Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00509/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2021	**On 22 November 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

CESAR LUIS ARBOLEDA BAUTISTA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr P Thoree, solicitor from Thoree and Co Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal following my previous error of law decision, promulgated on 25 May 2021, by which I concluded that the First-tier Tribunal had erred in law when allowing the appellant's appeal against the respondent's refusal of his human rights claim. I set the First-tier Tribunal's decision aside, but preserved a number of findings of fact contained within [18], [23], and [24].

2. The error of law decision is appended to this re-making decision: they are to be read together.

3. The Appellant is a citizen of Ecuador, born on 18 April 1959. He first came to the United Kingdom in 1993 and claimed asylum the following year. This claim was refused, but he was subsequently granted exceptional leave to remain in May 2000. On 4 February 2005 he was granted indefinite leave to remain with NTL granted in March of that year. The Appellant left the United Kingdom on 28 June 2006 and remained in Ecuador until his return to the United Kingdom as a visitor on 16 November 2017. On 27 March 2018 he applied for indefinite leave to remain outside of the Immigration Rules (this constituted the human rights claim). The Respondent refused his claim on 5 December 2018.

4. The basis of the claim was that the Appellant retained strong family ties in the United Kingdom. His ex-wife, four adult married children (it is not entirely clear whether the correct figure is four or two, but it makes no difference in this case) and seven grandchildren all resided in this country as British citizens. Further, it was claimed that the Appellant suffered from certain health conditions including diabetes. These conditions had, it was said, resulted in him having to seek treatment in Ecuador.

5. Additional medical evidence provided during the course of these proceedings indicates that the appellant has problems with his eyesight. This is relied on as a factor which, when taken in the round, demonstrates that he should be permitted to remain in the United Kingdom on Article 8 grounds.

Procedural issue: application to recuse

6. In my error of law decision I gave specific directions for the appellant to file and serve any new evidence relied on "**no later than 10 days** after this decision is sent out". In the event, a collection of items of evidence (without pagination or a proper index and some of which had been filed and served previously) was sent to the Tribunal, addressed to me personally, under cover of letter dated 19 October 2021. The additional evidence ranged in date from May to September 2021, the majority of it falling within the May to July period.

7. At the outset of the hearing, I raised with Mr Thoree the issues of compliance with directions and the admissibility of the further evidence. He responded by saying that the notice of hearing had only been sent out by the Tribunal on 8 October 2021. This did not, of itself, provide any explanation as to why further evidence had not been filed and served in compliance with my directions, or why, for example, an application for an extension of time with which to comply had not been made.

8. At this stage, Mr Thoree took objection to what he described as my "abrupt attitude" and he stated that I was "not acting professionally as a judge." I sought to reiterate the specific issue with which I was concerned, namely the compliance with directions and the admissibility of further evidence. Mr Thoree continued to express concerns over my "stance" and went on to state that he did "not believe we will get any justice today." Having reminded Mr Thoree that the hearing was being recorded, I asked him whether his comments amounted to an application for me to recuse myself. He responded by stating that "I would prefer a different judge to deal with this case. I do not believe you are impartial enough. You can refer me to the Law Society if you want." I took this as an application to recuse.

9. I refused the application. There was no basis on which I should have recused myself. The raising of the non-compliance issue was entirely legitimate: procedural rigour is an important aspect of this jurisdiction. I was satisfied that my conduct in relation to that issue was appropriate and disclosed no bias against the appellant, whether actual or perceived. As I made clear to the appellant himself (with his daughter interpreting), I was approaching his case with an open mind and would reach a decision based on the evidence as a whole, placed in the context of the relevant legal framework. Having given my decision, Mr Thoree sought to apologise for his earlier comments.

Procedural issue: admitting further evidence

10. The bundle of evidence referred to above three items which had already been filed and served: letters from the Department of Ophthalmology at Central Middlesex Hospital, dated 4 May and 10 May 2021; and a letter from the appellant's GP, dated 10 May 2021, accompanied by patient record printouts (these include a hospital letter dated 12 April 2021). As I pointed out to Mr Thoree, this evidence would be admitted.

11. As regards the additional evidence which had not been filed and served in compliance with my previous directions, and in respect of which there was no adequate explanation as to why it had been provided so late in the day, I refused to admit it.

The evidence

12. In re-making the decision in this case I have had regard to the following sources of documentary evidence:

(a) the respondent's appeal bundle prepared for the First-tier Tribunal hearing;
(b) the appellant's First-tier Tribunal bundle, indexed and paginated 1-152;

(c) the letters from the Department of Ophthalmology at Central Middlesex Hospital, referred to above;
(d) the letter from the appellant's GP and accompanying patient record printouts, referred to above.

13. The appellant, his daughter, and one of his sons, attended the hearing. I queried whether there would be any oral evidence, noting the fact that the Tribunal had not booked an interpreter for the appellant. I queried whether Mr Thoree had in fact requested an interpreter for the resumed hearing, to which he responded that he had not, but that one had been requested for the previous hearing (the error of law hearing. By way of observations, it is the normal practice that interpreters are not booked for error of law hearing is unless the particular circumstances of the case require this to be done; for example, if the appellant is acting in person, or there are other exceptional circumstances). Even if there had been a request for an interpreter at a previous hearing, it did not of course follow that one would automatically be booked by the Tribunal at a subsequent hearing, particularly one which was of a different nature to the first (i.e. a resumed hearing following an earlier error of law hearing).

14. Mr Thoree confirmed that he wished to proceed on the basis of submissions only. His position was that there was "sufficient evidence before the Tribunal" and that there was "no need for further evidence."

Submissions

15. I heard oral submissions from both representatives, for which I am grateful. I do not propose to set them out here, but will engage with the relevant points made when setting out my findings of fact and conclusions, below. Mr Thoree provided a skeleton argument, which I have also taken into account.

Findings of fact

16. I start by re-stating the preserved findings from the First-tier Tribunal's decision (noting that the date of hearing before the First-tier Tribunal was 9 September 2019, and its decision was promulgated 12 November of that year). Having regard to [18], [23], and [24] of that decision, I find as follows:

(a) in view of the central underlying facts, the appellant cannot meet the criteria of the adult dependent relative requirements under Appendix FM to the Rules, nor any satisfied paragraph 276ADE(1)(vi);
(b) the appellant first came to the United Kingdom in 1993 and remained here until 2006;
(c) he left this country in 2006 and did not return until 2017;

(d) a partial reason for his extended time in Ecuador was due to ill-health, this seeming to cover approximately two years of the absence;
(e) the appellant returned to the United Kingdom in 2017 with the intention to attend the graduation of one of his sons;
(f) the appellant maintained a good relationship with his family members during his extended absence;
(g) his four children and seven grandchildren are all British citizens;
(h) on return to Ecuador he could live in the home which he occupied until 2017;
(i) he could continue to be financially supported by his son, as had been the arrangement previously;
(j) the appellant currently enjoys a strong family life with his children in United Kingdom.

17. As set out in my error of law decision, the appellant's previous indefinite leave to remain lapsed following two years of his absence from the United Kingdom. The ill-health which apparently formed a cause of approximately two years of that absence does not explain the remaining nine or so years of that absence. There is no reliable evidence in respect of that period of time. Similarly, there is no reliable and/or corroborative evidence to demonstrate that any attempts to re-enter the United Kingdom sooner than 2017, or that if he had made such attempts, why these had been unsuccessful.

18. I turn to the appellant's current state of health. Mr Thoree placed significant reliance on what he said was a number of significant health problems faced by the appellant, in particular deteriorating eyesight. The two hospital letters, the GP letter, and accompanying patient record printouts, confirm that the appellant does have problems with his eyesight. It may be that these are directly connected to his diabetes, or might simply be glaucoma; I am not in a position to confirm any such connection.

19. The hospital letters state that the appellant has undergone right pars Baerveldt tube surgery bilateral panretinal photocoagulation laser and a right vitrectomy with delamination in oil. The latter procedure apparently took place in 2019, whilst the former occurred in April of this year. The appellant was taking relevant medication. His visual acuity was stated to be: "hand movements only in the right eye and 0.12 in the left eye". As I understand the meaning of this assessment (based on the LogMAR chart used by ophthalmologists), the appellant's vision in the right eye was very poor. In respect of the left eye, 0.12 represents 20/25 feet and 6/7.5 metres: in other words, the appellant can see at a distance of 25 feet/7.5 metres what a person with normal vision could see at 20 feet/6 metres. I am not of course an expert in this field. The appellant has not provided evidence as to the effect of the score stated in the hospital letter of 10 May 2021.

20. I find the fact that the appellant is partially sighted to the extent that the vision in his right eye is very poor, but the vision in his left eye is not significantly impaired.

21. I find that the appellant has had two Covid-19 vaccination doses, as confirmed by the patient record. That record confirms that, aside from the eyesight difficulties, the only other "active" problem is essential hypertension. I accept that the appellant suffers from this, although there is no evidence to indicate that this causes him significant disablement.

22. A number of other matters, including kidney disease, anaemia, urinary tract infections, and acute pyelonephritis are recorded as part of his "significant past" and I accept this to be the case. Again, there is no medical evidence before me to indicate that these past problems continue to have a significant bearing on his day to day activities.

23. Under the heading "minor past", diabetes is mentioned. I accept that the appellant suffers from this condition. There is no evidence to suggest that this is not properly managed.

24. Mr Thoree submitted that the appellant suffers from "heart failure". This condition is mentioned in the patient record, but only under the heading "Health Administration", in an entry dated March 2018. I am prepared to accept that he has suffered from this condition in the past. The medical evidence does not suggest that he suffers from ongoing problems of a significant nature by virtue of this condition.

25. None of the medical evidence makes any reference to the provision of appropriate medical treatment in Ecuador. There is no expert or country information relating to the provision of medical treatment in that country. The burden of proof to demonstrate the essential factual components of the case rests on the appellant. He has not proved that there is an absence of appropriate medical treatment available in Ecuador for the medical conditions described above.

26. The appellant's daughter, Karina, is described as the appellant's "main carer". This description can be found in the hospital letter dated 10 May 2021, although it does not appear in the GP letter. In her witness statement dated 19 June 2019, Karina states that at that time she was looking after her father on a "day to day basis as I am on maternity leave at the moment." I accept that was the case. However, there is no updated witness statement from Karina as to the current position regarding the appellant's daily care. I find that the two do not reside in the same household. In the absence of any evidence to the contrary, I find that Karina is no longer on maternity leave. I find that she has two children and it is more likely than not that she returned to her previous employment as an administrator at a health club.

27. It is probable that the description of Karina as her father's "main carer" came from him or her. There is no evidence from, for example, social

services or any other source to confirm the existence of caring responsibilities. In all the circumstances I am prepared to accept that Karina does provide a degree of day-to-day assistance for the appellant, but not that this represents a very high level of personal care. I accept that Karina provides some financial assistance for him. I find that the appellant is financially supported by at least some of his other children as well, as has occurred in the past.

28. On the basis of the evidence as a whole, I do not accept that the appellant is wholly dependent on the care of others in order to meet basic daily living needs. Further, or in the alternative, I do not accept that relevant care provision could not be secured in Ecuador. Those findings are the effect of two considerations. Firstly, the preserved findings from the First-tier Tribunal's decision. Secondly, the absence of any independent evidence relating to the current situation in the United Kingdom or in relation to Ecuador should the appellant be returned there.

29. I find that the appellant's adult children would be able and willing to provide meaningful financial support to him if he was returned to Ecuador.

30. There is no new evidence to depart from the preserved findings as regards the existence of accommodation in Ecuador and the ability of at least some of his family in United Kingdom to undertake visits there.

31. I find that there are no matters going to suitability in this case. In other words, there has been no misconduct by the appellant.

Conclusions

32. I accept that the appellant has established something of a private life in the United Kingdom (albeit tenuous) and that he also enjoys a strong family life with all, or at least some, of his adult children and his grandchildren here.

33. The respondent's decision is clearly an interference with the protected rights. That decision is in accordance with the law and pursues a legitimate aim.

34. On the basis of the preserved findings,, and the state of the evidence before me, it is clear that the appellant cannot satisfy the requirements of the relevant Immigration Rules, in particular paragraph 276ADE(1)(vi) and Appendix FM (including the Adult Dependent Relative provisions). For the avoidance of any doubt, the inability to satisfy Appendix FM is not solely down to the immigration status requirement. The appellant has failed to show by evidence that any personal care needs could not be provided for in Ecuador.

35. Given the above, I move on to conduct a wider proportionality balancing exercise. In so doing, I have regard to the mandatory considerations set

out in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended.

36. The maintenance of effective immigration control is in the public interest and this factor itself carries considerable weight.

37. Whilst the inability to satisfy the Rules is not fatal to an Article 8 claim, it does represent a factor weighing against the appellant in the overall balancing exercise. In my judgment, it attracts considerable weight in this case: see, for example, Agyarko [2017] UKSC 11; [2017] Imm AR 764, at paragraph 47. In particular, the appellant has not been able to demonstrate that he would face very significant obstacles to re-integration into Ecuadorian society, nor has he shown that any personal care required could not be provided for in that country, even with the assistance of financial support from family members in the United Kingdom. These two considerations go to the heart of the appellant's Article 8 claim: if it were not for claim the worsening of his health whilst in this country, the appellant would, on his own case, have returned to Ecuador after his visit to attend a son's graduation.

38. The appellant entered the United Kingdom as a visitor a relatively short period of time ago. His status here is highly precarious and he cannot rely on lengthy residence as a factor in his favour.

39. As regards his private life, there are no particularly compelling features of his claim which justify anything other than "little weight" being placed upon that protected right.

40. In terms of the family life, I have found that it is strong. He enjoyed that life with his children before he returned to Ecuador in 2006, he maintained good relationships during his absence, and he has re-established strong bonds since returning to this country four years ago. He does rely on his adult children for financial support and it is very clear that he derives emotional support from them as well. I have no reason to doubt that he enjoys good relationships with his grandchildren as well. It is uncontroversial that both the adult children and the grandchildren would be distressed by the appellant's departure. This consideration includes my assessment of the best interests of the grandchildren. There is no specific evidence relating to them and, whilst they would no doubt be upset, I conclude that it would not be contrary to their overall best interests were the appellant to be removed. Notwithstanding this, I take the general distress caused to family members fully into account and place appropriate weight thereon.

41. I also take account of certain mitigating factors as regards the upset caused to family members. In light of the preserved findings, visits to Ecuador are possible. Although modern methods of communication are not a substitute for face-to-face contact, they do represent a way of maintaining regular contact, very possibly on a visual basis as well. Finally, there is no evidence before me of any particularly strong bonds and any of

the grandchildren such as to give rise to unjustifiably harsh consequences to either the appellant or any individual child.

42. I am unable to discern whether the appellant can speak English to a reasonable standard. It does not appear to me as though he can. As such, this is an adverse factor. Even if he were able to, it would amount to no more than a neutral consideration.

43. As to financial independence, I accept that the appellant is being supported by his family members. Having said that, it is clear that he has been receiving treatment on the NHS. There is no evidence before me to indicate that the treatment has been privately funded. I acknowledge that there is no invoice in evidence, but this does not preclude me from taking account of the fact that recourse to public funds, through medical treatment, has occurred. Even if I left this consideration out of account, financial independence is a neutral consideration.

44. The appellant has not committed any criminal offences, nor has he engaged in any other misconduct. However, this does not add anything to his Article 8 claim.

45. Bringing all of the considerations set out above together, I conclude that the respondent's refusal of the appellant's human rights claim is proportionate and therefore lawful under section 6 of the Human Rights Act 1998. The appellant's family life in the United Kingdom, even when combined with all other factors in his favour, is, by some margin, outweighed by the cumulative effect of the public interest considerations resting in the respondent's side of the scales.

Anonymity

46. The First-tier Tribunal made no anonymity direction and there is no reason why I should adopt a different course of action. In all the circumstances, I make no anonymity direction in this case.

Notice of Decision

47. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. That decision has been set aside.

48. I re-make the decision by dismissing the appeal on Article 8 ECHR grounds.

Signed: H Norton-Taylor Date: 15 November 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: H Norton-Taylor Date: 15 November 2021

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00509/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 May 2021	.....

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CESAR LUIS ARBOLEDA BAUTISTA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr P V Thoree, Solicitor of Thoree & Co Solicitors

DECISION AND REASONS

Introduction

I shall refer to the parties as they were before the First-tier Tribunal. Therefore, the Appellant in these proceedings is once more "the Respondent" and Mr Bautista is "the Appellant".

This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Howard ("the judge"), promulgated on 12 November 2019, by which he allowed the Appellant's appeal against the Respondent's refusal of a human rights claim.

The Appellant is a citizen of Ecuador, born on 18 April 1959. He first came to the United Kingdom in 1993 and claimed asylum the following year. This claim

was refused, but he was subsequently granted exceptional leave to remain in May 2000. On 4 February 2005 he was granted indefinite leave to remain with NTL granted in March of that year. The Appellant left the United Kingdom on 28 June 2006 and remained in Ecuador until his return to the United Kingdom as a visitor on 16 November 2017. On 27 March 2018 he applied for indefinite leave to remain outside of the Immigration Rules (this constituted the human rights claim). The Respondent refused his claim on 5 December 2018.

The basis of the claim was that the Appellant retained strong family ties in the United Kingdom. His ex-wife, two adult married children and seven grandchildren all resided in this country as British citizens. Further, it was claimed that the Appellant suffered from certain health conditions including diabetes. These conditions had, it was said, resulted in him having to seek treatment in Ecuador.

The decision of the First-tier Tribunal

Having set out a summary of the evidence provided, the judge stated his relatively brief findings of fact at [18] of his decision. He found that the Appellant could not satisfy any relevant provisions in the Rules (including Appendix FM and paragraph 276ADE(1)(vi)). He also concluded that the Appellant did not "qualify" to resume his residence in this country (presumably with reference to paragraphs 18 and 19 of the Rules relating to returning residents). Having cited the decision in Ademuyiwa [1986] Imm AR 1, the judge set out his six factual findings:

i. the Appellant had resided in United Kingdom between 1993 and 2006;

ii. he had then resided in Ecuador between 2006 and 2017;

iii. aspect of the extended stay in Ecuador appeared to be ill-health, but also "stress" of not been able to obtain entry clearance to re-enter the United Kingdom;

iv. the purpose returning to the United Kingdom in 2017 was to attend the graduation of his adult son;

v. the appellant had maintained contact with his family when in Ecuador and had been financially supported by his son during that time;

vi. the appellant was living with his son in the United Kingdom.

Having then referred to a number of authorities on Article 8, the judge reiterated his conclusion that the Appellant could not satisfy any of the relevant Rules. He cited section 117B of the Nationality, Immigration and Asylum Act 2002, as amended, and passages from the Court of Appeal's judgment in TZ (Pakistan) [2018] ECWA Civ 1109.

The paragraphs containing factors weighing for and against the Appellant's claim are set out at [23] and [24]. In respect of the former, the judge noted the importance of immigration control and the fact that the Appellant had spent eleven years separated from his children before coming back to the United Kingdom. He found that his adult children would be able to visit him if he returned to Ecuador and that he would have somewhere to reside in the country of his nationality. Further, the judge found that he would be financially supported by his adult son, as had occurred whilst he (the Appellant) was last in Ecuador.

The basis for allowing the appeal is set out at [24]:

> "There is, however something unusual about the appellant's circumstances. His family is all in the UK because they lawfully settled here with him in 1993 this is not a case where I am considering unlawful or precarious status on the part of those he wishes to join all the appellant himself. When returning to the six questions posed in [Ademuyiwa] I am satisfied that notwithstanding the length of time he was away, he has always maintained a very close relationship with his family in the UK and has remained an intimate part of all their lives. Upon his return, for an entirely family related matter, he has done no more namely to strengthen those bonds. The fact I am considering a family life that was initially, lawfully established in the UK, maintained during the appellant's absence and resumed on his return leads me to conclude that on the facts as I have found them the respondent's decision is not proportionate."

The appeal was duly allowed.

The Respondent's challenge

The Respondent's grounds of appeal could have been drafted in clearer terms, but effectively assert that on the facts found and reasons provided the judge was simply not entitled to conclude that the decision under appeal was disproportionate.

Permission to appeal was granted by First-tier Tribunal Judge Parkes on 20 April 2020.

Following this, the Appellant provided a Rule 24 response. In this, Mr Thoree asserted that the judge had not erred in law and went on to suggest that the judge should in fact have considered the discretion contained in paragraph 19 of the Rules and that this should have been exercised in the Appellant's favour.

The hearing

Mr Avery confirmed that he was asserting that the judge's conclusions were perverse and, in the alternative, that the reasoning was inadequate. There was

no objection to the framing of the challenge in this way. Mr Avery submitted that contrary to the judge's view, there was nothing "unusual" in the Appellant's situation. The Appellant had voluntarily departed the United Kingdom and had lived in Ecuador for eleven years before returning to this country as a visitor. All the Appellant had done in effect was to resume a family life in this country. That, submitted Mr Avery, was insufficient to simply allow the appeal and the judge had been wrong so to do.

Mr Thoree relied on his Rule 24 response and submitted that there was strong family life in this country including dependency of the Appellant on his two adult children, there had been no misdirection in law by the judge and that his conclusions were open to him.

At the end of the hearing I reserved my decision.

Conclusions

I conclude that the judge has materially erred in law on the basis that the reasons provided are inadequate for the conclusion reached, or alternatively that on the facts found, the conclusion was perverse.

It is not in dispute that the Appellant left the United Kingdom and spent a very substantial period of time living in Ecuador. The ILR he possessed on departure lapsed after two years by operation of law. Whilst ill-health may have played a part in the length of the time spent in Ecuador, nothing in the judge's findings of fact indicate that this factor continued throughout the eleven-year period and there appears to have been no evidence in respect of any unsuccessful attempts to have re-entered the United Kingdom sooner (or, at least, there are no findings on any evidence which might have existed).

The judge's findings that the Appellant could not meet any of the relevant Rules have not been challenged and this included the conclusion that there would not be very significant obstacles to the Appellant's re-integration into Ecuadorean society. The inability to meet any of the Rules and the factual circumstances underpinning these conclusions were clearly important factors to be considered when assessing proportionality. It is not apparent from the face of the decision that the judge has either factored this into what is said at [23] and [24], or that he has provided reasons as to why this factor was less than significant.

The judge specifically found that the Appellant could reside in a property in Ecuador, that he could be visited by his adult children and that he would be financially supported by his son at least. Whilst the judge did not specify this, it is of some note that the Appellant re-entered the United Kingdom in 2017 only as a visitor in order, it was said, to attend his son's graduation. Thus, when applying for the visa and entering the United Kingdom he held an intention to return to Ecuador and not to re-settle in this country. The highly precarious status of the Appellant as at the date of hearing was not reflected in

the judge's reasoning at [24]: indeed, the judge approached the matter on the erroneous basis that this status was settled, as it had been when the Appellant still had his ILR.

The basis on which the judge concluded that the appeal should be allowed notwithstanding the foregoing was simply that there was an "unusual" element of the Appellant's circumstances, namely that he had family members lawfully settled in this country to whom he was returning to re-establish the family life enjoyed prior to his departure in 2006 and (as implicitly found by the judge) had continued in one form or another during the eleven-year absence (albeit to a lesser degree). In effect, and on a fair reading of the decision as a whole, the judge concluded that the mere existence of family life between the Appellant and his adult children (and perhaps also his grandchildren) led to the Respondent's decision being disproportionate and therefore unlawful. This conclusion, at least on the reasoning provided, in my judgment conflates the fact of family life with the question of whether a removal from this country would be disproportionate. It failed to disclose adequate reasons in respect of the Appellant's inability to meet any of the relevant Rules, the relatively high threshold for disclosing a strong Article 8 claim where none of the Rules could be met, and both the length of the residence in Ecuador and the surrounding circumstances. If it could be said that the reasons were adequate, the conclusion reached was, on the facts found, not properly open to the judge.

As regards the Appellant's health, none of the judge's findings support a contention that this, at least on the evidence before the judge, could have played a significant role in the proportionality exercise.

In light of the above, the judge has materially erred in law and I conclude that his decision should be set aside.

In terms of the Rule 24 response, I conclude that this is misconceived. The version of paragraph 19 cited in that response is out of date. The Rule, as stated as at the date of the First-tier Tribunal hearing, provided as follows:

> "A person who does not benefit from the preceding paragraph by reason only of having been absent from the United Kingdom for more than two consecutive years, must have applied for, and been granted indefinite leave to enter by way of entry clearance if, he can demonstrate he has strong ties to the United Kingdom and intends to make the United Kingdom his permanent home."

It is plain that the Appellant could not benefit from any discretionary element within paragraph 19 of the Rules on the basis of his circumstances. He re-entered the United Kingdom in 2017 as a visitor. He had not sought entry as a returning resident and indeed, it would have been impossible for him to show an intention to have made the United Kingdom a permanent home when he was proposing to attend a graduation and then return to Ecuador.

Disposal

It is not appropriate to remit this case to the First-tier Tribunal. Both parties were agreed that if I were to find that the judge's decision should be set aside, I should direct that any new evidence be filed and served within a fixed timeframe, with the Respondent being able to respond thereafter. Both parties would have the opportunity of making representations on the method of a resumed hearing.

The judge's findings of fact relating to the Appellant's overall circumstances and as set out at [18], [23], and [24] (with the exception of the erroneous statement that the Appellant's status in the United Kingdom is not precarious) shall stand as the starting point for the assessment of proportionality at the resumed hearing. There is no real dispute between the parties as to the existence of family life itself under Article 8(1).

Anonymity

Although the First-tier Tribunal made an anonymity direction, I see no reason for maintaining this, given the circumstances of this case. Both representatives were agreed. I therefore discharge the previous anonymity direction.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I adjourn this appeal for a resumed hearing in the Upper Tribunal on a date to be fixed.

Directions to the parties

(1) **No later than 10 days** after this decision is sent out, the Appellant shall file and serve any new evidence relied on, together with a notice pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008;
(2) **At the same time**, the Appellant may make any representations as to whether the resumed hearing should be conducted remotely or on a face-to-face basis;
(3) **No later than 17 days** after this decision is sent out, the Respondent may make any representations as to whether the resumed hearing should be conducted remotely or on a face-to-face basis;
(4) With liberty to apply.

Signed H Norton-Taylor Date: 10 May 2021

Upper Tribunal Judge Norton-Taylor