Neutral Citation Number: [2018] EWCA Civ 2462

Case No: C7/2017/0146

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Deputy Judge Hanbury
IA/50937/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2018

Before :

LORD JUSTICE LINDBLOM
LORD JUSTICE IRWIN
and
LORD JUSTICE BAKER

- -

Between :

SHABANA KOUSAR and Ors	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

S Chelvan and Alex Cisneros (instructed by **Sky Solicitors Ltd.**) for the **Appellants**
Zane Malik (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 3 October 2018

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Judgment Approved

Lord Justice Irwin:

Introduction

1. The Appellant challenges a decision of the Upper Tribunal (Immigration and Asylum Chamber) ["UT"], promulgated on 2 June 2016. In that decision, Deputy Judge Hanbury concluded that the First-tier Tribunal ["FtT"] had erred in law in the decision of 21 October 2015 (Judge Lewis) in that the F-tT had no jurisdiction to entertain the purported appeal from the Secretary of State's decision of 21 October 2014. That decision was that the Appellant's application to extend her leave to remain was an invalid application. As such, it was not an "immigration decision" within the meaning of s.82(1) of the Nationality, Immigration and Asylum Act 2002 ["the 2002 Act"]. Hence, there was no right of appeal to the F-tT, under the legislation as it then stood.

2. The Appellant's application was said to be invalid because she had failed to tick the relevant box on the form, which was the authority to the Respondent to collect the fee. Although she submitted a second or revised application in which she did give authority to collect the fee, that was done after her leave to remain had expired. That was a valid application, but was refused on its merits. That application too, it was said, failed to give a right of appeal because, although that was an "immigration decision" the application was made at a time when the Appellant had no leave to remain, and thus by reason of the terms of s.82(2)(d), no right of appeal arose: see *SA (s.82(2)(d): interpretation and effect) Pakistan* [2007] UKAIT 00083 and *R (Khan) v SSHD* [2017] 4 WLR 156 [2017] EWCA Civ 424.

3. The Appellant in written submissions sought to say that the second application was a revised version of the first, and that the decision in *Basnet (validity of application – respondent)* [2012] UKUT 00113 (IAC) and the policy of evidential flexibility mean that the decision was wrong in law. The Appellant sought permission to appeal (not drafted by either Mr Chelvan or Mr Cisneros, who additionally did not appear for the Appellants below) on grounds described by Longmore LJ as "excessive". Longmore LJ ordered the grounds to be reformulated. He considered it arguable that the case came within the *Basnet* principle and that the "evidential flexibility" principle might arguably apply. The former point was an important point of principle or practice, justifying a second appeal.

4. The reformulated grounds of appeal remain discursive, but advance three issues as follows:

   i) **Issue One**: Whether the rejection of the original application for further leave to remain of the applicant as a Tier 1 (Entrepreneur) was reasonable, fair, rational and/or proportionate, in light of the evidence and the consequential effects on the rights of the Appellant?; and

   ii) **Issue Two**: Whether the appellant/applicant should have benefited from the *Basnet* principle (unfairness of treatment and the postal application) in line with the Respondent's evidential flexibility policy pursuant to paragraph 245AA of the Immigration Rules?; and/or

iii) **Issue Three**: Whether in the instant case, as distinguished from other cases relied on by the Respondent, the facts and context show the Appellant has been treated unfairly?

5. The Respondent replies that the decision of the UT was correct. The first application was invalid and not an immigration decision. The second was out of time and gave no right of appeal. The *Basnet* principle applies only to valid applications and cannot found jurisdiction where none exists. The policy of evidential flexibility does not arise for similar reasons, and has in any event been shown to be limited in extent and effect, as at the relevant period, so that it cannot avail the Appellant, see: *Mudiyanselage v SSHD* [2018] EWCA Civ 65. Hence there was no jurisdiction for an appeal, and the UT was correct. The merits of the applications do not arise. If the refusal on the merits (of the second application) did arise for scrutiny the appeal would be bound to fail.

The Facts

6. The First Appellant was born in 1980, and her husband the Second Appellant in 1984. Their children were born in 2010 and 2011. The cases of the Second, Third and Fourth Appellants are agreed to be dependent on that of the First Appellant, and it is thus the facts of her case which are central.

7. The First Appellant arrived in the United Kingdom on 21 December 2010 with entry clearance as a Tier 4 (General) Student, her leave being valid until 31 May 2012. Her leave was subsequently extended until 13 August 2014.

8. On 12 August 2014, that is to say the day before her leave expired, she made an application under the Points-Based System ("PBS") for further leave to remain as a Tier 1 (Entrepreneur) Migrant. I will refer to this as the "First Application". Three applications were made on the same day on behalf of the three "dependant Appellants".

9. The PBS is deliberately designed as a detailed, objective, bureaucratic system by which applications will be considered. The process of acquiring or demonstrating the acquisition of the relevant points is painstaking. Part of the process is to provide payment of the relevant fee, which usually is performed by giving authority for electronic payment from the relevant bank account. As we shall see, an application not accompanied by the necessary authority for payment is invalid and will not be considered on its merits.

10. It seems to be agreed that the First Appellant completed the form properly, save in one key respect. Although it has subsequently been confirmed that she had available sufficient funds to pay her fee (and indeed the fees of the other Appellants) she did not tick the box on the form giving authority for the fee to be transferred. So that the matter is as clear as possible, I here reproduce the critical part of the form:

> "**Section 1 – Payment Details Tier 1 (Entrepreneur) Migrant**
>
> Please complete this section in block capitals and black ink.

> **A. Application Details**
>
> Applicants should refer to the Payment Guidance Notes which accompany this application form.
>
> A1. Tick the applicable boxes and fee. If no fee is ticked we cannot take a payment and your application will be rejected as invalid:
>
> The applicant is making a Tier 1 (Entrepreneur) application ☐ £1093 Standard
>
> Applicant is a national of: Turkey ☐ FYR Macedonia ☐
>
> And is making a standard Tier 1 (Entrepreneur) application ☐ £1038"

11. In the notes which form the first part of the form, there is guidance for the applicant. The applicant is told to read them before completing the form. On the second page of the form the following appears:

> "**Completing the payment details page**
>
> To ensure that your payment is processed without any delay, please follow this guidance when completing Section 1 of this form (Payment Details).
>
> A1 Tick the fee appropriate to your application. If you do not select a fee we cannot take a payment and your application will be rejected as invalid – see above guidance."

12. The rather simple, straightforward point at the heart of this case is that the First Appellant (or those acting for her) failed to tick the box in the form giving authority for the fee to be paid. The Secretary of State, therefore, says the application was properly treated as invalid. She had ticked the relevant boxes in the forms for the other Appellants.

13. The evidence was clarified as the matter proceeded before us. We were taken to the Guidance available to officials acting for the Respondent and in force at the time. The relevant passages would appear to be the following:

> "This page tells you what you must do if the applicant has not completed mandatory sections of the applications form.
>
> An applicant must fully complete all mandatory sections of the application form. They must answer every question and provide all the information specified in the section. You must reject the application if these requirements are not met.
>
> …
>
> You can use discretion and accept the application as valid if a mandatory section of the form is not completed but the

> applicant provides the required information elsewhere in the application. For example:
>
> - an applicant does not enter a required passport number on the form but provides a passport
>
> - a UK born dependent does not answer each question in the 'immigration history' section of a form."

14. The Respondent's officials make notes in relation to each such application, and these are kept centrally as the "GCID-Case Record". In this case these notes were disclosed very late, on 11 September 2018. They clearly should have been disclosed much earlier. The relevant notes here read:

> "APPLICATION INVALID – Rejected – Main app. Has not paid fees … 15 Aug 2014"
>
> …
>
> "bank rejection case … 18 Aug 2014"
>
> **Minute/Case Notes:**
>
> …
>
> This is the reason for the missing fee for the main applicant as received from Peter Mycock. I have a copy of the payments page mentioned.
>
> …..
>
> I can confirm that all payment pages are retained by our commercial partner (NS&I) for a period of 18 months from date of payment being processed (or attempted to be processed)
>
> Looking at the MI the payment against the main applicant shows as "M" which stands for missing. I have therefore contacted our commercial partner who have confirmed that no "fee" box was ticked on the payment page and therefore no attempt to process a payment was made. Both the payment page and supporting payment guidance notes do make it explicitly clear that "if no fee is ticked we cannot take a payment and your application will be rejected as invalid" and on the T1 Entrepreneur payment page there are 2 different fee options dependant on nationality (Standard fee & CESC fee). The supporting dependant payment pages did have a fee ticked and the payments were consequently successfully processed." (30 December 2014)

15. On 15 August 2014 the Respondent wrote to the Appellant informing her that her application was invalid. The relevant passages read:

> "The Immigration and Nationality (Cost Recovery Fees) Regulations 2011 and the Immigration and Nationality (Fees) Regulations 2011 specify the fee which (subject to a small number of exceptions) is to be paid in connection with an application for the purpose for which you have applied. The fee specified for an application made on this basis is £1,093.00 and £1,093.00 per dependant included with your application. If an applicant does not pay the specified fee, his or her application is invalid.
>
> The specified fee has not been paid in connection with your attempted application which you made by post on 12 August 2014. We do not consider that an exception to the requirement to pay the fee applies in this case, and therefore your application is invalid and we are returning your documents.
>
> The passage next to the box 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.
>
> …
>
> ☒ Although a payment has been made, it is not the correct amount and will be returned shortly. The payment for the main applicant on this application has been declined. Even if the payment for the dependant(s) has been cleared by the bank, this application falls for rejection."

A further box in this letter which was not ticked by the Respondent's official reads:

> "☐ You have not made any payment and have not completed the payment page of the application form …"

16. One of the points made by Mr Chelvan for the Appellant is that the "wrong" box was ticked by the Home Office Official, and therefore the wrong reason was given by the Respondent. He argues that it is wrong, and indeed unlawful, for the Respondent to seek to depart from the reason for invalidity given at the time. I address this below.

17. The Appellant responded quickly to the decision that her application was invalid. She made contact with her bank, visiting her branch in Ilford to find out what had happened. The bank wrote a letter "To whom it may concern", dated 20 August 2014, which we have seen. The letter confirms that there was no attempt to debit the Appellant's account of £4,272 (the total fee for all four applicants) but that the amount of £3,279 (for the other three applicants) had been "taken with no problem". The relevant bank statement confirms that the latter sum was paid out on 15 August, leaving a balance of £4,248.82. In other words there were ample funds to cover the whole amount, had payment been sought. For myself, I can understand why the Appellant was puzzled to be told this was a "bank rejection" case. However, as we have seen, the point had already been made that she had failed to give the relevant

authority. The matter would have been clearer had the GCID notes been disclosed earlier.

18. The Appellant then submitted a further application. I pause to note that, in written submissions, Mr Chelvan sought to suggest that this was not a fresh application but a continuation or amendment of the original application. This was not a point he sought to pursue in oral argument, and in my view he was correct in that. The suggestion is quite untenable. This was a fresh application. The importance of the point is that this second application was made after the Appellant's leave to remain had expired, and it is agreed that for that reason she has no right of appeal to a Tribunal.

19. This second application was valid, and was accepted as being valid. However, it was rejected on the merits. The Respondent's refusal was recorded in a letter of 21 October 2014. The Appellant had provided no evidence that she had been continuously engaged in business activity since before 11 July 2014, or no evidence sufficient for the requirements of paragraph 41-SD(e)(iii)(1) of Appendix A to the Immigration Rules.

20. In a separate letter of 21 October 2014, the Respondent rejected representations on behalf of the Appellant to the effect that her original application should have been treated as subject to the principle in *Basnet*.

Procedural History

21. The Appellant initially challenged the Secretary of State's decision on the validity of her first application by way of a judicial review claim before the Upper Tribunal on 19 January 2015. The Respondent filed an Acknowledgment of Service in March and UTJ Rintoul considered the matter on the papers and refused permission to apply for judicial review on 6 August 2015. UTJ Rintoul concluded that it was unarguable that the Appellant had made a valid application for leave to remain before her expiry of her leave and further concluded that it was unarguable that she was entitled to a right of appeal in respect of that application. He went on to conclude that the decision to refuse the second application on its merits was arguably not unlawful. The Appellant filed a renewal notice with the Upper Tribunal on 12 August 2015 but these proceedings were then stayed for three months by consent in September 2015. Subsequently, on 14 January 2016 they were struck out by UTJ Perkins. The September order had stipulated that within three months of the end of the stay the Appellant would inform the Tribunal if she wished to proceed to an oral permission hearing. That had not been done.

22. In the meantime, the Appellant also sought to challenge the decision that the original application was invalid by way of an attempted appeal to the F-tT. That was filed on 17 December 2014, that is to say a month before the issue of the judicial review claim. I shall describe this as an appeal, although of course the right of appeal is heavily in issue.

23. The appeal was heard by Judge Lewis in the F-tT on 21 October 2015. The Appellant's representatives did not inform the F-tT that UTJ Rintoul had already held the Appellant had no right of appeal from this decision.

24. The issue of right of appeal was addressed again as a preliminary issue before the F-tT. Judge Lewis noted that the Appellant's representative submitted that:

> "*.. due authorisation to collect the specified fees for the principal Appellant and her dependents was appropriately and accurately included with the applications* [emphasis added]; furthermore it was noted that the Respondent had been able to collect payment of £3279 (being the monies due in respect of the dependants), and that given that sufficient funds were in the relevant account at the time there was no reason why there should have been any failure of payment by the Appellants' bankers. The inference was that the Respondent had in error failed properly to attempt to collect the full fee despite due authorisation."

On that basis, the Appellant's representative relied upon the guidance in *Basnet*.

25. In February 2015, the F-tT had given directions that "respondent to provide evidence of steps taken to access fee from the Appellant's bank account … immigration judge to determine the issue of validity on the evidence provided by the Respondent…" Judge Lewis noted (paragraph 8) that the Home Office had made no response to those directions and then recorded (paragraph 9) that the Home Office Presenting Officer, Mr Williams, "accepted that he was not in a position to identify any evidence or otherwise advance any submission such as to overcome the evidential burden on the Respondent identified at paragraph 1 of the headnote in *Basnet*".

26. In those circumstances the F-tT Judge accepted "that a valid fee was submitted with the applications made prior to the expiry of the Appellant's previous immigration leaves (*sic*) and that accordingly those applications were made "in time" and the decisions of the Respondent do indeed attract a right of appeal".

27. F-tT Judge Lewis went on to consider the reasons for which the Respondent had rejected the second application as if they arose in respect of the first application. Briefly, he concluded that it was "implicit" that the material submitted proved that the leaflet and business cards concerned were in use prior to 11 July 2014. In his conclusion he relied on oral evidence given before him by the Appellant.

28. The Respondent appealed to the Upper Tribunal. Judge Hanbury gave a decision and reasons on 2 June 2016. It is this decision which is challenged before us. Judge Hanbury noted that on the day before the hearing began, the Secretary of State submitted a skeleton argument accompanied by additional papers revealing the judicial review proceedings which had been taken and their result. Judge Hanbury was highly critical of the Appellant's representatives for not informing the immigration judge below that there had been an unsuccessful application for judicial review and a ruling that there was no jurisdiction for a statutory appeal.

29. In addressing the significant argument as to the validity of the first application of 12 August 2014, Judge Hanbury indicated that he had been referred to the case of *Ved and Another (Appealable Decisions: Permission Application: Basnet)* [2014] UKUT 150 (IAC), [2014] IMMAR 868. That decision, it was said, indicated that the principles and approach outlined in *Basnet* depended on there being "an appealable

immigration decision" (UTJ Hanbury, paragraph 19). Judge Hanbury also made reference to the decision in *Mitchell v SSHD* [2015] UKUT 00562. On the basis of these arguments, the Upper Tribunal permitted the Secretary of State to address the jurisdictional point in the course of the appeal.

30. In his conclusions on the jurisdictional point and the application of *Basnet*, Judge Hanbury stated the following:

> "32. It is now appropriate to consider the merits of the newly inserted ground of appeal. I have been taken to the case of *Basnet* the applicant completed the application for leave to remain correctly. The fee was not taken from her bank when requested. It seems that the applicant had sufficient funds in his account to pay the specified fee but due to some error the Home Office was unable to process the payment. The Upper Tribunal decided that it was for the Home Office in such circumstances to prove that an application was not "accompanied by the specified fee".
>
> 33. Here, as Mr Jarvis submitted, the facts were different. The first appellant did not pay the correct fee, indeed, she failed to tick the box on the form specifying that the correct fee could be taken from her account or from her credit card. This may well have been deliberate because she also failed to specify the payment of the correct fee when she appealed to the FTT. The facts are much closer to those in the case of *Virk* [2013] EWCA Civ 652. In that case, the respondent took the "jurisdiction" point before the Upper Tribunal but had not taken the point in the FTT. It was held that she was entitled to do so. The important principle which emerges from that case that it is not possible to vest a Tribunal with jurisdiction when it lacks such jurisdiction. The Tribunal is a creature of statute. The Court of Appeal in that case set aside the decision of the FTT and substituted its decision to dismiss the appeals.
>
> 34. The first appellant came to the UK as a Tier 4 Student Migrant. As a result of various subsequent applications he had valid leave until 13 August 2014 which was statutorily extended by virtue of Section 3C of the Immigration Act 1971. However, when she made an invalid application as a Tier 1 Entrepreneur on 12 August 2014 (the application form on which she did not tick a box stating that she was prepared to pay the correct fee) she had only one day left of valid leave. The leave expired on 13 August 2014 so that by 15 August 2014 the application had been correctly rejected by the respondent. At that point she had no valid right of appeal against that decision. The subsequent application on 21 August 2014 which was refused on 21 October 2014 on the grounds that the evidential criteria were not met triggered the present appeal to the FTT and subsequent appeal from the FTT by the respondent to the Upper Tribunal. The respondent set out fully

> her reasons for refusing to entertain the first application in a letter dated 15 August 2014. I find that the FTT did not have jurisdiction and, following the case of *Virk,* it follows that despite the fact the point was not taken before the FTT, this is a valid argument which the respondent is entitled to take before this Tribunal.
>
> 35. I would add that the inclusion of the correct fee with the second application is irrelevant since by that point the first appellant had no valid leave, hence no right to appeal. Had the original application been accompanied by the correct fee (i.e. the appellant had ticked the correct box) she would have had a right of appeal.
>
> 36. It was argued that the result was unfair but this point is covered by the authorities referred to by Mr Jarvis. Had the fault been the respondent's or the appellant's bank she would have been covered by the *Basnet* principle.
>
> 37. I am reinforced in my view that the FTT did not have jurisdiction by the fact that Upper Tribunal Judge Rintoul found the point "unarguable" when he considered an application for judicial review against the decision to reject the initial applications (i.e. the first application). Upper Tribunal Judge Rintoul considered the unfairness point but found it also to be unarguable because the first appellant had not ticked the correct box."

The Rules

31. The Immigration Rule in force at the time of the decision and subsequent hearings, reads as follows:

> "34A. Where an application form is specified, the application or claim must also comply with the following requirements:
>
> (i) Subject to paragraph A34 the application or claim must be made using the specified form,
>
> (ii) any specified fee in connection with the application or claim must be paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes, as applicable,
>
> (iii) any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified.
>
> …
>
> 34C. Where an application or claim in connection with immigration for which an application form is specified does not

> comply with the requirements in paragraph 34A, such application or claim will be invalid and will not be considered.
>
> Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day."

32. The Appellant seeks to rely on paragraph 245AA, paragraph 41-SD of Appendix A of the Immigration Rules, that is to say the "evidential flexibility" policy. The text of this Rule has gone through several evolutions, and it appears that the text supplied to us in the course of the hearing was an anachronistic version. The sequence is analysed in *Mudiyanselage* at paragraphs 12 to 21. The version amended in October 2013 would appear to have been current thereafter and applicable at the time of this decision. The relevant text reads:

> "**245AA Documents not submitted with applications**
>
> "(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
>
> (b) If the applicant has submitted specified documents in which:
>
> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
>
> (iii) A document is a copy and not an original document; or
>
> (iv) A document does not contain all of the specified information; the decision maker may contact the applicant or his representative in writing, and request the correct documents. Such a request will only be made once, and the requested documents must be received at the address specified in the request within 10 working days of the date of the request.
>
> the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address

> specified in the request within 7 working days of the date of the request.
>
> (c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
>
> (d) If the applicant has submitted a specified document:
>
> (i) in the wrong format; or
>
> (ii) which is a copy and not an original document; or
>
> (iii) which does not contain all of the specified information, but the missing information is verifiable from:
>
> (1) other documents submitted with the application,
>
> (2) the website of the organisation which issued the document, or
>
> (3) the website of the appropriate regulatory body;
>
> the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b)."

33. The Guidance Notes have already been referred to above.

The Submissions

34. The Appellant argues that it was wrong for the Upper Tribunal to permit the Respondent to take the jurisdictional point, given that it had in effect been abandoned by the Presenting Officer below, and that the grounds of appeal from the F-tT did not include the jurisdictional complaint. As to the decisions in *Ved* and *Mitchell (Basnet Revisited)* [2015] UKUT 562 (IAC), Mr Chelvan says the facts in those cases were distinguishable from the instant appeal. He says the facts in *Basnet* were comparable, and *Basnet* should be followed.

35. Further, Mr Chelvan argues in a broader way that rejection of the first application as invalid was unreasonable, unfair, irrational and/or disproportionate. He says the necessary information in order to progress the application was present in the

Appellant's form, even though she failed to tick the relevant box. There was no question of ignorance on the part of the Respondent: the Home Office knew perfectly well that the Appellant was Pakistani, not Turkish or Macedonian. It was therefore clear that the relevant fee was £1,093 not £1,038. The payment details were otherwise filled in properly. The evidential flexibility policy, and the requirements of fairness and proportionality, should have meant that the application was treated as valid, and the Appellant asked to put a tick in the relevant box. That was particularly so where the point was conceded by the "very experienced" Presenting Officer before the F-tT.

36. Mr Malik for the Respondent argues that the Respondent could not be debarred from taking the jurisdictional point before the Upper Tribunal. Such points are fundamental. The "tick in the box" is not a mere formality but the necessary authority to the "commercial partner" of the Respondent, who is given the detached financial pages of such application, to process payment separately from consideration of the merits of an application. The omission is not trivial, and its importance is heavily emphasised in the Notes of Guidance to the Applicants and in the form itself. The "evidential flexibility" policy in force at the time (and quoted above) could not permit such application.

Conclusions

37. The starting point is that the Respondent could not be precluded from taking a jurisdictional point because it had not been taken before the F-tT. There either is or is not jurisdiction before tribunals, which are creatures of statute. Jurisdiction cannot be created by consent or waiver of a point, never mind a failure by the Secretary of State to take the point before the F-tT.

38. It is accepted that the PBS system is as I have described it above: detailed, objective and bureaucratic. It is intended to reduce the exercise of discretion. The system promotes clarity over flexibility. These characteristics are congruent with a system which must cope with a very large number of applications handled by officials who are trained, but are not lawyers. As was said by Underhill LJ in *Mudiyanselage*:

> "56. …The clear message of those authorities, including *Mandalia*, is that occasional harsh outcomes are a price that has to be paid for the perceived advantages of the PBS process. It is important not to lose sight of the fact that the responsibility is on applicants to ensure that the letter of the requirements of the PBS is observed: though that may sometimes require a good deal of care and attention to detail, because of the regrettable complexity of the Rules, it will normally be possible to get it right."

39. Here the Appellant failed to give authority to transfer the relevant fee in the form specified. The reason for the specification is revealed by the facts of this case: the fee parts of the form are separated off and sent to the "commercial partner". Given that fairly large sums of money are involved, I do not find it at all surprising that there is a clear and specific procedure for authorisation: anything else would be a likely source of confusion and risk. I see nothing unfair or disproportionate about such a process and certainly nothing unlawful about it.

40. Nor do I see that correcting such an error could possibly fall within the "evidential flexibility" policy as set out above. This is not "missing information" which is present in other parts of the form. It is a missing authority.

41. The problem was compounded by the extreme lateness of the application. The Respondent's officials are to be commended as to the speed of their reaction: the Appellant knew of the problem within three days. Had she applied a week before the end of her leave rather than on the last day, this problem would have been resolved in time. I see nothing unfair or disproportionate about the process.

42. I also consider that there was a clear obligation on the Appellant's representatives to draw the attention of the F-tT to the existence of the stayed judicial review proceedings and the extant Ruling of Judge Rintoul. The Respondent's representative should also have done so, if he had been informed of the matter, but that does not lessen the obligation of the Appellant's lawyers to have done so. Had that happened, it is very likely that events before the F-tT would have taken a different course.

Basnet

43. *Basnet* must be considered alongside *Mitchell (Basnet Revisited)* [2015] UKUT 00562 (IAC).

44. As the decision in *Basnet* itself makes clear, no right of appeal arises unless the applicant makes a "valid application within his period of leave", see paragraph 10. In *Basnet* itself, the UT found that the Applicant had made a valid application. He had done all that he should do, including placing a tick in the relevant box authorising payment, and having the correct funds available. However, the payment had not been made. The F-tT in that case had held that, because the payment had not been made, the application was invalid. The UT held that was an error:

> "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."

45. They then turned to the approach to evidence where payment had not been successfully processed. At the time of the decision in *Basnet*, the Respondent's system involved the early destruction of financial records, with the consequence it was difficult or even impossible to establish what had gone wrong:

> "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."

46. I pause to observe that, even on the facts in *Basnet* the "evidential burden" only shifted because the Appellant gave evidence that he had authorised payment, and was in funds, and crucially because the Respondent's system destroyed the evidence which would corroborate or contradict that evidence. It was in those circumstances that the Tribunal declined to "assume that processing is infallible" and found the application to have been valid.

47. The Respondent then altered their system of record-keeping to retain the copy forms for eighteen months (as here). In *Mitchell (Basnet Revisited)*, the Appellant gave evidence that the payment mandate in the application had been signed, although she did so only at a late stage: see paragraph 5. The Upper Tribunal pointed to a number of differences of fact between *Mitchell* and *Basnet*, including the late assertion of proper authorisation, but pointed out that there had been an inconsistent earlier representation by her then solicitor: see paragraph 8.

48. The Upper Tribunal in *Mitchell* went on to address a similar submission to that advanced here, and rejected it:

> "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."

49. In my view, the approach of the Upper Tribunal in *Mitchell (Basnet Revisited)* was entirely correct. It is only when an Appellant can demonstrate that he or she has taken the necessary steps to authorise and effect payment that it falls to the Secretary of State to show, by further evidence, that the application was nevertheless invalid on the ground that the application fee was not "paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes", as Rule 34A stipulates.

50. In this case, the Appellant could not do so, because she did not authorise payment. She could have done so, and if she had, it would have been effective, since the funds were available. If the error had been made earlier, it could have been corrected. But the error existed, there was no authorisation of payment, and it was all done at the very last minute. The result was an invalid application and no right of appeal to the Tribunal. The F-tT had no jurisdiction to hear an appeal. Therefore, the decision of the Upper Tribunal on jurisdiction was correct.

51. Nor can the validity of the application be saved by the policy of "evidential flexibility", for the reasons given by the Respondent. It is true that the information in the remainder of the form would have indicated that the appropriate fee here was £1,093. But that was not the point. This was not a case of missing information, a missing sheet in a sequence of bank statements or something similar. This was a missing authorisation. In any event, as this Court ruled in *Mudiyanselage* at paragraph 54:

> "… there is no longer a general policy to allow correction of minor errors: evidential flexibility will only apply in the particular cases provided for by paragraph 245AA."

52. The Appellant has no permission to appeal the decision on the Second Application, as the ruling of Longmore LJ makes clear.

53. Hence, I would dismiss this appeal.

Lord Justice Baker:

54. I agree.

Lord Justice Lindblom

55. I also agree.