



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/19410/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 1 September 2014**

**Determination Promulgated
On 9 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

ZAHEER AHMED

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim counsel instructed by Maher & Co

For the Respondent: Mr C Avery Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Prior promulgated on 1 November 2013 who found that there was no valid appeal before the Tribunal and dismissed the appeal.

Background

3. The Appellant was born on 14 July 1979 and is a citizen of Pakistan.
4. On 22 April 2013 the Appellant applied for leave to remain in the UK as a Tier 1 Entrepreneur Migrant under the Points Based System.
5. The application was refused and the refusal letter also stated that the decision did not carry a right of appeal as the Appellant did not have leave to remain at the time of his effective application, his leave having expired on 25 March 2013.
6. The Appellant lodged an appeal. He stated that he had a right of appeal against the refusal of leave as he made a valid application on 25 March 2013 and provided the correct credit card details and had sufficient funds in his account to cover the fees. He asserted that the Respondent failed to process the card details properly. He relied on the case of Basnet (validity of application - respondent) [2012] UKUT 00113(IAC).
7. The case came before Duty Judge L A North who directed that the issue of the validity of the appeal be determined at a substantive hearing.

The Judge's Decision

8. The hearing was before First-tier Tribunal Judge Prior (hereinafter called "the Judge") . The Judge found as a fact on the basis of the oral evidence and documentary evidence of the card details provided that the Appellant had not in fact provided correct card details as he asserted in his grounds of appeal as he had omitted two numbers from what should have been a 16 digit number for his card; he distinguished the Appellant's case from Basnet where the Appellant's case was that he had provided correct card details and found that the Appellant had not made a valid authorisation to obtain the fee; he found that no prompt communication by the Respondent of the inability to collect the fee on 26 March

2013 would have allowed the Appellant to render his invalid application valid prior to the expiry of his current leave on 25 March 2013; he found that there was no unfairness on the part of the Respondent in their treatment of the Appellant; he concluded that there was no valid appeal before the tribunal and dismissed the appeal.

9. Grounds of appeal were lodged and on 10 July 2014 Upper Tribunal Judge Maclennan gave permission to appeal stating:

“While this grant of permission is not restricted , it appears self evident that to be valid, a payment authorisation needs correct payment details. It may be difficult to show that the point needed any further reasoning. It is also fairly clear that there was no material by which any judge might sensibly have reached another outcome based on the appellant’s private life.”

10. At the hearing I heard submissions from Mr Nasim on behalf of the Appellant that in essence:

(a) It was common ground that the Appellant had made a mistake in relation to the card details rather than deliberately trying to deceive the Respondent.

(b) The Respondent should have known that the Appellant had provided incorrect details as there were only 14 digits in the card number. There was some discussion about this as I asked for the evidential basis for the suggestion that all cards had 16 digits. I checked by way of example an American Express card I had, Amex being one of the acceptable forms of payment of the fees as is clear from page 6 of the Tier 1 application form. The American Express card has 15 digits.

(c) Basnet was not restricted in the way the Judge interpreted and he relied on paragraph 32(3) and 33 that the Appellant intended the fee to accompany the application and the fact that he later paid the fee shows his intention

11. On behalf of the Respondent Mr Avery submitted that :

(a) There was no merit in the application.

(b) The case of Basnet was very different to that of the Appellant in that the applicant in that case had done everything right in relation to the provision of card details.

(c) The Respondent could not chase every applicant who made mistakes.

(d) The Judge was also entitled to find that even had the Respondent contacted the Appellant it would have made no difference given that his leave would have expired.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

13. Section 82 (2) (d) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) only gives a right of appeal against a decision to vary or extend an applicant's leave "*if the result of the refusal is that the person has no leave to enter or remain.*" In other words it is only if an application is made during the currency of existing leave that a refusal to vary or extend leave will be appealable. In this case the Judge determined that there was no valid appeal because the Appellant did not make an effective application for leave after his current leave had expired.

14. The Judge set out the history of the Appellant's application: that the Appellant had leave to remain in the United Kingdom as a Tier 1 Post Study Work Migrant that expired on 25 March 2013. The Appellant submitted an application for further leave as a Tier 1 Entrepreneur on 25 March 2013. Although asserting in his original grounds of appeal that he had provided the correct card details for the payment of the fee which the Respondent failed to process, the Judge found after examining the payment section of the visa application that the Appellant had in fact provided only 14 digits of a 16 digit card number as a result of which the fee could not be processed.

15. The jurisdiction of the First-tier Tribunal therefore turned on whether a valid application had been made prior to the expiry of leave on 25 March 2013. The Judge took into account the case of Basnet , which sets out the Immigration &

Nationality (Fees) Regulations 2011 (2011 No 1055), which provide at Regulation 37:

“Consequences of failing to pay the specified fee.

Where an application to which these Regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee.”

16. The question whether the first application was valid therefore depends not upon whether the payment was successfully processed, but on whether the application was accompanied by the fee. In Basnet at paragraph 20 the tribunal found
- “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.”*
17. I am satisfied that the Judge was entitled to distinguish this appeal from Basnet as he did in paragraph 11 of the determination because while it was undisputed in Basnet that the applicant had provided a valid authorisation in the form of correct card details in this case the Judge found that he had *‘supplied inoperative authorisation for discharge of the fee by the card issuer.’* The Judge acknowledged that this was a genuine mistake but was entitled to conclude that the incorrect details he provided resulted in a failure to provide valid authorisation to obtain the fee.
18. It is argued in the grounds and by Mr Nasim that in accordance with the measures set out in paragraph 32(ii) of Basnet to prevent such disputes in the future, to ensure fairness, the Appellant should have been contacted promptly in order to correct the error. I am satisfied firstly that nothing was produced or argued in front of the Judge that the provision of a 14 digit number to the Respondent should have alerted them to the fact that there was a problem, indeed having looked at an American Express card it was clear that a 16 digit number is not standard. I am also satisfied however that the Judge was entitled to take into account in determining the issue of fairness that the Appellant in this case chose to make his application on the day his leave expired, the 25 March 2013. This was the date given in the acknowledgement letter from the

Respondent dated 16 April 2013 and by the Appellant's representatives in their grounds of appeal to the First-tier rather than on or about the '20th or 21st March' as suggested in the grounds of appeal dated 11 November 2013 to the Upper Tribunal . The inevitable consequence of that was that the application had to be effective: I am satisfied that it was open to the Judge to conclude that prompt contact would have made no difference to the outcome as he had allowed no time '*for the regularisation of an invalid application*'(paragraph 12).

19. Mr Nasim argued that the Appellant's willingness to pay the fee was the decisive factor but I am satisfied that the Judge was entitled to conclude in accordance with Basnet that the provision of valid authorisation was the decisive factor and in Basnet it was given and in the Appellant's case it was not.

20. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning. There was no error of law.

CONCLUSION

21. I therefore found that no errors of law have been established and that the Judge's determination should stand.

DECISION

22. The appeal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Birrell