



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/17850/2012

THE IMMIGRATION ACTS

Heard at Field House

On 14 October 2013

Determination

Promulgated

On 18 October 2013

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Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

KEVIN CUBERO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation

For the Respondent: Ms H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal brought by the Entry Clearance Officer, New York, against the decision of the First-tier Tribunal following a hearing on 4 February 2013 in which that Tribunal allowed the appeal of the applicant, Mr Kevin Cubero, a citizen of the United States, against the decision of the

Entry Clearance Officer to refuse him entry clearance to the United Kingdom as the spouse of a person present and settled in this country.

2. The sole issue so far as I am concerned concerns paragraph 320(18) of the Immigration Rules. That paragraph states that 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 twelve months or any greater punishment, or if committed outside the United Kingdom would be so punishable if the constituting offence had occurred in the United Kingdom is a ground on which refusal of entry clearance or leave to enter should normally be applied. In other words this is a discretionary power to be exercised in the first instance by the Entry Clearance Officer but if appealed it is the function of the First-tier Tribunal to re-exercise that discretion.
2. The Judge of the First-tier Tribunal set out his reasons for allowing the appeal at paragraphs 11 to 15 of his determination. In paragraph 11 he noted the nature of the offence which was one count in 2009 of cocaine possession for which the claimant received what the judge described as a relatively light sentence of probation and a fine. The judge noted that the offence was never hidden from the authorities and that the claimant had completed his sentence with regard to his period of probation. He had not committed any further offence and there had been a passage of time in which according to the judge the claimant's behaviour had not been seen to be criminal. The judge noted that the claimant had worked and had shown signs of maturity. He said that whilst the five year period for the offence being spent had not elapsed the claimant was now more than three fifths of the way through that period. The authorities in the United States did not wish for him to remain on probation which he had completed.
3. The judge then went on to note that other matters regarding maintenance and accommodation were satisfied, that is not an issue which is pursued before me today. At paragraph 14 the judge considered the evidence not only from the claimant but also from the person described as the sponsor, that is the wife of the claimant, Mrs Cubero. She had given evidence in front of the judge and he found her evidence like that of the claimant to be credible. The judge noted that Mrs Cubero has type 1 diabetes which meant that she had a constant need for medical treatment but there was a large and wide family support available for her and both her godmother and stepfather were in court to support her. The judge went on to allow the appeal under the Immigration Rules.
4. The Entry Clearance Officer criticises the judge's decision for failing to engage with the issue as to whether or not strong compassionate reasons for allowing the appeal existed. Criticism is directed to paragraph 11 of the determination the terms of which I have just set out. It is true that the

judge refers in that paragraph to certain mitigating features but it is equally apparent to me that the determination needs to be read as a whole and that paragraphs 11 to 15 inclusive encapsulate the reasons why the judge decided to exercise discretion differently from that of the Entry Clearance Officer.

5. The judge heard oral evidence from Mrs Cubero and as I have said he found her credible. Her witness statement was in front of the judge and in finding her credible it is manifest to me that he accepted what she had to say in that statement. It is also equally manifest that the judge accepted what was said in the statement before him from the claimant. Both of those statements paint a picture of considerable stress being caused to Mrs Cubero as a result of the problems that have arisen regarding her husband's application for entry clearance. Stress in such circumstances is as I have indicated today a matter that can easily arise when people from different countries decide to form relationships and get married but in these circumstances with Mrs Cubero's type 1 diabetes being plainly of a serious and significant kind, the issue of stress assumes a much greater significance and I see nothing wrong in the judge accepting what he had heard from her regarding the consequences to her of the problems that had arisen regarding her husband.
6. The judge did not I find confine himself to the so-called mitigation regarding the criminal offence but in deciding in all the circumstances whether to exercise his discretion differently it was plainly material for the judge to have regard to that issue and what he said regarding the mitigating factors have not been sought to be challenged before me.
7. The grounds also make reference to the judge having in effect ignored an attempt by the claimant to enter the United Kingdom as a visitor following an earlier refusal of an application for entry clearance as a spouse. Ms Horsley is not specifically said to advance that aspect of the grounds before me today. I consider that that is correct for the reason that if one reads the decision of the Entry Clearance Officer it is plain that that issue played no material part in the Entry Clearance Officer's decision with regard to paragraph 320(18). For what it is worth the explanation for how the claimant came to seek entry clearance as a visitor is fully set out in the claimant's statement and since the judge accepted the evidence from both the claimant and Mrs Cubero it is apparent that he must have accepted that part of the evidence also.
8. In short therefore, reading the determination purposively, it is manifest that the judge was in substance addressing the issue as to whether the circumstances required by the Rules existed. It is equally manifest that there was material in front of him in the form of the witness statements and the oral evidence that amply supported a conclusion that in all the circumstances of this case such compassionate reasons existed. Accordingly, for the reasons I have given this appeal by the Entry

Clearance Officer is dismissed and the effect of that is that the decision of the First-tier Tribunal stands.

Signed

Date

Upper Tribunal Judge Peter Lane