Upper Tribunal
(Immigration and Asylum Chamber)

Ahmed & Ors (valid application – burden of proof) [2018] UKUT 53 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 7 November 2017	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE BLUM

Between

ZAHOOR AHMED, GHAFOORA KHANUM, IRFAD AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Nicholson, Counsel, instructed by Osmans Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

(1) Central to the analysis in Basnet (validity of application – respondent) [2012] UKUT 113 (IAC) is the existence of a further procedure undertaken by the Secretary of State in order to process payment in relation to which applicants are not privy and over which they have no control. As such, it remains appropriate for her to bear the burden of proof.

(2) The fact that an invalidity decision was not immediately challenged may be relevant in determining whether the legal burden, including an initial evidential burden requiring the Secretary of State to raise sufficient evidence to support her invalidity allegation, has been discharged.

(3) Whether the Secretary of State ultimately discharges the legal burden of proof will depend on the nature and quality of evidence she is able to provide, having regard to the timing of any request for payment details and the reasons for any delay, balanced against any rebuttal evidence produced by an appellant.

DECISION AND REASONS

1. These appeals fall to be determined under the appeal regime in force prior to the amendments wrought by the Immigration Act 2014. The appellants can appeal on the grounds, *inter alia*, that the respondent's decisions were not in accordance with the immigration rules, and that they were otherwise not in accordance with the law (section 84 of the Nationality, Immigration and Asylum Act 2002).

2. The appeals raise issues concerning the burden of proof in respect of applications deemed invalid by the respondent. These issues were first considered in *Basnet (validity of application - respondent)* [2012] UKUT 00113 (IAC), and revisited 3 years later in *Mitchell (Basnet revisited)* [2015] UKUT 00562 (IAC).

Summary of *Basnet*

3. Before his extant leave was due to expire on 28 May 2011 Mr Basnet applied for further leave to remain. On 16 June 2011 he was informed by letter that his applicated was invalid. The Respondent's letter is in identical terms to that in the instant appeal and is reproduced below.

> 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. Although Mr Basnet resubmitted his application the following day it was refused as he no longer had valid leave to remain and was unable to demonstrate that he had "an established presence studying the UK." He quickly lodged a notice of appeal. Although the First-tier Tribunal maintained that his initial application was invalid and that it had no jurisdiction, permission was granted to appeal to the Upper Tribunal and the matter came before the then President, Mr Justice Blake, and Upper Tribunal Judge Macleman. The Upper Tribunal concluded that it had jurisdiction to consider the invalidity issue and that the First-tier Tribunal erred in holding that non-payment was fatal to the validity of the application.

5. The Tribunal then examined the respondent's procedure for processing postal applications, which was based on the explanation given by the Presenting Officer. It noted that fees were not processed when an application was initially received, and that there were no instructions that applications should be processed before the expiry of an applicant's leave. If the fee could not be collected, for whatever reason, a standard letter was sent out and the application form and documents returned with the exception of the page providing for payment of the fee which, for security reasons, was shredded. This procedure gave an applicant no opportunity to check the accuracy of the billing data and resubmit the application before his leave expired, or to check whether the billing data was accurate after the processing failed. Nor was any evidence-based reason provided as to why the processing failed. No record was kept of what went wrong with the payment that could be provided to the tribunal determining invalidity issues.

6. The Upper Tribunal observed that the best evidence of whether an application was accompanied by the fee was the original information page supplied by an appellant, and that the best evidence of why an attempt to process a payment failed would be the record maintained by the processor. It concluded that the respondent's system put both these items of evidence beyond future reach of either party and of the tribunal.

7. At paragraph 27 the Upper Tribunal considered the burden of proof.

> We now 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 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.

8. At paragraph 28 the Tribunal stated,

> 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 … 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.

9. It was accepted in *Basnet* that the appellant had at the material time sufficient funds in his bank account to cover the entire fee for the duration of the relevant period.

Summary of Mitchell

10. Ms Mitchell had lawfully resided in the UK since November 2002 and had leave valid until 31 January 2010 when she made an in-time application for further leave to remain. On 18 February 2010 she was informed that her application was invalid as the payment mandate section on her application form was not signed. A new application was made on 1 March 2010 and Ms Mitchell was eventually issued with further leave to remain on 24 September 2010.

11. She made a further in-time application for leave to remain which was refused in October 2013. In an appeal against this decision she contended, for the first time, that she met the 10 years long residence requirements as she had signed the mandate section in her 2010 application. The respondent's position was that Ms Mitchell had no leave between 31 January 2010 and 24 September 2010. The long residence claim depended on whether her application made in January 2010 was lawfully rejected as being invalid.

12. The Upper Tribunal, consisting of the Vice President and Upper Tribunal Judge Macleman, found there were "a number of striking differences" between the circumstances of Mr Basnet and Ms Mitchell. There was a delay of some years by Ms Mitchell in asserting that she had in fact signed the authorisation. Nearly contemporaneous evidence referred to the absence of any signature and there was no challenge to the invalidity decision at the time. Unlike the application in *Basnet*, where the form submitted was 'good on its face' and where the difficulties arose in attempting to collect the fee on the strength of the information provided in the form, Ms Mitchell's application form was not 'good on its face' as the mandate was not signed. The crucial events in *Basnet* happened after the submission of the form and were solely within the knowledge of the Respondent. Accordingly, the Upper Tribunal did not consider that similar reasoning applied when the alleged defect was apparent on the face of the form itself, "and so was within the knowledge of the applicant." Where the application was, on its face, insufficiently completed, the burden of proof was not on the Secretary of State.

13. At paragraph 14, in what is strictly *obiter* comment, the Upper Tribunal referred positively to an affidavit, intended for use in judicial review proceedings in another case, describing the Secretary of State's accounting processes. Postal applications that are accompanied by a completed payment form are directed to the payment processing centre which inputs details from the payment page 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.

14. This was described "… in order to make clear and public what the position is in relation to evidence of the processing of payments." Generally speaking, the respondent will be in a position, within 18 months, to demonstrate that payment was not taken, and an applicant will be able to obtain the payment page within that period. An applicant could, in any event, take up the matter with his or her bank without involving the respondent at all. The Tribunal considered this further information "… may be regarded as casting some factual doubt on the conclusions in *Basnet*" as it was assumed in the earlier case that the respondent 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. Based on the affidavit this was no longer the case, and may not have been true at the time of *Basnet.* "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."

Factual background of the present appeals

15. The appellants are all nationals of Pakistan. The 1st appellant (DOB 2 August 1978) is the husband of the 2nd appellant (DOB 5 July 1981), and they are both the parents of the 3rd appellant (born in 2009). The 1st and 2nd appellants have another child born in 2012 who is not involved in these proceedings.

16. The 1st appellant entered the United Kingdom on the 14 May 2004 as a student. He was granted further periods of leave to continue his studies. The last period, issued on 30 April 2012, was valid until 22 May 2014. The 2nd appellant entered the UK on 18 March 2006 as a dependent of the 1st appellant. She was subsequently granted further leave to remain in line with that of her husband. The 3rd appellant was born in the UK and was granted leave to remain as a dependant on 6 August 2010.

17. On 31 August 2012 the 1st appellant's leave as a Tier 4 (General) Student was curtailed so that it expired on 30 October 2012. On 9 October 2012 the 1st appellant applied for leave to remain as a Tier 4 (General) Student, with the 2nd and 3rd appellants as his dependants. In January 2013 the respondent treated the applications as invalid and issued a letter in the terms described in paragraph 3 of this judgment.

18. Documentation obtained pursuant to a Freedom of Information Act (FOI) request contained two entries relevant to the applications of 9 October 2012. There is a screen print stating "PUK Payment Error – 17 October 2012". There is also an entry, dated 19 October 2012, on the General Case Information Database (GCID) database stating, "The application is potentially invalid due to – fee declined."

19. The 1st appellant lodged a further application for leave to remain as a Tier 4 (General) Student on 19 February 2013 with the other appellants as dependants. These applications were refused in decisions dated 23 January 2014 because the bank statements accompanying the resubmitted applications dated from more than one month before the applications were submitted (had the 9 October 2012 applications been accepted as valid, this requirement would have been met).

The First-tier Tribunal decision dated 20 October 2015

20. Appeals were lodged against the decisions of 23 January 2014. On 20 May 2014 the appellants issued a Statement of Additional Grounds, pursuant to section 120 of the Nationality, Immigration and Asylum Act 2002, asserting that, as the 1st appellant had achieved 10 years continuous lawful residence, he met the requirements for leave to remain under paragraph 276B of the immigration rules (relating to long residence).

21. The appeals were allowed by the Judge of the First-tier Tribunal Kennedy in a decision promulgated on 20 October 2015. The key issue at the appeal hearing was the validity of the 9 October 2012 applications. If valid, the appellants' leave would continue by virtue of section 3C of the Immigration Act 1971 and the 1st appellant would have accumulated over 10 years continuous lawful residence.

22. In the absence of a Presenting Officer the judge heard evidence from the 1st and 2nd appellants concerning the manner in which the 9 October 2012 application form was submitted, and from a friend, Mr Muhammad Asif, who said he checked the contents of the application form. The appellants asserted that they had sufficient funds available via credit cards to cover the fees.

23. Relying on the decision of *Basnet* the judge found that the respondent failed to discharge the burden of proving that the applications were unaccompanied by the appropriate fees. The judge stated,

> There was no meaningful evidence before the tribunal to show that the appellants failed to provide the authorisation necessary for the respondent to receive payment

from their credit card provider or that payment was declined by the credit card company because there was [sic] insufficient funds in the account.

…

The appellant's immigration history shows that they are experienced at making application [sic] for leave to remain. The 1st appellant, in particular, appeared to be intelligent and well educated. I find it entirely credible that they would have taken care when completing their application forms and would have understood the importance of ensuring that the proper fee was paid.

24. The judge then considered credit card documentation produced by the appellants relating to their total spending over a 12-month period. The judge found that the entries did not suggest that the 1st appellant was unable to control his spending, was disorganised or fell significantly behind in making repayments.

25. At paragraphs 32 and 33 the judge stated,

In any event, the onus is on the respondent and I find that she has failed to demonstrate the basis upon which it is said that the appellants failed to make payment of the fee. The file produced does not provide an answer to this question. While it is possible that a Presenting Officer would have been able to highlight something in the computerised records system that might cast more light on what happened, my own careful reading of the file does not allow me to draw any meaningful conclusions beyond noting that, on page 426, there is an entry (which appears to be dated 19 October 2012) stating, "the application is potentially invalid due to - fee declined" and on page 430 there is a screen print stating "PUK Payment Error – 17 October 2012".

The entries referred to suggest that the respondent attempted to take payment but was unable to do so. The reference to "payment error" says nothing about the reason for the error. The reference to "fee declined" says nothing about the reason for the payment being declined. It is not hard to imagine a number of reasons why an attempt to take a payment might have failed such as human inputting error, technical issues in the electronic system or failure by the bank to honour the payment for reasons unconnected with the availability of funds in the account. In the absence of more meaningful evidence from the respondent about the manner in which they attempted to process the payment, the credit card details they used when doing so and the reason for their failure, I find it impossible to conclude that the failure in payment was attributable to a deficiency in the authorisation provided by the appellant or a shortage of funds in their accounts. I note the error made by the respondent when attempting to take payment for the appellants second applications, which does not inspire confidence in the system that the respondent operates.

26. The judge concluded that the applications were validly made and that leave to remain continued under section 3C of the 1971 Act. The judge treated the applications made on 19 February 2013 as a variation of the 9 October 2012 applications (applying *JH (Zimbabwe) v SSHD* [2009] EWCA Civ 78) and concluded that the 1st appellant ought to have been granted the Tier 4 (General) Student leave that he had sought given that the bank statements provided with the earlier application met the requirements of the immigration rules, and that the 2nd and 3rd appellants ought to have been granted similar leave as dependants. The judge felt he could not entertain the 1st appellant's submission

that he met the requirements of paragraph 276B because the issue was only raised in response to a section 120 notice and he had no basis for claiming ILR at the time of the decision appealed against.

The Upper Tribunal's decision dated 25 May 2016

27. Although heard on 11 August 2015, the First-tier Tribunal's decision was not promulgated until 20 October 2015. *Mitchell* was promulgated on 8 October 2015. The Respondent obtained permission to appeal to the Upper Tribunal on the basis of the revised assessment of *Basnet*.

28. In a decision issued on 25 May 2016 Deputy Upper Tribunal Judge Shaerf found, through no fault of the judge, that his decision was vitiated by a material error of law as he failed to consider the more nuanced approach identified in *Mitchell*, which rendered his decision unsafe.

29. The Deputy Judge noted the absence of any explanation for the two GCID extracts, and that the 1st and 2nd appellants failed to clearly identify the means of payment tended for the application of 9 October 2012, and to supply sufficient evidence to show that the relevant accounts were in funds for the period 9 – 18 October 2012. The credit card payment records were said to be incomplete for the relevant period and there was said to be an issue as to the appropriate credit card number by reference to a new card that had been issued. At paragraph 22 the Deputy Judge stated,

> The facts as found by the judge at paragraphs 32 and 33 of his decision shall stand but will need to be considered in conjunction with other evidence, some of which I have already identified, through the prism of *Mitchell*.

The decision of the First-tier Tribunal dated 10 January 2017

30. The remitted appeals were heard before Judge of the First-tier Tribunal O'Garro (the FtJ) on 18 November 2016. Having summarised *Basnet* and *Mitchell* the judge stated, (at [21])

> I find, having considered *Mitchell* that the appellant would need to show he had given the correct information regarding his bank/credit card details, that he had sufficient funds in his account and that the credit card he intended to use had not exceeded its limit.

31. The FtJ held that none of this evidence was before the Tribunal. Although the appellants provided letters from Capital One (their Credit Card company) issued in May 2016 indicating that no payments were declined in respect of the credit card accounts from 1 September 2012 to 28 February 2013, the FtJ did not find this assisted the appellants' case as she did not believe their bank/credit card company would have received any notice that the payments did not go through if the reason for the unsuccessful payments was because an incorrect card number was put on the payment page of the application forms.

32. At paragraph 24 the FtJ accepted that there can be human inputting errors, and that the respondent had in fact made an error when attempting to take payment in respect of the resubmitted applications in February 2013, but stated,

> … it seems to me that in light of the respondent's responsibility, all efforts would have been made to check the card numbers given by the appellant to ensure that there was no mistake with the numbers given before submitting for payment.

33. At paragraph 25 the FtJ found it unfortunate that the appellants did not retain copies of their application forms which would have contained the payment page, and that it was now too late to obtain a copy but, given that the burden of proof was on them to demonstrate that they had submitted correct card details, that they had sufficient funds on their card account, and that they had not gone over their card limit, they failed to discharge the burden as any one of these could have led to payment being declined.

34. Having concluded that the respondent was entitled to hold the 9 October applications as invalid, the 1st appellant was unable to demonstrate 10 years of continuing lawful residents under paragraph 276B.

35. The judge went on to consider article 8, both with reference to Appendix-FM and paragraph 276ADE and outside the immigration rules. The judge concluded that the decision under challenge did not breach article 8. The appeals were dismissed.

The grounds of appeal and the error of law hearing

36. The appellants contend that the FtJ misdirected herself as to the scope of *Mitchell* and that it was only where the application was, on its face, insufficiently completed, that the burden of proof fell on them. Only the provision of evidence indicative of this could, it was submitted, shift the burden to the appellants, but the respondent failed to provide any evidence of that kind in the First-tier Tribunal appeals.

37. The grounds additionally contend that the FtJ should have applied the principles enunciated in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702 to the remitted appeal and that she was only entitled to depart from the findings made by the original First-tier Tribunal judge if there was a "good reason" for doing so (as explained by the Court of Appeal in *AA (Somalia) v SSHD & AH (Iran) v SSHD* [2008] Imm AR 241). It was further submitted that the FtJ's approach to the Capital One letters was perverse as the letters rebutted any suggestion by the respondent that the appellants' applications had been refused due to a lack of availability of funds. It was not open to the FtJ to assume that the respondent did not make mistakes as *Basnet* emphasised that there can be no presumption that payment systems are infallible, or even close to infallible. The appellants finally submitted that the judge misdirected herself as to the significance of the 3rd appellant's residence in

the UK in accordance with section 117B(6) and the Court of Appeal decision in *MA (Pakistan) v SSHD* [2016] EWCA Civ 705.

38. On 2 October 2017 Upper Tribunal Judge Pitt granted permission on the grounds relating to the FtJ's approach to the invalidity issue. She noted that the task before the First-tier Tribunal was made more complicated by the changing case law on the correct approach where there is an allegation that an application is invalid and by the upholding of certain findings of fact from the earlier First-tier Tribunal decision. It was arguable that an incorrect approach was taken to these matters.

39. Judge Pitt did not find it arguable that the FtJ erred in concluding that article 8 ECHR was not breached. The FtJ took into account the 3rd appellant's 7-year residence but this did not oblige her to allow the article 8 claim on "reasonableness" grounds. The FtJ gave cogent reasons for her conclusion and the human rights ground was not arguable.

40. At the Upper Tribunal hearing on 7 November 2017 we received no further evidence relating to the respondent's payment procedures. Both parties relied exclusively on the decisions in *Basnet* and *Mitchell*.

41. At the outset of the hearing, and without any prior indication, Mr Nicholson invited us to grant permission on the human rights grounds that had been expressly excluded by Judge Pitt. Mr Nicholson submitted that we had power to amend the grant of permission under the case management powers contained in rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the Procedure Rules) and applied to amend the grant of leave to enable him to challenge the FtJ's decision on human rights grounds. Having retired to consider this application we accepted that the Upper Tribunal does have power, by reference to rules 2 and 5 of the Procedure Rules, to grant permission to argue grounds that were previously refused. We were however entirely satisfied that it was not appropriate to grant the application. Mr Nicholson was unable to offer any explanation why no application had been made prior to the day of the hearing. The overriding objective in rule 2 of the Procedure Rules encompasses procedural fairness and the need to deal with appeals in a timely fashion, and, on the particular facts of this case, the respondent would need more time to consider her position, had permission been granted.

42. Mr Nicholson submitted that the decision in *Mitchell* was limited to its facts and that, generally, the burden remained on the respondent to demonstrate that an application was invalid. He drew our attention to several decisions making positive reference to *Basnet* including *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 00675 (IAC) and *Iqbal & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2015] EWCA Civ 838, where, it was submitted, the Court of Appeal appeared to endorse the *Basnet* principles. Mr Nicholson contended that, in addition to expressly reserving the factual findings at paragraphs 32 and 33 of Judge Kennedy's decision, his other findings, particularly those at paragraphs 27 to 31, were also retained on the basis of the

principles established in *Devaseelan* and that, in any event, these findings of fact were not the subject of the respondent's appeal to the Upper Tribunal in 2016. Mr Nicholson finally submitted that the FtJ was not entitled to reject the letters from the appellants' credit card company as the letters rendered untenable any suggestion by the respondent that the applications had been refused due to a lack of availability of funds, and that the FtJ impermissibly established a presumption that the respondent's payment systems were infallible, contrary to conclusions in *Basnet*.

43. Mr Jarvis submitted that the *Devaseelan* principles were of no application in cases that had been remitted to the First-tier Tribunal after a material error of law had been uncovered, and drew our attention to paragraph 29 of *Devaseelan*. The decision of the Designated Judge, properly understood, disclosed various unresolved factual issues relevant to both parties and that the FtJ was consequently entitled to her findings. Mr Jarvis pointed out that there had been no judicial review challenge to the respondent's invalidity decision dated 18 January 2013 and that the appellants had, by implication, accepted that their October 2012 applications were invalid. He relied on the delay in challenging the notice of invalidity in submitting that the burden rested on the appellants. They could have made enquiries of the processing centre and could have made enquiries of their own bank or credit card company. It was submitted that the *Mitchell* principles applied because evidence could have been obtained by the appellants in support of their claim as to why payment was declined.

Discussion

44. It is apparent from our summaries of *Basnet* and *Mitchell* that distinct and contrasting reasons were given by the respondent in each case for finding the relevant application invalid. *Basnet* was concerned with whether there was valid authorisation in the context of a rejection of payment by an issuing bank. As held in *BE (Application Fee: Effect of Non-payment)* [2008] UKAIT 00089, an application is "accompanied by" a fee if it is accompanied by such authorisation as will enable the respondent to receive the entire fee in question, without further recourse having to be made to the payer. This was affirmed in *Basnet* at [20],

> 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.

In *Basnet* the respondent actually attempted to obtain payment using her payment procedures having received what was, on its face, a completed payment page.

45. *Mitchell* does not concern the procedure for obtaining payment from a bank, but whether the payment mandate section of the payment page was signed. In contrast with the procedure for obtaining payment from a bank or credit card company, which involves a further process in respect of which an applicant has

no involvement and which will only be embarked on if an application appears to be sufficiently completed, there is no further process when determining whether an application is, *prima facie*, sufficiently completed.

46. We have no hesitation in endorsing the conclusion reached in *Mitchell* that, if an application is, on its face, insufficiently completed, the burden of proving its validly remains on an appellant. This stands in marked contrast to a situation where an attempt has been made to obtain payment following the provision of complete payment details. Central to the analysis in *Basnet* is the existence of a further procedure undertaken by the respondent in order to process payment in relation to which applicants are not privy and over which they have no control. As was observed in *Mitchell* (at paragraph 10), once a postal application is received that is, on its face, sufficiently completed, an applicant's involvement in the payment procedure ends and the matter is solely within the knowledge of the respondent (a point emphasised by McCloskey J in *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 00675 (IAC)). Applicants have no involvement in attempts to draw payment from a bank or credit card company using the card details provided. Nor are they provided with the payment page of a returned application deemed invalid. As the crucial events happen after the submission of the application form, and as the respondent is the party asserting that the application is invalid because the issuing bank or credit card company rejected payment, and given that only she is privy to and responsible for the actual attempt to draw payment, it remains appropriate for her to bear the burden of proof.

47. Nothing in the summary of the affidavit considered in *Mitchell* diminishes our conclusion. While we accept that the payment pages of an application are now retained by the payment processing centre for 18 months from the date of receipt, this does undermine the observation in *Basnet* that an applicant has no way of obtaining the payment information received by the respondent. We note that the payment information remains, throughout that period, in the possession of the respondent. It therefore remains the case, as indicated at paragraph 27 of *Basnet*, that the question whether an application was accompanied by accurate billing data can be answered only by the respondent. The summary of the affidavit indicates that, within those 18 months, it is "or should be" possible for an applicant to make an enquiry about a payment process, and, presumably, obtain the payment pages from the respondent. This information would equally be available to the respondent throughout that period.

48. What is required to enable the respondent to discharge the burden of proof (to the balance of probabilities standard) will depend on the nature of the evidence she is able to adduce, and this in turn may depend on whether any request was made by an appellant to obtain the payment details. If, in an appeal, the issue of invalidity arises within 18 months of receipt by the payment processing centre of the payment details, then the respondent will have access to those details. The fact that the invalidity decision may not have been immediately challenged has no bearing on determining which party must discharge the burden of proof, but it may be relevant in determining whether the legal burden, including an initial

evidential burden requiring the respondent to raise sufficient evidence to support her invalidity allegation, has been discharged. If an appellant has the opportunity of requesting the payment details from the respondent but does not avail himself of that opportunity in a timely manner, he cannot then rely on the respondent's inability to obtain those payment details. The reasons for a delay in challenging an invalidity decision or requesting the payment details may therefore be relevant in determining whether the respondent has discharged the burden of proof when considered in conjunction with other relevant evidence.

49. It will be rare in a statutory appeal for the respondent's assertion that an application is invalid to be entirely unsupported by other evidence. The respondent will almost always be able to provide information maintained on the GCID, which will usually include some basic information relating to payment (but not the debit or credit card details). If the GCID notes indicate that payment was declined (which suggests that an attempt to obtain payment was made), and the opportunity of obtaining the payment pages has passed, this may suffice in discharging a preliminary evidential burden, requiring an appellant to then produce evidence that their bank or credit card account had sufficient funds throughout the relevant period or that the credit card limit or transaction limit had not been breached, or that the bank or credit card company did not decline payment. The absence of any such rebuttal evidence may ultimately result in the respondent having discharged the legal burden. The question whether the respondent has ultimately discharged the legal burden of proof will therefore depend on the nature and quality of evidence she is able to provide, having regard to the timing of any request for payment details and the reasons for any delay, balanced against any rebuttal evidence produced by an appellant.

50. As noted in *Mitchell*, an appellant can and should be expected to make inquiries of his or her bank or credit card company to determine whether it received a request for payment and whether and for what reasons payment was declined. If the payment is being taken from a bank account, details of the funds held in that account over the relevant period are clearly relevant, as would be any reasons for a decline of payment. Also of relevance would be evidence that credit or transaction limits of a credit card have not been reached in respect of the relevant period. If a bank/credit card company maintains that no payments were declined, this may be *prima facie* evidence that the payment details used did not relate to that particular account, either because the wrong details were provided by an appellant, or because they were input incorrectly when the processing centre attempted to obtain payment. We endorse the observation in *Basnet* that there can be no presumption that an appellant may have inadvertently supplied incorrect details, just as there can be no presumption that payment systems are infallible.

51. In light of our assessment of both *Basnet* and *Mitchell* we are satisfied that the FtJ erred in law in approaching the issue of invalidity on the basis that the burden of proof rested on the appellants. The respondent's rejection of the 9 October 2012 applications was only based on an allegation that the issuing bank rejected the payment. It was never suggested that the applications were, on their face,

insufficiently completed. Given that the attempt to obtain payment occurred after the submission of the application forms and was a matter solely within the knowledge of the respondent, the burden of proof remained on her. The fact that the challenge to the invalidity decisions was only raised during an appeal against a later decision, while ultimately relevant when assessing whether the respondent has discharged the burden of proof, has no bearing in determining where the burden of proof laid.

52. We are additionally satisfied that the FtJ erred in her approach to the Capital One letters. These letters, which indicated that no payments were declined in relation to the appellants' credit card accounts during the period 1 September 2012 to 28 February 2013, were clearly relevant because the credit card company would have had notice of any declined payment due to lack of funds in the appellants' accounts, which was one of the possible reasons identified by the respondent in her invalidity letter. Likewise, if the appellants had exceeded the maximum transaction limits or the number of transactions permitted, it is highly likely that Capital One would have been aware of this. While the FtJ properly noted that Capital One was unlikely to have any knowledge of an attempted payment if the wrong card numbers had been provided by the appellants, this would be equally true if the respondent had input the wrong card details in her attempt to obtain payment.

53. We are additionally satisfied that the judge materially erred in law by assuming that the respondent did not make mistakes in checking card numbers, and that she impermissibly approached the evidence with this assumption in mind, a point expressly disapproved in *Basnet*. Allied to this finding is a failure by the judge to engage with the evidence provided not just by the appellants but also by their friend, Mr Asif, which was not challenged in the respondent's appeal to the Upper Tribunal and which the FtJ should have taken into account in determining the likelihood of the appellants making a mistake in their application forms or the respondent making a mistake in inputting the credit card details.

54. We see little merit in Mr Nicholson's submission that the *Devaseelan* principles have any application in the context of a remitted appeal. He was unable to identify any authority to support his proposition that, in the context of an appeal remitted by the Upper Tribunal to the First-tier Tribunal, where some specific findings of fact were retained, that all other unchallenged factual findings should also be retained. Such an approach would be contrary to the general underlying purpose of remitting decisions to be considered anew.

Re-making decision

55. With the acquiescence of both parties we indicated at the close of the error of law hearing that, if a material error of law was identified, we would be able to re-make the decision without the need for further evidence.

56. In determining whether the respondent has discharged the burden of proving that the October 2012 applications were invalid we first note that the appellants did not challenge the invalidity decisions by way of judicial review, and that the issue was not raised until May 2014, by which time the payment details, if retained by the processing centre, would have been destroyed. It is therefore impossible to categorically determine whether payment was declined because the appellants provided incorrect credit card details or whether they were input incorrectly by the respondent.

57. We do not however consider that it was unreasonable for these appellants to resubmit their applications rather than challenge the invalidity decisions by way of judicial review. In a great many cases the resubmission of an application may carry a much greater chance of achieving a successful outcome, especially if the resubmission is made within a short space of time. A re-submitted application will often be the most direct and cost-effective means for an applicant to obtain their desired status, especially given the expense and limited scope of a judicial review challenge. Furthermore, although it may have been notionally open to the appellants to have requested the payment details following the invalidity decisions, the knowledge that the details are retained for 18 months had not been publicly disseminated and was not in the public domain until the promulgation of *Mitchell* in October 2015. We additionally note that there was a delay of approximately a year by the respondent in considering the application resubmitted on 13 January 2013.

58. Other than the invalidity letters issued in January 2013, the only other evidence relating to the reasons for the applications being held invalid are the screen-print "PUK Payment Error – 17 October 2012", and the GCID entry, dated 19 October 2012, "The application is potentially invalid due to – fee declined." It is not clear what "PUK Payment Error" means. The entry dated 19 October 2012 suggests that the appellants' credit card company (Capital One) declined the application fees. Given that the payment details would have been destroyed, and the limited evidence available to the respondent, we find that the GCID entry is sufficient to discharge the initial evidential burden and to require the appellants to provide some rebuttable evidence that their applications were validly made.

59. We consider first the documentary evidence relied on by the appellants. They have consistently maintained that their October 2012 applications were accompanied by Capital One credit card details, and this assertion was not challenged in the First-tier Tribunal hearing on 18 November 2016. The Capital One letters dated 2 May 2016 in respect of the credit cards held by the 1st and 2nd appellants, indicated that no payments were declined between 1 September 2012 and 28 February 2013. This is significant as payment would almost certainly have been declined if the credit limits had been breached, or a request for payment exceeded the maximum transaction limits or the number of transactions permitted. The fact that no payment was declined suggests that either the wrong card details were provided to the respondent or the respondent miss-typed the card details when processing the payment.

60. While we are not in any way bound by the factual assessment of Judge Kennedy, we are entitled to take account of the evidence given by 1st and 2nd appellants at the hearing on 11 August 2015, and the unchallenged evidence given by Mr Asif. The 1st and 2nd appellants maintained that they carefully added the credit card details, and verified that the card details were correct. The application forms were then checked by Mr Asif. In his evidence Mr Asif explained that he and the 1st appellant always checked each other's immigration forms because of their importance. The credit card details were part of this exercise. We additionally note that the 1st appellant is educated and was already experienced at making application for further leave by the time the October 2012 applications were made.

61. We are satisfied, based on the above assessment, that the appellants have provided sufficient rebuttal evidence that the correct credit card details were provided to the respondent. We consequently find that the respondent has failed to discharge the burden of proving that the October 2012 applications were invalid.

62. As the applications dated 9 October 2012 were validly made, the respondent's decisions dated 23 January 2014 were not made in accordance with the law or the immigration rules as she erroneously believed that the applications were only made on 19 February 2013. The applications remain outstanding and await lawful consideration.

63. We note that in July 2014, the 1st appellant attempted to make an application for Indefinite Leave to Remain (ILR) based on his 10 years residence. A letter from the respondent, dated 1 November 2016, states that an earlier rejection of this application was made in error, and that the respondent would reopen the 1st appellant's long residence application. The ILR application is likely to constitute a variation of the 1st appellant's initial application for further LTR as a Tier 4 (General) Student. It remains for the respondent to consider whether the public interest requirements of paragraph 276B(ii) have been met.

64. We additionally note that the 2nd appellant has now resided in the UK for over 10 years. Consideration of her original application as a dependent of the 1st appellant will need to be made in light of any variation application that she may make, and in light of her length of residence and the requirements of paragraph 276B of the immigration rules. The 3rd appellant has not remained in the UK for 10 years. She was born on 7 April 2009 and has therefore resided in the UK for over 7 years. Her application as a dependent of her parents remains outstanding and must be considered in the context of the applications or her parents and the respondent's duty under s.55 of the Borders, Citizenship and Immigration Act 2009.

Notice of Decision

The decision of Judge O'Garro is vitiated by material legal errors. Her decision is set aside.
We re-make the decisions in the appeals by allowing them on the basis that the respondent's decisions were not in accordance with the law.
The appellants' applications remain outstanding, and await lawful consideration.

9 January 2018

Signed
Upper Tribunal Judge Blum

Date