Upper Tribunal
(Immigration and Asylum Chamber)

F (Para 320(18); type of leave) USA [2013] UKUT 00309 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow	**Promulgated on**
30 April 2013	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Macleman

Between

THE ENTRY CLEARANCE OFFICER, NEW YORK

Appellant

and

F

Respondent

Representation:

For the Appellant: Mrs M O'Brien, Home Office Presenting Officer

For the Respondent: Mr Sharma, instructed by Matthew Cohen and Associates Limited

1. Paragraph 320(18) requires a two-step approach. The sub-paragraph itself requires an assessment of whether there are no "strong compassionate reasons" before it applies at all; if it does apply it is discretionary because of the internal heading above para 320(18).

2. It may be necessary to ensure that, if an appeal is allowed, it is allowed on the correct ground, because that may have an impact on the reasons for any grant of leave, which itself may impact on any future attempt at renewal.

DETERMINATION AND REASONS

1.
The respondent, to whom we shall refer as "the claimant", is a national of the United States of America. He is married to a British citizen. He has visited the United Kingdom on a number of occasions to be with her, and in November 2011 made an in-country application for settlement as a spouse. That was refused solely on the basis that such an application has to be made from abroad. The claimant accordingly went back to the United States of America and made his application. It was

refused because of a criminal conviction in April 1992. The date of the Entry Clearance Officer's decision was 2 March 2012.

2.
The claimant appealed against that decision. His appeal was heard in Glasgow on 14 June 2012. The claimant was represented by Mr Sharma, as he was before us. No Presenting Officer appeared to argue the Entry Clearance Officer's case. Judge Clough heard evidence from the claimant's wife, and read his statement, with supporting documents. She noted that the claimant's conviction was for offences in 1989. He had served a term of imprisonment, originally set as eight - twelve years. He was in custody for five and a half years and on parole for six. Part of the evidence was a letter dated 1 July 2003 from the National Forensic Counsellor to the Massachusetts Parole Board describing the claimant as an exceptionally responsible client "who has maintained high integrity, sobriety and a positive relapse prevention plan. He does not seem to be a risk to society, his family or himself". The judge noted also the claimant's immigration history, including his previous visits to the United Kingdom, and was aware that in September 2008 he was visited by Immigration Officers who asked him about his offence but did not raise any issues about his being in the country. The judge looked at the surrounding circumstances and concluded that they were not "the exceptional compassionate circumstances envisaged in para 320(18) of the Immigration Rules". Her final word on the claimant's ability to comply with the Immigration Rules is the following:-

"The respondent failed, however to follow the UKBA guidelines and explain why the appellant would constitute a threat to the UK".

3.
We recall that the judge's final word on the matter so far as the Immigration Rules are concerned, because she then goes on to deal with Article 8, and neither here nor at the end of her determination is there any clear conclusion as to whether the claimant's appeal under the Immigration Rules succeeded or failed. But as she does pass on to Article 8, and indeed allows the appeal under Article 8, we must assume that she thought that the appeal under the rules must fail.

4.
So far as Article 8 was concerned, the judge reviewed again the circumstances. The appellant had family life with his wife; and his mother-in-law now needed considerable help. There had been no previous attempt to bar the claimant from the United Kingdom. He had employment available to him in the United Kingdom, and a family network. The judge concluded that it was disproportionate to refuse his application. As we have said, she allowed the appeal under Article 8.

5.
The Entry Clearance Officer's grounds of appeal, on the basis of which permission to appeal to this Tribunal was granted, are that the judge failed to give adequate reasons for her conclusion allowing the appeal. The offence was a serious one, and the claimant had been able to conduct his family life at a distance for some years. It was difficult to see the basis upon which the judge had decided that the decision was disproportionate.

6.
We heard submissions from Mrs O'Brien, who was able to assist us on the technicalities of para 320(18) and on the guidance to which the judge had referred. She confirmed that there was no Presenting Officer at the hearing, and indicated that that appeared to be the result of planned deployment of scarce resources, not a last-minute crisis. She confirmed that there was no doubt that

at all relevant times the claimant met the substantive requirements of para 281. We did not need to call upon Mr Sharma.

7.
Para 320(18) of the Statement of Changes in Immigration Rules, HC 395 (as amended) is complicated, or subtly drafted: perhaps it is both. It is part of a list running from sub-paragraph (8) to (20) following an interior heading:

“Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused”.

That part of para 320 is thus contrasted with sub-paragraphs (1) to (7C), which follow the sub-heading:

“Grounds on which entry clearance to leave or enter the United Kingdom is to be refused”.

Refusal is mandatory under sub-paragraphs (1) to (7C): there is a discretion to be exercised under sub-paragraphs (8) to (20). Sub-paragraphs (18) itself is as follows:

“18. Save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an offence which, if committed in the United Kingdom, is punishable with imprisonment for a term of 12 months or any greater punishment or, if committed outside the United Kingdom, would be so punishable if the conduct constituting the offence had occurred in the United Kingdom”.

8.
Thus, the sub-paragraph requires an assessment to be made as a precondition to its applicability. If the individual in question has been convicted of a relevant offence, para 18 does not apply if the Immigration Officer (here including Entry Clearance Officers) “is satisfied that admission would be justified for strong compassionate reasons”. If he is not so satisfied, sub-paragraph 18 applies, and sub-paragraph 18 imports, as we have said, a discretion. To put the matter shortly, if there are strong compassionate reasons, the sub-paragraph has no application; if there are, exclusion is still not mandatory.

9.
This feature of para 320(18) is of some importance because of the terms of the notice of decision. In it, the Entry Clearance Officer writes as follows:

“Paragraph 320(18) of the Immigration Rules requires the satisfaction that there has not been a [relevant] conviction …. [The claimant’s history is then set out, and the conviction identified]. Therefore, I have refused your application because I am satisfied that para 320(18) applies”.

10.
The Entry Clearance Officer did not consider whether there were strong compassionate reasons, nor did he show any signs of considering how the discretion should be exercised.

11.
As we have said, the judge referred to “the exceptional compassionate circumstances envisaged in paragraph 320(18)”. But that is not the phrase in the rules, and it may well be thought that circumstances or reasons may be “strong” without being “exceptional”. The judge’s decision does, however, make it clear that she was aware of one of the features of the sub-para that we have identified. She offers no treatment of the consequences of the Entry Clearance Officer having failed to indicate the exercise of discretion. She does, however, refer to guidance, which she correctly

summarises. She does not say in her determination that she regarded the guidance as going to whether there were “exceptional compassionate circumstances”; nor does she work through the consequences of the decision having been made contrary to relevant guidance. It is, we have to say, not easy to see why, having reached the conclusion that it was, she did not allow the appeal on the basis that the Entry Clearance Officer had not applied the Immigration Rules correctly. That at least would have been a conclusion consistent with her reasoning.

12.
It seems to us that the Immigration Judge erred in her application of the rules. So did the Entry Clearance Officer, by failing either to assess the circumstances or to apply the discretion. We now need to decide how to determine this appeal.

13.
If the First-tier Tribunal had, recognising the defects in the Entry Clearance Officer’s decision, concluded that the decision was not in accordance with the law and that the claimant’s application for entry clearance therefore remained outstanding, awaiting a lawful decision, we do not think that it would have been possible to criticise it. But the judge did not do that: she made no decision under the rules, but allowed the appeal under Article 8. Having detected an error in her decision, we have a discretion whether to set the decision aside: see s 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. It might be tempting to allow the judge’s decision to stand, on the basis that it looks as though the claimant should have been granted his entry clearance. The problem with that is that the judge’s decision allowed the appeal only on Article 8 grounds. The consequence is that in applying that decision the Immigration Officer would grant leave outside the rules, and the claimant would have difficulty in obtaining an extension of that leave in order to remain as a spouse, because of the nature of his leave. (The current rules are in Appendix FM, para E – ILRP.1.2.). On the other hand, if we substitute the decision that we think the First-tier Tribunal ought probably to have made, the claimant’s application remains outstanding after a considerable delay; and clearly remittal for a new decision by the First-tier Tribunal would do nothing other than extend that delay.

14.
The claimant meets all the substantive requirements of the rules. Despite his conviction for a serious offence he is fully rehabilitated and nobody thinks he is a danger to the community of the United Kingdom. He has been in the United Kingdom on a number of occasions without objection from the Secretary of State; it is clear from the fact that he was interviewed by Immigration Officers that the Secretary of State is aware of the history. Even if the Entry Clearance Officer took the view that there were no “strong compassionate reasons” for discounting his conviction, it seems to us that the question whether the discretion under para 320(18) should be exercised in his favour admits of only one answer. Indeed in the circumstances of this case we take the view that to exercise the discretion against him would be irrational.

15.
For the foregoing reasons we find an error in the First-tier Tribunal’s decision and set it aside. We substitute a determination allowing the appeal, and again, for the reasons we have given, we direct that entry clearance be issued to the claimant.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 4 June 2013

Direction regarding anonymity – rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.