Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40566/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6th August 2014	**On 21st August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MRS IOANA GEANA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel, instructed by Ennon & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Romania who applied for a registration certificate as a Romanian national exercising treaty rights in the United

Kingdom. Her application was refused, her subsequent appeal dismissed and on 30th September 2013 removal directions were served on her. Her further appeal to First-tier Tribunal Judge Hamilton was dismissed under the 2006 Regulations and also under Article 8 ECHR in a determination promulgated on 13th May 2013.

2. Grounds of application were lodged. Firstly, it was said that there was a period of more than three months between the hearing and the promulgation of the determination and the case law indicated that given that time lapse the determination would normally be rendered flawed. Secondly, it was said that the judge had misdirected himself as to the burden and standard of proof as it was not for the Appellant to show that she had a right to reside here but rather it was for the Respondent to prove that that she no such rights and that Regulation 19(3)(a)applied.

3. Permission to appeal was granted by a First-tier Tribunal Judge on the basis that there was arguable merit in both grounds.

4. A Rule 24 notice was lodged whereby the Secretary of State contended that the determination was sustainable on the basis that the judge's findings were properly based on evidence and it was not contended that any of the facts that he based his conclusions on were erroneous. As such it was said that the determination and the decision to dismiss the appeal should be maintained.

5. Thus the matter came before me on the above date.

6. I heard submissions from Mr Nicholson which contain a point not focused in the grounds seeking permission to appeal. What is said is that in support of the latter ground of appeal (the burden resting on the Respondent to show that the removal was lawful) that the judge had noted in paragraph 33 of his determination that the Appellant had re-entered the United Kingdom in August 2013. As such the Appellant's circumstances were covered by Regulation 13 of the 2006 Regulations which say that under 13(1) an EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which she is admitted here. It followed that the Respondent's decision of 30 September 2013 which was taken within this period was unlawful and must be set aide.

7. Before me Mr Nicholson submitted that this was merely a part of the second ground of appeal whereas Mr Jarvis argued that this was a fresh point for which permission would have to be sought.

8. Adopting a perhaps rather generous view I concluded that the point taken by Mr Nicholson did arise out of the second ground of appeal in that it goes to the lawfulness of the removal of the Appellant.

9. If that was treating the second ground of appeal with considerable elasticity I had also concluded in terms of my discretion under sections 2

and 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 that I should permit argument on this point to be made as plainly the Tribunal should not be acting unlawfully. Mr Jarvis requested and was granted a short adjournment to consider the position and to ascertain whether the Secretary of State agreed that the Appellant had – in fact - re-entered the United Kingdom in August 2013.

10. When we resumed Mr Jarvis said that the Secretary of State had no evidence either way on whether the Appellant had departed and entered the United Kingdom in August 2013. It was said that there had been no cross-appeal against the findings on that point which was not surprising given the decision of the judge to dismiss the appeal. It was said that the burden of proof was always on the Appellant to meet the requirements of the Regulations.

11. For the Appellant Mr Nicholson said that the removal of an EU national was an unusual measure and in this case it would be unlawful to do so. I was referred to the grounds of application under paragraph 5 which referred to the (admittedly old) case of Giangregorio v SSHD [1983] Imm AR 104 and paragraph 7.131 of MacDonald's Immigration Law on Practice 8th Edition. The judge had found that the Appellant did re-enter the UK in August 2013 and there was no challenge to that and as such the decision to remove her was therefore unlawful and I should so find.

12. I reserved my decision.

Conclusions

13. I should say that that judge apologised to both parties for the delay in promulgating the decision which he says was due to ill-health and an administrative error on his part. While the issue of delay was not really canvassed before me I agree with what the Secretary of State says in her Rule 24 notice that the determination can remain sustainable on the basis that the findings were based on evidence and it is not contended that any of the facts that he based his conclusions on are erroneous. There is a period of just over three months between the hearing and the promulgation of the determination but it is only a rule of thumb that the determination must be promulgated within the particular period. Putting it shortly, it would be very odd indeed that because a decision was fractionally late but extremely comprehensive in its terms it had to be set aside whereas determinations very close to the end of the three months but which were not nearly so clear in their terms would survive. I therefore doubt that there is any merit in this ground of appeal.

14. The general proposition is that the burden of proof is on the Appellant in a case under the 2006 Regulations even if it is up to the Respondent to prove particular facts which would mean that the Appellant ceases to be a qualified person under the regulations and which therefore merits their removal.

15. However, it seems to me that the outcome of the appeal turns on whether or not the Secretary of State's decision of 30th September 2013 which was taken within the three month period of the apparent re-entry of the Appellant was unlawful.

16. The judge found that the Appellant came to the United Kingdom on 18th August 2010 (paragraph 15). In paragraph 36 he says that the Appellant claimed she visited Romania in August 2013. It appears that he accepted that evidence as he goes on in paragraph 33 to say that it is not clear whether she was claiming as a job seeker "when she re-entered the UK in August 2013". While the dates are not precise it seems to be accepted that the Appellant came here in August 2010 and went back to Romania in August 2013 and then came back to the United Kingdom in the same month.

17. It was not suggested to me that the judge was wrong to find that the Appellant had re-entered the United Kingdom in August 2013 nor was it suggested that this re-entry did anything else than trigger the Appellant's entitlement under Regulation 13 of the 2006 Regulations to a three month initial right of residence.

18. Given that the Appellant had a three month entitlement of residence commencing from her date of entry in August 2013 it is clear that the decision taken in September 2013 to remove her was unlawful. It follows from this that the judge materially erred in law in concluding that there was no merit in the Appellant's appeal under the Regulations and that the decision must be set aside and the appeal allowed.

Decision

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

20. I set aside the decision.

21. I remake the decision in the appeal by allowing it under the 2006 Regulations.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald