Upper Tribunal
(Immigration and Asylum Chamber)

Basnet (validity of application - respondent) [2012] UKUT 00113(IAC)

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Determination Promulgated**
on 7 February 2012	.....

Before

MR JUSTICE BLAKE, PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

KAPIL BASNET

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr D Stevenson of McGill & Co, Solicitors
For the Respondent: Ms A M Lochrie, Senior Home Office Presenting Officer

1. *If the respondent asserts that an application was not accompanied by a fee, and so was not valid, the respondent has the onus of proof.*

2. *The respondent's system of processing payments with postal applications risks falling into procedural unfairness, unless other measures are adopted.*

3. *When notices of appeal raise issues about payment of the fee and, consequently, the validity of the application and the appeal, Duty Judges of the First-tier Tribunal should issue directions to the respondent to provide information to determine whether an application was accompanied by the fee.*

DETERMINATION AND REASONS

1. The appellant is a citizen of Nepal, as is his wife, Mrs Sumati Karki Basnet. He had leave to remain in the United Kingdom as a Tier 4 (General) Student under the Points Based System (PBS), valid until 28 May 2011. On 13 May 2011 he applied, with his wife as a dependant, for extension of his leave under Tier 4.

2. On 17 May 2011 the respondent wrote to the appellant:

> Thank you for your application … it will now be passed to a Case Work Unit.
>
> If there is any problem with your application, such as missing documentation, a case worker will write to you as soon as possible to advise what action you need to take to rectify the problem. If there is an issue with the fee you have paid then your application will be deemed to be invalid and returned to you as soon as possible by post. You will be advised on what action you need to take to make a valid application.

3. On 16 June 2011 the respondent wrote again to the appellant:

> Thank you for your attempted application for leave to remain …
>
> … Your application is invalid … The Immigration & Nationality (Cost Recovery Fees) Regulations 2011 and the Immigration & Nationality (Fees) Regulations 2011 specify the fee … to be paid … if an applicant does not pay the specified fee, his or her application is invalid.
>
> The specified fee has not been paid …
>
> The passage next to the box ticked below provides more detail about the failure to pay the specified fee and the steps you should take to ensure that you make the correct payment when returning your application.
>
> [Box checked]: Although credit/debit card details have been provided, the issuing bank rejected the payment. There may have been insufficient funds in the account or **the details provided did not match the information held by the bank.** For security reasons the cardholder's name, address, expiry date and 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 will reject the payment. Your fresh application should be returned to the address given on the application form.

4. The words in bold above are also in bold on the original; but the letter remains silent as to the specific reason for non-payment.

5. The first letter from the respondent was within the appellant's period of existing leave, but the second letter came after his leave expired.

6. The appellant received the second letter on 21 June 2011, and re-applied on 22 June 2011.

7. The respondent refused that application by letter dated 3 August 2011. The letter states that because the application was made when the appellant no longer had valid leave to remain in the United Kingdom, he did not have "an established presence studying in the United Kingdom", and so did not qualify for the reduced level of maintenance funds to be shown. The bank statements submitted to support the application did not meet the maintenance requirements.

8. It is common ground that throughout the period of both applications the appellant had funds in his bank account such that if he had made an "in time" application based on an "established presence", the application would have succeeded.

9. The respondent's letter also advised the appellant:

> There is no right of appeal against this decision.

10. If the appellant had not made a valid application within his period of leave, that would be a correct statement of the law.

11. The appellant filed a notice of appeal on 16 August 2011 with the First-tier Tribunal. His grounds argue that his leave continued beyond 28 May 2011 by the operation of section 3C of the Immigration Act 1971; that the respondent's rejection of the application made on 13 May 2011 was invalid; that his leave continued until the "first substantive rejection" of 3 August 2011; and that he had a right of appeal under section 82(2)(g) of the Nationality, Immigration & Asylum Act 2002. The appellant maintained that with his application of 13 May 2011 he provided correct bank details, and he showed that funds were in his account at the time. He referred to *BE (Application Fee: Effect of Non-payment)* [2008] UKAIT 00089, a case based on the 2007 Regulations, but "equally of assistance" to the 2011 Regulations. The appellant had accompanied his application by such information and authorisation as was necessary for the respondent to be paid, so the notice "invalidating" his application was "itself invalid". If so, the appellant would qualify for the reduced maintenance level, and was bound to succeed. The grounds conclude:

> The First-tier Tribunal is respectfully requested to list for hearing. If the respondent wishes to dispute the matter of payment and the competence of the appeal, then it is most appropriate for this to occur by virtue of evidence led and submissions made … as a preliminary matter.

12. The case was listed for oral hearing before Judge of the First-tier Tribunal Professor Rebecca M M Wallace at Glasgow on 21 September 2011. The appellant was represented by Mr Stevenson, and the respondent by Mr Young. The Presenting Officer maintained that there was no valid appeal before the Judge, and she considered that as a preliminary issue. As required by Practice Direction 3.4, the Judge issued her findings in the form of a determination, dated 26 September 2011, rather than by means of a notice under First-tier Rule 9. At paragraph 32, she said:

> The appellant's application fee has not been paid and whatever the reason, even if that fault lies with the respondent, in that someone may possibly have entered a wrong digit, causing payment to be refused, the fact remains that there is no valid case before me.

13. The Judge held that the case must fail "for want of jurisdiction", and ended her determination thus:

> Decision: I find there is no valid appeal before the Tribunal.

14. Still undeterred, the appellant on 5 October 2011 sought permission to appeal to the Upper Tribunal. The grounds argue that despite the First-tier Tribunal concluding that no right of appeal existed, it was competent for the Upper Tribunal to consider the matter, on the authority of *Abiyat (Rights of Appeal) Iran* [2011] UKUT 314 (IAC), now reported at [2011] Imm AR 6. It is pointed out that the grounds of appeal to the First-tier Tribunal called for evidence from the respondent that the application was not accompanied by the fee. The respondent:

> … failed to do so, simply relying on a bare assertion without evidence. In contrast the appellant had his witness statement which was not challenged and which spoke to his belief that he had completed the form correctly. In addition there was evidence that he held the relevant funds for the fees …
>
> The appellant "accompanied" his application with the fee. Whether the fee was taken or not is largely irrelevant (contrary to the IJ's findings at paragraph 32) ...

15. The grounds also contend that the respondent's:

> … current regime [in respect of fee payments] falls into simple administrative unfairness.

16. The first matter for us to consider was whether the appellant had a right of appeal to the Upper Tribunal against the First-tier Tribunal's decision declining jurisdiction. The Presenting Officer, no doubt advisedly, did not dispute that the appellant has such a right of appeal. The case is on all fours with *Abiyat*. The First-tier Tribunal reached its decision to decline jurisdiction not by way of a Rule 9 notice, but following full consideration of the matter at a hearing, and expressed its conclusion in the form of a

determination. The appeal was therefore validly before the Upper Tribunal.

17. The next question was whether the First-tier Tribunal was right to decide that it had no jurisdiction. The jurisdiction of the First-tier Tribunal turned on whether a valid application had been made prior to the expiry of leave on 28 May 2011. That leads to 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.

18. 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.

19. *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.

20. Accordingly we conclude that the Judge erred at paragraph 32 in considering that non-payment, for whatever reason, even if the fault of the respondent, was fatal to the validity of the application and of the subsequent appeal. 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.

21. Having identified that error of legal approach, we set aside the decision. We next have to decide whether to remake the decision for ourselves in the light of all the available information, or leave it to the respondent to make a fresh decision. In the light of what we subsequently heard, we conclude that the former course is more appropriate, for these reasons:

    i) A decision needs to be arrived at as to whether the appellant had tendered the relevant information in the first application so as to be a valid one.

    ii) We are at least as well-placed as the First-tier Tribunal to reach that decision, and remaking a decision following a finding of error of law is the presumptive approach of this Chamber.

iii) Ms Lochrie suggested that the fact that UKBA marked the second application as "valid" might have been a recognition that it was in time and otherwise complied with the rules. In our judgment, there is a risk that if the case was left for the respondent to re-examine the conclusion could be that the second application was valid in all respects save for the date when it was submitted.

22. Ms Lochrie helpfully explained to us the respondent's standard procedures. This was a postal application, as are most of those dealt with by the respondent. When such an application is received, a letter in the standard form of the letter of 17 May 2011 is issued. The fee is not processed at this stage, so the letter cannot act as an acknowledgement of date of receipt of a valid application. There are no instructions that the application should be processed before the expiry of the applicant's leave to remain. When an application is subsequently processed and the fee cannot be collected, for whatever reason, a standard letter is sent out in the form of the letter of 16 June 2011. With it there are returned the original application and all accompanying documents, *except* the page providing for payment of the fee, which is shredded, for security reasons. An applicant is thus:-

(i) Not given an opportunity to check the accuracy of the billing data and re-submit the application before his leave has expired;

(ii) Not given the opportunity to check whether the billing data was accurate after the processing has failed;

(iii) Not given any evidence-based specific reason why the processing has failed.

Further, no record is kept of what went wrong with the payment that can be provided to the Tribunal determining the issue. In the present case, we had given advance notice that the respondent should produce the billing data page, but we were informed that this could not be complied with because it had been routinely destroyed.

23. By contrast, at those offices where applications are accepted in person, a different procedure applies. Once an application is received the payment is immediately processed, with the applicant waiting to ensure that processing has been successful. The applicant is informed of the outcome after about 15 minutes. If the payment fails, an official advises the applicant and either extends the opportunity to check over the details provided previously, or provides a fresh billing page to complete. (A frequent inadvertent error is the reversal of the order of 2 digits.) A second attempt is then made to process the application, and in many cases this is successful.

24. The best evidence of whether an application was accompanied by the fee is clearly the original information page supplied by the appellant. An applicant could in theory be invited to photocopy and retain his application form and billing data. Applicants are not presently invited to do so, and in any event in a disputed case this could give rise to an issue that a subsequent version is put forward as a copy of the original.

25. The best evidence of why an attempt to process a payment failed would be the record kept by the processor.

26. However, the system as presently operated by the respondent puts both these items of evidence beyond future reach of either party and of the Tribunal.

27. We turn to the question of who bears the burden of proving that an application has been validly made. This would normally fall on the applicant, who would discharge it by producing evidence of acknowledgement of receipt or proof of postage. Here the application was received in time, but the question of whether it was accompanied by accurate billing data can be answered only by the respondent. In those circumstances, we conclude that the evidential burden of demonstrating that the application was not "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" must fall on the respondent. We reach this conclusion both by application of first principles - 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.

28. We now consider whether the evidential burden has been discharged in the present case on the basis of what is known to us today. Payment may fail for many reasons. An applicant may fail to provide any payment details; may make an inadvertent error; may give deliberately incorrect details; or may give the correct details, but lack funds. The respondent may enter the details incorrectly into the automated payment system. The payment system (operated, we understand, by ATOS) may fail. The Presenting Officer advised us that sometimes payments cannot be processed for a period of hours, or even days, due to system failure. There is the possibility of error or systems failure by an applicant's bank. Perhaps the most common error may be the inadvertent supplying of incorrect details, but there could be no presumption to that effect, and no presumption that payment systems are infallible, or even close to infallible.

29. 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.

30. In the present case the appellant is an intelligent young man pursuing a business studies course at degree level. He was well aware of the importance of accurately completing the application form, and demonstrated efficiency in the timing of his application, and in replying to the respondent's letter of 16 June. He has satisfied the respondent that he had the funds in his account at all material times. He made a statement that he is certain that he provided the correct financial data. Against that is merely the fact of failure to collect the money. As we have said, we are not prepared to assume that processing is infallible. We accordingly conclude that it is more probable than not that the appellant is accurate in his assertion that he provided the correct data; the respondent has not given us sufficient information to conclude to the contrary.

31. In those circumstances it is not necessary to determine Mr Stevenson's second submission that the respondent's system did not treat the applicant fairly. A determination of that submission might well require further investigation of the practical realities facing the respondent. We are however sufficiently impressed by the marked difference in treatment between the postal application and the personal application to indicate that it has every appearance of substantive unfairness. This requires an immediate review if time and money is not to be spent on similar appeals, or indeed on applications for judicial review in the Court of Session of similar decisions where there is no right of appeal.

32. In our judgment one or more of the following measures should be adopted to prevent similar disputes in the future:

    (i) The fee is processed immediately on receipt of the application and before an acknowledgment letter has been sent.

    (ii) The standard letter is amended so that it constitutes an acknowledgement that a valid application has been made.

    (iii) In cases of a failure to collect the fee in an application made in time, there is prompt communication with the applicant to afford an opportunity to check or correct the billing data.

    (iv) In cases where the accuracy of the billing data is critical to the success of the application and the existence of a right of appeal, the original application form is securely retained along with the processing report, and is produced to the judge in the event of a challenge by way of appeal or by determination of a preliminary issue.

33. The absence of such measures, or cogent reasons why they cannot be adopted, may well result in a determination that the consideration of the application has been unfair and therefore not in accordance with the law: see *Naveed (student – fairness)* [2012] UKUT 14 (IAC).

34. Duty Judges of the First-tier Tribunal should be alert when a notice of appeal is received, raising issues such as in this case, to issue directions for the respondent to provide the necessary information to determine whether the application was accompanied by the fee. This would enable the First-tier Tribunal readily to determine whether the notice is invalid, in which case a Rule 9 notice would issue, or whether it should be accepted.

Conclusion

35. The First-tier Tribunal erred in law, by applying the wrong test to whether there was a valid appeal. We remake the decision by finding that the onus was on the respondent to satisfy us that the application was not accompanied by the specified fee. The respondent has offered no evidence, or insufficient evidence, to that effect. On the available evidence, the application was accompanied by the specified fee, and was validly made. There was consequently a right of appeal to the First-tier Tribunal. It is not disputed that on the merits, the application for an extension of stay should have been granted, so the appeal, as originally brought to the First-tier Tribunal, is **allowed**. It will be for the respondent to decide what period of leave should be granted, in light of the appellant's current circumstances.

Signed

Dated

14 February 2012
Judge of the Upper Tribunal
Immigration and Asylum Chamber