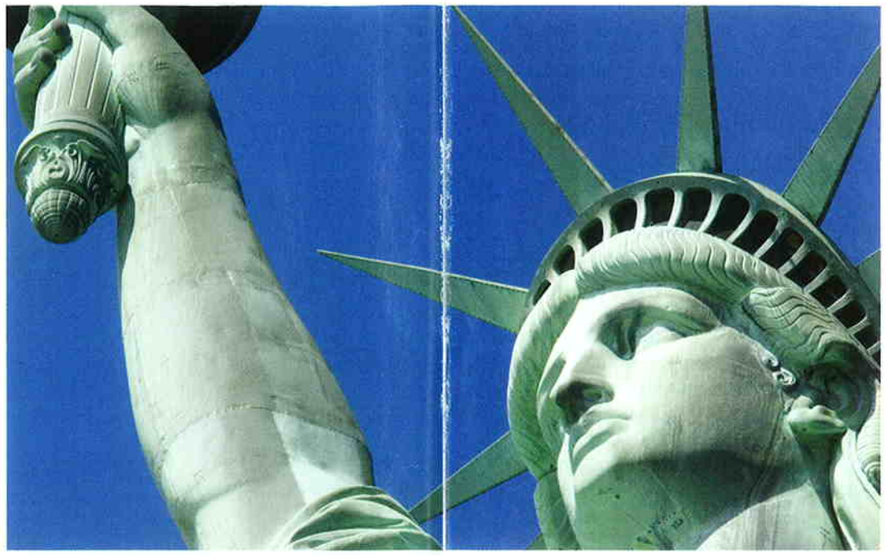
Branded a criminal

Entering the US can be an ordeal, particularly for those who have found themselves on the wrong side of the law in the past, says Steven Heller



WITHIN THE PAST year alone, entertainment personalities like Russell Brand, Lily Allen, Amy Winehouse and Boy George have had highly publicised difficulties with US immigration law. But countless others have had problems of their own, even if they did not make tabloid headlines. Anyone with a criminal record may be subject to heightened scrutiny for a US visa – or outright denied, even if a conviction is spent. And it does not go away; every time someone with a criminal record seeks a visa they must overcome the inadmissibility. In effect, with all due respect to Russell Brand, a criminal record can leave one branded as inadmissible to the US.

Section 212 of the US Immigration and Nationality Act (INA) describes grounds for denying entry to the US, from health-related protections to criminal and security-related provisions, as well as more administrative concerns relating to punishing those with a history of abusing US immigration laws. This article focuses on the criminal ground of inadmissibility.

'Moral turpitude is a notoriously plastic term – one so ambulatory that some justices have thought it unconstitutionally vague'

Inadmissibility determinations are made by US immigration inspectors at the port of entry or by a US consular officer as part of the visa adjudication process. The latter scenario is the primary focus of the discussion below.

The law is basically the same, but in practical terms, consular officers are bound by title 9 of the Foreign Affairs Manual (FAM). The FAM endeavours to enshrine changes in interpretations drawn from decisions by the Administrative Appeals Office (AAO), the Board of Immigration Appeals (BIA) and the various Federal Circuit Courts of Appeals.

Generally, INA s.212(a)(2)(A) proscribes admission to the US to anyone guilty of a "crime involving moral turpitude" or "a controlled substance violation". Significantly, these provisions apply not only to convictions, but also for admissions to the essential elements of the crime, and for attempt and conspiracy to commit the crime.

What is a crime involving moral turpitude?

If you are not familiar with the term 'crime involving moral turpitude', you're probably still puzzling over the meaning of the previous paragraph. Even those of us who feel comfortable enough to refer casually to 'CIMTs' have to keep tabs on variations in the law. Just this past year the BIA grappled with the matter twice and the US Circuit Court of Appeals for the Seventh Circuit lamented, "'moral turpitude' is a notoriously plastic term – one so ambulatory that some Justices have thought it unconstitutionally vague" (*Ali v Mukasey* 521 F.3d 737 (7th Cir. 2008)).

The FAM does not define CIMT, but it offers three common elements: fraud, larceny and intent to harm persons or things. Fundamentally, jurisprudence suggests identifying a certain level of baseness, vileness, or depravity undermining the specific violation – a purposeful, deliberate attempt to harm or defraud. Rape is a CIMT; so are petty larceny and mail fraud. A guiding principle is whether an essential element of the crime requires knowledge of wrongfulness – in a word, 'intent'.

'Intent' was the focus of the BIA in two cases it decided last year, addressing when assault amounts to CIMT. Historically, serious assault, such as assault with intent to kill or intent to cause grievous bodily harm, has been found to constitute a CIMT, while simple assault has not. In the two recent cases, one involved third degree assault in New York State (intent to cause physical harm) (*Re: Solon*, 24 I&N Dec. 239 (BIA 2007)); the second involved 'assault and battery of a family or household member' (in this case the applicant's wife) (*Re: Sejas*, 24 I&N Dec 236 (BIA 2007)). The BIA found one case constituted a CIMT; guess which one. Right, wife beating was deemed not to be a CIMT because the Virginia statute at issue did not make intent an element of the crime. It remains to be seen whether these cases will affect the FAM, although it might appear that the New York case nudges the CIMT standard a little closer to including simple assault.

Not just popstars: controlled substance violations

One of the most restrictive aspects of US immigration law is its treatment of controlled substance violations. These include "crimes related to a controlled substance" and controlled substance traffickers. Trafficking is self-explanatory, but "crimes related to a controlled substance violation" invites discussion.

It has been interpreted to include not only simple possession of a controlled substance, but also possession of drugs paraphernalia. The controlled substances at issue are identified in s.102 of the Controlled Substances Act and include marijuana, cocaine, LSD, amphetamines, barbiturates and angel dust. For consular officers, the FAM provides the list along with additional guidance like, "the term 'marijuana' includes . . . bhang, ganga, dagga, hashish…"

Alcohol is not a controlled substance, although it should be noted that drink driving convictions or other indicia of a history of drug use may subject one to inadmissibility, not for criminal conduct, but for health-related grounds (for example a drug abuser).

Is there any way to get into the US despite a criminal record?

Would-be travellers to the US should not (necessarily) despair; relief from inadmissibility may be available for immigrants or non-immigrants through a waiver – special permission from the US Department of Homeland Security (DHS) due to exigent circumstances. But, before considering waiver eligibility, one should scrutinise the inadmissibility determination itself.

When is a conviction a conviction?

A conviction is defined in s.101(a)(48)(A) of the INA as "a formal judgment of guilt . . . entered by a court or, if adjudication of guilt has been withheld, where – (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty."

The "some form of punishment" language is sufficiently vague to invite various interpretations. Earlier this year, the BIA held that imposition of court costs and surcharges constituted a sufficient penalty for a plea of *nolo contendere* to drug possession to result in inadmissibility (Matter of Arturo Cabrera, 24 I&N Dec. 459 (BIA 2008)). Such reasoning should give one pause when considering plea arrangements.

Even in the absence of a conviction, an admission of guilt can be the basis for inadmissibility. Not all admissions count. They must:

- be under oath;
- be based on the statute and personal statements to establish the CIMT;
- be made with an understanding the elements of the crime;
- include all the factual elements which constitute the crime; and
- be explicit, unequivocal and unqualified.

An admission for a crime for which the individual was tried and acquitted cannot be the basis for an inadmissibility determination.

When is a conviction not a conviction?

Not as often as you might think. As noted in the beginning of this article, convictions removed under the Rehabilitation of Offenders Act are still considered convictions, as are most convictions that benefit from some post-sentencing relief; however, for CIMTs in the US, a full and unconditional pardon issued by the US president or other appropriate official will remove the inadmissibility (this is not so for controlled substance violations or for foreign convictions; expungement, pardon, or other sentence modification is essentially irrelevant, although in limited circumstances there may be an argument for excusing convictions for first offenders).

A conviction overturned on appeal is not a conviction for immigration purposes, nor is a judgment vacated by the original court (writ of error *coram nobis*).

Even if there was a conviction, there are some exceptions:

Youthful indiscretions

Crimes prosecuted as acts of juvenile delinquency may not be used for inadmissibility if the applicant was under the age of 15 at the time of committing the crime. For crimes committed between the ages of 15–18, the consular officer will not apply the inadmissibility unless the crime was particularly serious.

Political offences

The CIMT bar does not apply to "purely political" offences.

Waivers

Non-immigrant visa waivers

The DHS is authorised to waive criminal-related inadmissibilities after assessing the risk of harm to society, the seriousness of the crime, and the reasons for seeking to enter the US. Consular officers can recommend approvals of such waivers. The FAM recommends considering:

- the recentness and seriousness of the activity or condition resulting in the alien's inadmissibility;
- the reasons for the proposed travel to the US; and
- any effect, positive or negative, of the planned travel on US public interests.

A well-prepared waiver application should present facts sufficient to establish all of the above – a task that can benefit from collaboration between US immigration and UK criminal counsel.

Immigrant visa waivers

Section 212(h) of the INA provides for discretionary waiver of inadmissibility based on criminal conduct, but only for individuals convicted of CIMTs (except murder and torture and attempts or conspiracy to commit murder or torture) or who are convicted of a single offence of simple possession of 30 grams or less of marijuana.

An increasing body of case law favours the expansion of the waiver to drug paraphernalia crimes related to simple possession of 30 grams or less of marijuana (earlier this year, the Seventh Circuit came to this conclusion in *Barraza v Mukasey*, 519 F.3d 388 (7th Cir. 2008)). To be eligible for a waiver, the applicant must establish either:

- that the crime occurred more than 15 years before application for a visa, and admission would not be contrary to the national welfare, safety, or security of the US, and that he or she has been rehabilitated; or
- that the spouse, parent, son or daughter is a US citizen or lawful permanent resident who would suffer "extreme hardship" if the individual were not allowed to live in the US. The 'extreme hardship' standard is strict, and requires more than "common results of the bar, such as separation or financial problems."

Getting help

Individuals subject to inadmissibility should consult a US immigration attorney. There is no central reference for US immigration practitioners in the UK. The American Immigration Lawyers Association is a professional membership organisation for US immigration lawyers, and it recently added a Rome District Chapter, which includes the UK, but, unlike the Law Society, it does not maintain a searchable directory of US immigration lawyers practicing in the UK.

To find US immigration counsel, traditional methods, like client and professional referrals, and more modern methods, like Google searches should provide a pool from which to choose – criminal solicitors would be well served to maintain such a resource (and vice versa).

A criminal record can be problematic enough in daily life, but it can be especially damning if one wishes to go to the US. Nevertheless, a good US immigration attorney can work with criminal solicitors to understand the ramifications, identify possible relief, and possibly minimise the extent of future US visa problems.

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