Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/15877/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 3 October 2013	**On 9 December 2013**

Mr C M G Ockelton, Vice President
Upper Tribunal Judge Macleman

Between

PATRICK EWEN POUNDS

Appellant

and

THE ENTRY CLEARANCE OFFICER, NEW YORK

Respondent

Representation:

For the Appellant: Ms S Shafaatulla, instructed by J. R. Rahman Solicitors
For the Respondent: Mr M Mathews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of the United States of America. He encountered his fiancée, Jillian Morrison, on Facebook. They decided they would like to get to know each other better. After they had been in contact electronically for over a year the appellant came to the United Kingdom as a visitor. He met and stayed with her and returned to the USA on the last date allowed by his visa, having been in the United Kingdom for one day short of six months. It was during that time that they decided to get married. The appellant's fiancée has a sixteen-year old daughter who is at school in Scotland. The appellant presently has no dependants. It is therefore hardly surprising that they hoped to be able to live together in the United Kingdom after their marriage.

2. Following his return to the United States, therefore, the appellant applied on 25 April 2012 for entry clearance with a view to marriage to his fiancée. On 18 July 2012 his application was refused. The refusal was based on paragraphs 290 and 320(18) and (19) of the Statement of Changes in Immigration Rules, HC395 as they were on that date. The substantive requirements for fiancées are those in para 290, and it is now accepted that those requirements were met. The refusal under para 320 was maintained by the Entry Clearance Officer, however, and was the subject of an appeal to Judge Quigley of the First-tier Tribunal, who after examining the circumstances of the case dismissed the appeal. The appellant now has permission to appeal to this Tribunal.

3. Paragraph 320(18) and (19) read as follows:

> "**Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused**
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> …
>
> (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;
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> (19) where, from information available to the Immigration Officer, it seems right to refuse leave to enter on the ground that exclusion from the United Kingdom is conducive to the pubic good; if, for example, in the light of the character, conduct or associations of the person seeking leave to enter it is undesirable to give him leave to enter;

4. Those paragraphs were relevant to the appellant's application, because he has a criminal record in the USA. The precise content of that record is not absolutely clear. The documents available to the First-tier Tribunal and to us mention the commencement of proceedings for some very serious offences, but having examined the material for ourselves we are perfectly satisfied that the appellant's relevant convictions were for the following offences only: First, burglary of a dwelling house, the circumstances being that he entered as a trespasser a neighbour's house and abstracted electricity from it for his own use, and, secondly, breach of bail or failure to attend court. The combined sentence was five years imprisonment, apparently imposed on 4 May 2006. We have no access to any sentencing remarks.

5. Before the First-tier Tribunal Judge there was a report from a Scottish solicitor, giving his opinion that, if those offences had been committed in Scotland, the penalty would have been very much less. Permission to appeal to this Tribunal was granted primarily on the ground that Judge Quigley had not given sufficient attention to that opinion. Before us, Miss Shafaatulla argued that, if the reality was that, if they had been committed in Scotland, the offences would not have attracted a custodial sentence, or only a short one, they would not come within the wording of para

320(18): "if committed in the United Kingdom, is punishable with imprisonment for a term of twelve months or any greater punishment".

6. There is no merit in that argument. An offence is "punishable" in a particular manner if the relevant statute (or, in the case of a common law offence, the common law) permits that level of punishment for the offence as defined. For immigration purposes the same concept appears in s.3(6) of the Immigration Act 1971, which reads as follows:

> "… a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of 17, he is convicted of an offence for which is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so".

7. It is to be noted that the word used in s.3(6) is "punishable", not "punished": that distinction demonstrates, if demonstration were needed, that the meaning of "punishable" is directed not to the actual punishment imposed, but to that which could have been imposed. For the purpose of showing whether the appellant came within s. 320(18), the solicitor's opinion was entirely irrelevant. There is no doubt that housebreaking (burglary in England) is "punishable", both in Scotland and in England, with imprisonment for more than twelve months.

8. Judge Quigley erred in treating the report as though it were relevant to the application of s. 320(18) to the appellant.

9. That error perhaps made little or no difference to her determination of the appeal; but there have been at least three other errors in dealing with the appellant's case. We will deal with them in chronological order. First, the Entry Clearance Officer misunderstood the meaning of para 320(18). After setting out the wording of those two sub-paragraphs and noting the appellant's conviction for "at least one criminal offence that could have carried a custodial sentence for more than twelve months if that offence would have occurred in the United Kingdom", the Entry Clearance Officer wrote this:

> "I have considered if there are any compassionate circumstances of your application, however I note that you are seeking entry to the United Kingdom purely for settlement purposes. I am not satisfied that any such circumstances have been demonstrated that are of a sufficiently compelling nature for me to exercise the powers of discretion granted to me by paragraph 320(18) and (19) of the Immigration Rules. The grounds of 320(18) and (19) therefore apply".

10. The Entry Clearance Manager's review simply confirmed the decision in those terms.

11. Para 320(18) sets out a process which is not that adopted by the Entry Clearance Officer or the Entry Clearance Manager. They each appear to have thought that it would be the "compassionate reasons" envisaged by the sub-paragraph that would motivate the application of the discretion envisaged by the word "normally" in the

heading to that part of para 320. That is wrong. If there are "strong compassionate reasons", para 320(18) does apply at all. The normal refusal under para 18 specifically applies only when the relevant officer is not "satisfied that admission would be justified for strong compassionate reasons". Thus, deciding that there are no strong compassionate reasons causes the question of discretion in sub-para (18) to arise: it does not answer it. See F v ECO New York [2013] UKUT 00309 (IAC).

12. The second error was that the First-tier Tribunal Judge clearly thought that the appellant's criminal record was very much more extensive than it was. She set out what she regarded as "quite a catalogue of criminal behaviour", but that included offences with which the appellant was charged but not convicted, and offences (including failing to stop at a road junction) which are not said to be punishable with imprisonment if committed in the United Kingdom. In our judgement she misunderstood the evidence before her.

13. The third error relates to her decision under para 320(18) and (19). Although at para [23] of her determination, the judge sets out what she regards as potential "compassionate circumstances", she appears to reach no judgement on whether para 320 (18) applies; and so far as concerns sub-para (19), she says simply that she is "not persuaded by the argument that the Entry Clearance Officer erred in law by applying" it. Her task was to decide, or additionally to decide, whether the discretion in paras 320(18) and (19) should have been exercised differently. She appears to have made no such decision.

14. The First-tier Tribunal Judge's errors would each be sufficient of themselves to justify the setting aside of her determination and we do so.

15. Looking at the matter anew, we have to decide whether it was right to refuse the appellant entry clearance, given that he meets the substantive requirements of para 290. We cannot condone his offences, but it is clear that the penalty of five years imprisonment represents a reaction to them which is at a quite different level from what it would be if the offences were committed in the United Kingdom. There have been no recent offences, and there is a strong measure of support from community leaders who know him. There is no suggestion that he was any danger to the public of the United Kingdom when he was here, lawfully as a visitor, within the twelve months before his application. He deserves credit for his decision, despite the permanence of the relationship he was entering into, to leave his fiancée in order to return to the United States to make his application.

16. Looking at the matter as a whole we take the view that there are no such "compassionate reasons" as to remove para 320(18) from consideration, but that the discretion conferred by that sub-para should have been exercised in the appellant's favour, taking his entire history into account. In our judgement para 320(19) does not apply to his case: there is no good reason for considering that he is a person whose exclusion is conducive to the public good.

17. For the foregoing reasons, having set aside the decision of the First-tier Tribunal, we substitute a decision allowing the appellant's appeal.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 3 December 2013