Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37789/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th May 2016	**On 31st May 2016**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MISS CLAUDIA ANDREWS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms K Pal, Senior Home Office Presenting Officer
For the Respondent: Ms D Ofei-Kwatia, Counsel instructed by Malik Law Chambers

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State in relation to a Decision and Reasons of the First-tier Tribunal, Judge Griffith, promulgated on 29th October 2015 following a hearing at Taylor House on 15th October 2015. By his Decision Judge Griffith allowed the Appellant's appeal on human rights grounds under paragraph 276ADE(vi) of the Immigration Rules. The Secretary of State sought permission to appeal. Firstly it is asserted that the judge erred in his assessment of paragraph 276ADE(vi) of the Immigration Rules. The

judge had sought to apply the guidance in **Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC)** to his assessment. The Secretary of State submits that that case concerned the previous wording of paragraph 276ADE(vi) which required an applicant to show lack of ties to the country of return whereas the current wording of paragraph 276ADE(vi) provides that there must be very significant obstacles to the Appellant's integration on return. Secondly it is asserted that when considering whether there would be very significant obstacles to the Appellant's integration, the judge should have considered the guidance in Appendix FM 1.0 family life (as a partner or parent) and private life: ten year routes. The relevant parts of that guidance is then set out in the grounds.

2. Before me Ms Pal relied on the grounds and Ms Ofei-Kwatia argued that the judge had not erred as asserted. The guidance referred to in the grounds was guidance for caseworkers not for a judge and the judge had not relied upon **Ogundimu** inappropriately. The judge had recognised at paragraph 44 of the Decision that **Ogundimu** referred to the earlier wording of paragraph 276ADE(vi) but was nevertheless relevant.

3. I agree with Ms Ofei-Kwatia that the guidance relied upon by the Secretary of State in the grounds is just that; guidance for a caseworker and is not binding upon the judge. Particularly, when it was not referred to or relied upon before the First-tier Judge.

4. However, I do accept that the judge has erred in his application of 276ADE(vi). Paragraph 276ADE is the Immigration Rule governing the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK. Prior to 28th July 2014 paragraph 276ADE(vi) provided that at the date of the application the applicant is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with a country to which he would have to go if required to leave the UK.

5. Since 28th July 2014 that paragraph has provided that an applicant must at the date of the application be aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

6. At paragraph 44 of the Decision and Reasons the judge said this:-

> "I have considered whether the Appellant can bring herself within paragraph 276ADE(vi) as she is over the age of 18 and has lived continuously in the UK for less than twenty years; the issue is whether there would be very significant obstacles to her integration into Ghana. Although based on the previous wording of paragraph 276ADE(vi) which referred to an applicant having no ties including social and cultural or family with the country to which they would have to go, I have looked for assistance to the case of Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT. I consider that the issue of 'very significant obstacles' is related to the absence or otherwise of real ties that an applicant has to his or her country. In Ogundimu the Tribunal said that ties

> involves there being 'a continued connection to life in that country; something that ties a claimant to his or her country of origin' and something more than 'remote and abstract links'. The Tribunal also stated that consideration of whether a person has no ties must involve a rounded assessment of all the relevant circumstances and is not to be limited to social, cultural and family circumstances."

7. I find that in linking very significant obstacles to a lack of ties the judge has erred. The change to the wording of the Rule was done for a reason. There can be no doubt that it has "raised the bar" and made it more difficult for an applicant to succeed. The previous wording would not appear to involve any forward-looking assessment as to what is likely to be the situation upon return, rather it is simply looking at ties. It cannot be equivalent. By way of an example, it could not possibly be said that a person, or indeed a family, with no previous ties whatsoever to another country, say the USA or Australia, would be unable to integrate there notwithstanding the lack of ties. On that basis I find that the First-tier Tribunal Judge made an error of law. Given that that was the basis upon which the appeal was allowed, the error was clearly material. I therefore indicated that having found the error of law I was going to set aside the Decision. It was agreed that the facts in this case are uncontroversial, it was simply the assessment of those facts against the law that was wanting.

8. I indicated my intention to redecide the case, there having been no application under Rule 15(2A) to permit new or further evidence to be admitted in accordance with the directions sent out by the Upper Tribunal prior to the hearing.

9. Ms Ofei-Kwatia expressed herself in difficulties as the Appellant was not present. I indicated that it was my intention to redecide the appeal and I would allow her time to take instructions to see if she could secure the Appellant's attendance but in the absence of any application to admit further evidence I would be proceeding with or without the Appellant. After over an hour Ms Ofei-Kwatia indicated that she had spoken to those instructing her and had been told that as the Appellant's grandmother had had a knee operation and she was looking after her she would be unable to attend that day. She indicated that she needed to take instructions from the Appellant and sought an adjournment. I again referred to the directions sent out by the Upper Tribunal to the solicitors which at paragraph 5 make absolutely clear that in order for further evidence of any description to be admitted a Rule 15(2A) application must be made and also to paragraph 4 of the directions which states:-

> "There is a presumption that, in the event of the Tribunal deciding that the Decision of the FTT is to be set aside is erroneous in law, the remaking of the Decision will take place at the same hearing. The fresh Decision will normally be based on the evidence before the FTT and any further evidence admitted (see [5] below), together with the parties' arguments. The parties must be prepared accordingly in every case."

10. There had been neither a Rule 15 application nor any indication from the Appellant's representatives that there was good reason why the matter should not be redecided and I indicated that I would be redeciding the case and would hear submissions. As Ms Ofei-Kwatia had not been provided with the necessary papers to prepare she was

provided with the court's copy of the Appellant's bundle before the First-tier Tribunal to assist in her preparation and was allowed two hours in which to prepare.

11. The court resumed at 2pm to hear submissions.

12. The factual scenario of this case is that the Appellant is a citizen of Ghana born on 17th July 1989 and therefore now aged 26. She is single with no dependants.

13. She came to the UK on 17th September 2002, aged 13 under the auspices of a multi-entry visit visa. She did not return at the expiry of the six months' leave and has overstayed ever since. The date of expiry would have been mid-February 2003.

14. On 7th December 2005 the Appellant applied for indefinite leave to remain as the grandchild of Wilhelmina Mensa Taylor, a British citizen. That application was refused and she was served with an IS.151A as an overstayer on 11th December 2006. She appealed that Decision but the appeal was dismissed on 28th February 2007.

15. On 13th September 2007 the Appellant applied for indefinite leave to remain outside the Rules on compassionate grounds and then on 23rd January 2012 she applied for leave to remain on the basis of her private and family life under the ten year route. The Secretary of State considered the application for indefinite leave to remain outside the Rules on compassionate grounds as further submissions following the refusal Decision of 28th November 2006.

16. On 29th January 2013 the Appellant applied for leave to remain on the basis of her private and family life under the ten year route. That application was refused without a right of appeal.

17. On 27th June 2014 she was refused permission to proceed with a judicial review and on 29th July 2014 was served with IS.75 asking for reasons why she should be allowed to remain in the UK and on 21st August 2014 a Statement of Additional Grounds was received. Following the Statement of Additional Grounds the Secretary of State issued a Decision on 4th September 2014 refusing her application.

18. The Secretary of State noted that she could not meet the requirements of Appendix FM as either a partner or parent in light of her circumstances. With regard to her private life the Secretary of State considered the application under paragraph 276ADE of the Immigration Rules. It was noted that she had not lived in the UK for twenty years, was not under the age of 18 and nor was she below 25. It was accepted however that she had come to the UK at the age of 13 and had remained for eleven years, spending her teenage years in the UK and had completed a degree. It was not accepted however that there would be very significant obstacles to her reintegration into Ghana. Contrary to what was stated in the additional grounds, namely that she came to the UK with the intention of starting a new life, the Appellant had actually come to the UK as a visitor and remained without leave since its expiry. Whilst the Secretary of State accepted that she had established a private life, she noted that that had been formed in the knowledge she had no legal right to remain.

19. The Secretary of State had not accepted that she had severed all connections with Ghana. It has been previously noted in the determination of February 2007 that her parents remained in Ghana and lived in a "comfortable house". In the absence of any evidence to the contrary her parents remain in Ghana although she has not returned there since her arrival in the UK. The Secretary of State did not accept that she had no contact with her parents. The Secretary of State similarly believed her parents would have contributed financially to her life in the UK and there was no evidence that her grandparents in the UK had supported her financially themselves. With regard to friendships the Appellant had formed in the UK, the Secretary of State considered that they could be maintained through modern forms of communication. The Secretary of State also noted that the Appellant had connections with the Ghana UK-Based Achievement Foundation and it was considered that liaising with Ghanaian nationals in the UK represented another tie to her home country.

20. The Secretary of State noted that she had been educated in the UK to degree level despite having no legal right to remain. That education however would stand her in good stead when it came to finding employment in Ghana.

21. The Secretary of State considered whether the application raised any exceptional circumstances taking into account her relationship with her grandmother; it being accepted that she lived with her and that they enjoyed a close relationship. However, whilst it was accepted that the Appellant provided assistance to her grandmother who had orthopaedic problems, there was no reason why that care had to be provided exclusively by the Appellant and that her grandmother, as a British citizen, would be able to access care from Social Services. It was also noted that the Appellant had an aunt and cousins in the UK who could offer support to her grandmother.

22. The Secretary of State did not accept that there would be real difficulties for the Appellant on return to Ghana particularly since she had been educated to degree level and had family there.

23. The First-tier Tribunal heard evidence from both the Appellant and two of her friends. Her grandmother had been unable to attend due to her ill health. The Appellant had provided a witness statement. In that witness statement the Appellant stated at paragraph 3 that she believed she had a legitimate expectation of being granted further leave to remain in the UK on the basis of the Immigration Rules and Article 8. Describing her family and private life the Appellant said that she lives with her grandmother who was born in 1938 and who is a British citizen and a pensioner; that she has lived with her ever since she arrived in the UK and that her grandmother has provided financial and emotional support. She said that she looks after her grandmother on a day-to-day basis, making her food and giving her medicines. She also books and attends hospital appointments with her and assists her in the management of the house including the payment of bills. She said that her grandmother had been reliant on her since her grandfather passed away in 2009.

24. The Appellant says that she arrived in the UK during her formative years and had been resident here ever since. She started her education in year nine and has now completed a degree in political sciences from Brunel University. She considers the UK to be her home.

25. She says she has slowly eroded all her ties to her country of origin and has formed relationships with friends and people in the UK. She says she is hard-working and bears all the potential to be a responsible citizen in the future and asks for her case to be decided with compassion.

26. She says she has fully integrated into British culture and the way of life and considers the UK as her country. She says that she is accommodated independently and without support from the State and she lives in her own accommodation in London. She says that she has no doubt that she would face extreme hardship if she were returned to Ghana. She acknowledges that her parents are in Ghana but says she has no job there, has no accommodation there and has no livelihood there. She specifically says at paragraph 10 of her statement that she had an expectation that she would be permanently settled in the UK after having lived here for over twelve years and she believes that anyone in her position would think the same. She says it would be cruel to expect her to return to a country that she has now no connections with being happily settled in the UK. She repeats again at paragraph 12 that she has a legitimate expectation of being granted leave to remain. At paragraph 15 the Appellant says she has no relatives capable of financially supporting her in Ghana. She says that although her parents and siblings are in Ghana she is no longer in contact with them and has formed new associations in the UK. She considers her grandmother and uncle in the UK as her only family.

27. She says that she currently does not have the right to work and so undertakes only voluntary work but if given permission to remain she would work. She says at paragraph 18 that she respects this country and is a law abiding citizen.

28. In her submissions Ms Pal relied on the Letter of Refusal dated 4th September 2014 and the Appellant's immigration history set out at paragraph 5. She referred to the fact that the Appellant had arrived on a visit visa and remained ever since making various applications having had previous appeals dismissed. She has been an overstayer since 2003. The Letter of Refusal sets out the requirements of Appendix FM, none of which can assist the Appellant. The only Rule that could possibly apply to this Appellant was paragraph 276ADE(vi) and the question to be satisfied is that there would be very significant obstacles to her integration into Ghana. She referred to the various relevant paragraphs of the refusal letter and argued that the Appellant's relationship with her grandmother could be maintained via modern means of communication. There are no significant obstacles to her integration into Ghana because she speaks the language, lived there for thirteen years, her parents and siblings are there and her UK degree will assist her to obtain employment. So far as there being exceptional circumstances outside the Rules to consider the only matter that could possibly assist is the fact that she gives assistance to her grandmother. However, her grandmother can access care from Social Services and the Appellant's presence is not required. She argued that the Appellant had not

established very significant obstacles and had not demonstrated any circumstances outside the Rules to consider a freestanding Article 8 application. However, if one was to consider a freestanding Article 8 application then I would be required to consider Section 117B of the 2002 Act. All of the private life which the Appellant relies upon should be given little weight as it was all acquired while she has been here unlawfully. Not just in a precarious position but unlawfully. Furthermore, she has been in the UK for a considerable time utilising services such as healthcare and education that she was not entitled to. Had she remained in Ghana and sought to study in the UK she would have been required to pay international tuition fees and so she has gained significant benefit from her time in the UK that she was not entitled to. She invited me to dismiss the appeal.

29. In her submissions Ms Ofei-Kwatia argued there were significant obstacles such as to satisfy paragraph 276ADE(vi). She referred me to the First-tier Judge's decision and the findings of fact which I had preserved. There was the matter of her length of residence in the UK – thirteen years. There was the matter of her social and cultural ties to the UK and lack of ties to Ghana. Despite her parents being in Ghana there is no reliable evidence that her parents would assist her. She argued that having entered the UK at the age of 13 the Appellant has been here now for fourteen years continuously. She has been building a private life from the age of 13 onwards and has developed from childhood to adulthood in the UK. The unit that she looks to for support has always been her grandparents and her grandmother alone since her grandfather's death. She is not living an independent life but resides with her grandmother and her grandmother relies on her for her daily care. She argues it would be impossible for her to integrate into Ghana as she has nothing there, nowhere to live and no job and on that basis does satisfy the requirements of paragraph 276ADE (vi). She argues on the basis of the Statement of Changes to the Immigration Rules which brought in the change of wording to paragraph 276ADE(vi) that the "very significant obstacles" test does equate to an absence of ties.

30. She submitted that if I were to find that the Appellant did not meet the requirements of paragraph 276ADE(vi) then there were compelling circumstances demanding an assessment under the ECHR which would include weighing up what the Appellant has now in the UK against what she would have in Ghana. She did not seek to argue that there was family life in the UK but she had a very substantial private life which includes her relationship with her grandmother.

31. She pointed out that for the first five years that the Appellant was in the UK she was still a minor and once she attained her majority she started making applications to regularise her stay and there have been various applications since 2007 to that effect. I thus cannot be said that she has remained "under the radar". She referred me to the fact that when the Appellant put forward the Statement of Additional Grounds in July 2014 she was only some three and a half months outside being under 25 for the purpose of paragraph 276ADE and whilst she acknowledged there was "no such thing as a near miss" this was one of the factors which should weigh into the balance when looking at the scenario as a whole. She referred to the numerous letters from friends and family in the bundle all indicating very strong ties to the UK and also to letters from the charity that she works for on a voluntary basis.

32. She acknowledged there was no evidence about finances and how she was supported but there was certainly no evidence that she has claimed any benefits. She speaks English and certainly at the present time is no burden on the UK and as a graduate it is more likely than not that she will not be a burden in the future. She argued that the public interest in maintaining immigration control was overtaken by other factors as she had outlined in this case.

My Findings

33. I find this case to be very straightforward. It is true that the Appellant cannot be blamed for being an overstayer during the time of her minority and it is also true that she has been seeking to regularise her position since she attained majority. However, the fact remains that this young lady, apart from the initial period of six months after her arrival has never had any right to be in the United Kingdom. It seems plain from the contents of her statement and her repeated assertion that she should be allowed to remain and has a "reasonable expectation" that she would be able to, that she never had any intention of returning to Ghana and her family never had any intention that she should do so either. There has been a previous finding, unchallenged, that she has no family life in the UK and that the relationship that she has with her grandmother, whilst close, is not one of mutual dependency. Her grandmother I have no doubt appreciates the care and assistance she receives from her granddaughter. However, as has been submitted on behalf of the Secretary of State, such assistance and care would be available to her through Social Services and the health services of the United Kingdom. She also has other family members in the United Kingdom who could assist her. Furthermore, whilst the Appellant might be offering help and assistance it is also the case that she has been a full-time student at university and throughout that period there will have been a limit to the amount of assistance she could give her grandmother. Similarly, she has acted as a volunteer which would also take her away from home.

34. The Appellant is clearly an intelligent young woman having been educated up to degree level and this would stand her in extremely good stead on return to Ghana.

35. Whilst it is true that the Appellant has not been to Ghana since age 13 (of course she could not do so because she had no leave to remain in the UK and if she went she would have been unable to return) that does not mean all ties have been severed. Her family members are there and although the Appellant says she has not had a lot of contact with them there is no evidence that they would abandon her upon return. She has maintained links with the Ghanaian culture and other Ghanaian people in the UK and did live there for the first thirteen years of her life.

36. The Appellant's numerous pleas that she has an expectation to be able to remain in the UK are misplaced.

37. For the reasons I found an error of law indicated above, I do not accept that the wording of paragraph 276ADE(vi) as it is now equates to the previous wording. What is required now is a forward-looking assessment namely what is likely to be the situation when she is returned. The Appellant will be returning as a young,

intelligent, highly educated young woman who has family in Ghana, where she speaks the language and where she will be able to find herself employment.

38. The fact that she has integrated in the UK has no bearing on her ability to integrate into Ghana. That is historic not forward-looking.

39. The Appellant falls a long way short of establishing very significant obstacles to integration into Ghana.

40. I am urged to consider Article 8 outside the Rules. I can see no compelling circumstances requiring me to do so not already envisaged by the Rules. She cannot meet the Rules for either family or private life.

41. However, if I am wrong she still does not succeed under Article 8. If I was to consider Article 8 then the case would clearly be about proportionality and in assessing proportionality I am required by Section 117 of the 2002 Act to take a number of factors into account. Section 117 makes clear that the maintenance of immigration control is in the public interest. That equates to a statement that persons permitted to enter or remain in the UK should be expected to meet the requirements of the Immigration Rules and this Appellant does not.

42. Whilst the Appellant speaks the language, I am provided with no information as to the financial circumstances and am therefore unable to make a finding that she is financially independent.

43. The most significant factor so far as Section 117B is concerned is that this Appellant has at no time, save for six months, had any leave to remain in the United Kingdom. It is not just that her situation was precarious but rather it was unlawful. She has had access to both education and healthcare and enjoyed life in the United Kingdom, none of which she was entitled to. For all these reasons an assessment of proportionality under Article 8 of the ECHR would not assist the Appellant as her claim in that regard also falls to be dismissed.

Notice of Decision

The Secretary of State's appeal to the Upper Tribunal is allowed. The decision of First-tier Tribunal is set aside and I redecide the appeal and dismiss the Appellant's appeal against the Secretary of State's decision to refuse her leave to remain.

The First-tier Tribunal made no anonymity direction. None was applied for in the Upper Tribunal and I can see no justification for making one and I do not do so.

Signed Date 27th May 2016

Upper Tribunal Judge Martin