



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

Appeal no: **IA 11134-13**

THE IMMIGRATION ACTS

At **Field House**
on **28.11.2013**

Decision signed:
28.11.2013
sent out: **5.12.2013**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Brij Mohan SHARMA

appellant

and

Secretary of State for the Home Department

respondent

Representation:

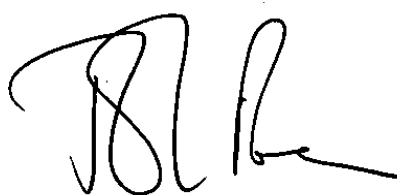
For the appellant: *Alex Burrett* (counsel instructed by Charles Simmons)
For the respondent: Miss Emilie Martin

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal against the decision of the First-tier Tribunal (Judge Mark Blundell), sitting at Hatton Cross on 9 August, to allow a tier 4 (general) student migrant appeal by a citizen of India, born 21 July 1987. The appellant's previous application for leave to remain had been rejected, on the basis that he had not included the photographs required by the Rules; but the judge found that he had done so, and, following *Basnet (validity of application - respondent) Nepal [2012] UKUT 113 (IAC)*, was entitled to have a further application, refused on its merits on 20 February 2013, considered on the basis that he had an established presence in this country. Since the presenting officer did not suggest that the appellant was not entitled to further leave to remain, provided his previous application for it had been validly made, the judge allowed his appeal.

2. The judge's decision was challenged on the basis that *Basnet* was a case of alleged non-payment of fees; but this one concerned photographs: furthermore, the appellant's fee had been refunded to him, so no fee had been paid. Miss Martin however was unable to suggest any difference in principle between this case and *Basnet*; nor can I see any. She did not take any point on the refund, which in my view was a unilateral act on the part of the Home Office which could not deprive the appellant of a right of appeal, if he had one in the first place.
3. Miss Martin went on to refer to *Miah & others* [2012] EWCA Civ 261, disposing of what used to be called the 'near-miss' argument. I do not however need to say any more about that decision, or to the further treatment of it in *Patel & ors* [2013] UKSC 72, to which Miss Martin also referred me. The reason is that in my judgment this was not a 'near-miss' case at all: the appellant claimed fully to have complied with all the requirements of the Rules, and the judge found in his favour on that.
4. Returning to *Basnet*, the principle is clear: the appellate authorities have jurisdiction to decide whether an application has been validly made, and to allow an appeal where it has been rejected as invalid. There might have been some room for argument as to the effect on the current application of regarding the previous one as valid; but sensibly, neither the presenting officer before the judge nor Miss Martin took any point on that.
5. In my view the judge was right to assume jurisdiction to resolve the simple question of fact as to whether the appellant had put in the necessary photographs with his application or not, and there is no criticism either of the way he did so, or of the consequences he drew from it.

Home Office appeal dismissed



(a judge of the Upper
Tribunal)