Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20998/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 August 2015	**On 4 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR STANFORD RICHARD STEWART
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms. E. Savage, Home Office Presenting Officer.
For the Respondent: Mr. S. Harding, Counsel.

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and Mr Stewart as "the appellant".

2. The appellant is a citizen of Jamaica who was deported to that country on 24 March 2005. He subsequently applied for entry clearance to the United Kingdom as the spouse of his sponsor and wife, Yein Stewart, who is a United Kingdom citizen. The decision was made on 6 August 2012 and was later confirmed by an Entry Clearance Manager on 6 March 2013. The basis for the decision was that the respondent was satisfied that the appellant met the requirements of paragraph 281 of the

Immigration Rules HC 395 (as amended). However, leave to enter was refused under paragraph 320(18) being one of the then general grounds for refusal.

3. The appellant's first appeal was heard by Judge of the First-tier Tribunal Archer who in a decision promulgated on 12 July 2013 found the respondent's decision was not in accordance with the law and the applicable Immigration Rules and accordingly the appeal was remitted back to the respondent for a lawful decision to be made.

4. Judge Archer found that paragraph 320(18) gave no discretion to consider allegations that have not resulted in conviction and placed reliance upon the authority of **Ukus (discretion – when reviewable) [2012] UKUT 00307**.

5. A further decision was then made on 6 August 2013. It again recited beyond the appellant's conviction (carrying a gun for which 42 months' imprisonment was imposed) four other charges (but not convictions).

6. The appellant's second application was refused firstly under the then paragraph 320(18) of the Immigration Rules by reference to a lack of sufficiently compelling circumstances, to the serious nature of the appellant's offence, the fact that he committed it in another country and the fact that he is excluded from rehabilitation. A second ground for refusal was under paragraph 320(19) of the Rules. The ECO having found that the refusal was conducive to the public good as the appellant was charged with four other additional offences which were not pursued.

7. In allowing the appellant's second appeal in the way that he did Judge Freer's conclusions can best be gleaned from paragraphs 67 to 68 of his decision which state:-

> "67. I make a finding based on the evidence and the accepted arguments that the respondent has wholly erred in the approach taken (that is in the final section of the refusal reasons) in the second decision towards sub-Paragraph 320(19), that is to say the 'conducive' ground, where reliance was wrongly placed on unproved charges that never resulted, if they existed, in any conviction. These alleged charges if real were collectively more serious, on their face, than the actual conviction for possession of a weapon. Therefore they were given great weight by the respondent and that was done wholly in error. The respondent in the second decision repeated the same error and then additionally went on to misunderstand or misapply or not take into account the decision given by Judge Archer.
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> **Summary of Decisions**
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> 68. I dismiss the first part of the appeal in relation to sub-Paragraph 329(18) but will allow the second part of the appeal under sub-Paragraph 320(19). The decision was in part not in accordance with the law. It suffered from a defect in procedure. The effect of this determination is accordingly that the decision is quashed in part and that the application remains outstanding awaiting a lawful decision."

8. The respondent sought permission to appeal. Her application was initially refused in the First-tier Tribunal by Judge Monica J. Perotta on 23 February 2015. However, the application was subsequently renewed to the Upper Tribunal and in a decision dated 29 May 2015 Upper Tribunal Judge Storey gave his reasons for granting permission to appeal. They state:-

> "As regards grounds 1 and 2, it is arguable that the judge erred in considering that no account could be taken of the evidence relating to preferred charges/'unproven allegations' made against the appellant in the US when considering whether to apply paras 320(18) and 320(19) against the appellant. However, I do not consider such an error to be arguably material as under para 320 the burden of proof rested on the respondent and evidence relating to these allegations was not sufficient to discharge that burden.
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> I do not entirely follow the arguments raised in ground 3, since if the appellant was caught by para 320(18) entry clearance was properly refused, irrespective of whether para 320(19) also applied against him. Nevertheless, by allowing rather than dismissing the appeal and hence seeking to require the ECO to consider rejection on 320(19) grounds as well, the judge arguably erred and for that reasons (sic) I grant permission."

9. Thus the appeal came before me today.

10. There were two strands to Ms. Savage's submissions. Firstly, that there was no basis for the judge to require the Entry Clearance Officer to reconsider paragraph 320(19) of the Immigration Rules as he had already found that the application had been lawfully refused under paragraph 320(18) of the Immigration Rules. Accordingly, paragraph 320(19) was not in play. Secondly, the judge had inadequately reasoned why the decision under paragraph 320(19) of the Immigration Rules is not in accordance with the law. Paragraph 320(18) is limited to a consideration of "convictions" whereas paragraph 320(19) encompasses issues such as character, conduct and association and there was nothing in law to prevent the judge taking into account the charges referred to in the refusal. Indeed there had been nothing within the first decision relating to this appellant's application (that of Judge Archer) to suggest that discretion was not available to the Entry Clearance Officer and that those charges could not be taken into account.

11. Mr. Harding relied on the Rule 24 notice that he had drafted and is dated 2 July 2015, wherein he argues that the judge properly took into account the question of the "evidence" or lack of it to support the Entry Clearance Officer's contention that it was undesirable to allow the appellant to enter the United Kingdom on the basis of being conducive to the public good. He properly assessed credibility and concluded that the appellant had not used deception, but in the absence of evidence in relation to the "charges" against the appellant it was open to the judge to "dismiss the bearer of the burden of proof on that basis". In particular response to ground 3 (which is the only ground upon which permission was granted by Upper Tribunal Judge Storey) Mr. Harding states at paragraph 7 of his notice that:-

"The Appellant does not understand Ground 3. The Judge was entitled to allow it and send it back."

12. He went on to argue that ten years have now passed since the appellant was released from prison and in light of the findings of Judges Archer and Freer he should now be granted entry clearance. The appellant now clears the hurdles of Immigration Rule 320.

13. In his oral submissions Mr. Harding urged me to adopt an holistic approach to find a pragmatic solution in light of the factual matrix relating to the appellant's marriage, ability to meet the then paragraph 281 of the Immigration Rules and the considerable delay in the event that I acceded to the respondent's submissions which urged me to conclude that the appellant's appeal should have been dismissed. He made reference to Section 12 of the Tribunal's Courts and Enforcement Act 2007and also urged me to set aside the decision of the First-tier Tribunal and allow the appeal outright. He emphasised that the appellant ought not to be prejudiced as a consequence of these proceedings, particularly bearing in mind the current delay in appeals being listed in the First-tier Tribunal.

14. Paragraph 320(18) has been deleted from the Immigration Rules. It dealt with conviction in any country of an offence punishable in the United Kingdom by a term of twelve months, or any greater punishment. There was an exception to refusal, where the Immigration Officer was satisfied that admission would be justifiable for strong compassionate reasons. At the date of the decision it read in full:-

> "320(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;"

15. In setting out paragraph 320(18) Judge Freer was invited to look at relevant guidance and the impact of the authority of **Ukus [2012]** upon paragraph 320(18). Paragraphs 24 to 28 of the judge's decision state:-

> "24. There is guidance from 2013 which I am told is still current now. The current guidance states that for [a sentence in this category] there is mandatory refusal *unless* a period of 10 years has passed *since the end of the sentence*.
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> 25. I do not see any reference to this 10 year exception in the ECO or ECM's reasons and I have recorded above with calculations how I find that 10 years have passed since conviction but not since the end of the sentence served (which event will happen in a few months from now).
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> 26. The guidance does not make it clear if the meaning is 'sentence served' or 'sentence handed down', which I raise as a significant drafting matter that

the respondent may very kindly wish to address when convenient to do so, in order to avoid the possibility of future disputes in many other cases.

27. The guidance goes on to say that an IO should take into account any human rights grounds. If it should fall for refusal but there are exceptional, compelling or compassionate circumstances, the IO should refer to RFL03.

28. **Ukus (2012)** was likewise a sub-Paragraph 320(18) case. Where a person should have exercised differently a discretion conferred by the Rules, the Tribunal must allow the appeal to that extent."

16. I find that the nub of this appeal is not as complex as perhaps the representatives' submissions suggest. By reason of his conviction, the appellant was "caught" by paragraph 320(18) of the then Immigration Rules and entry clearance was thereunder properly refused. This is irrespective of whether paragraph 320(19) also applied against the appellant. The appellant's appeal fell to be dismissed as he was "caught" by paragraph 320(18). Accordingly, by allowing rather than dismissing the appeal, and hence seeking to require the Entry Clearance Officer to consider rejection on paragraph 320(19) grounds as well the judge has materially erred.

17. Of course I understand Mr. Harding's arguments regarding delay and the impact of the appeal process upon the appellant. However, my task is to consider the law and I find the making of the previous decision involved the making of an error on a point of law and accordingly I set the previous decision aside.

18. I remake the decision in the appeal by dismissing it.

19. No anonymity direction is made.

Signed Date 1 September 2015

Deputy Upper Tribunal Judge Appleyard

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 1 September 2015

Deputy Upper Tribunal Judge Appleyard