



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16512/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 15th November 2013

Determination Promulgated
On : 28th November 2013

Before

Upper Tribunal Judge McKee

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

SERGIU MOISEEV

Appellant

Respondent

Representation:

For the Appellant: Miss Alice Holmes of the Specialist Appeals Team
For the Respondent: Miss Paluasha Heidar of AA Immigration Lawyers

DETERMINATION AND REASONS

1. This is a somewhat unusual case. The respondent, Mr Moiseev, hails from Moldova, but had been living for several years in the Republic of Ireland before taking up a place at the University of Greenwich in 2008. His wife, Ina, and his daughter, Alexandra, joined him from Moldova in 2009, and in 2010 he obtained leave to remain for two years as a Tier 1 (Post-Study Work) Migrant. In May 2012 Mr Moiseev made an in-time application for leave to remain outside the Points Based

System, with his wife and child as his dependants, and nearly a year went by before this application was refused on 1st May 2013. Simultaneously, a decision was taken to remove Mr Moiseev under section 47 of the 2006 Act. By this time, on 27th November 2012, Ina had been issued with a certificate showing that she had regained Romanian citizenship, although it was not until 27th June 2013 that she and Alexandra were issued with Romanian passports. On 15th August 2013 Mr Moiseev's appeal came before the First-tier Tribunal for determination 'on the papers', and it is that determination which has been challenged by the Secretary of State. I have to say that, in granting permission to appeal to the Upper Tribunal, Judge Easterman pointed out lucidly and succinctly just what the problem was, and after hearing submissions from both sides today, I find myself taking exactly the same view.

2. Judge Iqbal dismissed the appeal under the Immigration Rules, but made a further three decisions favourable to Mr Moiseev. She held, quite rightly, that the removal decision under section 47 was not in accordance with the law. Unnecessarily in my view, she "remitted it back" to the Secretary of State. At today's hearing, Miss Holmes helpfully withdrew the removal decision. Judge Iqbal also "*remitted back ... all aspects of the Appellant's claim that might arise under the EEA Regulations 2006*", but she allowed the appeal outright under Article 8. It is the two latter decisions of the First-tier Tribunal which were the focus of submissions today.
3. Those submissions covered the ground very thoroughly, and I mean no disrespect to the advocates if I do not try to summarise them now. The fact is, the First-tier Tribunal got completely confused between rights arising under the 'free movement' provisions of European Community law and rights arising under the humanitarian provisions of the European Convention.
4. Essentially, the appeal was allowed under Article 8 because Mr Moiseev's wife and daughter have acquired Romanian nationality and are now Union citizens. But the fact that Mr Moiseev may be eligible for a residence card if he applies for one, as the spouse of a Union citizen who is exercising 'Treaty rights' in the United Kingdom, is not a reason for allowing the appeal under Article 8. The application has yet to be made, and if it is made, it will probably succeed. There is documentary evidence in the bundle prepared by AA Immigration Lawyers to show that Ina Moiseev has been undertaking part-time employment and has also registered a company called Denina. On the other hand, if Ina and Alexandra were not Union citizens, it is hard to see how this family, after residing together in this country for only four years, could possibly establish a right to remain on Article 8 grounds.
5. The First-tier Tribunal has clearly erred in law, and Miss Holmes sensibly suggests that the Upper Tribunal should allow the Secretary of State's appeal and re-make the decision on the original appeal by simply dismissing it. I agree. With the withdrawal of the decision under section 47, there is no longer any threat of removal hanging over Mr Moiseev. He can apply for a residence card under the EEA Regulations 2006 for the not unreasonable sum of £55, and Ina Moiseev can apply for a registration certificate if she so wishes. Mr Moiseev's Moldovan passport is at the Home Office, probably with an Enforcement group, and it would be convenient if, instead of having first to get his passport back, Mr Moiseev could apply straight away

to the European Casework Directorate, to which his passport could be transferred directly from Enforcement.

6. It would certainly be more advantageous to Mr Moiseev to have a residence card, valid for five years with the prospect of permanent residence thereafter, than to be granted discretionary leave under Article 8. In the unlikely event that his application is refused and a fresh decision is taken to remove him, he will of course have a full right of appeal against that decision.

DECISION

The Secretary of State's appeal is allowed, and the decision on the appeal against the refusal of further leave to remain is re-made by dismissing it.

Richard McKee
Judge of the Upper Tribunal

15th November 2013