



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

Appeal Number: OA/11691/2013

THE IMMIGRATION ACTS

**Heard at Belfast – Bedford House
On 13th January 2015**

**Determination Promulgated
On 13th February 2015**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ENTRY CLEARANCE OFFICER - SUDAN

Appellant

and

MRS FATIMA BASHEER MOHAMED ELFAKI

Respondent/Claimant

Representation:

For the Appellant:

Mr M Shilliday, Home Office Presenting Officer

For the Respondent/Claimant:

Mr S Holiwood, Counsel instructed by Andrew Russell
& Co Solicitors

DETERMINATION AND REASONS

1. The claimant is a national of Sudan born on 1st January 1986. On 1st March 2013 she applied for entry clearance as a family member of an EEA national, namely her husband Mr Mohamed Elfaki. He is a British national.
2. The application was refused on 30th April 2013 because her sponsor, as a British citizen, was not exercising treaty rights.

3. The sponsor himself was originally from the Sudan but obtained British nationality in 1998 on the basis of his marriage to his first wife. Since 2007 he has been working as a chef in a local hotel. He has a daughter by the first marriage but there are no children to the marriage that he has with the claimant.
4. The claimant sought to appeal against the refusal which appeal came before First-tier Tribunal Judge Farrelly on 8th May 2014.
5. The Judge did not find that the EEA Regulations were engaged.
6. As to the Immigration Rules it was noted that a previous application for entry clearance had been refused under paragraph 320(7B). In any event the earnings of the sponsor were less than the £18,600 which was required under the Rules.
7. The Judge went on, however, to consider matters under Article 8 and in particular noted in relation to proportionality the comments made by Mr Justice Blake in **MM, R (On the Application Of) v The Secretary of State for the Home Department [2013] EWHC 1900 (Admin)** that the imposition of such a high financial threshold was unfair and disproportionate in terms of human rights. It is clear from paragraph 32 that that comment was a determinative influence in the decision by the Judge to allow the appeal in respect of Article 8 of the ECHR.
8. The Secretary of State for the Home Department sought to appeal against that decision on the basis that the Judge had failed to identify any compelling circumstances over and above the Immigration Rules to justify the decision.
9. Permission to appeal was granted on that basis. Thus the matter came before me in pursuance of that permission.
10. Events have moved on to a significant extent in that the decision of Mr Justice Blake as set out in paragraph 22 of the determination was considered by the Court of Appeal in **MM (Lebanon) [2014] EWCA Civ 985**. In essence the approach taken by Mr Justice Blake did not find favour with the Court of Appeal. The Court of Appeal held that the Secretary of State and Parliament were entitled to set a particular standard of earnings in all the circumstances and that to do so was not in breach of fundamental human rights. Mr Holiwood, who represents the appellant, conceded most fairly at the outset that the Court of Appeal decision in **MM (Lebanon)**, although made subsequent to the decision of the First-tier Tribunal Judge, nevertheless reflected a change in the approach to be taken to the Immigration Rules and fundamentally undermined the reasoning of Mr Justice Blake at first instance. Given that the findings in relation to Article 8 were essentially predicated on that basis it was conceded that the decision was wrong in law and could not stand.
11. It was somewhat of a grey area in any event, whether the First-tier Tribunal Judge was entitled to embark upon a consideration of Article 8 in an application made under the EEA Regulations. It was conceded, however, once again by those who represented the claimant, that the refusal of entry clearance purported to deal with matters also on the basis of Article 8 and as such therefore it was legitimate for an

appeal to be lodged upon that basis. It was not considered therefore that a formal fresh application in respect of Article 8 was required. It was at any event important in that context to consider the nature and effect of 320(7B) and whether that should continue to be applied in all the circumstances.

12. There would need to be evidence and legal argument in relation to what were the compelling circumstances of the claimant and whether or not he should continue to be excluded from the United Kingdom. In those circumstances, in pursuance of paragraph 7 of the Senior President's Practice Direction, it was conceded that the decision should be quashed and set aside to be remade by a differently constituted First-tier Tribunal.
13. I do not set out any detailed directions at this time other than to indicate that if further evidence is to be provided as to family and private life and/or compelling circumstances such should be served no later than seven working days prior to the new hearing.

Decision

The appeal by the Secretary of State for the Home Department is allowed. There will be a reconsideration of Article 8 and related issues before the First-tier Tribunal.

Signed

Date **13th February 2015**

Upper Tribunal Judge King TD