Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00130/2014**

THE IMMIGRATION ACTS

Heard at Field House, London **Determination Promulgated**
On 16 April 2015 **On 1 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MUHAMMAD WAQAS KHALID

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms H Price instructed by Addison & Khan Solicitors
For the respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is Muhammad Waqas Khalid, a national of Pakistan. He appealed to the First-tier Tribunal against the decision of the Secretary of State dated 4 December 2013 to refuse his application for leave to remain as a Tier 4 (General) Student Migrant under the Points Based System. Judge of the First-tier Tribunal Braybrook dismissed his appeal. He now appeals with permission to this Tribunal.

2. The background to this appeal is that the appellant entered the UK on a Tier 4 (General) Student Migrant in April 2011 with leave to enter until 30 October 2012. He applied to extend his leave before the expiry of his leave to enter, electing to pay the

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specified fee through a bank card. That application was rejected by the respondent as invalid in a letter from the respondent dated 17 December 2012 on the basis that the required fee had not been paid. The appellant made a fresh application on 21 December 2012. This time the fee was collected from his bank account. That application was refused on 4 December 2013 and the appellant was informed that he had no right of appeal as the application had been made out of time. The application was refused because the bank statements submitted, which were the same as those submitted with the first application and ended on 16 October 2013, were, by the time of the second application, dated more than a month prior to the date of the application and the appellant therefore failed to gain the required 10 points for maintenance. The appellant lodged an appeal which processed by the duty Judge as a valid appeal.

3. At the hearing in the First-tier Tribunal the First-tier Tribunal Judge had documentation from the respondent in relation to the payment of the fee [4]. The Judge did not make any finding as to whether the first application had been made in time. The Judge noted however that the appellant's representatives conceded that the appellant could not succeed under the Immigration Rules and the Judge considered the appeal under Article 8 of the European Convention on Human Rights. He found that any interference to the appellant's private life as a result of the delay by the respondent in considering the application was proportionate to the legitimate objectives set out in Article 8.2.

4. The appellant applied for permission to appeal against the First-tier Tribunal Judge's decision on the grounds that the Judge erred in failing to make any finding on the preliminary issue as to whether there was a valid right of appeal and failing to consider the evidence submitted with the October application. It is contended that he erred in that, after having assumed jurisdiction and accepted that the application was made in time, he failed to assess the appeal on the basis of the evidence submitted with the original application. It is further contended that the Judge erred in failing to consider evidence as to the maintenance funds held by the appellant's father. Finally, it is contended that the Judge misdirected himself in the context of Article 8 in failing to consider whether the appellant had a legitimate expectation as a result of the time and money he had invested in his education in the UK.

5. Permission to appeal was refused by the First-tier Tribunal and the application was renewed to the Upper Tribunal._On 18 February 2015 Upper Tribunal Judge Hanson granted permission to appeal to the Upper Tribunal on the basis that it is arguable that the decision of the First-tier Tribunal Judge is bad for want of jurisdiction because, as the appellant made an out of time application for leave to remain, he had no leave to remain at the time the application was made and in those circumstances a refusal to grant leave is not an immigration decision as defined in section 82 of the Nationality, Immigration and Asylum Act 2002 and so there is no right of appeal. The parties were given an opportunity to respond to Upper Tribunal Judge Hanson's preliminary view in relation to jurisdiction and he sought their consent to the determination being set aside and the appeal being disposed of by being declared invalid for want of jurisdiction.

6. In the rule 24 response the respondent consented to the determination being set aside. However in submissions dated 11 March 2015 the appellant objected to this proposal contending that the respondent had not discharged the burden of proof to establish that the application was made out of time in accordance with the decision in Basnet (validity of application – respondent) [2012] UKUT 00113(IAC). The matter therefore proceeded to a hearing.

7. At the hearing before me Mr Melvin accepted that the appellant had leave to remain when he made the application in October 2012. The issue is therefore whether that was a valid application. Mr Melvin submitted that there was evidence before the First-tier Tribunal that the respondent had attempted to obtain the fee from the appellant's bank account on 2 November 2012 but that the transaction failed because the authorisation was declined. Ms Price submitted that the appellant had not seen these documents prior to the Upper Tribunal hearing. However the First-tier Tribunal Judge clearly referred to the documents at paragraph 4 of the determination so it was before him. The appellant was represented by counsel at the hearing and there was every opportunity to deal with this issue. The grounds of appeal to the First-tier Tribunal clearly deal with this issue. This was obviously an issue the parties were aware of in advance of the hearing before the First-tier Tribunal. I do not accept that the appellant had not previously seen this evidence.

8. Ms Price submitted that the appellant should have been provided with this evidence in 2012 when the payment was declined so that he could have provided information from the bank. She relied on regulation 17 of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007 (SI 2007, No 882) and submitted that the appellant should have been provided with an opportunity to correct the situation within 28 days of the payment being declined. However regulation 17 refers to the requirements of regulation 16 (1) which prescribe procedures in relation to the form and application but do not refer to the payment of the fee.

9. Ms Price referred to the Immigration and Nationality (Cost Recovery Fees) Regulations 2011. This governs the payment of fees for applications for leave to remain. Regulation 38 provides:

> "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."

10. Accordingly the application is not valid if not accompanied by the specified fee. According to the documents submitted by the respondent the appellant elected to pay the fee of £394 through a visa/mastercard/amex card. He gave the card number (part of which is redacted on he copy before me) and signed the form. The respondent submitted a transaction report showing that payment was declined on 2 November 2012 at 12.13.

11. The Lloyds Bank statement submitted by the appellant shows that the appellant lodged £400 into his account on 2 November 2012. There is no record as to the time at which the funds were lodged. The last transaction prior to that lodgement was on 16 October 2012 following which the balance was £5.77. It is therefore clear that if the money was lodged after 12.13 the appellant did not have the required funds to cover the fee transaction. The appellant has not shown when he lodged the funds but on the basis of the

transaction report submitted by the respondent it is unlikely that he lodged the funds before 12.13. In these circumstances I find that the respondent has established that she attempted to obtain the fee on 2 November 2012 but that the appellant did not have the required funds. In those circumstances the application was properly considered to be invalid and returned to the appellant. As the subsequent application made by the application was after the expiry of his leave to remain it does not attract a right of appeal because a refusal to grant leave is not an immigration decision as defined in Section 82 of the 2002 Act.

12. As stated by Upper Tribunal Judge Hanson in his grant of permission to appeal if jurisdiction does not exist in law it cannot be 'conferred' or 'accepted'. In Virk & Others v Secretary of State for the Home Department [2013] EWCA Civ 652 it was held that although the Secretary of State had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain an application for leave to remain, the Upper Tribunal was entitled to dismiss the subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below. The Court of Appeal said at paragraph 23;

> "Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point. Although, as Longmore LJ pointed out, decisions taken without jurisdiction may in due course become irreversible, that point has not been reached in this case. It was, in my judgment, open to either the FTT or the UT to take the point about jurisdiction notwithstanding the failure of the Secretary of State to raise it herself."

13. In these circumstances I find that the Duty Judge erred in finding there was a valid appeal before the First-tier Tribunal and that Judge Braybrook erred in not considering this issue on the basis of the evidence before him. I therefore set aside the decision of First-tier Tribunal Judge Braybrook in its entirety.

14. In these circumstances I find that the Judge made a material error of law by failing to consider whether he had any jurisdiction to hear the appeal before purporting to dismiss it. I find that there was no jurisdiction for all the reasons set out above and the decision of the First-tier Tribunal is accordingly set aside and is remade by dismissing the appeal.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.

There was no jurisdiction to hear the appeal and the decision of the First-tier Tribunal is set aside and remade by dismissing the appeal.

Signed Date: 29 May 2015

A Grimes
Deputy Judge of the Upper Tribunal