Upper Tribunal
(Immigration and Asylum Chamber)

Mitchell (Basnet revisited) [2015] UKUT 00562 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow	**Promulgated on**
18 December 2014	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SHANA MILINI JO MITCHELL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr H Ndubuisi, of Drummond Miller LLP

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

1. The decision of the Tribunal in Basnet v SSHD [2012] UKUT 0113 (IAC) does not put the burden of proof on the Secretary of State where the application was, on its face, insufficiently completed.

2. The evidence shows that the payment pages are retained for 18 months. Thus, within that period, any question of the reason for failure to obtain payment can be investigated, although the reasons for declining a payment are available only to the bank account holder, not the Secretary of State. In the light of this, a more nuanced approach to the burden of proof may be needed.

DETERMINATION AND REASONS

1.
The appellant is a national of Jamaica. She has been in the United Kingdom since 9 November 2002. On 22 September 2012 she applied for leave to remain, outside the Immigration Rules, on health grounds. The application was refused on 19 October 2013. The appellant exercised her right of appeal against that decision: the grounds were purely general. On 20 May 2014 the appellant's representatives raised two specific further grounds on appeal. The first was that the appellant had acquired ten years' lawful residence in the United Kingdom; the second was that she had a well-

founded fear of persecution in Jamaica. Following a case management review hearing, the appeal came before Judge Agnew in the First-tier Tribunal. The hearing extended over two days, 15 July and 4 August 2014. Judge Agnew dismissed the appeal insofar as it was based on the Immigration Rules, but concluded that the appellant had established a well-founded fear of persecution. She thus allowed the appeal on Refugee Convention grounds.

2.
It does not appear that there is now any suggestion that the application for leave ought to have been granted on the basis upon which it was made. Further, there is no challenge to the judge's conclusion that the appellant had established her status as a refugee. Nevertheless, the appellant sought and obtained permission to appeal to this Tribunal challenging the judge's conclusion in relation to her ten years' residence in the United Kingdom.

3.
The respondent's position is that the appellant was in the United Kingdom without leave between 31 January 2010 (when her leave to remain as a student expired) and 24 September 2010 when she was granted leave as a Tier 1 (Post Study) Student. The appellant's position is that before her leave expired on 31 January 2010 she had made a valid application for further leave, so that her leave was extended beyond 31 January 2010 by s. 3C of the Immigration Act 1971.

4.
The history, as revealed by the evidence before Judge Agnew, is as follows. The appellant sent an application for further leave on 29 January 2010. It was returned by the respondent on 18 February 2010, with a letter stating that the application was invalid because the payment mandate section on the application form had not been signed. The appellant sent a new application on 1 March 2010, which the respondent appears to have treated as a valid application. The respondent wrote on 15 April 2010 seeking further evidence, and on 11 May 2010 refused the application. The reason was that neither the evidence of the appellant's academic award, nor the evidence of her funds, met the requirements of the Rules. There was further correspondence between the appellant's solicitors and the Secretary of State, and further documents were provided, following which the Secretary of State reconsidered the application and granted it on 24 September 2010.

5.
The argument before Judge Agnew had two limbs. The first was that the appellant, apparently now for the first time, said that the payment mandate in the application of 29 January 2010 had indeed been signed, and that therefore that application was a valid in-time application. She sought to put the Secretary of State to proof of its invalidity, on the authority of Basnet v SSHD [2012] UKUT 00113 (IAC). Not merely would the in-time application have given rise to the extension of her leave under s. 3C; its refusal would also have engendered a right of appeal, which she could have exercised, and in the course of it could have remedied any defect in the documents accompanying the application. Secondly, the appellant claimed that the material supporting the application was in truth sufficient under the Rules to entitle her to a grant of leave. Judge Agnew examined those submissions. It is not clear that she reached a firm conclusion on the Basnet point, but she clearly took the view that the material before her did not establish that the appellant met the requirements of the Rules at any date before the submission of further evidence to the Secretary of State in August 2010. She thus concluded that the respondent was correct in asserting that the appellant had been in the United Kingdom without leave from the expiry of her leave at the end of January 2010 until the grant in September stopped. Permission to appeal to this Tribunal was granted on the Basnet point.

6.
Mr Ndubuisi took us through the facts and the assertions made about the evidence. He relied on Basnet . Mr Matthews' position was primarily that it is simply too late to raise this issue, which should have been taken up much closer to the time in question. He also, however, provided important supplementary material in relation to the facts underlying the decision in Basnet .

7.
In that case the appellant had completed all the requirements for the forms in relation to payment, but the Secretary of State was, she said, unable to obtain the fee from the appellant's bank. The application was therefore returned as invalid. The matter was immediately challenged by the appellant, despite indications that there was no right of appeal. The Upper Tribunal's decision is to the effect that if the Secretary of State asserts before the Tribunal that there is no right of appeal because a fee has not been paid, it is for the Secretary of State to show that such authorisation was provided in the application form was not sufficient to enable the fee to be recovered.

8.
Despite the assertions made on behalf of the appellant in this case that it is "on all fours" with Basnet , there are a number of striking differences. The first is that, so far from taking up the matter straight away, the appellant in the present case did not make her assertion about having signed the authorisation until these proceedings, years later. Further, the more nearly contemporary evidence provides no support for her assertion. Her solicitor's letter, dated 27 August 2010, contains the following sentence:

"Please note that Ms Mitchell had attempted to make the first application when her student visa was still valid, but this was refused on the basis that she had not signed the bank deduction mandate for payment by her credit/debit card."

The letter goes on to discuss the appellant's second application and asks that it be considered as in time. There is no suggestion here of any assertion that the first application was valid or in time.

9.
Secondly, in Basnet the form submitted was good on its face: the difficulties are said to have risen in attempting to collect the fee on the strength of the information provided in the form. In the present case the position as asserted by the respondent (and apparently accepted by the appellant and her legal representatives in the years that followed) was that the form was not good on its face: the mandate was not signed.

10.
In Basnet the Tribunal took the view that, on the facts of that case, it was for the Secretary of State to establish that the appellant had no right to bring the appeal that he sought to bring. The appellant had submitted an apparently good application form, and the Secretary of State's response to the appeal was to assert that the fee could not be collected on the basis of the authority given. This was a matter solely within the knowledge of the Secretary of State, because the crucial events had happened after the submission of the form, and it was therefore for the Secretary of State to show that the difficulty arose from a default by the appellant. It does not appear to us that similar reasoning applies when the alleged defect was apparent on the face of the form itself, and so was within the knowledge of the applicant. There is the further difficulty that these proceedings are not on their face a challenge to the Secretary of State's conclusion as to the validity of the 29 January 2010 application, nor was there any challenge to that conclusion at the time.

11.
We therefore reject the submission that, in the circumstances in the present case, Basnet imposes on the Secretary of State the burden of establishing that the application of 29 January 2010 was invalid for failure to sign the payment mandate. In any event, however, the evidence available would, in our judgement, be sufficient to establish the point in the Secretary of State's favour: that evidence is the evidence showing that, during 2010 and subsequently, there was no suggestion that the form had in fact been validly completed, including signing the mandate.

12.
The appellant's failure to raise the matter at the time has other consequences, to which we must allude. It is said on her behalf that if the 29 January 2010 application had been in time, she would have had a right of appeal against any refusal of that application. That may be so, but questions as to whether she would have appealed remain purely speculative. Further, the position is that at all relevant times the applicant knew that the Secretary of State's position was that her leave had expired on 31 January 2010. We have great sympathy with Mr Matthews's submissions that if she wanted to assert that the Secretary of State's view was wrong, she should have done so at the time: this view is if anything reinforced by the evidence to which we refer below. One reason why any difficulty needs to be taken up promptly is that nobody is entitled to require anybody else to keep documents indefinitely.

13.
We shall therefore dismiss this appeal: the First-tier Tribunal Judge was right not to be influenced by Basnet . She was right in concluding that the appellant failed to establish ten years' lawful residence.

14.
Before parting with the case we must draw attention to the material Mr Matthews produced in relation to the Secretary of State's accounting processes. That material is contained in an affidavit affirmed by Mr Matthews on 16 January 2013 and intended for use in judicial review proceedings in the Court of Session in another case. We see no reason to doubt the accuracy of the matters asserted in that statement and we therefore record them here. The relevant facts are as follows. Applications made by post and accompanied by a completed payment form are directed to the payment processing centre in Durham. The payment processing centre input details from the payment page on the front of the application form onto their system. If full and valid card details are received these are input onto a system called TNS and sent via Streamline to be processed. The result is usually received within 50 minutes, and is either "successful" or "declined". The banks provide no further details of the reason for declining a payment. If the payment is successful the application is treated as a valid application. There may be a number of reasons why a payment might be declined, including insufficient funds, exceeding the maximum transaction limit or the number of transactions permitted, incorrect card number, or failure to indicate the amount to be taken. All cases where the payment is declined are classified as "payment exceptions", and an indication of that result is sent to the applicant as soon as possible. The payment pages are stored at the payment processing centre for eighteen months from the date of receipt. Thus, within those eighteen months, it is, or should be, possible for an enquiry to be made as to the success or otherwise of the payment process; and, if the applicant obtains those details, he or she may be able to ascertain from the bank the reason for declining the payment. After eighteen months, however, the payment pages are destroyed.

15.
We have set this out in order to make clear and public what the position is in relation to evidence of the processing of payments. Generally speaking, the Secretary of State will be in a position, within

eighteen months, to demonstrate that the payment was not taken. Further, an applicant will be able to obtain the payment page within that period. It goes without saying also, of course, that an applicant can take up the matter with his or her bank without involving the Secretary of State at all. This may be regarded as casting some factual doubt on the conclusions in Basnet . It was there assumed that the Secretary of State was not in a position to show that the non-availability of the payment was the result of a decision by the bank rather than an error by the Secretary of State. It does not look as though that was in truth the position at the time of Basnet ; certainly, on the basis of the material in the affidavit to which we have referred, it would not be the case now. Given that the Secretary of State does not have access to the reasons for declining a payment that has been sought in accordance with a completed mandate, a more nuanced approach to the burden of proof may be needed.

16.
For the reasons we have given, the appeal in relation to ten years' residence remains dismissed; we therefore affirm the decision of the First-tier Tribunal Judge in relation to the Refugee Convention and also in relation to the Immigration Rules.

17.
This appeal was heard on 18 December 2014. After the hearing, the appellant's solicitors sought an anonymity order on the basis that "our client has been accepted as a refugee". The Tribunal understood that to be an assertion that the Secretary of State had acted on Judge Agnew's findings and granted refugee status (including leave to remain) to the appellant. The consequence of the grant would be that this appeal is abandoned. In further correspondence, however, the solicitors clarified the position. The appellant has not been "accepted" as a refugee: their letter was simply a reference to the findings of Judge Agnew. We do not consider that the circumstances of this case are such that the normal rule that legal proceedings are in public should not apply. Like Judge Agnew, we make no order for the anonymity of the appellant.

18.
The appeal is dismissed for the reasons we have given.

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 14 September 2015