Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/11930/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 December 2015	**On 04 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

M F
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Sponsor in person
For the Respondent: Mr Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a Moroccan national. On 22 August 2014 she was refused entry clearance as a partner under Appendix FM of the Immigration Rules. The Respondent refused her application on financial grounds as her sponsor's gross income from State Pension was £6,456.48 and consequently the income threshold of £18,600 was not met. The Appellant appealed against that decision and her appeal was dismissed by First-tier Tribunal Judge C Burns in a decision promulgated on 29 June 2015. The Appellant sought permission to appeal against that decision. Permission was granted by First-tier Tribunal Judge Bartlett on 7 September 2015 on the grounds that First-tier tribunal

gave no consideration to the best interests of the young children as against the children being in the United Kingdom and their mother remaining in Morocco. The First-tier Tribunal judge had considered whether the Appellant's husband could not go to Morocco but gave no consideration to the question of the best interests of the UK children being in the UK without their mother. Judge Bartlett, in granting permission, considered that the failure to assess the best interests against the background of the UK citizen children being in the United Kingdom and the mother remaining in Morocco constituted an arguable error of law.

The Grounds

2. The grounds for permission to appeal are dated 11 July 2015 and rely on a letter from the sponsor's MP Henry Bellingham in which he states that it would be unrealistic for the Appellant's children to come to the UK to start their schooling without their mother.

The Hearing

3. As the sponsor was unrepresented I explained to him the nature of an error of law hearing. He relied on the letter from his MP and the grant of permission.

4. Mr Melvin submitted that the First-Tier Tribunal acted appropriately. The Judge looked at the Rules and then found those Rules could not be met. The Judge moved on to conduct staged Article 8 assessment. The children were free to move to and from Morocco and the Judge made findings on the best interests of the children that were open to her to make. The proportionality assessment was open to her and not irrational. The sponsor was free to live in Morocco should he wish. There were many examples of British Citizen children living abroad. It may be beneficial for them to be educated here but this did not bring the determination into material error. The children's best interests were considered throughout and it was taken on board that they were British Citizens. S55 of the Borders, and Citizenship Act 2009 had been applied. The argument was with the findings. The prior residence of the sponsor in Morocco and the difficulties he may have on return to Morocco were considered. There was no breach of the Human Rights Act for not granting leave outside the Rules as they failed to meet requirements.

5. The sponsor said that he had been to his local MP who had supported him and was a barrister. He thought it was not realistic for him to go abroad. They were genuinely married for 7 years. The children came along two years after they married. It was still a genuine marriage and his children were suffering really badly with their education. Their medical expenses and everything in Morocco cost a lot. They were learning French and Arabic and she taught them English. He travelled in and out of Morocco and they lived here for two

years and when the visit visa ran they were advised that she should go back. His wife had passed her English test, had her own national insurance number he couldn't understand how someone could be legally married and have British children and not be allowed to be here with family. He could not look after the children alone. They had to go to school here. His wife would have to be here to look after the children and he was 72 years old and could not be expected to run the children. He was not asking the state to keep his wife and she was well and truly educated enough. She spoke four languages. It was hard for her having to look after them. There was street fighting. His sister in law had broken her arm protecting his children. If someone was British they should be allowed to be here. She was here on a visa and did not overstay.

Discussion and Findings

6. The First-tier Tribunal made the following findings. The Judge found that the Appellant did not meet the requirements of the Immigration Rules as the sponsor had a state pension of £6,456.48 which fell far short of the Rules. She considered the case outside the Rules. She assessed the proportionality of the Respondent's decision, addressing the best interests of the children as a primary consideration (paragraph 26). She found it was in their best interests to live with both parents. She found that the sponsor could move back to Morocco where he had lived from 2008 to 2011 with the Appellant and their twin children who were born in 2010. In assessing the public interest, she took account of all the relevant factors in section 117B. She considered, that in view of the fact that there was no prospect that the Appellant would be able to meet the requirements of the Immigration Rules due to the sponsor's financial circumstances that the only prospect of the family being reunited was for the sponsor to move to Morocco (paragraph 31). She then concluded that it would be in the children's best interests to return to the United Kingdom to start their schooling with their mother (paragraph 35), all things being equal. However, she then concluded at paragraph 36, that all things were not equal because the Appellant did not meet the requirements of the Rules and there would be insufficient funds to ensure that the Appellant was financially independent. Further, the sponsor had lived in Morocco recently for 3 years. She weighed the factors in the balance and concluded that the best interests of the children were outweighed by the cumulative effect of the all the other considerations (paragraph 37).

7. I find that there is a material error of law in the decision of the First-tier Tribunal. Whilst the Judge is clearly aware that the Appellant's children are British Citizens, the First-tier Tribunal did not direct itself in accordance with **ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)** [2011] UKSC 4 as to the intrinsic importance of citizenship, namely that the children have rights which they will not be able

to exercise if they live another country. Further, having found that the best interests of the children were to return to the UK with their mother and start their schooling, the First-tier Tribunal did not consider whether the exclusion of their mother would mean that they were constructively expelled from the European Union and unable to enjoy the substance of their rights.

8. In **Campbell (exclusion; Zambrano)** [2013] UKUT 147 (IAC) the Tribunal held that there is no reason in principle why the principles in (**Zambrano v Office National de l'Emploi C-34/09)** cannot have application in entry clearance cases: in both in-country and out-of-country cases the Member State must ensure that any "refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union": **Dereci & Others (European citizenship)** [2011] EUECJ C-256/11, 15 November 2011, paragraph 74. Non-EEA nationals acquire rights under Article 20 TFEU if their expulsion from the territory of the EU would have the necessary consequence that a dependent EU citizen child would be required to leave the territory – effectively, the constructive expulsion of an EU citizen child. **McCarthy v. Secretary of State for the Home Department (Case C-434/09, judgment of 5th May 2011)** established that nothing short of the constructive expulsion of the EU citizen will suffice and the rupture of family life will not engage Article 20 TFEU.

9. The grounds as expressed in the letter of Mr Henry Bellingham MP argue that it would be unrealistic for the children to be educated in the UK without the Appellant residing with them. Permission was granted on the basis that the best interests of the children had not been assessed against the background of the UK citizen children being in the United Kingdom and the mother remaining in Morocco. I find that the First-tier Tribunal's decision did not take account of material factors arising out of the Appellant's children's British Citizenship or consider the relevant case law set out above and that this amounted to a material error of law.

Notice of Decision

10. For the above reasons therefore I find that there was an error of law in the decision of the First-tier Tribunal.

11. I set the decision aside. Having regard to Part 7.2 (a) of the Practice Statements for the Immigration and Asylum Chamber of the First-tier Tribunal and Upper Tier Tribunal, the extent of judicial fact finding is such that this matter should be remitted to the First-tier Tribunal for rehearing.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Whilst there was no application for anonymity as there are children involved I consider an order to be appropriate. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge L J Murray