Upper Tribunal
(Immigration and Asylum Chamber)

JO (qualified person – hospital order – effect) Slovakia [2012] UKUT 00237(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 May 2012	

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Before

LORD JUSTICE McFARLANE

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JO

Respondent

Representation :

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr A Grigg, Counsel, instructed by J M Wilson & Co.

An EEA national does not cease to be a qualified person as a result of being detained in a hospital pursuant to an order of the court under the Mental Health Act 1983, having not been convicted of any criminal offence.

DETERMINATION AND REASONS

1.
This is an appeal by the Secretary of State against a determination of the First-tier Tribunal (Judge Andrew and Mr FT Jamieson JP) promulgated on 12 December 2011 in which the appeal of JO ('the Respondent') was allowed.

2.
The Respondent is a citizen of Slovakia who was born on 6 December 1979. He claims to have entered the United Kingdom on 21 January 2005 in the exercise of his Treaty rights as a European Economic Area National. The single event which has determined the course of JO's life, and is the focus of these

proceedings, took place some 18 months after his arrival. On 2 July 2006 the Respondent committed an horrific attack upon a pensioner in Hereford during which one of the victim's thumbs was bitten off.

3.
The Respondent was arrested on the day of the attack and was charged with attempted murder. He was not, however, convicted, having been found not guilty by reason of insanity, following a diagnosis of paranoid schizophrenia. On 4 April 2007 a Hospital Order was made under the Mental Health Act 1983, s 37 and the Respondent was made subject to the special restrictions set out in s 41 of that Act.

4.
On 27 April 2011 the Secretary of State decided to make a deportation order against the Respondent under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") on the basis that she was satisfied that he would pose a genuine, present and sufficiently serious threat to the interests of public policy if he were allowed to remain in the United Kingdom and that his deportation is justified under reg. 21 of those Regulations.

5.
By notice dated 11 May 2011, the Respondent sought to appeal the deportation decision. The First-tier Tribunal allowed the Respondent's appeal and it is against that determination that the Secretary of State now appeals, permission to appeal having been granted by First-tier Tribunal Judge V P McDade on 25 January 2012.

6.
The point at the centre of the appeal is whether the period that the Respondent spent in a secure mental health unit pursuant to the Hospital Order can be calculated as part of a period of permanent residence as a worker in the UK under the 2006 Regulations.

7.
We heard the appeal on 23 May 2012 and, at the conclusion of the hearing, announced our decision which was to dismiss the appeal. This judgment sets out our reasons for that decision.

The legal context

8.
The 2006 Regulations, reg. 14 (1) provides that "a qualified person is entitled to reside in the UK for so long as he remains a qualified person".

9.
The 2006 Regulations, reg. 6 defines a "qualified person" as including "a jobseeker" or "a worker".

10.
The 2006 Regulations, reg. 15(1)(a) provides that "an EEA national who has resided in the UK in accordance with these regulations for a continuous period of five years" shall "acquire the right to reside in the UK permanently".

11.
The 2006 Regulations, reg. 5 provides for a worker or self-employed person who has ceased activity. It is the Respondent's submission that his circumstances come within reg. 5(7)(b):

"Regulation 5(7)

Subject to regulation 7A(3), for the purposes of this regulation:

(a)
…

(b)
Periods of inactivity due to illness or accident

(c)
….

shall be treated as periods of activity as a worker or self-employed person, as the case may be."

12.
The following provisions of the European Union Directive 2004/38/EC (‘The Citizens Directive’) are relevant:

Recital 23:

“Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.”

Recital 24:

“Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. …."

Article 7(3):

“ … a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(b) he/she is temporarily unable to work as the result of an illness or accident.”

The issues in the case

13.
The decision to deport the Respondent was taken on 27 April 2011, which was over five years after he had arrived to work in the UK. By reg. 15(1)(a) of the 2006 regulations, if the Respondent's time in the UK had been “in accordance with” the regulations then he would have obtained a right to reside here permanently. It is the Respondent's case that he worked as a joiner, and therefore as “a worker” within the 2006 Regulations, in the period between his arrival in the UK and the horrific assault in July 2006. He argues that the effect of reg. 5(7)(b) is that the subsequent period of his incarceration on remand and then subject to the Hospital Order was "inactivity due to illness" and is therefore to be treated as "a period of activity as a worker", thereby maintaining his status within the 2006 Regulations and entitling him to claim a permanent right to reside in the UK at the conclusion of a five-year period.

14.
The Secretary of State disputes the Respondent's claim on the basis that a period of time spent in a secure mental health unit does not count towards the acquisition of permanent residence. Further, in reliance on the importance given to a person's integration in recitals 23 and 24 of the Citizens Directive, it is submitted that it is very difficult for the Respondent to demonstrate genuine integration in the UK given that much of his time here has been spent in a secure unit. Finally, on the facts, the Secretary of State disputes the Respondent's assertion that he was legally exercising his Treaty rights by working in the period prior to his arrest.

15.
These respective cases were developed in argument before us. Mr Melvin, for the Secretary of State, made the following substantive points:

(a)
It is settled law that a person who is serving a prison sentence cannot claim to be exercising his Treaty rights during the period of incarceration (see Carvalho v Secretary of State for the Home Department [2010] EWCA Civ 1406 and SO (imprisonment breaks continuity of residence) Nigeria [2011] UKUT 164 (IAC));

(b)
Although Mr Melvin accepted that the two contexts are not the same, by implication a period of compulsory detention under a Hospital Order made under the Mental Health Act by a criminal court should be approached in the same manner as a prison sentence;

(c)
There is a clear difference between an EEA National being temporarily incapacitated by reason of an ordinary illness or accident and incapacity due to long-term mental illness; the former falls within the 2006 Regulations but the latter does not. In consequence there is no jurisdiction to hold that the Respondent comes within the 2006 Regulations;

(d)
The 2006 Regulations have to be read in the light of the Treaty. Recitals 23 and 24 of the Citizens Directive emphasise that the greater the degree of genuine integration a Union citizen has in the host member state, the greater should be the degree of protection against expulsion. Mr Melvin submits that the impact of this factor is two-fold: firstly, the respondent can claim very little protection from expulsion as he can not establish any genuine integration in the UK; secondly, irrespective of the 2006 Regulations, there is a freestanding need under the Treaty for an individual to establish genuine integration in the host state in order to avoid expulsion;

(e)
The Respondent never registered as an Accession State Worker and therefore cannot be said to have been exercising his Treaty rights in any event.

16.
For the Respondent, Mr Grigg made the following submissions:

(a)
It is accepted that the authorities clearly establish that prisoners serving a sentence are not resident for the purposes of the 2006 Regulations during their time in custody;

(b)

There is no legal foundation for the proposition that time spent in detention as a result of mental illness is to be treated in the same manner as time spent in prison following conviction for a criminal offence;

(c)
There is a plain difference between a criminal who deliberately commits a criminal act and a person who acts in the same manner, but does so involuntarily as a consequence of mental illness;

(d)
The Respondent comes clearly within the 2006 Regulations (regs 5(7)(b), 14(1) and 15(1)(a)) together with Article 7(3) of the Citizens Directive, which in plain terms make provision for discounting a period of inactivity due to illness. The Crown Court finding when making the Hospital Order under the Mental Health Act 1983, s. 37 that the Respondent was suffering from mental disorder is binding;

(e)
Mental disorder is a form of illness and it is therefore the inescapable factual conclusion that the Respondent, who has been prevented from working as a result of the Hospital Order, has been prevented from working as a result of illness;

(f)
Those drafting the 2006 Regulations could have chosen, but did not choose, to insert words of qualification to the word ‘illness’ which might limit its scope to a specific period of time or specific types of illness;

(g)
The Secretary of State’s submissions as to ‘integration’ are misplaced. Integration only arises as a factor where there is a discretion and the need to act proportionately is engaged. Here the Regulations are plain and no question of discretion arises;

(h)
Permission was not given to appeal the findings of fact as to the Respondent’s work status. In any event the bar is set high for appeals against findings of fact. In the absence of completely inadequate reasoning or perversity, the finding must stand.

Discussion

17.
We are grateful to both Mr Melvin and Mr Grigg for their clear and helpful submissions. The debate, whilst important, is within a narrow compass and it is possible to consider the various points and state our conclusions in short terms.

18.
A plain reading of the 2006 Regulations, as set out at paragraphs 8 to 11 above, establishes that periods of inactivity ‘due to illness’ are nevertheless treated as ‘periods of activity as a worker’ for the purposes of determining whether an individual is a ‘worker’ and therefore ‘a qualified person’ and for the purpose of establishing residence in the UK ‘in accordance with these Regulations for a continuous period of five years’ in order to ‘acquire the right to reside in the UK permanently’.

19.
The Respondent’s circumstances will only fall outside the 2006 Regulations if one or both of the following submissions by the Secretary of State is established:

i.
‘illness’ under reg. 5(7)(b) does not include mental illness and/or is limited to temporary indisposition or illness for a short period of time;

ii.
Detention in a secure mental health unit under a compulsory Hospital Order made by a criminal court, albeit as a result of a diagnosis of mental disorder, is to be treated in the same manner as detention during a prison sentence with the result that the individual concerned is not a ‘qualified person’ during the period of detention.

20.
Dealing with these two issues in turn, we see no basis for holding that the term ‘illness’ as used in the 2006 Regulations should be given a narrow or restricted meaning, either in terms of the type of illness or the period of incapacity.

21.
The 2006 Regulations, which could have been drafted to target or restrict the provision are entirely without qualification. The phrase ‘temporarily unable to work as a result of an illness’ is to be found in Article 7(3) of the Citizens Directive. The UK Regulations, which were made two years later in 2006, could have adopted the word ‘temporarily’ from Article 7(3) but did not. In the same manner, there is no restriction on the type of ‘illness’ to which the provision applies and no ground established by case law, guidance or practice for holding that mental illness is to be excluded. Indeed, we consider that any attempt to exclude those who are incapacitated by mental ill health from these provisions might well be contrary to public policy, statute and human rights legislation on the ground of discrimination.

22.
We therefore reject the first of the Secretary of State’s two principal submissions.

23.
It is common ground that time spent serving a prison sentence does not count towards the qualifying period for permanent residence under reg. 15(1)(a) of the 2006 Regulations. It is, however, instructive to look at the approach of the courts to this issue.

24.
In Bulale v Secretary of State for the Home Department [2008] EWCA Civ 806, Buxton LJ said, obiter (at paragraph 9):

‘It is difficult to think that the process of integration can take place while a person is living outside normal society in the host state, not because of illness or accident, but because he has chosen to breach the societal norms of that state.’

25.
In HR (Portugal) v Secretary of State for the Home Department [2009] EWCA Civ 371, Elias LJ (at paragraph 39) emphasised that the factor which isolated from the 2006 Regulations those incarcerated in prison following conviction was that ‘they have by their own conduct placed themselves where they cannot avail themselves of the rights of EU citizens’.

26.
The authorities make it plain that the exclusion of time spent in prison applies to any prison sentence of whatever length following conviction. The question is left open whether time spent on remand prior

to an acquittal, or which is eventually followed by a successful appeal against conviction, falls for separate consideration (see HR (Portugal) above).

27.
A distinction is therefore expressly drawn between those who are serving a prison sentence following conviction as a result of 'their own conduct' and those who are unable to work because of illness or accident. The fact that the questions of remands in custody and of cases where there is a subsequent successful appeal are potentially to be distinguished, indicates that the limits of this line of authority are delineated around prison sentences following conviction and go no further.

28.
Other than the bare assertion that detention in a secure unit should be treated in like manner to a prison sentence following conviction, the Secretary of State's argument is unsupported by authority. In our view there is a fundamental distinction between these two forms of disposal, each of which may follow precisely the same behaviour (in the present case the appalling assault in Hereford in 2006). The distinction is that a prison sentence follows the choice of an individual to act in a criminal manner, whereas a Hospital Order results from a finding that the individual suffers from a mental disorder and is not therefore criminally responsible for their otherwise culpable behaviour. We consider that this distinction places those who are detained in a secure mental health unit in a completely different category, in the context of these Regulations, from those who are imprisoned following conviction. That is our conclusion without reference to the express reference to 'illness' in the 2006 Regulations; once the reference to 'illness' is taken into account, the distinction between the two contexts is all the more stark. We therefore reject the Secretary of State's submissions on this second principal ground.

29.
The two remaining points, namely 'integration' and the factual background, can be dealt with succinctly. We accept Mr Grigg's submission that the question of whether or not the Respondent has become genuinely integrated in the UK during his time here does not arise where the circumstances are the subject of express regulation, rather than one for administrative discretion.

30.
The relevant findings of fact made by the First-tier Tribunal are at paragraph 15 of its determination:

"(a) The Appellant came to the UK to work as a joiner on 21 st January 2005. We have no reason to doubt this assertion of the Appellant. The Respondent has no records to show when the Appellant entered the UK.

(b)
The Appellant would have been required to register as an Accession State Worker requiring registration. We have no evidence before us to show that he did, in fact, register.

(c)
However, an EEA national can never be an illegal entrant. (See section 7(1) of the Immigration Act 1988). A person who does not require leave to enter can never enter the United Kingdom illegally.

(d)
The Appellant would have benefited from the initial right of residence. After three months of his arrival, if he did not register, he would no longer be exercising his EU rights, but this would have little impact on his status in United Kingdom law.

(e)
Further, the worker registration scheme for, inter alia, Slovakia, came to an end on 30 th April 2011. From that date the Appellant became a Union citizen with full and equal rights of free movement and residence.

(f)
We are further satisfied that the Appellant retained his status as worker in accordance with Article 7(3)(a) of Directive 2004/38/EC. It is apparent to us that the Appellant was temporarily unable to work as a result of his illness. However, we have no evidence before us to show that he would be unable to return to work now.

(g)
We are satisfied that the Appellant worked as a joiner in the Hereford area up until the date of his arrest on 2 nd July 2006."

31.
In her Grounds of Appeal, the Secretary of State submits that the Respondent has produced no documentary evidence to support his oral testimony regarding his work history, and the First-tier Tribunal fail to give reasons for their conclusions. No point on the failure to register is raised in the grounds and permission to appeal was not granted for any point based upon non-registration.

32.
In our view the fact that the oral testimony of the Respondent as to his work record was not supported by documents did not prevent the First-tier Tribunal from making the findings that were made. The approach of the Tribunal to these factual matters, including the absence of positive evidence of registration, was sensible, pragmatic and one which was entirely open to them. Other than asserting the case against the findings, the Secretary of State has filed no further contrary evidence and has, in our view, done nothing to discharge the substantial burden that an appellant faces when seeking to overturn factual findings. The criticisms of the First-tier Tribunal's determination in this regard are therefore not sustained.

Conclusion

33.
As a result of our adverse conclusions on each of the matters raised by the Secretary of State, the appeal must be dismissed.

Signed

Lord Justice McFarlane