Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/30273/2015**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 20 June 2017	**On 28 June 2017**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

HAFIZA MADIHA HAMID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sarwar, instructed M A Consultants
For the Respondent: Mr Mills, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Hafiza Madiha Hamid, was born on 20 September 1987 and is a female citizen of Pakistan. She entered the United Kingdom on 4 August 2010 as a student. She subsequently applied to extend her leave to remain.

2. The outcome of this appeal turns on the application of the respondent's relevant policy, namely an Immigration Directorate Instruction (IDI) entitled "Appendix FM, Section 1.0(B) 'Family life as a Partner or Parent and Private Life, Ten Year Routes'". This guidance instruction at

paragraph 11.2.3 (“*Would it be unreasonable to expect a British citizen child to leave the UK?”)* states:

> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.

3. In his decision at [45], Judge Row wrote:

> Mr Sarwar on behalf of the appellant argues that the appellant’s guidance … indicates that a decision maker must not make a decision in relation to a parent of an EU citizen child where the effect of that decision would be to force a child to leave the EU. The guidance does say that. It is not however guidance which is in accordance with the case law 117B(6) of the Nationality, Immigration and Asylum Act 2002.

4. Judge Row has touched upon a tension which clearly exists between the policy document of the Secretary of State and the statutory provisions of Section 117B(6). The statutory provision introduces a reasonableness test which would be entirely nugatory if, according to the respondent’s guidance, no British citizen child should ever be expected to leave the EU. However, the dim view which the judge took of the respondent’s guidance unfortunately has led him into error. Mr Sarwar relied on the Upper Tribunal decision in *SF and Others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120 (IAC). This decision was promulgated in January 2017, some months after Judge Row’s decision. The head note reads as follows:

> *Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal.*

The guidance note to which the Tribunal refers in *SF* is the same note as that put before Judge Row in the instant appeal. In *SF* at [12], the Tribunal concluded

> On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it.

Notwithstanding the tension between the statutory provisions and the respondent’s policy, this is a case where the outcome of the appeal should have been different given the existence of the policy. I am very grateful to both Mr Sarwar for the appellant and also Mr Mills, who appeared for the respondent who acknowledged that the judge’s failure to apply the policy

has led him into error in this instance and that the appeal against the immigration decision should have been allowed.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 12 September 2016 is set aside. I have remade the decision. The appeal of the appellant against the decision of the respondent dated 21 August 2015 is allowed.

No anonymity direction is made.

Signed Date 23 June 2017

Upper Tribunal Judge Clive Lane