate records had not been kept because these records were only kept for six month. Ms Pal did not know why this was the case.

17. In answer to a question from the Tribunal as to whether this was a satisfactory procedure, because the respondent must be aware that records would often be required after six months had elapsed, Ms Pal asserted that the appellant had not even produced a bank statement to show that the payment would have gone through if the cheque had been presented. In those circumstances it was suggested that the judge's decision had been open to her.

18. However, in answer to a further question from the Tribunal, Ms Pal accepted that following the decision in *Basnet*, the burden of proof in this case was on the respondent and that the respondent had not been able to discharge this. However, the appellant would still need to show that he had adequate funds in order to satisfy the requirements of the Rules. The judge did not refer to any evidence of funds in her determination, although in the grounds of appeal the appellant had raised an issue that he had £5,700 odd in an account.

19. In answer to a further question from the Tribunal, Ms Pal accepted that as the respondent had not established precedent facts, the appellant did have a right of appeal against the refusal.

20. Ms Pal also accepted that as the respondent had not established that the rejection of the application for administrative reasons was correct (as per *Basnet*) he would only have needed to show that he had the lower amount of funds available, that is two

months' maintenance (£2,000) plus the outstanding tuition fees (another £1,000) which was £3,000 in all.

21. Having considered the issues further, Ms Pal accepted that she would be in difficulty contesting this approach.

Discussion

22. Having considered the arguments advanced on behalf of the respondent, I was entirely satisfied that Judge Mogridge's determination had contained an error of law such that her decision must be set aside and re-made by the Upper Tribunal. My reasons can be stated shortly as follows:

23. As was made clear by this Tribunal in *Basnet*, the burden of proof was on the respondent to establish that the original application had not been accompanied by the correct payment. As accepted on behalf of the respondent, the respondent has not established this. I do not consider the reasons advanced, that records are only kept for six months, at all satisfactory. Appeals are frequently heard more than six months after an application has been made, and as made clear by this Tribunal in *Basnet*, it is for the respondent to ensure that she keeps proper records. It is worth reminding the respondent of what was said by this Tribunal at paragraph 29 of *Basnet* as follows:

> "We recognise that there are good security reasons for destroying financial information that could fall into wrong hands and be abused, but we see no reason why a system cannot be devised that permits secure retention of data pending resolution of any dispute about whether accurate billing data has been supplied".

24. At paragraph 28 of *Basnet*, the Tribunal had set out a number of reasons why payment might fail, some of which would not have been the fault of an applicant, but could be the fault of the respondent.

25. In these circumstances, given the respondent's failure in this case to set out the basis upon which the payment had been refused, it was not, in my judgment, properly open to Judge Mogridge to make the finding which she did at paragraph 7 that the appellant had not ensured that adequate funds were in place to meet the fee payment. Contrary to what Judge Mogridge understood the appellant to be saying at para 9 of his witness statement (that he knew that the respondent had been unable to withdraw money from the account given) that is not in fact what the appellant stated. He said at paragraph 9 <u>that the respondent had stated</u> (my emphasis) that the application was invalid because she could not withdraw the money towards the application fee, but went on to say at paragraph 10 that he had had enough funds in his account at that time, of which he enclosed proof with his appeal documents. In my judgment, it is accordingly clear that the respondent had not satisfied the burden of proof which was on her and that accordingly the appellant's appeal should have been considered on the basis that the relevant date of the application was when the original application had been submitted, at which time, it is accepted, he did have an

"established presence" in this country, because he still had lawful permission to remain.

26. Accordingly I proceeded to re-make the decision on the basis first that the appellant did have a right of appeal (as effectively accepted on behalf of the respondent by Ms Pal) and also that because he had an established presence at the time the application was made, he only needed to show that he had a total of £3,000 available to him.

27. As the respondent accepted in the letter of refusal that he had above this sum (and Ms Pal did not seek to challenge this before me) it follows that the maintenance requirement was in fact met, and, there being no other basis upon which this application could properly be refused, this appeal must be allowed, and I will so find.

Matters subsequent to the Hearing

28. I should record that after I had informed Ms Pal, representing the respondent, that I intended to allow the appeal, and had risen, I was told that the appellant had in fact been present in the building, but had not come into the hearing, due to a misunderstanding, the exact circumstances of which it is not necessary to record, other than that this does not seem to have been his fault in any way. I accordingly agreed to reconvene briefly in order to inform him that I had considered the appeal in his absence, and had decided to allow the appeal.

Decision

29. I set aside the decision of First-tier Tribunal Judge Mogridge as containing a material error of law and substitute the following decision:

30. The appellant's appeal is allowed, under the Immigration Rules.

Signed: Date: 30 September 2013

Upper Tribunal Judge Craig