Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/00986/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On May 18, 2015	**On May 20, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DANIEL CRAIG REEVES
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Avery (Home Office Presenting Officer)
For the Respondent: Mr Lewis, Counsel, instructed by Davidson Morris Limited

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The Appellant is a citizen of the United States of America. On June 21, 2012 he applied for entry clearance to settle in the UK as a spouse. He and his wife had met in 2001 and they married in August 2002 in Scotland and between August 2002 and August 2005 he travelled to the United Kingdom then in August, September and

November 2002, May 2003 and November 2005. They then lived together in Hawaii for 6 ½ years before his wife returned to the United Kingdom to run a profitable farm business she had purchased in 2009. The respondent initially refused the appellant's application on August 3, 2012 under paragraphs 320(18) and (19) HC 395. The matter came before Judge of the First-tier Tribunal Thew on July 3, 2013 and she remitted the decision back to the respondent to consider whether it was appropriate to exercise her discretion in light of the compassionate circumstances she had found.

3. The respondent reviewed the application but refused the application on December 6, 2013.

4. The appellant appealed that decision on January 6, 2014, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002. The matter came before Judge of the First-tier Tribunal Canavan (hereinafter referred to as the "FtTJ") on June 26, 2014 and in a decision promulgated on July 8, 2014 she allowed the appeal under both the Immigration Rules and Article 8 ECHR.

5. The respondent lodged grounds of appeal on August 12, 2014 submitting the FtTJ had erred by considering the appeal under paragraph 320(18) and (19) when the decision was confined to Paragraph 320(19) and she had also erred in her approach to Article 8 ECHR. The matter came before Judge of the First-tier Tribunal Simpson on November 21, 2014 and she found there was no error in law. The grounds of appeal were renewed on December 18, 2014 and Upper Tribunal Judge Kekic found there was an arguable error in law.

6. The matter came before me on the above date and the parties were represented as set out above.

7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order

SUBMISSIONS ON ERROR IN LAW

8. Mr Avery submitted the FtTJ erred by failing to make a ruling on whether the respondent's decision was unlawful. He submitted that she had to do this before she could consider if discretion had been exercised correctly. The FtTJ based her findings on what the previous judge had found following an earlier hearing and failed to make substantive findings. The FtTJ failed to have full regard to the serious history of offending and limited her assessment to the public interest to the risk of re-offending whereas this issue was whether his admittance was conducive to the public interest. The FtTJ erred by failing to engage with the public interest issue and treated the appeal as if Judge of the First-tier Tribunal Thew's findings were binding.

9. Mr Lewis submitted the original determination was fundamental in this appeal because Judge of the First-tier Tribunal Thew had the same information before her and made it clear that if all of the evidence had been before her she would have allowed the appeal but she was constrained by the fact some of the evidence post-

dated the date of decision. The respondent had failed to properly consider the evidence that had been submitted and the FtTJ was entitled to find that the respondent should have exercised her discretion differently under paragraph 320(19). Although paragraph 320(18) was not raised in the refusal letter there was no material error because firstly the Entry Clearance Manager had reviewed the appeal after the appellant had appealed and "concluded that a refusal under paragraphs 320(18) and (19) was still appropriate." The FtTJ did adopt many of the Judge of the First-tier Tribunal Thew's findings but the FtTJ made it clear that this was her starting point. In paragraph [18] of her determination she accepted the circumstances relating to the sponsor's health and her ability to obtain adequate health insurance and lifesaving treatment in the USA, the need for the sponsor to care for her parents all amounted to "strong compassionate circumstances". She made it clear that serious past convictions can weigh in the public interest in refusing entry but this concern could be outweighed by compassionate circumstances. The FtTJ considered all the facts and made a finding open to her.

10. I reserved my decision.

CONSIDERATION AND FINDING ON MATERIAL ERROR OF LAW

11. The respondent had been granted permission to appeal albeit Upper Tribunal Judge Kekic erroneously referred to the respondent's decision as being under paragraph 320(20 HC 395 when in fact the Tribunal was concerned with paragraph 320(19). Although Mr Avery raised this as a preliminary issue it was not a matter he pursued any further.

12. The appellant succeeded in his appeal primarily because two Judges of the First-tier Tribunal found in his favour. Judge of the First-tier Tribunal Thew sent the decision back to the respondent to consider compassionate circumstances that had not been before her. The respondent appealed that decision but she lost her appeal. A fresh refusal letter was issued and simply said those circumstances should have been made in a separate application. She did not consider this evidence under the Rules but briefly considered it under Article 8 ECHR and concluded, "… I am satisfied that the interference with Article 8 is not disproportionate given your criminal history."

13. Mr Avery criticised the FtTJ for her approach to the issue of whether the exclusion of the person from the United Kingdom is conducive to the public good. He argued that the FtTJ only had regard to the age of the convictions and the lack of offending since his release in 2001.

14. Any proper reading of the determination reveals that the FtTJ considered a number of factors in the determination. She agreed with the findings of Judge of the First-tier Tribunal Thew who had heard all of the evidence previously. She did not dissent from the position she adopted but the FtTJ went on to consider what had happened since. This is demonstrated in paragraphs [14], [18], [19], [20] and [21] of her determination.

15. The decision to allow the appeal was not based on risk of re-conviction. The FtTJ had regard to the serious nature of the offences but took on board what Judge of the First-tier Tribunal Thew found as was recorded in paragraph [7] of the determination. She reminded herself about the "public interest" in paragraph [19] and in paragraph [20] she agreed there were strong compassionate circumstances and these were the factors that had originally been before Judge of the First-tier Tribunal Thew and had been placed before the respondent prior to the latest decision.

16. Mr Avery submits that by allowing the appeal under paragraph 320(18) the FtTJ erred but this submission overlooks the fact the ECM reiterated the refusal under this paragraph in her review. The argument has no basis in any event because the FtTJ went on in paragraph [21] to allow the appeal under paragraph 320(19). She had regard not only to his lack of convictions but all of the evidence submitted relating to his character, conduct and associations. She concluded her assessment finding there was no evidence to suggest his entry to the UK was likely to be detrimental to the public order in preventing disorder and crime.

17. The FtTJ accepted a lawful decision had been taken but found the respondent had not exercised her discretion reasonably. That finding was open to the FtTJ and no error of law is made out.

18. Mr Avery did not address me separately on Article 8 and it seems to me that the challenge to that decision falls once the substantive application has been allowed. I therefore find no error in law in the way the FtTJ dealt with Article 8 ECHR.

DECISION

19. There was no material error. I uphold the FtTJ's decision.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award for the reasons given by the FtTJ.

Signed: Dated:

Deputy Upper Tribunal Judge Alis