



**The Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/06023/2014**

**Appeal number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On December 5, 2014**

**Determination  
Promulgated  
On December 9, 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MS SUSMITHABEN PARSHOTTAMBHAI PATEL  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

For the Appellant: Mr Sharma, Counsel, instructed by Malik  
Law Chambers  
For the Respondent: Mr Walker (Home Office Presenting  
Officer)

**DETERMINATION AND REASONS**

1. The appellant, born November 6, 1981 is a citizen of India. On May 28, 2004 the appellant arrived in the United Kingdom in possession of an entry clearance visa as a visitor. Her visa expired on November 21, 2004 and she did not make any application to extend her stay and therefore became an overstayer. The appellant lodged an application to stay on

January 13, 2010 under article 8 ECHR but no copy of the refusal letter was produced and it was not until January 22, 2014 that the appellant was served with Form IS151A. On January 22, 2014 she was served with a section 10 decision to remove her. The appellant was not afforded an in-country right of appeal but in April 2014 a Duty Judge decided the appellant had an in-country appeal, as the respondent failed to provide evidence the appellant had not raised human rights before Form IS151A was served on her (this was correct in light of subsequent evidence).

2. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on January 29, 2014. On September 9, 2014 Judge of the First Tier Tribunal Aujla (hereinafter referred to as the "FtTJ") heard her appeal. He refused her appeal in a determination promulgated on September 16, 2014.
3. The appellant lodged grounds of appeal on September 25, 2014 and on November 5, 2014 Judge of the First-tier Tribunal Osborne granted permission to appeal finding it arguable the FtTJ may have erred because there was no evidence the respondent had had regard to requirements of paragraph 353B HC 395.

#### **ERROR OF LAW SUBMISSIONS**

4. Mr Sharma adopted his grounds of appeal and the permission granted. He submitted that if the respondent considered the provisions of paragraph 353B HC 395 in 2010 this was over four years ago and these provisions were not considered when the decision to remove was taken. The Court of Appeal in Qunwane and others v SSHD [2014] EWCA Civ 957 makes clear the respondent should have regard to those factors and the fact the FtTJ had no evidence this was done meant the decision was not in accordance with the law. At paragraph [24] the Court of Appeal stated

"... Paragraph 353B can be of relevance only to those who have no right to remain in this country and whose claims have been finally determined (because their appeal rights are exhausted and there are no unanswered submissions). The discretion is a safety valve, pursuant to which the Secretary of State may refrain from removing but only in such circumstances, which will necessarily be rare."

5. Mr Walker discovered in his file a refusal letter dated June 17, 2010 and a response from Malik Law Chambers dated July 13, 2010 that acknowledged the refusal letter and invited the respondent to issue a section 10 removal decision as this would

enable the appellant to appeal on human rights grounds whereas the refusal letter did not generate a right of appeal. He accepted that when the section 10 decision was taken there was no evidence the respondent had considered the paragraph 353B factors.

6. Both parties invited me to find an error in law because the decision was not in accordance with the law.
7. In light of the submissions I agreed with the parties' request.

**DECISION**

8. There was a material error of law. I allow the appeal to the extent that the application would be remitted to the respondent to make a fresh decision in compliance with the Immigration Rules.
9. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.



Signed:

Dated:

Deputy Upper Tribunal Judge Alis



TO THE RESPONDENT

No fee was payable.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis