Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11421/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
And via Skype	**On 28th January 2021**
On 5th January 2021	

Before

UPPER TRIBUNAL JUDGE KEITH

Between

OLUYEMI KOLEWOLE OJO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Dhanji, Counsel, instructed by Peer & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 5th January 2021.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim.

4. The appellant, a citizen of Nigeria, sought leave to remain in the UK on the basis of a right to respect for his family life, specifically his relationship as an active, albeit non-resident father to his dual EU (Romanian)-Nigerian national son, a five-year old boy, 'J'.

5. On 9th December 2019, First-tier Tribunal Judge Frantzis (the 'FtT') dismissed the appellant's appeal against the refusal of the appellant's human rights claim, including on the basis of a proportionality assessment. The appellant appealed, and I allowed the appeal, setting aside the FtT's decision, but preserving the FtT's findings of fact at §[25] to [35] of her decision, in the error-of law decision annexed to this decision, under the title, 'Annex – error of law decision'. I regarded it as appropriate that the remaking be retained by the Upper Tribunal, noting the preserved findings and limited issues to be considered.

The issues in this appeal

6. The issues before me were whether, in the context of a human rights claim, the appellant satisfied elements of the Immigration Rules, which were relevant to a proportionality assessment. The appellant accepted that he did not meet all of the requirements of the Immigration Rules. In the proportionality assessment, Mr Dhanji invited me to carry out a classic 'balance sheet' exercise.

7. In starting with a review of the appeal through the lens of the Immigration Rules, in discussion with the representatives, I focussed on the provisions relating to limited leave to remain as a parent (sections ending 'LTRPT'), and the facts as they had developed since the original FtT hearing. J's mother now had settled leave to remain, as did J, albeit he was just under three months short of his 7th birthday. Ms Everett confirmed for the purposes of Section R-LTRPT.1.1 that although there was no valid application for limited leave to remain, the applicant did not fall for refusal on grounds of suitability. There was an eligibility issue potentially with regard to English language proficiency, but it need not be met where an applicant met the requirements of sections E-LTRPT.2.2 to 2.4 and EX.1.

8. Having explored with the representatives, it appears that the appellant did meet the requirements of the Immigration Rules, except for the purposes of EX.1(a), because while J had settled status, he was not a British citizen and had not lived in the UK continuously for at least seven years preceding the date of the application. A similar (but not identical) analysis would be relevant for the purposes of whether J was a 'qualifying child' for the purposes of Sections 117B(6) and 117D of the Nationality, Immigration and Asylum Act 2002, noting the FtT's findings, which I preserved, that it would not be reasonable to expect J to leave the UK; and that the appellant had a genuine and subsisting parental relationship with J. However, J was not a qualifying child, by virtue of his 7th birthday not being until March 2021. I was also conscious

that the maintenance of effective immigration controls was in the public interest, for the purposes of the proportionality assessment.

9. In terms of the documents and bundles, I was provided two bundles on behalf of the appellant which I have marked 'bundle 1' and 'bundle 2,' and it was mainly 'bundle 2' to which I was referred and in particular, the witness statements of the appellant and his former partner, the mother of J, Ramona Burza. I heard oral witness evidence from both the appellant and Ms Burza, on which they were cross-examined. I summarise the gist of the evidence below and whilst I have considered the documents to which I was referred by the representatives, for the sake of brevity, I do not repeat all of the documents or evidence which I was referred to.

The appellant's evidence

10. In terms of the appellant's witness evidence, very broadly speaking, he reiterated his immigration history and his parental relationship with J; the fact that he has had a job which enabled him to provide financial support to J; and his view that there was no substitute for an absent father, nor was modern means of communication an adequate substitute. He had been a part of J's life for the entirety of J's life.

11. In oral evidence, the appellant added that he had contact with J every weekend and in particular sought the agreement of his employers for time off during school holidays in order to assist with childcare. He collected J from school and was able to name both J's teacher and headteacher. He described how J would call him if he were running late to pick him up, which illustrated the close connection between the two.

12. He and Ms Burza took joint decisions in relation to J and at the very least, she would not take decisions without his knowledge.

Ms Burza's evidence

13. Ms Burza had provided a brief letter by way of a witness statement at page [B46] of 'bundle 2', which reiterated the genuine and subsisting parental relationship between J and the appellant. J was now old enough (being 7 in March) to know the appellant; and have a close bond with him. When asked about who took decisions in relation to J, she had taken the decision about the choice of primary schools, but with the appellant's knowledge and he had never raised an issue. The appellant and Ms Burza were in discussions about arranging for private tuition for J to take the '11-plus' exam for the local grammar school, which the appellant was very supportive about and was willing to pay towards.

14. Ms Burza reiterated that while she had a close relationship with J, if the appellant were late, for example, then J may ask where his father was and so there was a certain amount of neediness on J's part about wanting to know where his father was and a close relationship between the two. In particular, whilst J was young and not yet 7, she anticipated that over the next couple of years their relationship would be a critical one because in her view, boys in particular needed a role of their father in

their lives. J as attached to his father and she believed that it would be really harsh if the appellant were removed.

The Respondent's submissions

15. Ms Everett noted the preserved findings; accepted that the appellant had an active parental relationship with J and addressed the first issue of whether it would be in the best interests of J for the appellant to remain in the UK. Clearly, that was the wish of both parties and so it was likely to be in J's best interests psychologically. However, there was a slight nuance in that on the evidence before me, I was invited to find that Ms Burza was J's primary carer and in that sense, she had sole parental responsibility on all issues and there was no evidence that J's welfare would be hugely compromised. It seemed likely that at this stage J's mother would be able to explain the reasons for J's father leaving the UK and J would not have a sense of being abandoned.

16. In terms of the proportionality assessment, on the one hand J was nearly a 'qualifying child' but on the other hand, age was not a bright line, was of significance and had been referred to in statute and therefore should weigh on the respondent's side in the proportionality assessment. Both partners could put in place mitigating measures, for example the relationship could continue meaningfully via visits and telecommunications and it was an acceptable outcome, even if not the preferred outcome or in J's best interests, which of course was not a trump card.

The appellant's submissions

17. Mr Dhanji submitted that the only reason why the appellant could not meet the test of Section 117B(6) was that J was not 7 years old until March 2021. In a balance sheet analysis, weight could be attached to the family life and it was not appropriate, for example, to apply Section 117B(4) and (5) as the relationship here was between parent and child. There were the preserved findings, in particular at paragraph §[34] of the FtT's decision that it was in J's best interests to remain with his mother in the UK, but the missing gap that I had identified in the error of law decision was whether the best interests were in maintaining the status quo, i.e., with the appellant also remaining in the UK. On the basis of indications from Ms Everett, it was in those best interests, and even noting that that was not a trump card, those best interests must weigh heavily.

18. Against that in the proportionality assessment, Mr Dhanji accepted that there should be weight attached to the maintenance of effective immigration control but equally, in terms of the weight that such public interest should have, this needed to be considered in context. The appellant had initially appealed when his EEA residence card (which he obtained as the partner of Ms Burza) had yet to expire, so that the appellant had always been in the UK with the knowledge of the UK government and without breaching any law. It could not be appropriate to disregard the fact that the appellant was less than 3 months' off meeting the requirements of Section 117B(6) and in those circumstances the proportionality balance lay in the refusal of leave to remain being in breach of the appellant's Article 8 rights.

Discussion and conclusions

19. First, I expressed my appreciation to both representatives for their clear and focussed submissions, particularly in identifying the core issue in this case, which is around the proportionality assessment. As has been accepted, Ms Burza herself has indefinite leave to remain under the EU Settlement Scheme, (see page [104] of 'bundle 2') and although I have not seen this document, Mr Dhanji has confirmed his client's instructions and has seen a copy of a letter which confirms that J similarly has the same grant of leave and he has no reason to believe that that letter is not genuine. Accordingly, Ms Everett, without having seen the letter, was content, on the basis of Mr Dhanji's understanding, not to dispute the issue. I therefore find that both Ms Burza and 'J' have indefinite leave to remain, at the date of this hearing.

20. I also find, in light of Ms Everett's submissions, that it would be in the best interests of J for the status quo to be maintained, namely that both of J's parents remain in the UK, which is consistent with the oral evidence of the parents as to the close parental relationship between the appellant and J; and the support that he provides to J. In particular and what has been preserved from the FtT's previous findings is that the appellant has an active and committed relationship with J, seeing him on a regular basis, namely at weekends at least; remains in regular contact; assists Ms Burza in terms of school pick-ups; is aware of, for example, and has had dealings with, J's schoolteachers, albeit on his own evidence, he may not have particularly close dealings with J's friends. He is nevertheless actively involved in discussions around J's schooling. Even if, and I find it is likely, that Ms Burza decides upon the lion's share of the decisions in relation to J's life and is J' primary carer, I accept that particularly in the context as has been identified of the upcoming tuition for the grammar school examinations, there are important decisions which remain joint ones and indeed the evidence, unchallenged, of the appellant and Ms Burza is that the couple are jointly meeting the costs of the examination tuition, so that the engagement extends beyond joint decision-making to financial support. The appellant has had a sustained, active involvement throughout J's life.

21. I am, however, conscious that even where it is in J's best interests for the status quo to be maintained, that is not a "trump" card in terms of the balance sheet assessment when considering the proportionality of the respondent's decision. I am also conscious that, as accepted by Mr Dhanji, the appellant does not meet the requirements of the Immigration Rules, the lens through which the human rights claim may initially be considered, and I am equally conscious for the purposes of Section 117B(1) of the 2002 Act that the maintenance of effective immigration controls is in the public interest. I also bear in mind that Section 117B(6) of the 2002 Act does not apply, but only because J misses the '7-year' residence requirement by just over two months.

22. While the appellant is proficient in English and is not a drain on the public purse (he works and financially supports 'J'), these are neutral factors.

23. On the other side of the balance-sheet, in favour of the appellant, and while I accept the submission of Mr Dhanji that although there is no "near-miss" principle in these cases, the weight attached to the public interest in these circumstances has to be considered in the context that 'J' will be 7 years old on 24th March 2021. That is a relevant factor in the proportionality assessment and should not be discounted, in relation to family life between the appellant and 'J', both directly and indirectly, in terms of the support that the appellant provides to Ms Burza.

24. In addition, in relation to the weight to be attached to that family life, it is not reduced by any application of Sections 117B(4) or (5) of the 2002 Act, as neither is applicable to a family relationship between a parent and child, in other words, limited weight should not be attached because of either the appellant or 'J' has or has had 'precarious' or unlawful status. The appellant has made an application outside the Immigration Rules, while still in possession of an unexpired EEA Residence Card, so is not seeking to flout the Immigration Rules.

25. Considering both sides of the 'balance sheet', I conclude that it is the deep and committed parental relationship between the appellant and 'J' for the entirety of J's life, and just at the stage that 'J' will need the appellant more, as a father figure, that tips the proportionality assessment in the appellant's favour. Maintenance of such a relationship via modern means of telecommunication, even if mitigating the loss to some extent, will simply provide no replacement for the quality and depth of the existing relationship, and even if J is able to understand that he has not been deserted by his father, the appellant's removal will have a substantial impact on J, which alternative arrangements cannot mitigate.

26. Taking into account all of the circumstances, I conclude that the decision to refuse leave to remain is disproportionate and is in breach of the appellant's rights under Article 8 ECHR in respect of his right to respect for his family life.

27. The decision of the Secretary of State is therefore not upheld, and the appellant's appeal succeeds.

Decision

28. The appellant's appeal on human rights grounds succeeds.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **19th January 2021**

TO THE RESPONDENT
FEE AWARD

The appeal has succeeded. I regarded it as appropriate to make a fee award of £140.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **19th January 2021**

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11421/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th September 2020	**On**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

OLUYEMI KOLEWOLE OJO

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:	Mr J Dhanji, Counsel, instructed by Peer & Co Solicitors, via Skype
For the respondent:	Ms J Isherwood, Senior Home Office Presenting Officer, via Skype

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 30th September 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. The appeal is by Mr Ojo (the appellant) against the decision of First-tier Tribunal Judge Frantzis (the 'FtT'), promulgated on 9th December 2019, by which she dismissed his appeal against the respondent's refusal of his application for leave to remain on the basis of the right to respect for the appellant's family and private life, pursuant to article 8 of the ECHR. The appellant's family life is his subsisting parental relationship with his son aged 5, ('J') an EU (Romanian) national, whom it was initially claimed had settled status in the UK.

4. In essence, the appellant's claims involved the following issues: whether J had settled status in the UK, based on which the appellant asserted that he met the requirements of the Immigration Rules relating to limited leave to remain as the parent of a child with settled status in the UK; and whether the appellant met the English language requirement of paragraph E-LTRPT.5.1-.5.2 of appendix FM of the Immigration Rules. The same issues impacted on whether the appellant met the requirements of section EX.1; and the respondent separately considered whether refusal of the appellant's application would result in unjustifiably harsh consequences for the purposes of paragraph GEN.3.2. The respondent also considered and rejected the appellant's application by reference to his private life.

The FtT's decision

5. The FtT made a careful analysis of the evidence, running from §[24] to [43] of her decision. She correctly reminded herself of section 117B of the Nationality, Immigration and Asylum act 2002, identified that section 117B(6) was not applicable on the basis that J was not a qualifying child (§[25]) because he was not a British national and had not resided in the UK for seven years, and so did not meet the requirements of section 117D of the 2002 Act. For the same reason, the appellant could not meet the requirements of paragraph E-LTRPT and section EX.1(a) of appendix FM. Even had paragraph E-LTRPT applied, while the FtT noted that the appellant's English appeared very good at the hearing before her, (§[27]) the appellant did not have evidence of the required English language competency, or an exemption from that requirement. The appeal could nevertheless be considered outside the Immigration Rules.

6. The FtT found (at §[28]) that the appellant had a genuine and subsisting parental relationship with J, which while section 117B(6) was not applicable, was plainly relevant to a proportionality analysis. Whilst the appellant and J's mother were no longer in a relationship, there was consistent evidence of the appellant featuring prominently in J's life as a constant father figure, seeing him every weekend and taking time off during the school holidays to be with him. J was described as attached to the appellant, with strong feelings for him. The FtT did not, however, accept that J slept overnight at the appellant's home, as this was contrary to J's

mother's evidence, but the FtT accepted that the appellant nevertheless assisted J's mother and step-brother, albeit J's mother was responsible for J's daily life.

7. Having considered the evidence as a whole, the FtT concluded that article 8 ECHR was engaged in relation to respect for both the appellant's family and private life. The FtT reminded herself that at the heart of the appeal was a five-year-old boy, J. In the article 8 analysis, the FtT regarded the sole remaining question as whether the refusal of leave to remain was proportionate. The appellant spoke good English and worked, paying taxes. He had an active role in J's upbringing. The FtT found that it would not be in J's best interests to leave the UK with his mother and step-brother (the step-brother had a different father) and relocate to Nigeria (§[33] and §[34]). In that respect, the FtT did not accept the respondent's conclusions about the ability of J to relocate.

8. Nevertheless, the FtT regarded the refusal of leave to remain as proportionate, noting that neither J's mother, also an EU (Romanian) national, nor J, nor the appellant had settled status in the UK. J's mother was the primary carer for J and contact between the appellant and J could continue, even in the event of the appellant's removal. The FtT concluded that her conclusion may have been different had J or J's mother had settled leave to remain.

The grounds of appeal and grant of permission

9. The appellant lodged grounds of appeal which are essentially that the FtT had erred in failing to consider whether it would be in best interests of J for both parents to remain in the UK, namely a maintenance of the status quo; the FtT had failed to attach sufficient weight to J's best interests; and at §[39] of the reasons, the FtT had erred in taking into account, in the proportionality assessment, the fact that the appellant did not have settled leave to remain, which by implication, impermissibly applied tests by analogy to section 117B(4) and 117B(5) of the 2002 Act, neither of which were applicable.

10. Permission was initially refused by the First-tier Tribunal but granted by Upper Tribunal Judge Kamara on 4th June 2020. She regarded it as at least arguable that the FtT had erred in her assessment of J's best interests, noting that he was a dual EU/Nigerian national; and further, that it was arguable that the FtT had misdirected herself by attaching weight to the appellant's immigration status, when weighing the importance of his family life with J. The grant of permission was not limited in its scope.

The hearing before me

11. I found the submissions of both Mr Dhanji and Ms Isherwood helpful, concise and to the point. They assisted me in identifying the scope of the issues and deciding those issues.

The appellant's submissions

12. The appellant did not seek to now argue that J was a 'qualifying child' for the purposes of section 117B(6) of the 2002 Act. Indeed, Mr Dhanji was aware of Upper Tribunal Judge Stephen Smith's decision in MM v SSHD (section 117B(6) - EU citizen child) Iran [2020] UKUT 00224 (IAC), which made clear that an EU national child was not, without more, a 'qualifying child', and he did not seek to argue that that proposition was incorrect.

13. Instead, this was an appeal based on human rights (article 8 ECHR) outside the Immigration Rules. The core of the appeal was that the FtT had taken into account matters that she ought not (the appellant's, J's and his mother's lack of settled status) and failed to take into account relevant factors, specifically whether the maintenance of the 'status quo' of co-parenting was in J's best interests, in her assessment of the proportionality of the refusal of leave to remain.

14. The FtT had made findings of fact at §[27] to §[31] of her reasons; analysed J's best interests at §[32] to §[35] and then drew together her conclusions at §[36] onwards. The appellant did not seek to criticise the findings (particularly the findings about the appellant's active role in J's life). Rather, there was a gap in the analysis of J's best interests in maintaining the status quo and the weight to be attached to those best interests. At §[33], the FtT had analysed why it would not be in J's best interests to leave the UK with his mother and move to Nigeria. At §[34], the FtT had analysed why it would be in J's best interests to maintain the structure and stability of his life with his mother. While the FtT had made findings about the relationship between J and the appellant, the FtT had not gone on to analyse the best interests of the status quo in the same way she had analysed the best interests of J not leaving the UK and not being separated from his mother. Mr Dhanji readily accepted that J's best interests were not a "trump card", but the lack of analysis of the status quo, particularly where the appellant was an active, important figure in J's life, had undermined the FtT's proportionality assessment.

15. The final ground of appeal related to the FtT's reference at §[39] of her decision to the immigration history of J, his mother and the appellant, explicitly in the context of the proportionality assessment:

> *"On the Respondent's side of the balance, I take account of the fact that on my findings, the appellant does not meet the Immigration Rules. Neither J nor the Appellant's mother are, as yet, settled in the UK. On authority, considerable weight is to be placed on the Respondent's policy on the public interest (as set out in the Immigration Rules). I take account of the fact that the Appellant's leave in the United Kingdom has never been settled."*

16. These were impermissible factors to take against the appellant, in the proportionality exercise, noting that neither section 117B(4) not section 117B(5) of the 2002 Act applied.

The respondent's submissions

17. Ms Isherwood agreed that in the context of a human rights appeal rather than the EEA Regulations, the focus on the FtT's proportionality assessment was key. I needed to consider the FtT's reasons as a whole and not take issue with passages of the reasons in isolation. In reality, the appellant's challenges were disagreements with the FtT's conclusions. The FtT had made detailed findings and the argument that the FtT had failed to take into account the maintenance of the status quo in the proportionality exercise was plainly not correct, as §[35] of the reasons refer to the FtT considering how, and to what extent, the appellant assists J's mother and to what extent J's mother would be able to cope on her own. The FtT had also considered in detail the strength of the relationship between the appellant and J at §[29].

18. In relation to the final ground, I needed to read §[39] in the context of the remainder the reasons from §[39] to §[42]. The reference to the lack of settled status of the parents and J was not a negative factor but merely a statement of fact.

Discussion and Conclusions

19. I conclude that the FtT's analysis did contain errors of law on the grounds identified in the grounds of appeal. The FtT's decision was clearly structured; her findings were of equally admirable clarity; and she correctly identified the law, and the core issues. This was not a case where the appellant met the Immigration Rules and by the time of the hearing, Mr Dhanji did not seek to argue as such (the appellant had previously argued that J's EU citizenship, where alone or as part of 'pre-settled' status under the EU Settlement Scheme, was equivalent to his being a 'qualified child, but this was not pursued). The FtT had correctly identified the sole issue in this case, concerning the proportionality of the refusal of leave to remain, the final element of the classic analysis set out in Razgar v SSHD [2004] UKHL 27.

20. I accept Ms Isherwood's submission that the FtT had made detailed findings in relation to the appellant's relationship with J (§[29]) and how the appellant assisted J's mother with the school and nursery run and during holidays, where the appellant's work schedule permitted (§[35]). However, the FtT's analysis at §[35], in terms of how the appellant fits into J's daily life, as a non-resident but active father, is in clear contrast to §[33] and [34]. As a reminder, §[33] and §[34] follow a sub-heading referring to section 55 of the Borders, Citizenship and Immigration Act 2009 (in other words, J's best interests). §[33] begins:

"As to J's best interests, I note that the decision letter argues that the respondent's decision does not require J to leave the United Kingdom….but that there is nothing preventing your ex-partner and child accompanying you to Nigeria… "

9. In the remainder of §[33] and [34], the FtT explains clearly why it would not be in J's best interests to relocate to Nigeria with his mother and the appellant, and instead it would be in J's interests to remain with his mother in the UK. At §[34], the FtT once again analyses the facts through the lens of J's best interests:

"Maintaining the structure and stability in J's life afforded by [his mother] is plainly in J's best interests."

10. In contrast, when considering the status quo of how the appellant fits into family life in the UK, while §[35] describes how the appellant is involved, in practical terms, the FtT then does not go on to decide whether maintenance of the status quo is in J's best interests. While in some cases, the conclusion is so self-evident that it need not be stated, the omission at §[35] has to be seen in the context of the FtT's explicit reasoning about the best interests of J in other scenarios (the family relocating to Nigeria at §[33]; or being separated from his mother at §[34]); and the FtT's apparent reservations in §[35] about the extent of the appellant's involvement with J, because of the limits on the appellant's ability to offer practical support as a result of his long working hours; and the FtT's discussion about J's mother's ability to cope in the appellant's absence, as she has a support network (a sister) and a supportive employer. J's mother's ability to cope without the appellant may well be relevant in assessing whether J's best interests are outweighed in a proportionality assessment, but §[35] does not state this. This goes to the heart of how the lack of a conclusion on whether J's best interests are for the status quo to be maintained, feeds into the proportionality assessment. While in many other respects the FtT's reasons are detailed and clear, the omission in reasoning at §[35] is material.

11. On the final ground, I also accept Mr Dhanji's submission that the FtT placed negative weight on the lack of the appellant's, J's and his mother's 'settled immigration status,' in the proportionality assessment. Ms Isherwood's submission to the contrary cannot be sustained on the plain reading of §[39]:

"On the respondent's side of the balance I take into account the fact that on my findings the Appellant does not meet the Immigration Rules. Neither J nor [the appellant's mother] are, as yet, settled in the UK."

12. At the end of §[39], the FtT took account "*of the fact that the appellant's leave in the UK has never been settled*." The FtT's reiteration of family members' lack of settled status at §[42], when she states, "*Balancing all of the features in this appeal I have come to the view that the Respondent's decision is proportionate to immigration control. Neither J, his mother nor the appellant have settled status in the UK…*" does not detract from the clearly negative weight she attaches to the lack of status.

13. Ms Isherwood did not suggest that the FtT was correct in regarding the lack of settled status as a factor counting against the appellant, and I agree with Mr Dhanji that it is at least unclear why it should count against the appellant. Sections 117B(4) and (5) of the 2002 Act are clearly inapplicable: 117B(4) applies to relationships with a partner or private life established at a time when a person is in the UK unlawfully –

not, of course, the same as having precarious status; and 117B(5) applies to private life. Neither section applies to a parental relationship. At the very least, the FtT's reasons for counting the lack of settled status against the appellant are not fully explained.

14. Both issues identified above go to the FtT's assessment of proportionality. It is not possible to conclude that had FtT addressed J's best interests in the maintenance of the status quo and explained more fully the impact of the lack of settled status, the FtT would have reached the same conclusion on proportionality. Accordingly, the errors are material, so that the FtT's decision is unsafe and cannot stand. However, given the detailed and unchallenged fact-finding, while I set aside the decision, I do so preserving the FtT's findings. That being said, the family's circumstances may well have changed since the FtT's decision, particularly in light of applications under the EU Settlement Scheme.

Decision on error of law

15. There are errors in the decision of the First-tier Tribunal, such that it is unsafe and must be set aside. However, I preserve the First-tier Tribunal's findings of fact at §[25] to §[35] of her decision.

Disposal

16. With reference to paragraph 7.2 of the Senior President's Practice Statement, the preserved findings and the limited scope of the legal issues, the parties' representatives were agreed that it is appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

Directions

17. The following directions shall apply to the future conduct of this appeal:

    29.1 The Resumed Hearing to remake the appeal will be listed, if possible before Upper Tribunal Judge Keith, via Skype, time estimate two hours, on 21st December 2020;

    29.2 The appellant must make any application to adduce any new evidence, pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, by 4pm on 7th October 2020;

    29.3 The respondent may respond to that application by 4pm on 14th October 2020;

    29.4 The parties shall agree and produce a consolidated, complete bundle and witness statements (not an addendum to the previous bundles) for use at the Resumed Hearing, not later than 23rd November 2020;

    29.5 The appellant shall ensure that appropriate arrangements are in place for him to be able to give evidence via Skype.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to the preserved findings of fact.

No anonymity direction is made.

Signed J Keith Date: 7th October 2020

Upper Tribunal Judge Keith