Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/01062/2015**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On 16th January 2018	**On 1st February 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

ALINA MARIANITA GORDILLO QUISHPE
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P. Thoree, Thoree & Co Solicitors
For the Respondent: Mr P.Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Equador, born on the 30th September 1960. She seeks leave to remain in the United Kingdom on human rights grounds. In substance she relies upon her private life of some 17 years standing in this country, and her *Kugathas* family life with her British sisters and their descendants.

2. In the first section of this determination I summarise the 'background and decision of the First-tier Tribunal'. On the 11th December 2017 I set the determination of Judge Shiner aside; my reasons for doing so are set out in section two, under the heading 'error of law'. The appeal hearing was reconvened on the 16th January 2018 when I heard further evidence and

submissions from the parties. I reserved my decision which I now give under the heading 'the remade decision' in section three.

1. Background and Decision of the First-tier Tribunal

3. It is not now in dispute that the Appellant has lived in the United Kingdom since October 2000, when she entered unlawfully. She came here to live with her sisters, Aida and Isabel, and their respective families. Aida and Isabel were already living here when they had asked her to come, as they were worried about her living alone in Equador. Over the years the Appellant, and indeed Aida and Isabel, made various attempts to regularise their positions with the Home Office. The first, as far as the Appellant is concerned, was on the 6th December 2004 when she was listed as a dependent on Isabel's application for indefinite leave to remain. Although other family members were granted leave to remain as a result of such applications, the Appellant remained without any status. Subsequent correspondence led to the Respondent agreeing to consider the Appellant's human rights. The basis of her submissions was that she has been living here all this time with her extended family, they are very close and she has nothing and no-one to return to in Equador.

4. The Respondent's decision to refuse is dated the 4th December 2014. She considered the application under paragraph 276B of the Immigration Rules. Notwithstanding that the refusal letter begins by noting that the 'long residence' provision had been amended on the 9th July 2012 to remove the '14 years' route, it is this very provision that the Respondent went on to consider, refusing leave on the grounds that the evidence was not sufficient to establish 14 years residence. The Respondent then considered whether there were any exceptional factors such that might justify a grant of leave 'outside of the rules'. Concluding that there were not, the application was rejected.

5. The Appellant duly appealed to the First-tier Tribunal. The Tribunal made a finding of fact that the Appellant has continuously lived in this country with her sisters since October 2000. In its assessment of the Immigration Rules the Tribunal directed itself that the rules to be applied to this case were those in force at the date of the decision in November 2014, ie the 'new rules'. The matter in issue was whether the Appellant could show that there were "very significant obstacles to her integration" in Equador, as per paragraph 276ADE(1)(vi) of the Rules. As to that matter the Judge made the following findings:

    - The Appellant has no family or friends in Equador

    - She is of good character, aside from her period of overstaying

- She is an able, friendly woman who has been able to make friends in this country

- She is, and has been, supported in this country by her sisters and brothers-in-law who give her £100 per month to spend

- It would not be difficult for that money to be remitted to her in Equador

- She left that country when she was 40 years old and is therefore familiar with the language and customs (she still speaks fluent Spanish, indeed she teaches a Spanish class)

- Whilst life in Equador might have changed in the years she has been in the UK, it is unlikely that it would have done so to the extent that the Appellant would have any difficulty in integrating

Considering all of those matters the Tribunal did not accept that there were "very significant obstacles" to the Appellant returning to Equador and the appeal was dismissed with reference to paragraph 276ADE.

6. Turning to consider Article 8 'outside of the rules' the Tribunal accepted that the Appellant has an exceptionally close relationship with her sisters such that 'family life' would be engaged. It found a particular emotional and financial dependency between the Appellant and her sisters and applied Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. The Tribunal accepted that the Appellant's removal to Equador would interfere with her enjoyment of that Article 8 right but it did not consider the interference to be disproportionate. In doing so the Tribunal rejected the contention that there had been an unacceptable delay on the part of the Home Office, or at least if there had been, that it was squarely the fault of the Respondent. Whilst the Appellant's solicitors had frequently written to the Home Office between 2010 and 2014 apparently chasing a decision in respect of an application she had made as long ago as 2004, the Tribunal accepted the contention of the Respondent that the application in question had in fact been 'withdrawn' in April 2005. Overall the Tribunal was satisfied that the public interest, in removing persons not entitled to leave under the Rules, prevailed. The appeal was therefore dismissed.

2. The Appellant's Appeal to the Upper Tribunal: Error of Law

7. Before me Mr Thoree submitted that the decision of the First-tier Tribunal was flawed for the following material errors in approach:

    i) The determination contains an error of fact in respect of when the Appellant had made her application for leave to remain on human rights grounds and this infected the reasoning;

ii) Failing to make clear findings;

iii) Failing to consider the circumstances faced by the Appellant upon return to Equador, in particular in light of the long time that she has spent in this country.

8. Although ground (iii) was not withdrawn, the substance of the oral argument before me was concerned with grounds (i) and (ii). The gist of Mr Thoree's submissions were as follows. The Appellant made an application in 2004 that was never resolved. Her sister Isabel, who was the primary applicant, had been granted leave along with her daughter, but the Respondent never dealt with the Appellant's claim. The correspondence referred to by the Tribunal was all about that outstanding application. That was relevant not just to the matter of proportionality, EB (Kosovo) [2004] UKHL 39 applied, but also substantively to the application of the Immigration Rules. The '14 year' provision in the old version of 276B was the operative rule: it had been considered by the Respondent in the refusal letter. The only ground for refusal had been on the facts, and these were resolved in the Appellant's favour by the Tribunal.

9. The Respondent in reply submitted that the First-tier Tribunal had done "everything it was supposed to do". The Tribunal had properly applied the rule in operation at the date of the appeal, and given good reasons why the requirements were not met. The grounds amounted to no more than a disagreement with the findings. As to the dispute as to when the application was made, there was no obligation on the Respondent to prove that the 2004 application had been dealt with. Even if the delay could be proven, it could make no substantive difference to the Appellant's case, given the terms of s117B of the Nationality, Immigration and Asylum Act 2002.

14 Years Long Residence

10. I deal first with Mr Thoree's submission that the Appellant was entitled to rely on the old version of paragraph 276B(b) of the Rules. This required the Applicant to show that she had spent at least 14 years continually residing in the UK prior to any enforcement action being taken against her. On the facts as found by the First-tier Tribunal, the Appellant would win her case if she could show that this old policy applied to her.

11. The 14 years long residence provision was part of the Rules until the 9th July 2012 when it deleted and replaced with the competing alternative requirements in paragraph 276ADE(1)(iii)-(vi). Mr Thoree began his appeal by submitting that the Appellant's claim should have been considered under the old framework, because she made her application before the provision was deleted, and the Transitional Provisions stated that the operative rule should be that in force at the date of the application. Unfortunately for Mr Thoree, the Court of

Appeal have decided otherwise. In Singh and Khalid [2015] EWCA Civ 74 the Court held that a further amendment to the rules, effective from the 6th September 2012, overruled the Transitional Provisions that he had sought to rely upon:

> (1) When HC 194 first came into force on 9 July 2012, the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. That is because, as decided in *Edgehill*, "the implementation provision" set out at para. 7 above displaces the usual *Odelola* principle.
>
> (2) But that position was altered by HC 565 – specifically by the introduction of the new paragraph A277C – with effect from 6 September 2012. As from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE–276DH in deciding private or family life applications even if they were made prior to 9 July 2012. The result is that the law as it was held to be in *Edgehill* only obtained as regards decisions taken in the two-month window between 9 July and 6 September 2012.

The decision in this case was not made until the 4th December 2014, well after the *Edgehill* window closed. It is therefore unarguable that the case can be resolved by looking at the old rule, ie 276B (unamended). The Secretary of State should never have considered it in her refusal letter; the First-tier Tribunal was correct to have applied the new scheme, ie 276B (as amended, to remove the '14 year' route) and 276ADE(1). The decision in respect of the Rules is upheld.

Delay

12. My conclusions on the '14 year' point do not, however, mean that the case history is irrelevant. If, as a matter of fact, the Appellant has been waiting for a decision on her human rights claim since 2004, then this is a matter that should have informed the Tribunal's proportionality balancing exercise. Such a delay might arguably reduce the public interest in refusing the Appellant leave in two ways. First, the delay itself, and the failure to respond to the Appellant's repeated requests for a decision could, be said to reduce the public interest in immigration control. Second, on the facts of this case there was a fairness argument raised: why was the Appellant treated differently from her family members?

13. What then were the First-tier Tribunal's conclusions on this claim? They are set out in paragraphs 29-36 of the determination. The Tribunal concluded, in short, that the Respondent was right and Mr Thoree is wrong. In her refusal letter the Respondent had asserted that the 2004 application had been 'withdrawn', and that in 2006 the Appellant had been "considered not eligible for indefinite leave to remain". No notices or evidence to this effect had been produced, but this is what the Respondent said in her refusal letter and the Tribunal accepted that assertion at face value. The Tribunal found that the 'human rights application' which resulted in the refusal under appeal was made in November 2014 when

the Appellant completed an 'Immigration Status Questionnaire'. I accept Mr Thoree's submission that this finding is not clearly reasoned. It is difficult to see why the Tribunal accepted the Respondent's unsupported assertions, or that it balanced them against the uncontested fact that the Appellant remained in contact with the Home Office throughout the period, and that at least between 2010 and 2014 her representative sent numerous letters chasing a decision. It appears from those letters that Mr Thoree, and the Appellant, were very firmly of the view that she still had an application waiting to be determined.

14. The relevant chronology is as follows:

1.11.04	Sister Isabel makes application for ILR under the then 'amnesty', naming the Appellant and Isabel's 9 year-old daughter Lizeth as dependents
17.12.04	Isabel completed and returned a 'family questionnaire' in which she again listed the Appellant and Lizeth as her dependents
3.3.05	Sister Aida makes an application for ILR naming her daughter, son-in-law and their children as her dependents
24.11.05	*2004 application 'withdrawn' (assertion in refusal letter)*
	Isabel and Lizeth granted indefinite leave to remain
25.4.06	*Appellant 'considered ineligible for indefinite leave to remain' (assertion in refusal letter)*
28.8.07	Aida and her dependents granted indefinite leave to remain
11.2.10	Appellant's representatives write to the Home Office asserting that she was included in Isabel's ILR application and that she has still not had a decision
1.4.10	Appellant's representatives write again to the Home Office asserting that she was included in Isabel's ILR application and that she has still not had a decision
22.10.10	Appellant's representatives write again in similar terms, asserting a legitimate expectation that she should be granted ILR
26.10.10	Respondent acknowledges letter of 22.10.10 and says it has been passed to a caseworker
24.2.11	Appellant's representatives make further representations

23.8.11	Appellant's representatives write again requesting a decision and asserting that delay is unreasonable, and threatening to issue judicially review proceedings
8.9.11	Judicial Review Unit within the Home Office write to caseworker requesting response
18.4.12	Judicial Review Unit within the Home Office write to caseworker requesting response
14.5.12	Respondent requests photographs and identity documents
6.6.12	Photographs and Equadorean passport submitted to Home Office
28.8.12	Respondent requests further information and evidence
13.9.12	Further information and evidence supplied
21.11.13	Appellant's representatives send letter before action asserting unreasonable delay, and that the application has remained outstanding for over nine years
26.2.14	Appellant's representatives send further letter before action asserting unreasonable delay, and that the application has remained outstanding for over nine years
3.3.14	PAP acknowledged by OCLU
6.5.14	Appellant's representatives send further letter before action asserting unreasonable delay, and that the application has remained outstanding for over nine years
15.10.14	Appellant's representatives send letter before action asserting unreasonable delay, and that the application has remained outstanding for over ten years
5.11.14	Appellant returns Immigration Status Questionnaire
14.11.14	Appellant submits further documents
4.12.14	Human Rights claim rejected

15. Aside from the two matters in italics, which are based solely on the assertion in the refusal letter, I draw that chronology from the evidence before the First-tier Tribunal. I find it to strongly support the Appellant's claim that she was unaware that the 'decisions' in 2005 and 2006 had been made. One date in

particular stands out: the 24th November 2005 when Isabel and her dependent daughter were granted ILR. That is the date that the Respondent records that the Appellant "withdrew" her corresponding claim to be granted leave under the ILR amnesty in place at that time. As I say, the Appellant stoutly denies having ever withdrawn her application, and the Respondent has been unable to explain why her record reads as it does. It appears to me that one possible explanation may be the terms in which that amnesty was originally offered to Isabel.

16. The form that Isabel completed, and returned to the Home Office on the 17th December 2004, is reproduced in the Appellant's bundle. At page 142 is the final page of the application which at part 3, required Isabel to sign a declaration. The form explained:

> "In order for your case to be considered, you must agree to withdraw any other outstanding applications you may have made to the Immigration and Nationality Directorate if you are granted Indefinite Leave to Remain in the United Kingdom.
>
> This may include:
>
> - Your outstanding asylum claim
> - Any outstanding claim under the European Convention on Human Rights (ECHR)
> - Any other applications requesting leave to remain (for example, as a student, or on the basis of marriage to a person present and settled in the United Kingdom)
>
> Please indicate in the box below whether you are prepared to withdraw any outstanding applications should you be granted Indefinite Leave to Enter or Remain in the United Kingdom"

Isabel duly ticked the box marked 'Yes – I wish to withdraw my outstanding applications if I am granted Indefinite Leave to Remain in the United Kingdom'.

17. In the absence of any other explanation for the Appellant's case being treated in the way that it apparently has, it appears to me that the caseworker dealing with the linked ILR applications back on the 25th November 2005 granted Isabel and her minor daughter ILR, and not knowing what to do with the case of a dependent adult, treated it as 'outstanding application'; applying the undertaking given by Isabel at part 3 of her application form, he or she treated it as 'withdrawn'. I am satisfied that the First-tier Tribunal did not take that evidence into account when it attempted to determine when the Appellant had made her application, and whether the 2004 application was outstanding. I find that to be a material error, since it is at least arguable that the Home Office caseworker erred in applying Isabel's undertaking in that way. The form was

plainly concerned with earlier, *outstanding* applications, not the one that was *currently* under consideration. I therefore find Mr Thoree's grounds (i) and (ii) to be made out. The Tribunal did not give reasons for its finding that the 2004 application was withdrawn, and in making that finding failed to take relevant evidence into account. I am satisfied that the issue of delay was plainly relevant to the overall proportionality balancing exercise, and so the error has been shown to be material. I set that part of the Article 8 decision aside to be remade.

3. The Re-Made Decision

Discussion and Findings

18. In remaking the Article 8 assessment I bear in mind that the First-tier Tribunal has dismissed the Appellant's appeal insofar as it related to paragraph 276ADE(1)(vi) of the Immigration Rules. The grounds of appeal to the Upper Tribunal did challenge that part of the decision but in submissions to me Mr Thoree did not elaborate on or pursue this ground. The Tribunal's reasoning is summed up at paragraph 5 above and I see no reason to interfere with its findings that the Appellant would not face "very significant obstacles" reintegrating. It is a high test and on the facts, where she speaks the language, has long-standing familiarity with the culture and could be supported by remittances, it would not be met.

19. The Respondent accepts however, that here the Rules do not represent a 'complete code'. Indeed they are far from doing so, since the scope of paragraph 276ADE(1) is by its nature limited, inviting no assessment of the Appellant's *existing* Article 8(1) rights and the interference with them. Instead the rule focuses exclusively on what her private life might be in the future, should she end up back in Equador. Whilst that it is obviously a relevant consideration, it does not amount to the holistic evaluation that Article 8 requires, particularly in a case such as this, where on the facts both private and family life rights are engaged. I begin then with those rights and the quality of them.

20. The First-tier Tribunal accepted on the evidence before it that the Appellant arrived in this country in 2000 and that she has never left since. On arrival she moved in to a house in Peckham with Aida, Isabel, their children and grandchildren. Aida, Isabel, Aida's daughter Wilma and her son-in-law Cueva all worked to bring money into the household. The Appellant made the home and looked after the four children: Isabel's grandchildren Jessica, Daniel and Karla who were respectively eight, two and newborn at the time of her arrival, and Isabel's daughter Lizeth who was then about five years old.

21. Lizeth describes growing up in this household headed by the three sisters in glowing terms. Her own mother worked long hours and it was the Appellant who was there to "fill the void". She would be at the school gates, would prepare "delicious" dinner and look after the children with "love and joy". Lizeth describes the Appellant as "joyous, funny and constantly positive" who

would dance and sing her way around the house. She has no hesitation in describing the Appellant as her "second mother". Cueva describes the Appellant as a "very charismatic person" who has always been an integral, "essential" part of this extended family. He explains that since she was not allowed to work he and his wife (Wilma) have always helped to support her financially and continue to do so today. Wilma concurs that her auntie has been a massive support to her over the years, that they are very close and that she and her husband are prepared to support her financially for as long as she needs it. Wilma's children have all prepared written statements in support of the Appellant. Daniel, who was just two when the Appellant started to live with the family in the UK, describes growing up under her care as a "privilege" and sums up his feelings succinctly: "there are not enough words in the English vocabulary to express the love I have for this woman".

22. As for the Appellant's life outside of the family home the bundle contains numerous letters from friends and members of her local community. I mean no disrespect to the 11 other people who have taken the trouble to write by confining my summary of that evidence to the words of her Priest, Andrew Montgomery, who describes the Appellant as a vivacious and well liked member of the congregation, known for her honesty, integrity, hard work and unselfish voluntary contributions to the community. As to the latter, there was a number of references in the evidence to the Appellant running Spanish classes on a voluntary basis.

23. I am satisfied that the Appellant has established, in what is approaching 18 years residence in Peckham, a strong and deep rooted private life in the community. She has continued to develop the close bonds that she already enjoyed with her sisters (they had lived together in Equador, too) and I am quite satisfied that the First-tier Tribunal was correct to conclude that this was a family life deserving of protection under Article 8. These three sisters, who all attended the hearing before me, have an unusual degree of sibling affection for each other, having together formed the leadership of an extended family of three generations. There can be no doubt that the Appellant is seen by the second and third generation as an additional parent/grandparent.

24. Given the strength of these bonds I cannot accept Mr Thoree's submission that the decision to refuse the Appellant leave would have the effect of entirely nullifying family life for the Appellant. If she were to return to Equador it is inconceivable to me that all ties with her family in the UK would be severed. I find that contact would be maintained by telephone and 'skype'-type services, and for those well enough to travel, the possibility of visits. I do however accept that the removal of the Appellant would have a very severe impact on her natural enjoyment of family life. Keeping in touch via 'modern means of communication' would be a poor substitute for the comfort and security of daily contact and physical presence in the family home. It is unlikely that the Appellant's current private life in the community in Peckham would be

maintained at all. I am therefore satisfied that the decision to refuse leave would amount to an interference with the Appellant's Article 8(1) rights.

25. There is no dispute that the decision is one that the Secretary of State for the Home Department is lawfully empowered to make.

26. I turn then to address the proportionality of the decision. I begin by considering the public interest in removing the Appellant, delineated by parliament in s117B of the Nationality, Immigration and Asylum Act 2002:

27. The maintenance of effective immigration controls is in the public interest. The Appellant arrived in this country unlawfully in 2000 and has lived here without any lawful leave ever since. She does not qualify for leave to remain under the Immigration Rules. That is a matter that must attract significant weight against her in the balancing exercise.

28. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. In her evidence to me the Appellant spoke in English to describe to me how she did attend classes for a period, but that they were far from her home, on the other side of London in Hounslow. It was difficult and expensive to get there so she gave up and stopped attending before she could get the certificate to show she had reached a certain level of proficiency. I must therefore weigh against her the fact that she has no qualification to evidence her ability to speak English, although I accept that this is somewhat mitigated by the fact that she does appear to have integrated to some extent and there is no evidence at all that she has been a burden to taxpayers since she arrived.

29. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons are not a burden on taxpayers, and are better able to integrate into society. It is quite clear that the Appellant is not financially independent. In the unlikely event that both her sisters, her two nieces and their family members should all disown her the Appellant would, in all likelihood, be compelled to have some recourse to public funds. Her lack of financial independence is therefore a matter that weighs against her. It is however important to note that the Appellant has not been an entirely unproductive member of society. She has never been in formal employment since she arrived in the UK, because she has never had permission to do so; that said it is quite clear from the evidence before me that she has made a significant contribution in that she provided childcare for four children that enabled four other adults to work long hours.

30. Section 117B at (4) and (5) reminds me that little weight should be given to a private life that is established by a person at a time when the person is in the

United Kingdom unlawfully or their status is 'precarious'. I am therefore obliged to only attach a little weight to the evidence of Mr Montgomery and other supporters of the Appellant, and to my finding that she has, in her long residence, made numerous friends, has been a regular churchgoer and has contributed to her local community through, for instance, her voluntary work and teaching.

31. Section 117B(6) has no application in this case since all the children of this family have now reached adulthood.

32. The factors set out in the statute are not, of course, an exhaustive list. There are other matters that may be taken to weigh in the public interest in removal, but in this case Mr Duffy did not identify any. There is for instance no evidence that the Appellant has been engaged in criminality or any other anti-social behaviour, other than, it is important to note, her illegal entry and decision to remain in this country without leave.

33. In his submissions Mr Thoree placed considerable emphasis on what he submitted to be the long delay and unacceptable behaviour of the Home Office in this case. He adopted my analysis of the evidence from the 'error of law' decision and invited me to find as fact that the 'withdrawal' of the Appellant's case in 2005 was based on nothing more than Isabel's declaration in her legacy application. The Appellant herself had never 'withdrawn' her application to be granted leave in line with Isabel and Lizeth, and Mr Thoree asked me to find that the decision-maker had wrongly interpreted the terms of the declaration (see my paragraphs 16-21 above). He submitted that to his knowledge many adult dependents were granted leave in line with primary applicants under the 'legacy' scheme and pointed to the case of Cueva and Wilma, both adults when they were granted leave in line with Aida in 2005. He submitted that there was no rational reason why the Appellant had not benefitted from such a concession and that the Home Office had acted unfairly in granting leave to everyone else in this family except the Appellant.

34. I am satisfied that the declaration signed by Isabel was wrongly interpreted. It is quite plain on the face of the application form that the 'outstanding applications' referred to are other previous or concurrent applications made by the declarant. It cannot be logically read to exclude dependents to *that* application. I accept that the Appellant never 'withdrew' her claim. What is quite apparent, however, from documents produced at the second hearing before me, is that the Appellant, or at least her representative, must have been aware that the Respondent was refusing to give her leave under the legacy scheme. That is because, as I have now been told, the entire matter had been settled following an application to move for judicial review. Isabel and her two dependents had *all* been refused leave under the scheme. An application for permission to judicially review that decision had been granted and the matter was resolved on the 18th October 2005 when a Consent Order was sealed in the High Court, with the Respondent agreeing to grant Isabel and Lizeth indefinite

leave to remain. No mention is made of the Appellant. That she was expressly excluded from the settlement is however confirmed in a letter from Treasury Solicitors sent to the Appellant's solicitors on the same day, which states in terms that the Respondent could not be satisfied that there were ties of emotional or financial dependency such that a family life could be established, and that the Appellant was therefore being refused under the scheme. There can therefore have been no doubt in the mind of the Appellant, and indeed Mr Thoree who has represented her throughout, that at that point she was not being granted leave 'in line' with Isabel.

35. How then are the 'chasing' letters to be explained? In his submissions Mr Thoree said that following the Consent Order further representations were made, pointing out the nature of this close-knit family, and the fact that other adult 'dependents' (ie Cueva and Wilma) had been successful. Unfortunately Mr Thoree was not able to produce this correspondence. He explained that he had worked for another solicitor's firm at the time, and that he had not been able to retrieve the entire file. As to the gap of some four years before he started sending chasing letters Mr Thoree pointed out that the Home Office was beleaguered by severe delays during that period, the very reason why the legacy scheme had been introduced. The apparently inconsistent application of the concession had spawned a considerable amount of litigation and applications for review. He, and the Appellant, had just put the Respondent's inaction down to these ongoing problems and had waited patiently for a further decision. As to the question of fairness and consistency, raised by him at 'error of law' stage, he submitted that in retrospect the Respondent was proven to be wrong in refusing 'legacy' leave: the only reason given by the Treasury Solicitors had been the lack of a *Kugathas* relationship, a matter of factual dispute now settled in the Appellant's favour.

36. Whilst the evidence now before me indicates that the matter is not as clear cut as it had initially appeared, I am satisfied on the balance of probabilities that the Appellant did consider herself to be waiting for a response from the Home Office in the years between October 2005 and December 2014. I make that finding in the absence of written evidence of those 'further representations' for these reasons. First, I have no hesitation in finding the Appellant herself to be a completely credible and honest witness (indeed no suggestion has been made to the contrary). Secondly the terms in which the matter was pursued in the years 2010-14 make it perfectly clear that Mr Thoree himself, a qualified and regulated solicitor, believed there to be outstanding representations. Third, it is not in dispute that the Appellant remained in contact with the Home Office and never changed address: the fact that she remained 'in the open' is consistent with her evidence that she understood her case to be under review, or at least this is what she had requested.

37. As I note in the 'error of law' decision, delay in decision-making can be relevant in a number of ways. In this case it is primarily of relevance because it permitted the Appellant to remain with her family, deepening and

strengthening her ties to them and life in London whilst simultaneously seeing her ties to Equador diminish. Whilst it may not be possible to say that the sisters love each other any more today than they did in 2005, I accept that the impact of separation would today be harder to bear. Had the Appellant left the country in 2005 it would have been upsetting for the children and adults alike but they would no doubt have learned to adapt. Aida and Isabel would have paid for childcare, the children would gradually have learned to live without her. The Appellant herself would have been returning to a country from which she had been away for only four years, at the age of just 44. It is likely that at point she would still have had friends and family, and some contacts to whom she could turn in re-establishing herself. Today the position is quite different. The Appellant is now approaching 60 and has not been to Equador for 18 years. She has, the First-tier Tribunal found, no friends or family in that country. This is a return scenario that understandably causes the Appellant herself, and her family members, considerable distress and anxiety. Whilst she has always been an integral part of this family her removal now, after such a long time, would be far more challenging, both in terms of the practicalities involved and the emotional impact on three sisters who have now come to anticipate growing old together.

38. I must in addition consider Mr Thoree's submissions as to the weight to be attached to the public interest in these circumstances. It is established that unreasonable delay on the part of the Respondent, if resulting from poor administration, can diminish the normally substantial weight that the 'maintenance of immigration control' should attract: EB (Kosovo) [2008] UKHL 41. I have accepted that further representations were made in 2005, and that the Appellant remained living at the same address. I accept that the Appellant did not receive a further decision until December 2014, some 9 years later. Mr Duffy protests that if further representations were sent, they do not appear to have been received by the Respondent and in those circumstances she cannot be blamed for inaction. I bear that in mind. I see no reason to doubt the Respondent's contention that those representations are not on file (indeed very little of the material before me, including letters from the Respondent or her representatives, appears to be available today). Even if I disregard that initial period it is however clear from the documents produced that the Appellant wrote again to the Home Office in February 2010 and had to wait a full four years and 10 months – and threaten judicial review – before a decision was forthcoming. Whatever might be said about the 'delay' between 2005 and 2010, it is incontrovertible fact that there was a further delay of almost five years between the Appellant's 'chasing' letter of February 2010 and a decision finally being taken, and that after a further 12 letters/set of representations being made by the Appellant's representatives. To date no reasonable explanation has been given for that delay, and that is a matter that I find diminishes to some extent the weight to be attached to the public interest in the maintenance of immigration control.

39. I make no finding on Mr Thoree's arguments in respect of consistency of decision making. True, it is apparent from the documents that Cueva and Wilma were granted indefinite leave to remain as adult dependents to a 'legacy' claim. True, the First-tier Tribunal and I have found there to be clear evidence of a *Kugathas* family life in this case. That is however insufficient evidence, in my view, to support a finding that there has been a clear historical injustice in the Appellant's case. Mr Thoree has produced the policy statement which set out the parameters of what became known as the 'legacy' concession, and on its face that document indicates that adult dependents such as the Appellant would not ordinarily benefit from a grant. The letter from the Treasury Solicitor appears to indicate that the Respondent considered exercising her discretion in the Appellant's favour, but in the absence of evidence that there was a particular dependency, declined to do so. The fact that a *Kugathas* family life has subsequently been established is not capable of showing the Respondent's decision of 2005 was irrational. I infer from the terms of the Consent Order that this much was recognised by her representatives at the time, who were content to see her excluded from the terms of the settlement.

40. I have already noted the nature of the relationship between the Appellant and her family members in the UK, and I have accepted that enforced separation would cause considerable anguish for all of them. By the date of the second hearing before me there had however been a sad development in the case which is likely to exacerbate such distress. In August 2017 Isabel was diagnosed with cancer of the pancreas and liver. I have been provided with copies of her recent medical notes and with correspondence showing her to be under the care of specialist consultants at King's College Hospital, where she is being treated with chemotherapy, administered as a day patient. Isabel had prepared a short additional statement for the further hearing. Therein she states that she is finding it very hard to cope and that the Appellant is providing her with support and assistance. In her live evidence I asked her to elaborate on this. She explained that her daughter is now married and living on the other side of London and although she continues to see her as often as possible, it is the Appellant to whom she has turned for emotional and practical support. Isabel has had six rounds of chemotherapy since August. She attends hospital and they inject her with the drug. For about a week after this she experiences constant nausea and exhaustion and in this period the Appellant does everything for her including cooking, cleaning as well as attending to her personally. Isabel acknowledged, in response to Mr Duffy's questions, that there are other people who could give this assistance if the Appellant were not here – she still lives with Aida, Wilma and Cueva and their son and her own daughter manages to visit every couple of weeks. Isabel stressed however that it is the emotional support that the Appellant is giving her which is helping her through this very difficult time. It is the "little things" that the Appellant does that her giving her strength.

Conclusions

41. This is an unusual case for several reasons. First, it concerns a somewhat unorthodox family unit. The Appellant is one of three sisters who have an exceptionally strong bond, having each reached their sixth decade of life with very little time spent apart: they lived together in Equador prior to their emigration to the United Kingdom and continue to do so today. Together they have brought up a further two generations. Second, it serves to illustrate the kind of inefficient administration that thankfully no longer persists as a matter of course at the Home Office. The Appellant has, on the most generous of readings, waited almost five years for a decision; nine if you count the period between 2005 and 2010. This is ironic given that her original application was itself based on the 'legacy' program, a concession designed to deal with the huge backlog that developed at the Immigration and Nationality Department during the 1990s. Finally, it now involves the serious illness of a close family member, a factor which introduces a significant additional weight to be considered when assessing the Appellant's claim that this decision is disproportionate.

42. I remind myself that the public interest is a weighty and ordinarily powerful factor in refusing leave to persons who do not qualify for leave under the Rules. Looking at all of the relevant matters in the round in this case, I cannot however be satisfied that the Respondent here seeks to wield the power vested in her in a proportionate way.

43. True this is a woman who would, albeit with some difficulty, be able to "integrate" if returned to Equador. She lived in that country until she was 40 and although she no longer has any friends or family there she speaks the language and has a familiarity with the culture which would stand her in good stead. Her family in the UK would be able to support her with financial remittances. She could continue to attend Church and make new friends in the congregation there. It is for those reasons that the Appellant cannot bring herself within the Rules. Looking beyond those bare practical factors, however, it is plain that such a removal would have a devastating impact on the Appellant personally. She does not seek permission to remain in this country for, I am quite satisfied, any reason other than the fact that she desperately wants to stay and grow old with her sisters and their families, with whom she has lived for virtually all of her life. They in turn would find it hugely distressing and worrying to see her removed to Equador at her age, knowing as they do the challenges that she would face, and that they would be very unlikely be reunited with her for any length of time beyond a short visit. As I note above Isabel's illness adds a further dimension to that fear, since it would, it must be recognised, be a real possibility that these two sisters may not see each other again if the Appellant were to leave the UK at this stage. Whilst Mr Duffy is right to point out that this is a dependency of choice rather than necessity, it is presently a fact that this British national is currently dependent – both emotionally and physically – on this Equadorean national and that any

interference with that relationship is likely to be extremely difficult for both of them.

44. Even taking into account the long residence without leave, the lack of financial independence and the failure to demonstrate an ability to speak English to the required level, I am satisfied that this is precisely the sort of compelling case where it would be appropriate to grant leave to remain. I find that the impact upon the Appellant and her family of her removal would be far beyond the commonplace inconvenience generally felt by those separated by immigration control, and that is at least in part attributable to the long delays that there have been in resolving her case. Although this appeal was framed by the rule relating to private life it had at its heart an Article 8 family life of exceptional strength and warmth, such that an interference with it, at this late stage, has not been shown to be justified.

Decisions

45. The making of the First-tier Tribunal decision involved an error in approach such that the decision is set aside to the extent identified above.

46. The decision is remade as follows: "I allow the appeal on human rights grounds".

47. I have not been asked to make a direction for anonymity and on the facts I do not consider it appropriate to do so.

Upper Tribunal Judge Bruce
19th January 2018

PS. The Tribunal has no role to play, in a statutory appeal, in deciding how long an appellant should be granted leave for. If an appeal is allowed on human rights grounds, as this has been, it is for the Secretary of State for the Home Department to decide whether leave should be granted, and if so how long for. I believe that the usual grant would be for thirty months. I take the unusual step of adding this coda because I am conscious that a grant of thirty months would leave this Appellant, upon its expiry, just short of the 20 years long residence that she would require to qualify for leave under the rules. Given the circumstances in this case, and the already long delay, that hardly seems justified. The Secretary of State for the Home Department may wish to consider whether a longer grant, or indeed indefinite stay, would be more appropriate at this stage.