ASYLUM AND IMMIGRATION TRIBUNAL

OA (Prisoner – not a qualified worker) Nigeria [2006] UKAIT 00066

THE IMMIGRATION ACTS

Heard at: Field House
On 21 July 2006

Determination Promulgated
On 1 August 2006

Before:

Senior Immigration Judge Jordan
Senior Immigration Judge Goldstein

Between:

APPELLANT

and

The Secretary of State for the Home Department
RESPONDENT

For the Appellant: Mr M. O'Connor, counsel, instructed by Cranbrook, solicitors
For the Respondent: Mr P. D'Silva, Home Office Presenting Officer

A serving prisoner is not a worker for the purposes of the Immigration (European Economic Area) Regulations 2000 or 2006 and a spouse is not, therefore, entitled to a residence card.

DETERMINATION AND REASONS

Introduction – the procedural history

1. The appellant, born 27 October 1972 is now aged 33. She seeks reconsideration of the determination of Immigration Judge S. Clarke, promulgated on 28 July 2005 in which she dismissed the appellant's appeal against the decision of the Secretary of State

made under the Immigration (European Economic Area) Regulations 2000. The basis of the respondent's decision was that he was not satisfied that her husband was in the United Kingdom and a qualified person within the meaning of the 2000 regulations. Accordingly, on her arrival in the United Kingdom from Marseilles, he revoked her residence permit and cancelled her leave to remain in the United Kingdom.

2. On further inquiry, it transpired that her husband, Mr R, a Portuguese national, was serving a seven-year term of imprisonment imposed at Croydon Crown Court on 9 March 2005 for an offence of being knowingly concerned in the importation of a Class A drug. The Secretary of State therefore took the view that, as a person serving a term of imprisonment, the appellant's husband was not a qualified person exercising treaty rights pursuant to the 2000 regulations, thereby justifying the respondent's earlier decision, albeit on different grounds.

3. By a decision made on 16 May 2005, the Secretary of State notified the appellant of the material immigration decision revoking her residence permit and refusing her admission to the United Kingdom. This deprived the appellant of any lawful basis for remaining in the United Kingdom and the Secretary of State required her to leave by giving directions that she be removed to Nigeria. In the Notice of Immigration Decision – Refusal of Admission under European Community Law, the appellant's removal was proposed in accordance with Regulation 21 (3) and 26 of the Immigration (European Economic Area) Regulations 2000 as amended. This was an appealable decision under section 82 (1) of the Nationality, Immigration and Asylum Act 2002. The appellant appealed.

4. At a hearing before the Tribunal on 21 April 2005, Senior Immigration Judge Storey found that there was a material error of law for the following reasons:

> "1. At paragraph 5 the Immigration Judge wrote: 'I told the parties that I would not consider the interview transcript or the report dated 17 May 2005 in so far as it was a source of facts.' The aforementioned report was the only source of evidence before her stating that the appellant's spouse was imprisoned. However, at paragraph 17 and 18 she gave as her reasons for dismissing the appeal the fact that the appellant's husband, being a detainee, could not be a 'qualified person' under the Immigration (EEA) Regulations 2000. This contradictory approach to the evidence and to the issue of whether it was right to exclude such evidence (even though going on to rely on it) amounts to a material error of law.
> 2. I agree with the parties that I am not in a position to deal with the second-stage reconsideration at this stage, as it is clearly relevant for there to be evidence presented and

considered as to (1) the relationship between the appellant and her husband, and (2) his economic activities in the United Kingdom, prior to being imprisoned and whilst in prison."

The Immigration (European Economic Area) Regulations 2006 (S.I. 2006 No. 1003)

5. At the material time, the rights of the appellant were determined by the Immigration (European Economic Area) Regulations 2000. These were replaced by the Immigration (European Economic Area) Regulations 2006 (S.I. 2006 No. 1003) which came into force on 30 April 2006. Under paragraph 5 of Schedule 4 (Transitional Provisions) to the 2006 Regulations, where an appeal against an EEA decision under the 2000 Regulations is pending immediately before 30 April 2006, the appeal is to be treated as a pending appeal under the corresponding EEA decision under the 2006 Regulations. This appeal falls to be determined under the 2006 Regulations. See MG and VC (EEA Regulations 2006; "conducive" deportation) Ireland [2006] UKAIT 00053 in which the Tribunal stated:

> "15. We need only add that the previous statutory regime, contained in the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326 as amended) is for present purposes entirely revoked with no savings or transitional provisions.
>
> 16. The first thing that is apparent is that the new Regulations came into force immediately on 30 April 2006, and that the previous law is no longer in effect. The effect on existing decisions and appeals is quite remarkable: they are to be treated as decisions and appeals under the new Regulations. The consequence may be that a decision lawful when it was made, and a determination by the Tribunal containing no error of law when it was made, may now disclose an error of law because of the retrospective change of the decision and its authority.
>
> 17. Those considerations apply directly in relation to decisions under the previous Regulations and appeals against EEA decisions under those Regulations."

The appellant is a spouse

6. At the commencement of the hearing before us, Mr D'Silva, who appeared on behalf of the Secretary of State, conceded that there was no issue in relation to the first of the matters identified by the Senior Immigration Judge, namely, the state of the relationship between the appellant and her husband. For the purposes of both the 2000 and the 2006 Regulations, a spouse is defined in Part 1 as not including "a party to a marriage of

convenience". Whilst there was a considerable volume of material directed towards this issue before us, as a result of the concession made by Mr D'Silva, we approach this appeal on the basis that this was not a marriage of convenience.

The Immigration Judge's determination

7. Whilst it is not now necessary to consider the Immigration Judge's determination in any detail, she found that the appellant's husband was not a qualified person because the appellant had provided no evidence on the issue other than the fact that her husband was then in prison. She found as a fact that a detainee is not capable of falling within the definition of a qualified worker. There was no evidence that he was registered with an unemployment office. In paragraph 19 of her determination, she said:

> "I find that Mr R is not a qualified person because he is imprisoned and there is no evidence before me that he is engaged in an economic activity, or ever was, other than paragraph 3 of the statement of Mr R which simply states that he was employed."

8. She dismissed the appellant's associated claim under Article 8. The Immigration Judge was not satisfied that the evidence provided by the appellant was sufficient to establish that it would be disproportionate to require the appellant to leave the United Kingdom, notwithstanding the presence of her husband in prison.

The facts

9. In a statement provided by the appellant on 11 July 2005, prior to the hearing, the appellant stated that she met her husband in July 2002 and the relationship started in the following month. They started living together in early 2003 and were married on 18 December 2003. On 12 February 2004, the Home Office provided the appellant with the right to reside in United Kingdom on the basis that she was married to a qualified person exercising treaty rights. Some 9 months later, on 4 October 2004, Mr R was arrested at Gatwick Airport for the offence for which he was subsequently sentenced to imprisonment on 9 March 2005. Bearing in mind the nature of the offence, the Immigration Judge considered it likely that Mr R remained in custody after his arrest. Accordingly, whatever work Mr R was doing prior to his arrest, it ceased on 4 October 2004. Evidence from the prison authorities reveals that his release date is 4 June 2009 although, were he to be successful for parole, he might be released as early as 4 April 2008.

Qualified person

10. The 2006 Regulations define a qualified worker and the rights that attach to a qualified worker and his spouse:

> 6. (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—
>
> (b) a worker;
>
> (2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—
>
> (a) he is temporarily unable to work as the result of an illness or accident;
>
> (b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—
>
> (i) he was employed for one year or more before becoming unemployed;
> (ii) he has been unemployed for no more than six months; or
> (iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;
>
> (c) he is involuntarily unemployed and has embarked on vocational training; or
>
> (d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.
>
> 14. (1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.
> (2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.

The relevance of past work when considering whether an EEA national is a qualified person

11. Although the Senior Immigration Judge at the first stage of the reconsideration hearing indicated that it would be relevant to consider Mr R's economic activities in the United Kingdom prior

to his being imprisoned, there is little material before us dealing with this aspect of the appeal.

12. Three payslips have been provided from Berry Recruitment Limited dealing with Mr R's employment. The weekly payslip dated 21 September 2003 showed taxable pay to date of £2,377.50 and that his weekly wages were £212.50. These pre-dated his marriage to the appellant.

13. Mr O'Connor, however, did not seek to argue that his earnings prior to his imprisonment were material in establishing that, at the date of the Secretary of State's decision on 16 May 2005 or thereafter, Mr R was or is a qualified person for the purposes of the Regulations.

14. In our judgment, this concession was inevitable. It may appear arguable that, where a person is detained for a short period during which his job remains open to him to recommence on release, he does not cease to be a qualified person for the purposes of the Regulations. His situation would be little different from the situation that arises when a worker is absent, perhaps for an extended period, through illness. In each of these examples, the contract of employment remains in place.

15. The difficulty we see in equating these two examples is that the person unable to work as the result of an illness or accident is retained within the definition of a worker by express statutory provision - see Regulation 6 (2) (a) above. A serving prisoner is not. In any event, the same reasoning cannot apply, even arguably, where the sentence of imprisonment is longer and where the contract of employment has terminated.

Whether a person serving a sentence of imprisonment who works is a qualified person

16. The issue before us as to whether Mr R is a qualified person must depend upon the appellant establishing he is a worker during the course of his sentence.

17. With this issue very much in mind, Mr R prepared a statement dated 30 June 2006 in which he confirmed that he works in prison as a carpenter and his weekly pay varies from £1.50 to £6.30. In addition, Mr Augustine, the instructional officer, wrote from HMP The Verne on 4 July 2006 confirming that Mr R is currently employed in the carpentry industry where he assembles furniture.

18. Mr O'Connor abstracted from the H. M. Prison Service website a passage about working in prison. It describes such work in these terms:

> "**Working in Prison**

Work can play a fundamental role in providing valuable skills and qualifications that help prisoners get a job once they are released. As part of the induction process, each prisoner's suitability and preference for work is assessed. Throughout their stay in prison, prisoners' achievements and needs are recorded and monitored to ensure that, as far as resources allow, each prisoner follows a constructive work plan. Educational and training needs are considered and many allow prisoners to attain recognised qualifications, for example National Vocational Qualifications.

Type of work available

The type of work available varies in each prison depending on the availability of resources and security and control requirements. Normally, work is available in industrial workshops and/or land-based activity units. Work undertaken in these units is varied and can provide skills in trades such as: textiles, engineering, woodwork, printing, data entry, plastic moulding, component assembly, computer aided design, desktop publishing and employment offering practical training in rural activities, fresh produce production, protected cropping, amenity horticulture and landscaping leading to formal qualifications.

Other work is available within the prison, such as catering, cleaning and general building and maintenance work.

Pay

Rates of pay vary depending on resources, the amount and type of work available at each prison.

19. We accept that Mr R spends part of his time whilst in custody assembling furniture for which he is paid between £1.50 and £6.30 a week. Although there is no evidence as to his hours of work, the definition of a worker in the 2006 Regulations is not restricted to full-time work. Further, as part of the prison regimen, it may be that Mr R performs other work, cleaning and maintaining the building or other domestic work, although no evidence was directed to us on this issue.

European jurisprudence

20. In Lawrie-Blum [1987] 3 CMLR 389, the European Court of Justice considered the term "worker" in the context of Article 8 of the Treaty. Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the expression has a Community meaning and is not defined by national law. Since it defines the scope of a fundamental freedom, the Community concept of "worker" must be interpreted broadly. In accordance with objective criteria, employment must be considered by reference to the rights and duties of the worker, although the central feature of an

employment relationship is that, for a certain period of time, a person performs services for and under the direction of another in return for which he receives remuneration. Thus trainee teachers, if they provide work for an employer for pay, even though under supervision and working in preparation for a qualifying examination, fall within the definition of worker. All that is required is that the activities should be in the nature of work performed for remuneration. Further it is irrelevant that the work is of a non-economic nature, such as state education or in public service.

21. The decision in Lawrie-Blum followed the decision in Kempf [1986] ECR 1741 which itself drew support from earlier European jurisprudence to the effect that an activity as an employed person which yields an income lower than that which is considered as the minimum required for subsistence so that the person's income has to be supplemented by other means, (perhaps state benefits or assistance from family), is nevertheless a worker provided he pursues an activity as an employed person which is effective and genuine. As part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small-scale as to be regarded as only marginal and ancillary. Hence, the European Court of Justice decided a music teacher who gave twelve lessons a week was to be regarded as pursuing effective and genuine work, if only because the national court decided that the work was not on such a small-scale as to be purely a marginal and ancillary activity.

22. In Bettray [1989] ECJ 1621 the concepts developed in Kempf and Lawrie-Blum were applied. As long as an effective and genuine activity is pursued, the level of productivity, the source of the funds from which the remuneration is paid and the nature of the legal relationship between the employee and the employer are of no consequence in regard to whether or not a person is to be regarded as a worker. Activities pursued under national legislation intended to provide work for the purposes of maintaining, re-establishing or developing the capacity for work of persons who, by reason of circumstances relating to their situation, are unable to take up employment under normal circumstances cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned. Accordingly, under social employment law in the Netherlands, a rehabilitation centre for drug addicts at which those attending were afforded the opportunity to engage in paid work under conditions which corresponded as far as possible to the legal rules and practices applicable to paid employment under normal conditions were not "working as employed persons". A German national working there was not, therefore, entitled to a residence

permit. The jobs in question were reserved for persons who, by reason of their circumstances, were unable to work in normal conditions.

Tribunal case law

23. In RP (EEA Regs – worker – cessation) Italy [2006] UKAIT 00025, the Tribunal decided that a person who has been a worker within the meaning of Community law does not cease to be a worker simply by virtue of falling unemployed, but he must be able to show that he has been genuinely seeking work and has not effectively abandoned the labour market. Further, in assessing whether a person has satisfied the condition that he is or has remained a worker, the national court must base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both that person's activities whilst in the Member State and any employment relationships at issue.

24. We are not concerned here with Mr R's past employment because it is accepted that this is immaterial for the purposes of deciding whether he is now in effective work through the work he performs in prison. The fact that Mr R rendered himself liable to imprisonment also prevents him from genuinely seeking work in the community. We are in no doubt that he has effectively abandoned the ordinary labour market. Adopting the reasoning in RP Italy, we will have to consider whether working in prison is a part of the labour market.

Working in prison

25. There are clear differences between a part-time worker who is employed at market rates and a prisoner who works in prison, even if the prison work is not purely therapeutic. It is accepted that a prisoner is not entitled to many of the benefits afforded in the field of employment. He does not have the benefit of legislation granting him employment protection or rights of redundancy. The legislation enacting the minimum wage does not apply to prison work. The PAYE scheme and National Insurance contributions do not apply. As far as we know, the remuneration is not taxable, even in the case of a serving prisoner with outside income, such as a private pension. This is sufficient to demonstrate that working in prison is of a very different character to work in the community.

26. There are other differences. There is no right to work for remuneration and whether an individual is permitted to work will depend upon a variety of factors, including security considerations, and the resources available, both physical and financial, in any particular prison establishment. A prisoner has no choice as to the place of imprisonment; accordingly, no means of choosing whether there are opportunities to work. A

prisoner is not able to compete for his labour and his wages are not governed by market forces. The purpose of working in prison may be very different. It may involve elements of rehabilitation, training or therapy and those elements may have a much more significant role in the prison environment than they do in the community. Further, the provision of work may be an important element in maintaining the orderly functioning of a prison establishment, defusing the tensions that may arise when large numbers of prisoners have little to do.

27. Mr O'Connor seeks to argue that Mr R is a worker because assembling furniture can properly be regarded as work. He receives remuneration for it, albeit at a different level compared to similar work in the community. The work is productive work in that he produces furniture which can either be sold or can be used in the public sector. The submission contains within it the implicit concession that not all those serving prison sentences are workers and, therefore, qualified persons for the purposes of the Regulations.

28. The effect of his submission would be distinguish between those who carry out productive work in the sense that their output is sold outside the prison for profit and other serving prisoners, for example:

(i) those prisoners who work in prison carrying out unpaid domestic duties;
(ii) those prisoners who are unable to work because there are not facilities to do so within the prison or because security considerations act as a practical bar upon work;
(iii) those prisoners who carry out non-productive work for therapeutic purposes;
(iv) those prisoners who carry out work as part of a training or rehabilitation programme;
(v) those prisoners incapable of work.

29. It seems to us that it would be invidious to draw any distinction between prisoners who fall within the definition of a qualified person because of their work and those that do not, all the more so as a serving prisoner may fall into or out of the category without any ability to control the change. His status as a worker will be dependent upon the actions of the prison authorities in selecting his place of confinement and then in offering the opportunity for work in the establishment selected.

30. As the European jurisprudence makes clear, the fundamental principle of Community law on which Mr O'Connor relies in his submissions is the freedom of movement for workers. This concept is singularly inapt in the case of a person serving a prison sentence who has no freedom of movement at all. A purposive approach towards interpreting Community

legislation would not, therefore, include a prisoner within the fundamental principle of the scheme; rather the opposite, it would tend to exclude him because he is a person to whom a right of freedom of movement has no practical meaning. If he, as principal, does not stand to benefit from the fundamental purpose of Community law, it is illogical that the vicarious benefits afforded to family members of qualified persons should attach to them.

31. If a European citizen serving a sentence of imprisonment will not benefit from the Community right to enjoy freedom of movement for workers, the only beneficiaries for a prisoner who works will be his family members who are thereby entitled to a right of residence. For the reasons we have given, however, only some serving prisoners will be workers in the sense envisaged in the European jurisprudence. If such a distinction is to be properly drawn, the distinction will only be felt by family members, only some of whom will be able to continue as holders of a residence document. Their right to remain will, therefore, be dependent upon the serendipitous choice of prison establishment and the opportunities for work there.

Conclusion

32. We do not consider that any serving prisoner is a worker and thereby able to fall within the definition of a qualified worker under the 2006 Regulations.

33. In our judgment, the concept of a worker involves a person who works in an ordinary commercial or public sector setting which, in either situation, is influenced by market forces. Whilst work in state education or in public service is non-economic in character in that the employer is not a commercial enterprise, the employee works in the economic working environment – the open market – and his employment cannot be classed as non-economic, even though the work he does might be. It is this economic motivation which adds meaning to a right to enjoy freedom of movement for workers. In our view, it is this concept that is identified in RP Italy when the Tribunal speaks of a worker being a person who has not effectively abandoned the labour market.

34. That economic element is lacking in the prison environment where it may be difficult to discern whether an economic motive exists at all, even in the case of paid work if the work also has therapeutic, training or rehabilitative functions or is there to maintain order. A person serving a prison sentence has effectively and clearly abandoned the ordinary labour market. Whilst working in prison has some of the characteristics of normal work, (and may for therapeutic or rehabilitative

purposes be designed to replicate those characteristics), it is not the labour market in any meaningful sense. If there is such a thing as an internal labour market within the prison system, that suggests how far it is alienated from the labour market outside the prison walls.

35. In our judgment, European jurisprudence dealing with work in the community and influenced by economic forces can have little direct bearing on work performed in prison.

36. Our determination is, however, consistent with the decisions in Lawrie-Blum and Kempf which are to the effect that the work must be effective and genuine. Prison entails the forcible removal of persons from the community and the deprivation of their right to freedom, including the freedom to conduct economic activities. Working in prison is not central to that purpose and it can therefore properly be classified as marginal and ancillary.

Article 8

37. It was not argued before us that, if the Secretary of State acted lawfully in revoking the residence document because Mr R ceased to be a qualified person, the appellant's removal would nonetheless violate her human rights under the ECHR. It is not suggested that the appellant is not permitted to visit her husband whilst he is serving his sentence. Whilst the relationship between husband and wife during the husband's imprisonment is restricted, such restrictions arise from the very fact of imprisonment. Whilst visiting may be rendered less convenient or more costly by reason of the appellant's removal, it will not be prevented. The ECHR is not primarily concerned with the economic consequences that interference brings about. If the effect of removal will render the continuation of family life more difficult, the principal causative action is not the Secretary of State's decision to remove the appellant because she is not entitled to a residence document but Mr R's criminal conduct. The purpose of the ECHR is not as a tool to mitigate the effects of his conduct.

38. In reaching this conclusion, the parties were not able to assist us in whether facilities exist in the EEA for European citizens to serve their sentences in the country of their nationality, rather than in the country of conviction. If such facilities exist, we were not told what circumstances qualify a prisoner to be considered for transfer.

DECISION

(1) The original Tribunal made a material error of law.
(2) The following decision is accordingly substituted:

a. The appellant's appeal is dismissed under the Immigration (European Economic Area) Regulations 2006,
b. The appellant's appeal is dismissed on human rights grounds.

ANDREW JORDAN
SENIOR IMMIGRATION JUDGE