Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20682/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 August 2014	**On 26 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS VERA LAMILE LARSEN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Secretary of State:	Mr Paul Duffy, Specialist Appeals Team
For the Respondent/Claimant:	Ms A Seehra, Counsel instructed by Fitzpatrick & Co, Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of

State to refuse to grant her leave to remain as an adult dependent relative outside the Rules. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. On 6 July 2012 Cleveland & Co Solicitors submitted an application on behalf of the appellant, who is a Ghanaian national and whose date of birth is 11 September 1944. In a covering letter, they said they were instructed that the appellant had initially arrived in the UK on 13 May 2003 as a visitor and was granted six months' leave to enter. As a result of unscrupulous legal advice from a legal representative, she had overstayed through no fault of hers. The basis of her application for ILR was that firstly she was a widowed mother over the age of 65. Secondly, she was living in the most exceptional, compassionate circumstances before coming to the UK in 2003. She was financially wholly and mainly dependent on relatives and friends present and settled in the UK. She had no-one to care or her if she was forcefully returned to Ghana. Her family here had provided her with all the amenities of life and love, abundant care and happiness. She would continue to be maintained and accommodated adequately without recourse to public funds in accommodation owned or occupied exclusively by the family in the UK. Above all, their client had no relatives in Ghana to whom she could turn to for financial support. In the alternative, their client relied on Article 8 by virtue of the fact she had established private and family life in the UK. Her children were settled here, and her grandchildren would dearly miss her if she was removed from the UK. Her removal would be disproportionate.

3. On 15 May 2013 the Secretary of State gave her reasons for refusing the claimant's application. She had remained in the United Kingdom beyond the period of her permitted leave, and she was a person liable to administrative removal in accordance with Section 10 of the Immigration and Asylum Act 1999. Notice to that effect (IS15A, notice to a person liable to removal) was enclosed. Her application for settlement did not fall within the Immigration Rules, published policies or concessions outlined in the IDIs. She was seeking a variation of leave to enter or remain for a purpose not covered by the Rules, and so her application was refused under paragraph 322(1) of HC 395 as amended.

4. Consideration had been given to her rights in respect of any family/private life she may have established in the UK. She said she had established family life in the UK with her 40-year-old daughter and her 37-year-old son. Paragraph A277C and Appendix FM of the Rules set out the criteria the government expected a person to fulfil in order to establish a right to remain in the United Kingdom on the basis of their family life. She did not meet the requirements of Appendix FM.

5. Regard also had been given to paragraph 276ADE of the Rules in order to address any private life factors that she had raised. She had not lived continuously in the UK for at least twenty years. Furthermore, she had resided in Ghana for the majority of her life, and it was not accepted she had severed all ties with Ghana, including social, cultural and family ties.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The claimant's appeal came before Judge Del Fabbro sitting at Taylor House in the First-tier Tribunal on 19 March 2014. The claimant was represented by Miss Seehra of Counsel, and an unnamed Presenting Officer appeared on behalf of the Secretary of State.

7. The judge heard submissions on a preliminary issue raised by Miss Seehra. This was that the decision appealed against was not in accordance with the law. Miss Seehra's reasoning was that the application had been made before the introduction of the new Immigration Rules, which came into force on 9 July 2012, and therefore the application should have been assessed as against the criteria of the old Rules. The judge ruled in favour of the claimant on this issue. He found that the decision was not in accordance with the law, and held that he could reconsider the application under paragraph 317; and that if he found that the claimant met the requirements of paragraph 317, he could allow the appeal. Alternatively, if the claimant did not meet the requirements of paragraph 317, he said he would need to consider her position as regards to Article 8 rights according to the criteria which existed prior to the coming into force of paragraph 276ADE and Appendix FM.

8. The judge received evidence from the claimant, her daughter and a family friend, Mr Desmond Can-Abaidoo. He was a finance manager in local government, and had provided evidence of his financial standing. He lived alone and out of his salary he regularly paid £100 towards the claimant's financial support. He regarded the claimant as he would his own parents. The judge also received oral evidence from the claimant's son, Mr Marcus Larson.

9. In closing submissions of the respondent, the Presenting Officer submitted that the claimant did not meet the criteria of the old Rules. As for her Article 8 claim, her Article 8 rights have been properly considered in the refusal letter. She deliberately overstayed for eleven years, and in that context acquired very limited rights to a private and family life in the UK. She had not demonstrated that she had no ties to Ghana. She had cultural and social ties which she maintained to this day. There were telephone calls to classmates where they exchanged news about mutual friends. There was also inconsistent evidence about her contact with her sons who lived with her in Ghana. There was no evidence of their status in Nigeria, and no reason why they could not have returned to Ghana. Her husband's brother had family there and several nephews and nieces still lived in Ghana. As far as maintenance and accommodation was concerned, the local housing authority had not formally noted that she occupied and shared her current accommodation with her daughter. Her position was precarious in relation to her housing. She was not wholly or mainly financially dependent on her daughter. Mr Desmond Can-Abaidoo was a good friend, but not a family member. Financial support from him appeared to be a haphazard arrangement. The claimant had failed to make out a case that there was adequate support and maintenance for her in the UK.

10. In reply, Miss Seehra submitted that even if she did not meet the requirements of paragraph 317, then this was a case where the removal of the claimant after having lived in the United Kingdom for the better part of eleven years would be disproportionate. There was no evidence of family members living in Ghana to whom she could turn for financial support.

11. The judge's findings are set out in paragraphs 23 to 29 of his subsequent determination. He found that the evidence he had received from the claimant and her supporting witnesses was credible. He thereby concluded that in all the circumstances the claimant met the criteria of paragraph 317.

12. He went on to consider Article 8 in the alternative. He observed that at the date of decision there was apparent overlap between Rule 276ADE and Article 8 rights and jurisprudence. **Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT 0060** provided some insight into the requirement of Rule 276ADE(vi). Although the claimant had lived most of her adult life in Ghana and only left there in 2003, the substance of her existing ties and her advanced age meant that she was now likely to have lost those ties. She had not lived in Ghana for at least ten years and was nearly 70 years of age. Her family's social network was rooted in the United Kingdom as evidenced in the bundle before him: "She no longer enjoys any ties of substance in Ghana".

13. Even if she did not meet the requirements of Rule 276ADE, consideration had to be given as to whether she qualified for leave to remain outside the Rules. The guidance which was contained in the Long Residence and Private Life Guidance valid from 11 November 2013 showed that exceptional circumstances were considered by the Secretary of State to mean circumstances where refusal and removal would result in unjustifiably harsh consequences for the individual; and that an overall consideration of facts and all relevant factors in the particular case before him would suggest that there would be unjustifiable harsh consequences for a 70-year-old widow with no social ties trying to re-establish her life in Ghana. He had taken into consideration the relevant authorities of **Razgar**, **Huang** and **MF (Nigeria)**, and other decisions when considering the impact on the family unit as a whole. It was clear that there would be a significant impact felt by the claimant and the family unit including the children. Evidence before him, including letters written by those children, suggested they had a very close relationship with the claimant. She had a direct input into their daily lives.

14. The judge concluded at paragraph 29 that the claimant would be placed in an unjustifiably harsh situation in Ghana. Although she probably would still be able to rely on financial support from her family in the United Kingdom, the practical help and emotional support that was available here from family and friends could not be replicated. The interference with the Article 8 right to a private and family life in the UK would be in all the circumstances disproportionate.

The Application for Permission to Appeal

15. The Secretary of State applied for permission to appeal, raising two grounds. Ground 1 was that the judge had materially directed himself in law in holding that the claimant's application needed to be considered under the old Rules. The Statement of Changes referred to by him made it clear that someone such as the claimant who had overstayed her permitted stay by a number of years did not qualify for consideration under the Immigration Rules in force prior to 9 July 2012.

16. Ground 2 was that the judge failed to give reasons or adequate reasons for findings on material matters. The judge had failed to provide adequate reasons as to why the claimant would be living in the most exceptional compassionate circumstances. He failed to consider whether her family could hire care for her in Ghana, or whether her family could send her money and find accommodation for her.

17. The judge also failed to provide adequate reasons for the finding in paragraph 27 that she had no ties to Ghana, where she had spent her youth and formative years and almost all her adult life. She would be fully familiar with the culture and customs in Ghana. Even if she no longer had any family there, she would have friends and connections. It would not be unusually harsh for her to resume contact with her friends there.

18. Finally, any Article 8 assessment should only be made after consideration under the new Rules. It was made clear in **Gulshan [2013] UKUT 00640 (IAC)** that the Article 8 assessment should only be carried out when there were compelling circumstances not recognised by the new Rules. In this case, the Tribunal did not identify such compelling circumstances, and therefore the findings under Article 8 were unsustainable.

The Grant of Permission to Appeal

19. On 20 June 2014 First-tier Tribunal Judge Fisher granted permission to appeal for the following reasons:

> "The evidence appears to be that she lived in difficult circumstances in Ghana, but it is arguable that the judge has conflated her lack of means and a pension with the circumstances in which she was living.
>
> I conclude that this is an arguable error of law in the judge's reasoning which is capable of affecting the decision made."

The Hearing in the Upper Tribunal

20. At the hearing before me, Mr Duffy withdrew ground 1 of the appeal. He could find nothing to support the proposition that the Statement of Changes made it clear that someone such as the claimant did not qualify for consideration under the Rules in force prior to 9 July 2012.

21. He submitted that the judge had erred in law in finding that the claimant met all the requirements of paragraph 317. He had not given adequate reasons for finding that at the date of the hearing before him the claimant would have been wholly or mainly financially dependent on her relatives in the UK if she had been in Ghana, whereas the evidence was that the main source of funding for the claimant in the United Kingdom was Mr Can-Abaidoo.

22. With regard to the judge's Article 8 assessment, he submitted that the judge's finding on Rule 276ADE(vi) was inadequately reasoned.

23. In reply, Miss Seehra relied on her written Rule 24 response opposing the appeal. The judge was correct to find the new Rules did not apply, as this was supported by **Edgehill & Another v SSHD [2014] EWCA Civ 402**. The argument that the judge had failed to give adequate reasons for his findings was perverse. Overall, the judge's decision was clear that the proposed removal was disproportionate and resulted in unjustifiably harsh consequences.

24. The argument raised by Mr Duffy with regard to subparagraph (iii) of paragraph 317 has not been raised in the Secretary of State's grounds of appeal, and it was too late for him to raise it now. She opposed any addition to the Secretary of State's grounds of appeal at this late stage.

Discussion

25. At the time of application, the claimant was already over the age of 65. So if she was eligible for consideration under Rule 317, she did not need to satisfy the hypothetical requirement that, if she had been in Ghana at the date of decision, she would have been living alone in the most exceptional, compassionate circumstances.

26. Under Appendix FM, the requirements that have to be satisfied to obtain entry clearance or leave to remain as an adult dependent relative are much more onerous than those contained in Rule 317, and the claimant would not satisfy the new requirements.

27. Accordingly, it is an issue of central importance whether Judge Del Fabbro was right to consider her application under Rule 317, although she was an overstayer at the date of application. Even though the claimant's former legal representatives did not invoke Rule 317 when making the application, and expressly stated that the application was being made outside the Rules, Mr Duffy said that he could not find anything to support the position taken in the grounds of appeal that the claimant was debarred from qualifying for leave to remain under the old Rule. He further stated that in his experience Rule 317 had been invoked in the past in in-country appeals not only by those who had extant leave (of whatever type) at the date of application, but also by overstayers.

28. At paragraph 25 of his determination, the judge held that the appellant was living in exceptional, compassionate circumstances in Ghana prior to coming to the UK, given

that her adult sons had left their shared rented home, and she had no means of support and no pension.

29. As was intimated by the judge granting permission to appeal, this finding is tendentious and inadequately reasoned. Her circumstances in 2003 were alleviated by the fact that she was, as the judge found, receiving financial support from her family present and settled in the United Kingdom. Moreover, her evidence, as recorded in paragraph 9 of the judge's determination, was simply that she was living in difficult circumstances before she came to the United Kingdom. So her own evidence fell short of asserting that she was living alone in the most exceptional, compassionate circumstances in 2003. Moreover, if this was in fact the case, then it would follow that she had misrepresented her circumstances to the Entry Clearance Officer in order to obtain entry clearance to the United Kingdom as a visitor. Finally, if she was still in contact with old school friends in Ghana even now, many years after she had left Ghana, it was reasonably to be inferred that she was not living in a state of social isolation in Ghana prior to her arrival in the United Kingdom on 13 May 2003.

30. But the judge's finding on the claimant's situation in 2003 is irrelevant, as it was her hypothetical situation in Ghana at the date of decision and/or hearing that determined whether she qualified for leave to remain under Rule 317. The finding was also irrelevant for another reason, which was that the claimant was over the age of 65 at the date of the decision/hearing. So she did not need to show that she would be living alone in the most exceptional, compassionate circumstances if she was currently in Ghana.

31. Mr Duffy submits that the judge has not given adequate reasons for concluding in paragraph 26 that she would continue to be totally dependent on her UK relatives for financial support if she was living in Ghana, and that the lack of adequate reasoning on this topic undermines the conclusion that the appellant met the requirements of Rule 317.

32. While it is true that a friend of the claimant's was providing her with financial support in the United Kingdom, it does not follow that the same financial arrangements would apply if the claimant was hypothetically in Ghana. The judge found that, following the departure of the adult sons to Nigeria, the claimant became wholly or mainly financially dependent on her family present and settled in the United Kingdom at that time. It was a reasonable inference for the judge to draw that, if the claimant was hypothetically in Ghana now, there would be a restoration of the status quo ante, and the claimant would be wholly or mainly financially dependent on her family in the United Kingdom as before. In any event, the judge does not make a finding that Mr Can-Abaidoo is the claimant's main source of financial support in the UK. He simply records evidence from Mr Can-Abaidoo that he regularly pays £100 towards the claimant's support, but there is no information given as to whether this payment is monthly or weekly.

33. The Presenting Officer below questioned whether there was satisfactory evidence that the claimant would be maintained and accommodated without recourse to public funds if she was allowed to stay. Given the lack of clarity over the extent of Mr Can-Abaidoo's support, I can see some force in this argument. But there is no challenge in the Secretary of State's grounds of appeal to the judge's findings on adequacy of maintenance and accommodation.

34. Accordingly, I find that the Secretary of State's limited error of law challenge to the judge's finding under Rule 317 is not made out, and that the decision allowing the appeal under Rule 317 does not contain an error of law.

35. In view of this conclusion, the challenge to the judge's Article 8 assessment becomes academic. But I do not in any event consider that an error of law is made out. The judge has effectively followed a two-stage approach, considering the appellant's Article 8 claim under Rule 276ADE, before going on to consider whether she qualifies for leave to remain outside the Rules on the grounds of exceptional circumstances. Although the judge's finding under Rule 276ADE(vi) could be said to be a generous one, it is nonetheless sustainable, having regard to the guidance given by the Upper Tribunal in **Ogundimu**, to which the judge makes reference. While it is true, as argued in the grounds of appeal to the Upper Tribunal, that the claimant cannot be said to have no social or cultural ties to Ghana in a literal sense, **Ogundimu** illuminated the importance of ascertaining whether the applicant has "effective" ties to the country of return, such that he or she can lead an adequate private life there, and such that the consequences of returning him or her would not be unjustifiably harsh. Although the judge addressed the question of unjustifiably harsh consequences as a separate consideration outside the Rules, his findings on that question underpin his finding under Rule 276ADE(vi).

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson