**Upper Tribunal**

**(Immigration and Asylum Chamber)** Appeal Number: HU/06313/2015

**THE IMMIGRATION ACT**

**Heard at Field House** **Decision & Reasons Promulgated**

**On 12th July 2017** **On 18th July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MOHAMED OMAR MAHMOUD BORAIK**

**(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr Tarlow Senior Home Office Presenting Officer

For the Respondent: Mr Turner of Farani –Javid Taylor solicitors

**DECISION AND REASONS**

1. The Respondent, Mr Mohamed Omar Mahmoud Boraik date of birth 1st July 1979 is a citizen of Egypt. Having considered all the circumstances, I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of First-tier Tribunal Judge Bell promulgated on 26 October 2016 whereby the judge allowed the respondent's appeal against the decision of the SSHD. The SSHD had refused the respondent indefinite leave to remain in the United Kingdom on the basis of 10 years lawful and continuous residence and thereby refused the respondent's application under Article 8 of the ECHR, family and private life.

3. By a decision of 24th April 2017 Designated First-tier Tribunal Judge Campbell granted permission to appeal to the Upper Tribunal. Thus the case appeared before me to decide whether there was an error of law in the original decision.

**The grounds of appeal**

4. It was submitted that there had been material error in respect of the assessment of paragraph 276B of the Immigration Rules. The issue being lawful continuous residence, it is suggested that the judge had wrongly assessed that there was a period of break in the continuity of the respondent's leave of less than 28 days in a relevant period.

5. As the respondent had leave, which had ended on the 30th April 2012 and the respondent had only re-entered the UK on the 7th June 2012. As such there was a period of over 28 days breach in the lawful and continuous residence. In the circumstances the judge's finding was not in accordance with paragraph 276A of the Immigration Rules.

6. Further as the respondent left the UK at a time when he did not have leave, namely in respondent May 2012 the lawfulness of the appellant's leave was not continuous. The did not meet the requirements of the rules.

7. Further the judge was wrong to consider that Article 8 was engaged on the facts.

**Basic outline of the facts**

8. The respondent is a citizen of Egypt. At various times the respondent has had entry clearance and leave to enter and remain in the United Kingdom.

9. According to the chronology the respondent first entered the UK as a visitor on 29 September 2005. At that stage he appears to have had leave through to 22 March 2006.

10. Subsequently the respondent applied abroad for leave to enter the United Kingdom as a postgraduate doctor. It appears likely that the respondent made his application whilst his existing leave was still valid. This 2nd application was successful and the respondent re-entered the United Kingdom on 28 March 2006 with leave valid until 1 May 2007. The respondent then left the United Kingdom on 3 April 2007.

11. The respondent then made an application abroad for entry clearance as a student. Leave was granted on 21 June 2007 with leave valid until 31 October 2009. The respondent re-entered the United Kingdom on that leave. Again making the application within 28 days of having left the United Kingdom.

12. The respondent then applied in country for leave to remain as a Tier 1 Post Study migrant. The application was made on 21 September 2009. The application was granted on 13 October 2009. At that stage leave was to be valid until 13 October 2011. Thus far it appears to be accepted that the respondent had continuous lawful leave and residence through to 13 October 2011.

13. It is at this stage that problems arise.

14. The respondent applied on 8 October 2011 leave to remain as a Tier 4 General Migrant. In accordance with Section 3C of the 1971 Immigration Act the respondent would have leave until the determination of that application or until any appeal was finally determined. However the application was rejected on 25 October 2011. No appeal against that rejection was lodged, for the reasons set out below.

15. The respondent's application was made in conjunction with applications by his spouse and children. The total cost of the applications was to be £772 pounds and the cost of the respondent's application alone would have been £386. The respondent had provided details of his bank on his application form but not on the application forms for his wife and children, presuming that as the details were the same the appellant would take monies from the account for all the applications. Copies of the respondent's bank statements have been submitted and they disclose that there were sufficient funds available in the account to pay for all the applications. It is also clear from the account that whilst a request for payment in respect of the respondent was made and paid by the bank, no request was made for the spouse and child. It is not clear why no request for payment was made in respect of the child and spouse.

16. Of significance is the fact that a request for payment for the respondent's application was made and was paid on 17th October 2011. Having taken payment, the SSHD rejected the respondent's application, ostensibly on the basis that the fee had not been paid. Whilst there may have been grounds for rejecting the spouse's and children's applications, payment having been requested and made in respect of the respondent's application there was no grounds for rejecting the respondent's application.

17. As an integral part of the respondent's application at that time the respondent was claiming to have an established presence in the United Kingdom under the rules. By reason thereof he was required to show that he had funds at a lower level than if he did not have an established presence. The documentation with the original application only disclose financial documents showing funds sufficient to meet the Immigration Rules as a person with an established presence.

18. The SSHD rejected the respondent's application on 25 October 2011. The SSHD having rejected the application, the respondent was invited to resubmit his application. The respondent resubmitted the application on 28 October 2011. In line with the invitation the respondent, rather than appealing the decision or seeking to judicially review the decision, resubmitted the application.

19. It has to be noted that the respondent's bank account had the funds from the original application recredited to it on 1 November 2011 by the appellant.

20. On 4 November 2011 the respondent's bank account paid out the monies for all of the applications including that of the appellant in the sum of £772.

21. The applications were refused on 30 April 2012. At that stage it appears that the applications were refused on the basis that the respondent did not have an established presence in the United Kingdom because there had been a break in his leave between 25 October and 28 October 2011. Because of that the respondent was required to show financial resources at a higher level than was evident on the documents submitted and, as he had not, the application was refused. The respondent in evidence before the judge stated that had he known that the SSHD was no longer accepting that he had an

established presence he would have submitted further financial documents to show that he had the funds in any event. Indeed it appears from the documentation submitted in the form of bank statements submitted in support of the appeals that he did have the funds.

22. Not only did the SSHD take against the respondent that he did not have an established presence by reason of the break between 25 October and 28 October 2011 but also by reason of that break the respondent was not given a right of appeal. The structure of section 82 of the Nationality, Immigration and Asylum Act 2002 being such at the time the appellant's position was that it was not as a result of the present decision to refuse leave that the respondent had no leave and therefore no right of appeal arose.

23. The decision in respect of the respondent's application was taken on 30 April 2012. It was notified to the respondent on 2 May 2012. In the normal course of events if the respondent had been given a right of appeal then he would have had 14 days in which to lodge such an appeal and his leave would have been extended by operation of Section 3C of the 1971 Immigration Act.

24. Documentation has been produced which confirms that the respondent was informed of the decision on 2 May 2012. At that stage the SSHD had the respondent's passport. Discussions were then undertaken between the respondent and the appellant to return the respondent's passports to him to enable him to leave the country. The passport appears to have been returned on about 9 May and the respondent left the country on 19 May 2012. Any delay in the respondent leaving the United Kingdom was in part due to the fact that he could not obtain his passport from the SSHD and until he had his passport he could not book a flight.

25. On return to Egypt it appears that the respondent's passport had run out of town to be renewed. Once it had been renewed the respondent immediately made application for leave to enter the United Kingdom.

26. It would have been available to the respondent to seek to judicially review the decision taken. Rather than do that the respondent returned to his home country and made application to re-enter the United Kingdom as a Tier 4 Migrant. Having left the United Kingdom on 7 June 2012 the respondent made an application for leave to enter the United Kingdom as a Tier 4 Migrant. That application was granted and the respondent re-entered the United Kingdom on 19 June 2012 with leave that was valid until 28 February 2015.

27. The respondent applied on 15 February 2015 for an extension of his leave and was granted with leave valid until 30 April 2016.

28. The respondent then made an in-time application on the basis of 10 years lawful residence in the UK. The SSHD refused the application on the basis that there was a break in lawful residence from the 30th April 2012, when the decision on the Tier 4 application was deemed to be notified to the respondent, until after 7th June 2012 when the further application was made and granted.

29. In refusing the application policy guidance is referred to in respect of applications for long residence in the continuity of residence. The policy guidance is version 15 published on 3 April 2017. Page 16 of 43 deals with time spent outside the United Kingdom and provides that;

*Time spent outside the UK*

*a person who is outside the UK will not be in breach of the immigration rules*

*You can overlook a period of unlawful residence if the applicant leaves the UK after their valid leave has expired but before 24 November 2016, and:*

*applies for entry clearance within 28 days of their original leave expiring*

*returns to the UK with valid leave within 6 months of their original departure*

30. The respondent's application for indefinite leave having been refused by decision taken on 4 September 2015. The respondent appealed and the appeal was heard by First-tier Tribunal Judge Bell, who allowed the appeal on Article 8 grounds.

**The grounds of appeal**

31. It is against that decision that the SSHD now appeals. In the grounds of appeal it is suggested that the respondent re-entered the United Kingdom unlawfully on 7 June 2012. That is not the case. The evidence clearly disclosed that the respondent made an application and re-entered the United Kingdom after that application was granted.

32. The grounds of appeal submit that the judge has misunderstood the effect of paragraphs 276 A and 276B. It is pointed out that at the time that the respondent left the United Kingdom he was required to have leave at the time of departure and that the time of return. On the facts as presented the respondent did not have leave at the time that he left the United Kingdom in May 2012. It appears that his leave had expired on 30 April 2012 and he departed the United Kingdom on 19 May 2012.

33. Further the grounds of appeal submit that the respondent had made an application for entry clearance more than 28 days after his leave had expired. The respondent would have had an option of either seeking to judicially review the decision to seek to appeal against it otherwise but chose to leave the United Kingdom and make an application from abroad.

34. It is suggested that the judge has found that the respondent was disadvantage due to a handful of administrative errors. It is suggested that these should have no bearing on the decision. As the application had been rejected because the requisite fee for all the applicants had not been paid, the SSHD was entitled to make the decision that they did. With respect that seems to wholly ignore the fact that payment for one of the applications had been taken. There appears to be no reason why a decision could not have been taken on the respondent's application, even if the applications by the spouse and child were to be rejected. No substantive reason has been advanced as to why that application would have failed at that time.

35. Further it is submitted that the judge materially misdirected himself in finding that article 8 was engaged on the facts. There was nothing exceptional within the facts and the respondent could not meet the immigration rules. The respondent's private life was catered for within the rules.

36. The judge has failed to apply the provisions of section 117B of the 2002 Act and failed to give little weight to a private life acquired whilst the person's status in the United Kingdom is precarious.

37. A factor which appears to have been overlooked is the fact that the respondent some was 7 years old and was attending school. There appear to have been no assessment of the best interests of the children in the refusal of the SSHD.

**Consideration**

38. In allowing the appeal Judge Bell found that the respondent's original application of 8 October 2011 was wrongly rejected. Certainly on the facts as presented that was a finding of fact he was entitled to make. Further to that the judge was satisfied that had the matter been dealt with properly the respondent would have had his leave extended during any period that he could have pursued an appeal.

39. The judge also took into account the fact that had the respondent been granted a right of appeal his leave would have been extended until 16th of May 2012. Therefore the application abroad would have been made within 28 days of his leave having expired and he would have been returning to the United Kingdom within 6 months. The respondent would therefore have fallen within the policy.

40. It was clear to the judge that the respondent had taken all reasonable steps to seek to remain inside the law and that any difficulties experienced by the respondent were due to administration on the part of the SSHD.

41. In light of the circumstances set out the judge was entitled to conclude that had the appellant been treated in accordance with the law in his previous applications there would not have been a break in the continuity at the lawfulness of his residence and he would otherwise have fallen to be considered in accordance with the policy set out.

42. In light of that the judge assessed the issues under Article 8. He was satisfied that there was a family and private life on the part of the respondent in the United Kingdom and that the decision significantly interfered with such. The respondent had established a position as a consultant ophthalmologist. In support of his work as a consultant ophthalmologist the respondent had submitted documentation to support his working career. As is evident from paragraph 34 the respondent had studied and worked in the United Kingdom at a high level. He completed higher medical training and had worked as a consultant and completed Masters and PhD is in the United Kingdom. He was a member of the Royal College of Surgeons and a member of the Royal United Service Institute. Taking account of those commitments the judge was satisfied that the respondent had established a significant and substantial private life within the United Kingdom. Given all the evidence that was a finding of fact that the judge was entitled to make on the judge has given valid reasons for the conclusions reached. The judge was clearly satisfied that the factors highlighted warranted consideration of article 8 outside the rules.

43. The judge went on having examined all the facts to conclude that the decision was not proportionately justified. In point of fact the judge was satisfied that there was no significant public interest in the respondent being returned to Egypt. Having examined all the evidence the judge concluded that the decision was not

proportionately justified and that it therefore breached the respondent's rights under Article 8 of the ECHR.

44. Given the factors set out above that was a finding that the judge was entitled to make on the evidence. In the circumstances I do not find that there is any material error of law in the decision by the first-tier Tribunal. I uphold the decision to allow this appeal.

**Notice of Decision**

45. I dismiss the appeal to the Upper Tribunal and uphold the decision of the First-tier Tribunal to allow this appeal.

46. I do not make an anonymity direction

Signed Date

Deputy Upper Tribunal Judge McClure