



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10887/2014

THE IMMIGRATION ACTS

Heard at Field House
On 20 April 2015 and on papers

Decision and Reasons Promulgated
On 21 August 2015

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

Entry Clearance Officer

Appellant

and

Danielle DeMarsh

Respondent

Representation:

For the appellant: Mr T. Melvin, Home Office Presenting Officer on 20 April 2015

For the respondent: No appearance on 20 April 2015 (family members present)

DECISION AND REASONS

1. This is an appeal brought by the Entry Clearance Officer against the decision of First-tier Tribunal Judge Lowe whose determination was promulgated on 16 December 2014 allowing Ms DeMarsh's appeal against the decision of the Entry Clearance Officer refusing her leave to enter the United Kingdom. For the sake of continuity, I shall refer to Ms Marsh as 'the appellant', as she was in the First-tier Tribunal.
2. The appellant is a citizen of Canada who was born on 2 October 1985. She sought entry clearance to enter the United Kingdom as the partner of Mr

Howells, a British citizen then working in Canada. Her application was made on 12 June 2014. It was her intention to accompany him on return. By a decision made on 15 August 2014, the application was refused. The Entry Clearance Officer recited that Mr Howells had been employed as a bartender in Canada since 10 March 2014 earning an equivalent salary of £9,940 per annum. Given the period between 10 March 2014 and 12 June 2014 was a period of approximately 3 months, this would equate with earnings of about £2,490. Prior to that he stated that he had been employed with Great Plains Drilling for a period of two months from 9 October 2013 to December 2013 showing gross earnings of Canadian \$13,314. However, the appellant provided evidence that Mr Howells had been offered employment in the United Kingdom as a teacher with a start date on 1 September 2014 at an annual salary of £26,465.

3. The basis for the refusal was expressed to be a failure to provide mandatory documents confirming Mr Howells' employment. However, the decision also refers to the financial requirements when overseas employment is relied upon in support of an entry clearance application. Those requirements were to be satisfied by the provision of personal bank statements and payslips. In particular, the payslips had to cover a period of six months prior to the date of application (12 December 2013 to 12 June 2014) if the individual has been employed for at least six months or alternatively any period of salaried employment in the period of 12 months prior to the date of application (12 June 2013 to 12 June 2014) if the person had been employed by his current employer less than six months.
4. The decision letter, however, did not go on to specify the level of remuneration that Mr Howells was required to meet.
5. The applicant submitted a tax return for the year 2013 confirming his remuneration in Canadian dollars at an equivalent of £12,878.40.
6. When the matter came before me for hearing on 20 April 2015, I was concerned to know where the requirements of the Rules were to be found and how the respondent alleged Mr Howells had failed to meet them. I directed:
 1. The respondent* has 14 days (i) to set out the applicable Immigration Rules (ii) to identify the evidence submitted to the Entry Clearance Officer and (iii) to set out how it is said the respondent failed to meet the requirements of the Rules (the refusal letter fails to do this)
 2. The respondent has liberty to respond, if she chooses to do so, within 14 days.
 3. The papers are to be placed before me in 28 days to determine the appeal on the papers without a hearing.
7. As my record of proceedings made clear, the reference to the respondent* in paragraph 1 is a reference to the Entry Clearance Officer who is the appellant in this appeal.

8. Pursuant to my directions, and within time, Mr Melvin filed with the Tribunal and served upon the sponsor's brother a document setting out the requirements of the Immigration Rules as they related to entry clearance as the dependent partner of a British citizen under Appendix FM. In addition, he submitted a copy of the Immigration Directorate Instructions insofar as they related to Family Members under Appendix FM and in particular Annex FM, Section FM 1.7: *Financial Requirement*. In section 5 of this document, entitled '*Salaried and non-salaried employment*' the following sections were highlighted:
 - (i) 5.2 Category A: With current employer for six months or more - overseas sponsor returning to the UK
 - (ii) 5.4 Category B: Less than six months with current employer or variable income - overseas sponsor returning to the UK
9. Ms DeMarsh provided no response.
10. The crucial factor to note is that in each category, that is in either Category A or B, the applicant had to meet the financial requirements which is the minimum income threshold that the partner must satisfy. At the time of application and decision the relevant threshold to be met by Mr Howells as a partner with no children was £18,600.
11. It was this crucial figure that was omitted from the decision made by the Entry Clearance Officer. Once this ingredient is added to the decision-making process, the outcome of the appeal becomes clear. In essence, where the applicant's partner was in employment for less than six months with what was then his current employer (as a bartender from 10 March 2014 to 12 June 2014) the financial requirement had to be met in two parts. First, the applicant's partner had to confirm an offer of salaried or non-salaried employment and secondly he had to show that he had received in the 12 months prior to the date of application a level of income of no less than £18,600.
12. The applicant, as recorded by the First-tier Tribunal Judge submitted evidence that between October 2013 and November 2013 he had earned Canadian \$13,300 with Great Plains Drilling and a further sum by working as a bartender from 10 March 2014 at an annual equivalent sterling rate of £9,940. The combined effect was that in the 12 months preceding the application, the applicant did not reach the minimum threshold of £18,600 however generously one viewed the documentation.
13. It is regrettable that the Entry Clearance Officer failed to make clear where the application failed. It is also regrettable that I found the Rules so impenetrable that I was unable to apply them unaided. However, now that the position has been made clear to me I am satisfied that the application made by the appellant was bound to fail because her partner did not meet the financial requirements which would have enabled her to obtain entry clearance as a partner.

14. When the matter came before First-tier Tribunal Judge Lowe, she allowed Ms DeMarsh's appeal on the basis that the application for entry clearance only required it to be established that the offer of UK employment met the threshold rate set out in the Rules. In doing so she failed to apply the provisions of the Rules as I now understand them to be (and, for reasons similar to mine, she may have misunderstood those requirements). As the First-tier Tribunal Judge recorded the 2013 tax return confirmed Mr Howells' earnings at about £12,878.40, or their equivalent in Canadian dollars, had the Judge applied the correct requirement, she would have been bound to have dismissed the appeal.
15. It is apparent that the decision of the Entry Clearance Officer was incomplete in that it failed to set out in intelligible form the reasons for refusal. It would normally be appropriate to set aside the decision and require the Entry Clearance Officer to make a fresh and lawful one. However, as there is no discretionary element involved and as I now understand the basis for refusal, there is no advantage to be gained by requiring the Entry Clearance Officer to perfect his decision by making a lawful one. I now know what that decision must be. Accordingly, I am in as good a position as he to set aside the decision of the First-tier Tribunal Judge and remake the decision dismissing Ms DeMarsh's appeal.

DECISION

1. The Judge made an error on a point of law and I allow the Entry Clearance Officer's appeal.
2. I set aside the decision of Judge Lowe.
3. I re-make the decision dismissing Ms DeMarsh's appeal on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
11 August 2015