Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33842/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 July 2017	**On 24 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR PRAVEEN MARWAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Victor-Mazeli of Counsel
For the Respondent: Mr N Bramble, a Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the appellant's appeal against the decision of the First-tier Tribunal (FTT), which dismissed his appeal against the refusal of the respondent to grant him further leave to remain.

2. By way of background the appellant was given leave to enter the UK as a student until 1 January 2011 and on 16 September 2010 he obtained leave to remain as a student until 30 March 2012. He was then given further leave to remain on 7 August 2012 as a Tier 1 (Post-Study Work) Migrant until 7 August 2013. Therefore, 7 August 2014 was a crucial date for him, because his leave was due to expire on that date.

3. On 7 August 2014, the appellant applied form for further leave to remain. There is an issue as to what then happened. According to the Immigration Judge who determined the appeal to the First-tier Tribunal (Judge of the First-tier Tribunal N Lodge – the Immigration Judge) the application was presented for payment on 8 August 2014. However, it was accepted by both parties at the hearing in the Upper Tribunal that this date is incorrect. The correct date for presentation of payment was in fact 11 August 2014. Pausing there, one of the crucial issues in the case is whether that makes any material difference to the outcome of the appeal.

The Hearing before the First-tier Tribunal

4. The respondent's decision under appeal was the decision on 19 November 2014 to refuse further leave to remain. The background to that is that the original application was made on 7 August 2014 but due to the lack of the correct fee it was rejected on 14 August. The Appellant had to submit a fresh application on 27 August 2014. By that time, the appellant's leave had already expired on 8 August 2014.

5. The appellant's appeal came on for hearing on 8 March 2017 at Birmingham before the Immigration Judge. Miss R Ramsey, a Home Office Presenting Officer appeared for the respondent at that hearing. Despite being represented by a firm of solicitors, the appellant did not attend the hearing or make any written representations. The appellant submitted a fresh application on 27 August but by that stage his leave had expired. The Immigration Judge was presented with representations by the respondent but very little information from the appellant's representative. He did have the grounds of appeal and additional grounds of appeal. Those grounds of appeal state that the refusal notice contained no assessment of the evidence about to attributes. Secondly, the Secretary of State had awarded no points for maintenance/funds. It is alleged that was erroneous because he held funds of the Regulated Financial Institution. It was averred that if the Secretary of State had assessed the evidence to support investment funds which the appellant held she would have concluded that he scored the necessary points under both Appendices A and C and that the appellant provided sufficient evidence to demonstrate that he had access to the funds of over £50,000.

6. I have been helpfully provided with an attendance note of the hearing before the First-tier Tribunal. I am conscious that the appellant's representative had not had prior sight of that and obviously was not at the hearing to which it related, but it appears from that document that there was a brief outline of the application before the First-tier Tribunal. The explanation for the rejection of the application given to the Immigration Judge was that there had been an unpaid fee. The appellant's leave then expired and there was a new application with no leave and no right of appeal. The appellant then sought to judicially review of that refusal to recognise the right of appeal. Upper Tribunal Judge Grubb refused permission to judicially review the decision on 14 October 2014.

7. Mr Bramble went on to explain that there had been no attendance at the Case Management Review and no indication prior to the hearing that any documents were

to be submitted. The relevant bank statement appeared to have been provided in support of the judicial review application. The appellant held the account in the joint names of himself and a Mr Singh. It has a sort code of 20-58-83 and the last four digits of the account number are 6383. It is clear from the bank statement that as at 11 August, when it is contended the application was presented, there was £1,409.99 in the account; more than sufficient funds to cover the respondent's fee which was £1,093. However, it is clear from the attendance note that there was no one in attendance from the appellant's side.

8. The Immigration Judge was referred to the case of **Basnet** [2012] UKUT 113. The Immigration Judge regarded the burden as being on the appellant to show that he did have sufficient funds to discharge the debt to the Home Office at the material date (the date of the application). Otherwise, the appellant would have had no leave at the time of that application. Therefore, it was clear to the Immigration Judge that this was an invalid application and on that basis, he decided to dismiss the appeal.

Discussion

9. I did not find the law in this area straightforward, or clear, but I have had an opportunity to fully consider the case of **Basnet**. It was submitted that the Immigration Judge was wrong to have dismissed the appeal as the original application had been valid. Ms Victor-Mazeli submitted that at the date the application was considered, 11 August 2014, there ought to have been sufficient funds in the account. However, she accepted that the bank rejected the application. She could not explain why, but she accepted that no evidence had been supplied to the respondent from the bank to explain why it had rejected the application.

10. Mr Bramble for the respondent on the other hand, considered that the documents supplied by the appellant were wholly inadequate in terms of discharging the burden which, he said, rested on the appellant to show why the bank had refused the application for payment. He accepted that the burden rested upon the respondent to show that the application had indeed been rejected. That in fact was not in issue and therefore the burden effectively shifted to the appellant to show why the bank had rejected the application. The appellant had been unable to discharge that burden, but had placed no material before the court or the Tribunal on the previous occasion. In the circumstances, the Immigration Judge was entitled to come to the decision he came to on the evidence and arguments presented to him. It would have been open to the appellant, either to attend the hearing and explain his position, produce documents in support of his arguments or put in a written submission or write a letter, but he did not do so.

11. The appellant's representative said in reply that the 8 August 2014 was not the relevant date. The issue was: what funds were available at the correct date i.e. 11 August 2014? Ms Victor Mazeli did not accept Mr Bramble's submission that it was incumbent upon her client, or her client's representatives, to present the evidence or facts before the Immigration Judge on the previous occasion so he could make a

decision. At the end of the hearing I retired for a short time but then announced my decision to dismiss the appeal. My reasons now follow.

My Conclusions

12. Having carefully considered the arguments I have had to remind myself of the principles in the case of **Basnet**. In the case of **Basnet** there was an application made by the applicant and the issue was whether it was accompanied by the relevant fee. It is right that the Upper Tribunal in that case did place the burden of establishing the facts upon the party who asserts them and they said at paragraph 27 of the decision:

> "The party that asserts a fact should normally be the one who demonstrates it; and because the respondent is responsible for the procedure to be used in postal cases, and the features noted above prevent both the issue of a prompt receipt and an opportunity to understand why payment was not processed. An applicant is not present when an attempt to process payment is made, and has no way of later obtaining the relevant information."

13. The burden therefore rests on the Secretary of State to show that the relevant fee has not been paid. However, the circumstances of that case are slightly different from those in this case. The important point to make is that the applicant must provide information as to what information he supplied at the time of making the application so that payment may be obtained by the respondent. Whether it is by sending a cheque in the post or by submitting a direct debit or whatever other means of payment is used, it is difficult to see that the respondent can investigate the matter at all if an application for payment is simply rejected by the bank and the applicant then proffers no explanation. At paragraph 30 of the same decision the appellant was described as an intelligent young man who was well aware of the importance of accurately completing the application form. He had satisfied the respondent that he had the funds in the account at all material times and he made a statement that he is certain that he provided the correct financial data. Those facts were different from these.

14. In this case there is no evidence at all as to why, when payment was asked for on 11 August 2014, it was not forthcoming. The present fees structure came into force on 6 April 2013 and had therefore been around for some time. Information could have been obtained from the Home Office website as to exactly how to make payments and what information was needed in support of an application. The box that was ticked on the original refusal (on 14 August 2014) was the box which said that:

> "Although credit and debit card details had been provided the issuing bank rejected the payments. There may have been insufficient funds in the account or details provided did not match the information held by the bank. For security reasons the card holder's name, address and expiry date and the issue number supplied on the payment form must correspond to the information held by the issuing bank. If the details fail to match the bank, the bank will

reject the payment. Your fresh application should be returned to the address given on the application form."

15. I take the view that it was incumbent on the appellant to attend the hearing or provide some written representation before the Immigration Judge to explain why the original payment had not been made. The fact of whether or not the correct fee was supplied was exclusively in his possession. This is not a case where, like in **Basnet**, the appellant completed the correct form and gave evidence that he supplied the correct fee which was payable from an account in which there were adequate funds. It was not good enough simply to supply bank statements which indicated a sufficient balance in an account. Bank accounts can show a credit balance but there may be a set-off, which may go to reduce the overall balance in that account. The explanation may well have been that he failed to put a correct digit on the form or internet application when he submitted his application form to the respondent. It is impossible to see how the respondent could have the burden of showing the nature of the mistake or deficiency. The respondent has discharged the burden of showing that the application was not accompanied by the correct fee and there must then be a burden on the appellant to establish that in fact he supplied all the information he should have supplied.

16. In those circumstances, as the Immigration Judge was provided with very limited evidence by the appellant, he was placed in a difficult position. He did his best to decide the case on the limited information he was given and due to the appellant's failure to attend the hearing or place any submissions or documents before the Immigration Judge, it is difficult to see how he could have come to a different conclusion than the one he came to. In particular, it appears that the Immigration Judge had before him an application form completed by the appellant on 7 August 2014 and a Home Office printout, which stated that the 'fee (had) not (been) paid'. It is clear looking at the bank account for 7 August 2014 that he did not have such funds at the time he submitted the application on that day and he therefore took a grave risk that it would be rejected. It is right to say that within a few days he may well have had the funds but all he needed to do was to obtain information from his bank explaining why the payment had not gone through. Had he done that, it may well be that he would be in a different position than the position he is in.

17. Whilst I have got some sympathy for the appellant, I find that although the Immigration Judge's decision contains an error in relation to the factual details and the date the payment was presented, it does not contain a material error. Even if the appellant's application to pay was presented on 11 August 2014, I am not satisfied that the appellant had given information to justify the appellant's factual assertion that he did have the funds at that date. On the balance of probabilities, as the respondent was able to show that the application was rejected for lack of funds it was for the appellant to show, nevertheless, that had the required funds available and that state was one for which he was not responsible, for example, by his bank. He failed to provide the respondent with all the information he should have supplied to enable the respondent to draw down those funds.

Notice of Decision

The appeal is by the appellant to the Upper Tribunal is dismissed. The decision of the First-Tier Tribunal to dismiss the appeal against the respondent's decision of 19 November 2014 to refuse to grant leave to remain as a Tier 1 (Entrepreneur) stands.

No anonymity direction is made.

Signed Date 20 July 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 20 July 2017

Deputy Upper Tribunal Judge Hanbury