Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/15319/2014**

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 4 May 2016	**On 10 May 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HOROJA SALLAH

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Stein, Advocate; Stuart Karatas, Solicitors, London
For the Respondent: Mrs S Saddiq, Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Gambia, born on 17 March 1981. No anonymity order has been requested or made.

2. The appellant was issued with a visit visa on 20 December 2001, valid until 20 June 2002. She overstayed. In September 2009 she sought leave to remain outwith the Immigration Rules, on the basis of the ECHR, in particular Article 3, on medical grounds. The respondent mislaid the application. It was not decided until "chased up" by her solicitors in December 2013.

3. The respondent's reasons for refusing the application are in a decision dated 6 March 2014.

4. The appellant's appeal to the First-tier Tribunal was allowed by Judge Majid in a decision promulgated on 28 November 2014, but that was set aside by Deputy Upper Tribunal Judge Manuell by determination promulgated on 20 February 2015. The case was case remitted to the First-tier Tribunal.

5. Judge Walters dismissed the appeal again, by determination promulgated on 28 September 2015.

6. The appellant appeals to the Upper Tribunal on the following grounds:

> 2. … in paragraphs 32-37 of the determination … the Tribunal erred in the assessment of proportionality. In assessing proportionality, the Tribunal decides how much weight is to be attributed to competing considerations in determining how the balance should be struck between the public interest and protected individual rights: see *Huang* [2007] UKHL 11 and *EB (Kosovo)* [2008] UKHL41. The doctrine of judicial precedent requires … tribunals to follow binding authorities of the superior courts. As a result, section 117B(4) and (5) [of the 2002 Act] does not require the … Tribunal … to ascribe "little weight" to the matters specified therein. Rather … what appears to be a clear and strict instruction to the … Tribunal can effectively be ignored, with the result that the judge is unconstrained in deciding how much weight to accord to each of the listed considerations.
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> 3. The concept of proportionality is central … to the Tribunal … failed to take into consideration the guidance in … *Huang* …
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> 4. The judge … failed to take into consideration the delay it has taken the [respondent] to consider the appellant's application submitted on 1 September 2009 … nearly 5 years … the judge's contention that the appellant remained in the UK unlawfully for all her stay is therefore inaccurate as she has been pursuing her application for the past 6 years. The delay in making a decision in this case is exceptional.

7. On 24 December 2016 First-tier Tribunal Judge P J M Hollingworth granted permission to appeal, observing as follows:

> 2. At paragraph 40 … the judge has referred to the … delay by the respondent. The judge has not set out any findings of fact in relation to the consequences … the judge states his submissions without making any findings of fact.
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> 3. At paragraph 36 the judge has referred to the appellant having been here unlawfully for all of her stay … except the first 4 months. The judge has not referred to the date of the appeal or the status of the appellant having so appealed. At paragraph 7 … the judge refers to the immigration history. It is arguable that the judge should have differentiated between the periods there referred to in making his analysis under the proportionality exercise.

8. Ms Stein relied on the grounds of appeal and the grant of permission, and submitted further as follows. There was no dispute as to the applicable law. The determination recorded that it had been conceded that the appellant could not meet the requirements of the Immigration Rules, and that her medical issues did not reach the level required for protection under Article 3. However, those circumstances were part of the factual matrix under which her appeal should have succeeded under Article 8. Applying the principles of *Huang*, all relevant circumstances had to be taken into account in the final proportionality decision. As set out in the grounds, the judge failed to recognise all such circumstances. The judge

failed to recognise that the time spent by the appellant in the UK without lawful permission was not entirely her responsibility, because she had been awaiting a decision from the respondent. The analysis by Judge Hollingworth was accurate. This was a significant factor which the judge failed to take into account. It had also now emerged that there were some issues with the literacy of the appellant, which had become apparent to Ms Stein only following her very recent instruction in the case. These issues appeared not to have been fully appreciated in the past, and might explain apparent contradictions in her evidence. Those issues would be best be resolved by another hearing. The First-tier Tribunal's decision should be set aside and the case should be remitted there for a fresh hearing in order for the appellant to have the opportunity to put forward further evidence, particularly on the medical aspect and her illiteracy.

9. Mrs Saddiq submitted in response as follows. The case had a long history and medical issues were always to the fore. The appellant had every opportunity to make her case, and had not applied to introduce any further evidence. The assertion that illiteracy had anything to do with the matter came very late, given the long history of decision-making and appeal. The appellant's grounds went much too far in their assertion that tribunals could ignore the statutory expression of Article 8 in section 117B of the 2002 Act. That argument went in the face of the statute and had been settled by case law, in particular *Dube* (section 117A-117D) [2015] UKUT 00090, which made it clear that the provisions were "not an *a la carte* menu" and that the enactment that these were "public interest considerations applicable in all cases" left no doubt as to the intent of the legislature. The fact that the appellant made an application in 2009 did not alter the fact that she was here unlawfully. She had no leave since expiry of her visit visa in 2002. The application she made never had any prospects of success either in or out of the Immigration Rules. The evidence given on behalf of the appellant had been found not to be credible, for sensible reasons which were not criticised in the grounds of appeal. Medical evidence had not been ignored but had been set out at paragraph 24. There was no error in the determination.

10. Ms Stein in reply said that the leading authority on the correct approach to Article 8 outside the Immigration Rules was *MS v SSHD* [2013] CSIH 52.

11. I reserved my determination.

12. There has been lengthy delay here, partly on the part of the respondent. The appellant's application was lost, and not dealt with until she chased the matter up some years later. There has also been unfortunate delay in the appeal process, due to a highly unsatisfactory determination in the first instance. However, it remains the case that the appellant was here from 2002 to 2009 unlawfully, without making any assertion of a right to remain here; and the application which she made in 2009 was one with no real prospects of eventual success on its merits. There has been no such delay on the part of the Secretary of State as significantly to enhance the appellant's position under Article 8 of the ECHR, outwith the Rules.

13. The interpretation of section 117B (4) and (5) of the 2002 Act contended for in the grounds is plainly contrary to the statute itself, and now also to case law. Those provisions were applied accurately by the judge at paragraphs 33 to 36 of the determination.

14. Counsel has attempted to make the best case that could be made for the appellant on the facts, but the assessment of proportionality was well within the judge's lawful scope. He took into account all relevant considerations. No error of law is disclosed.

15. While it is not necessary to go further than that for present purposes, it is difficult to see how any judge, on the evidence, might have justified a proportionality outcome in the appellant's favour.

16. The determination of the First-tier Tribunal shall stand.

5 May 2016
Upper Tribunal Judge Macleman