Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11077/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2018	**On 20 February 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

AICHA HOUTI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Laughton of Counsel instructed by Visa Legal
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Algeria born on 29 March 1984. She arrived in this country as a visitor on 5 October 2015 with leave until 5 February 2016. She applied on 4 February 2016 for leave to remain as a spouse. This was refused on 19 April 2016. The appellant appealed and her appeal came before a First-tier Judge on 18 September 2017.

2. The appellant was unrepresented at the hearing before the First-tier Judge. The judge heard from the appellant and her husband whom the appellant had married in Algeria on 23 April 2013. The couple have a daughter born on 21 January 2014 who is a British citizen.

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3. It was the appellant's case that she had first visited the UK in 2013 and that during her second visit she became pregnant and returned to Algeria to give birth to her daughter.

4. The judge also heard from the appellant's husband who is a British citizen. He married the appellant after obtaining a divorce from the High Court on 24 January 2013. He has a 19 year old daughter by his previous marriage.

5. The First-tier Judge made unfavourable credibility findings and found that the appellant used deception to enter the UK as a visitor. She noted that the appellant could not meet the requirements to stay on the basis of family life because she did not comply with paragraph E-LTRP.2.1 because at the time of her application she had leave as a visitor only and hence was not eligible. While the couple had a qualifying relationship within paragraph EX.1 the Judge concluded that there were no insurmountable obstacles to family life continuing with her husband outside the UK. There was nothing to prevent the appellant returning to Algeria and it was a matter for the couple whether the daughter was left with her husband or returned with her to Algeria. There would be no significant obstacles to the appellant's reintegration into Algeria and no exceptional circumstances outside the Rules under Article 8. The Secretary of State had fully considered the best interests of the British child. The appellant had lied in her evidence and these lies were an attempt to remain in the UK and not to return to Algeria in order to make a proper spouse application. The judge referred to Section 117B of the Nationality, Immigration and Asylum Act 2002 but it is argued in this case that she erred in not referring to Section 117B(6):

> "6. In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

117D(1) In this part-

> "(2) 'Qualifying Child' means a person who is under the age of 18 and who-
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more."

6. The judge dismissed the appeal under the Rules and on human rights grounds.

7. There was an application for permission to appeal on 16 October 2017. Permission to appeal was granted on 6 November 2017 on the basis that it was arguable that the judge had erred in concluding that the appellant did not meet the requirements of paragraph EX.1 when there was a concession in the refusal notice that EX.1 applied. It was also arguable that the judge had erred in failing to consider paragraph 117B(6).

8. A response was filed on 14 December 2017 arguing that EX.1 did not apply as the appellant did not meet the eligibility requirements of the Rules and the judge had been correct. In respect of Section 117B the judge had taken into account that the appellant had obtained entry to the UK by deception and she had further taken into account the situation that the British child would face if removed.

9. A skeleton argument was filed shortly before the hearing on 29 January 2018. Reference was made to **Agyarko [2017] UKSC 11** but it was noted that in that case neither appellant had any children and the decision predated the implementation of Section 117B. It was clear that the appellant met Section 117B(6). The only issue was whether it was reasonable to expect the child to leave the UK. Reference was made to the respondent's policy which had been considered by the Tribunal in **SF (Albania) [2017] UKUT 00120 (IAC)**. In paragraph 7 the Tribunal refers to guidance on the issue of whether it would be unreasonable to expect a British citizen child to leave the UK and in the headnote it was stated that the Tribunal ought to take such guidance into account if it clearly pointed to a particular outcome.

10. Ms Ahmad accepted that the issue had been clearly set out in **SF (Albania)** and the policy was still applicable. The First-tier Judge had not taken into account the question of reasonableness. It was agreed there was a material error of law. Ms Ahmad further agreed that the appeal should be allowed and the decision of the First-tier Judge reversed in the light of the Home Office policy guidance under Rule 8.

11. At the conclusion of the submissions I reserved my decision. In this case it is agreed that the First-tier Judge materially erred in law. The judge failed to take into account the question of reasonableness. No reference is made to Section 117B(6). Although in the refusal issue was taken with the appellant attempting to circumvent Immigration Rules it was not argued by Ms Ahmad that the appellant was disqualified under the policy by reason of criminality or "a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

12. For the reasons I have given, the determination of the First-tier Judge was materially flawed in law.

13. I remake the decision. It is accepted that in the light of the Home Office guidance as referred to in the case of **SF (Albania)** that the appeal should be allowed. Accordingly I allow the appeal under Article 8. The period of leave is to be determined by the Secretary of State.

ANONYMITY Order

The First-tier judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal any fee paid by the appellant is to be returned to her.

Signed Date 15 February 2018

G Warr, Judge of the Upper Tribunal