Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01841/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 April 2016	**On 27 April 2016**

Before

UPPER TRIBUNAL JUDGE H H STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ABEDLKRIM ZERGUI

Respondent

Representation:
For the Appellant: Ms A Brockelsby-Weller, Home Office Presenting Officer
For the Respondent: Mr A Gilbert, Counsel, instructed by JD Spicer ZEB

DECISION AND DIRECTIONS

1. In a decision sent on 5 October 2015 First-tier Tribunal (FtT) Judge Hussain allowed the appeal of the respondent (hereafter the claimant) who is a national of Algeria against a decision made by the appellant (hereafter the Secretary of State for the Home Department or SSHD) dated 9 January 2015 refusing his application to remain based on human rights.

2. The claimant came to the UK illegally in June 1999 and unsuccessfully claimed asylum. He became appeal rights exhausted in February 2001. He continued to stay in the UK unlawfully and in March 2010 his solicitors

submitted a Legacy questionnaire. The SSHD refused to grant him leave to remain under the Legacy programme and rejected his further representations. He appealed a refusal made on 17 March 2011. This resulted in FtT judge Dennis finding in a decision of 14 July 2014 that his case should be reconsidered. Placing particular reliance on R (Mohammed) v SSHD [2012] EWHC 3091, Judge Dennis considered that the SSHD had never adequately responded to the claimant's legacy-related applications of 2010. This reconsideration formed the basis of the decision under appeal in this case.

3. Judge Hussain did not consider that the claimant had made out a case that he could succeed under the Immigration Rules dealing with Article 8. Judge. He rejected the claimant's claim that he would be imprisoned on return to Algeria because he had failed to comply with his obligations as a reserve soldier. He was adamant that the claimant had family members in Algeria and that he had not lost all ties with that country and could re-integrate there.

4. Judge Hussain then turned to consider whether the claimant was entitled to succeed outside the Rules on Article 8 grounds. He concluded that the claimant could not succeed because there was "nothing exceptional about the claimant's circumstances that would merit consideration outside of the … Rules" [18].

5. The only reason the judge allowed the appeal was because he was dissatisfied with the treatment given by the SSHD in her refuel letters to paragraph 353B considerations. Paragraph 353B came into force on 13 February 2012 following the same Statement of Changes in Immigration Rules, as that which deleted of paragraph 395C. Paragraph 353B, in Part 12 of the Immigration Rules, entitled "Procedure and rights of appeal", reads as follows:

> "*Exceptional Circumstances*
>
> 353B. Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant's:
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> (i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;
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> (ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;
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> (iii) length of time spent in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused;
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> in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate.

> This paragraph does not apply to submissions made overseas.
>
> This paragraph does not apply where the person is liable to deportation."

6. Judge Hussain considered first of all, in relation to paragraph 353B(i) considerations, that its terms required the SSHD to treat the fact that the claimant did not have a criminal record as being in his favour. Turning to paragraph 353B(ii) considerations, which concern compliance with conditions, the judge noted that the SSHD had earlier alleged before Judge Dennis that the claimant had failed to keep to the terms of his temporary admission and was treated as an as an absconder. He then noted that Judge Dennis had found that there was nothing before him to show that the claimant was on any reporting conditions and continued:

> "30. I find it regrettable that despite the clear rejection of the claim that the appellant was an absconder, in Judge Dennis's determination, the respondent has again relied on this allegation without providing any objective evidence, whatsoever. In the absence of any such evidence, I can only echo the words of the learned judge and conclude that the respondent has not shown that the appellant has been non-compliant."

7. The judge then went on to consider para 353B(iii) concerning the length of time spent in the UK for reasons beyond the migrant's control. The judge said that he found force in the SSHD's submissions that since the claimant's appeal rights had been exhausted in February 2011 he had taken no steps to leave the UK and only surfaced in 2010 by making a claim under the legacy scheme: "A substantial part of the [claimant's] residence has therefore been built up without the [SSHD] having a part in it". However, he went to consider that the SSHD had delayed for a period of some 3 years in taking steps to remove the claimant and concluded:

> "What is singularly lacking in the SSHD's assessment is an acknowledgement that although the [claimant] has been here of his own choosing, he has now been in the United Kingdom for 16 years. He came to this country at the age of 25 and is now aged 42 years. In this time he has clearly built up a substantial private life including two cohabiting relationships the last of which has lasted no less than 5 years. The [claimant] is also known to a great many people who have written in his support. "

8. The judge then stated:

> "32. … what is required is a "holistic" approach. In my view, this means that the Secretary of State has to look at all the criteria in paragraph 353B in the round in order to decide whether the [claimant] should be removed from the UK.
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> 33. Since paragraph 353B is a provision of the Immigration Rules, I find that this tribunal has the jurisdiction to make its own assessment as to whether the [claimant's] circumstances are such that by reference to the criteria in that rule, it is no longer appropriate to remove him. I find that it is not.

> 34. I find that the [SSHD's] decision is in accordance with the law and does not interfere with the [claimant's] human rights. I find that the decision is in accordance with paragraph 276ADE however I find that the decision is not in accordance with paragraph 353B of the Immigration Rules. Accordingly it is my view that the [SSHD] should now make a decision as to what leave to grant the [claimant] in the light of the finding that I make above. "

9. The grounds of appeal allege (i) by reference to the Tribunal decision in Khanum & Others (para 353B) [2013] UKUT 00311 (IAC), that in finding that he had jurisdiction to determine the appeal under paragraph 353B the judge misdirected himself, as a decision under 353B is entirely a matter for the SSHD and is not justiciable; (ii) that in any event the judge did not have power to direct the SSHD to decide to grant leave; and (iii) the judge made contradictory findings in that he found on the one hand at [18] that there was nothing exceptional about the claimant's circumstances that would merit consideration outside the Immigration Rules and that there was no violation of his human rights ([34]) , but then at [31] found the claimant's circumstances looked at holistically merited being allowed outside the Rules on a paragraph 353B basis.

10. In submissions before me Mr Gilbert did not seek to argue that Khanum was wrongly decided and accepted that the determination of Judge Hussain had difficulties. He did not seek to challenge the judge's conclusions that the claimant could not succeed under the Immigration Rules or outside the Rules on an Article 8 basis. However, he submitted that the judge's only error was in seeking to direct the respondent to decide what leave to grant the claimant. He contended that in essence the judge had construed the refusal decision to amount to a failure on the part of the judge to apply her own policy on paragraph 353B; and, that being the case, the judge was entitled to allow the appeal. I informed the parties that I understood there to be a Court of Appeal judgment dealing with para 353B which neither had cited and that if I found I was correct in that understanding I would have regard to it. As I allude to below, I did in fact locate the case I had in mind.

11. I have no hesitation in finding that Judge Hussain materially erred in law.

12. The first and fundamental error on the part of the judge was in considering that he had jurisdiction to allow the appeal on paragraph 353B grounds. That was flatly contrary to established case law: in Khanum the head note states that "the decision whether or not to carry out a review (within the scope of paragraph 353B) is entirely a matter of discretion of the Secretary of State and is not justiciable". As pointed out in Khanum, a decision to carry out a review under para 353B is not an immigration decision within the meaning of s.82(2) of the Nationality, Immigration and Asylum Act 2002 and because it is predicated on appeal rights having been exhausted it is an entirely internal matter. The decision in Khanum has been confirmed by the Court of Appeal in Thandiwe Qongwane, Vilan Patel and Aysha Khanum and others v SSHD [2014] EWCA 957. In that judgment Sir Stanley Burnton analysed paragraph 353B as follows:

Discussion

13. I would begin by making what I would hope are uncontroversial observations. The first is that paragraph 353B is not to be construed by reference to the deleted paragraph 395C of the Immigration Rules. The Rules must be construed and applied in the form they take at the date of the decision in question. It would be quite wrong to require or to expect immigrants, prospective immigrants or their advisers to trawl through previous versions in order to seek to understand them. Indeed, if anything, the different wording and location in the Immigration Rules of paragraph 353B as compared with paragraph 395C (and the difficulties to the administration of the immigration system caused by 395C) point to change rather than similarity.

14. Secondly, on any basis the scope for the exercise by the Secretary of State of the discretion envisaged (to use, for the present, a neutral expression) by paragraph 353B is narrow. Persons who seek to remain in this country under specific provisions of the Immigration Rules, such as students on approved courses of further education, will be expected either to qualify under the Rules or to leave. Person who establish claims for asylum, or under the European Convention on Human Rights, or EU Treaty rights, are outside the scope of paragraph 353B, and in any event have no need for the exercise of any discretion applicable in "exceptional circumstances". 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.

15. I think that the words "the decision maker has established whether or not they (i.e., the migrant's further submissions) amount to a fresh claim under paragraph 353 of these Rules" must be read as "the decision maker has established that they do not amount to a fresh claim under paragraph 353 of these Rules". If the Secretary of State accepts that the submissions amount to a fresh claim under paragraph 353, she will have to consider them; if she rejects them on their merits, and refuses leave to enter or to remain, the migrant has a right of appeal under section 82(1)(d) or (e) of the 2002 Act. Pending final determination of the claim, the Secretary of State will not remove the migrant.

16. My last observation is that paragraph 353B does not concern the decision to grant or to refuse leave to enter or to remain. It is concerned only with the decision to remove or not to remove. Whether a decision that removal is no longer appropriate must lead to the grant of leave to remain, and if so when and in what circumstances and what should be the terms of such leave, are not matters that arise in these appeals, and I say nothing about it. But it follows from this, and from the decision of the Supreme Court in *Patel* [2013] UKSC 72 [2013] 3 WLR 1517, that a failure to apply paragraph 353B will not render unlawful a decision to refuse leave to enter, or to refuse to extend leave, made at the same time as the decision to remove.

17. Turning to the matters in controversy, I reject the contention that paragraph 353B confers a discretion on the Secretary of State. In support of his argument, Mr Malik relied on the judgment of Sedley LJ in *Mirza* at paragraphs 18 and 19, but that case concerned the very different provisions of what was then paragraph 395C. It is implicit in section 84(1)(f) of the 2002 Act that the Secretary of State may exercise discretions relating to immigration and asylum other than those conferred by the Immigration Rules. The discretion not to remove a migrant with no rights to be here is not one that is subject to any Immigration Rule; it is a discretion exercised outside those Rules. I entirely agree with the Upper Tribunal on this point.

18. I also reject the submission that paragraph 353B of itself creates an obligation on the Secretary of State to carry out a review in the circumstances to which it refers. The wording necessary to create a duty is obvious, and there is no reason why paragraph 353B should not have expressly used them if it was intended to create a duty.

19. In my judgment, the basis for the creation of a duty, if there is one, is to be found in the Enforcement Instructions and Guidance issued by the Secretary of State, which in section 53.1 states:

> "Exceptional circumstances should be considered in cases where an asylum or human rights claim has been refused, appeal rights have been exhausted and no further submissions exist, as part of the process of asylum case owners keeping their cases under review. In these cases paragraph 353B is to be applied."

20. A failure to apply the Enforcement Instructions and Guidance is in general a failure to apply a policy and may render the decision resulting from that failure unlawful for the purposes of judicial review: see, e.g., *The Queen on the application of Pratima Das v Secretary of State for the Home Department* [2014] EWCA Civ 45 and *IM (Nigeria***)** *v Secretary of State for the Home Department* **[**2013] EWCA Civ 1561 [2014] 1 WLR 1870. It is not easy to read the Guidance as creating a duty to keep all cases to which paragraph 353B may apply under review, particularly since the Immigration Rule itself refers to "a review", which suggests that it is only when a decision is made, or a duty exists, to review a case that it applies.

21. Going on to cite the Upper Tribunal in Khanum, Sir Stanley Burnton observed further that:

> "31. However, whether there was a duty to carry out a review is irrelevant in all of the cases before us. In each case, the decision letter of the Secretary of State referred to the factors listed in paragraph 353B and stated that they did not justify a finding of exceptional circumstances resulting in removal no longer being appropriate. If there was a duty to consider those factors, it was amply complied with.
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> 32. Furthermore, if a decision is lawfully made to remove at the same time as a decision to refuse leave claimed on Article 8 grounds, there is likely to be no sensible reason for a review to be carried out separately from the consideration of the claim for leave. In such circumstances, paragraph 353B will not apply. In any event, the factors referred to in that paragraph are

likely to have been considered in the rejection of the Article 8 claim. It would be unnecessary for the decision maker to refer to those factors again, other than the statement that there are no exceptional circumstances justifying a decision that removal is not appropriate.

33. I would add that in this context, where *ex hypothesi* the migrant has no right to be here, and faces no real risk on return, and paragraph 353B is applied, I see no reason why detailed reasons or recitals of facts should be required. The reasons given in the letters in the present cases were adequate. Furthermore, in most if not all cases, the factors will necessarily have been considered: decision letters normally summarise the immigration history of the migrant, which includes the length of time here, whether his or her presence has been lawful or not and whether there was a failure voluntarily to leave. Unless the migrant has provided information about his character, conduct and associations the Secretary of State is unlikely to know anything about them, so there may be nothing to consider.

34. I do not think that the word "review" in paragraph 353B and in the Guidance is used in any technical sense. Where there is occasion to consider removal outside the context of any Article 8 or other claim, I would expect the decision maker to consider the factors listed in that paragraph when deciding whether to decide to remove. Conversely, if a claim for permission to appeal to be granted, it must be shown that the proposed appeal would raise an important point of principle or practice, or that there is another compelling reason for an appeal to be heard. If an application for permission to apply for judicial review of the decision to remove is brought on the ground that the paragraph 353B factors were not considered in the Secretary of State's decision letter, but there is no sensible case for finding exceptional circumstances, I see no reason why permission to apply for judicial review should be granted.

35. It follows from my conclusion that paragraph 353B does not itself creates a duty on the part of the Secretary of State that a migrant may not appeal to the First-tier Tribunal under section 84(1)(f) of the 2002 Act on the ground that "the person taking the decision should have exercised differently a discretion conferred by Immigration Rules". Section 113 of the 2002 Act defines "immigration rules" as "rules under section 1(4)" of the Immigration Act 1971 "general immigration rules". If, as I have already stated, the only basis for a duty is to be found in the Enforcement Instructions and Guidance, that duty is not conferred by the Immigration Rules so defined. A decision by the Secretary of State that there are no exceptional circumstances justifying a finding that removal is no longer appropriate cannot be appealed under paragraph 84(1)(f). It also follows that the Tribunal cannot allow an appeal under section 86(3)(b) solely on the ground that it considers that the discretion should have been exercised differently, since the discretion is not one that may be one "against which [the] appeal is brought or intended to be brought".

36. It follows from my conclusion that the factors listed in paragraph 353B were in fact considered in the case of each of these appeals that no question arises of the decision to remove being unlawful by reason of any failure to do so. It follows that no question of unlawfulness arises for the purposes of Article 8.2 or section 84(1)(e) or section 86(3)(a) of the 2002 Act."

22. I consider the reasoning of the Court of Appeal to be cogent and in any event I am bound by it. Judge Hussain's decision is directly contrary to Court of Appeal authority. He was wrong to consider that he had jurisdiction to allow the appeal on paragraph 353B grounds. He misunderstood the nature of paragraph 353B.

23. Even if I had considered Judge Hussain had not misdirected himself as regards paragraph 353B and even if I had entertained Mr's Gilbert's submissions that in effect the judge was treating the SSHD as having failed to apply her own policy, I would still have concluded that the judge's decision was vitiated by legal error. That is for the following reasons. First, it is clear that the SSHD's consideration of matters under paragraph 353B was lawful, rational and reasonable. Its thrust was that the claimant's character, conduct and compliance history and length of time in the UK were such as to mean that there were no "Exceptional circumstances" justifying the claimant not being removed. The SSHD's consideration of paragraph 353B addressed all relevant matters and gave sound reasons for concluding that these did not amount to exceptional circumstances

24. Second, even if I were to have accepted that the judge was entitled to consider paragraph 353B considerations on their merits (not just in terms of legality); the judge's own treatment of them was seriously flawed. For one thing, he appeared to deem "exceptional" the very same (or substantially the same) circumstances that he had earlier concluded were not exceptional in the context of the Article 8 assessment. If there was some different basis for considering exceptionality to arise in the paragraph 353B context the judge failed to identify it. His only identified reasons – history of compliance and length of time in the UK and the nature of the claimant's relationships in the UK – had necessarily to be ones that he considered when assessing Article 8. Mr Gilbert did not contend otherwise.

25. Further, the judge was clearly wrong to consider that the SSHD had no evidential foundation for her position that the claimant had a history of noncompliance. It is not clear what evidence about the claimant's immigration history was before Judge Dennis, but what is clear is that in the refusal decision made by the SSHD subsequently in January 2015 she identified with great specificity the basis for her assessment that the claimant had a history of noncompliance. In her decision letter she identified that the claimant had been issued with IS 96 forms informing the claimant that he was on temporary admission and required to report to his local Immigration Office on 7 dates between June 1999 and August 2000 and on 19 March 2002 had been issued with an absconder report because he had absconded from his temporary address. The refusal letter further identified that it was only after the claimant sought to stay under the Legacy programme by way of letter sent in June 2010 that his reporting (which commenced in August 2013) was compliant. Thus there was prima face evidence of a history of noncompliance from June 1999 until the claimant identified himself to the SSHD in June 2010 (it may indeed have gone on longer, but I shall assume for the purposes of this appeal that by contacting the SSHD in June 2010 the claimant at least sought to comply). Thus, for Judge Hussain to have sought to rely on the findings of fact made by

Judge Dennis at an earlier point in time when this evidence was either not available or was overlooked by Judge Dennis, was wholly erroneous. At the very least Judge Hussain should have engaged with the further evidence of noncompliance outlined in the SSHD letter of January 2015 and explained why he considered it was not relevant. I would add that if similar evidence regarding absconding had in fact been available to Judge Dennis in July 2014, then he was also in error in disregarding it (he said that the reference in Home Office correspondence about the claimant having absconded was "wholly unsubstantiated").

26. There was no proper basis, therefore, for Judge Hussain considering that there was no history of noncompliance. I would add that given that it was Judge Hussain's own assessment (which acknowledge that "a substantial part of the [claimant's residence had been built up without the SSHD having a hand in it" since the claimant only "surfaced in 2010"), it was wholly unjustified for him to treat the 16 years the claimant had been in the UK as amounting to residence to which significant weight could be attached. Even if not directly applicable to paragraph 353 considerations, the reasoning of the European Court of Human Rights (also reflected in s.117B(4) and (5) of the 2002 Act] is pertinent in this context. Family life and private life relationships established when a person's immigration status is precarious, cannot be accorded the same weight as otherwise. This consideration the judge wholly ignored.

27. I would also point out that both Judge Dennis and Judge Hussain appear to have been greatly influenced by the views as regards Legacy cases as set out in the High Court decision in Mohamed. A long line of subsequent case law pending in Court of Appeal decisions have taken a very different view from that taken in Mohamed. In particular delay on the part of the SSHD for a period of three years (which was a factor to which Judge Hussain appeared to attach quite significant weight) has not been found to be a significant factor: see in particular, SH (Iran) & Anor v Secretary of State for the Home Department [2014] EWCA Civ 1469 (12 November 2014), If there is one feature of the appeal before me that stands out from the others it is that First tier Tribunal judges need to make sure that are aware of relevant developments in the law. Judge Hussain overlooked key cases relating to both paragraph 353B and Legacy cases.

28. For the above reasons I conclude that Judge Hussain materially erred in law and his decision is to be set aside.

29. Although both representatives urged me not to re-make the decision myself without a father adjournment I was not persuaded by the reasons they gave, I have decided that I am in a position to re-make the decision without further ado. Mr Gilberts' submission that there were two friends who had not been able to attend the claimant's appeal because they were on holiday, does not assist because it wrongly presupposes that there is a viable basis of appeal in the context of paragraph 353B. Ms Brocklesby-Weller's submission that a further hearing would help clarify the issue of the history of absconding does not assist either for similar reasons. Insofar as there is a factual issue regarding whether the SSHD had an evidential basis for stating that the claimant had a

history of noncompliance I have found that there was. I note further that the claimant has had ample opportunity in seeking to reply to the SSHD's grounds of appeal to adduce further evidence to rebut the allegations of the SSHD regarding his immigration history. He has failed to adduce anything.

30. For the above reason:

The FtT judge Hussain materially erred in law and his decision is set aside.

The decision I re-make is to dismiss the claimant's appeal on all grounds.

Signed

Date 22 April 2016

Judge of the Upper Tribunal