Case No: JR/6393/2013

IN THE UPPER TRIBUNAL
IMMIGRATION & ASYLUM CHAMBER

Field House
Bream Buildings
EC4A 1DZ

Date: 22 March 2016

Before :

MR JUSTICE PHILLIPS

- -

Between :

The Queen, on the application of

TARIQ ABDULLA

Applicant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -
- -

Nicola Braganza (instructed by **Barnes Harrild & Dyer**) for the Applicant
Zane Malik (instructed by **Government Legal Department**) for the Respondent

Hearing date: 12 November 2015

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Judgment

Mr Justice Phillips :

1. The applicant, a national of Iraq, seeks judicial review of the respondent's decision dated 30 September 2013 to refuse his fresh application for leave to remain in the United Kingdom on the basis of his asylum and human rights claim. The application, as amended, also includes a challenge to a further 'decision' of 31 December 2013, although the respondent's letter of that date was, at least in form, an answer to the applicant's solicitors' pre-action protocol letter challenging the decision of 30 September 2013, not a new decision.

2. The basis of the application is the allegation that the respondent failed to take into account a material consideration, namely, that the applicant, as an 'undocumented' national of Iraq, cannot be removed from the UK and has not been removable for many years. The applicant asserts that, if that factor is properly taken into account on a reconsideration, the respondent might determine that there are exceptional circumstances within paragraph 353B of the Immigration Rules which mean that

removal from the United Kingdom is no longer appropriate. Paragraph 53.1.2 of Chapter 53 of the respondent's Enforcement Instructions and Guidance ('EIG') provides that if removal is no longer considered appropriate then discretionary leave to remain should be granted.

3. The applicant recognises, through his Counsel, Ms Nicola Braganza, that the fact that a person's removal from the UK cannot be enforced does not in itself entitle a migrant to leave to remain: see *Hamzeh v Secretary of State for the Home Department* [2013] EWHC 4113 (Admin) per Simler J, approved by the Court of Appeal under the name *SH (Iran) v Secretary of State for the Home Department* [2014] EWCA Civ 1469. The applicant's case is that there must nonetheless come a point where a failed asylum seeker has been 'irremovable' for so long that that becomes a material consideration for the purposes of paragraph 353B and that that line was crossed in the present case.

The applicant's immigration history

4. The applicant was born in Kirkuk, Iraq, on 3 January 1969 and is an ethnic Kurd. He arrived in the UK clandestinely on 22 May 2002 and claimed asylum, asserting that he feared persecution if returned to Iraq. He also claimed that he had served in the Iraqi army, had been responsible for the death of two soldiers, and had been sentenced to death, that sentence later being reduced to 12 years' and then to 6 years' imprisonment.

5. The applicant's asylum claim was refused on 17 October 2003 and a decision made that day that he be removed. His appeal was dismissed on 24 February 2004, the adjudicator finding that the applicant's account revealed numerous discrepancies and was not credible. The applicant was refused permission to appeal on 8 July 2004 and became appeal-rights exhausted thereafter.

6. On 29 October 2004 the applicant left the UK illegally and travelled to Holland to claim asylum, returning on 31 October 2004. On 20 May 2005 he again left the UK to attempt to claim asylum in Belgium, returning on 19 August 2005. On each occasion, on his return to the UK, he made a further claim for asylum. On each occasion the claim was refused.

7. In November 2008 the applicant was returned to the UK from France under the Dublin II Regulations and made a fourth asylum claim. That claim was refused on 18 November 2008, but he was granted temporary admission on 19 November as he was non-removable. In June 2009 it was noted that the UKBA Third Country Unit received notice that the applicant had been fingerprinted in France. His case had been classed as voluntary departure.

8. On 29 October 2009 the applicant was listed as an absconder. On 30 December 2009 he was arrested for possessing cannabis. He was granted temporary admission as he was non-removable.

9. On 12 February 2011 the applicant was refused leave to remain under the Legacy Scheme.

10. On 14 March 2011 the applicant's previous solicitors wrote to the UKBA, enclosing a report from a psychiatrist. The report set out the applicant's account of torture in Iraq

and confirmed that he was homeless and suffered from post-traumatic stress disorder and secondary depression. The author concluded that his team's view was that the applicant should be granted refugee status in UK and provided with appropriate independent accommodation and thereafter offered trauma-focused psychotherapy.

11. On 22 October 2012 the applicant submitted further representations dated 23 August 2012 on the basis that the country guidance case of *HM (Art 15C) Iraq CG* [2010] UKUT 331 had been overturned by the Court of Appeal, contending that it was therefore arguable that the level of indiscriminate violence in Iraq entailed that returning him to that country would amount to a breach of Article 15C of the Qualification Directive. However, on 13 November 2012 the Upper Tribunal delivered new Country Guidance in *HM (Art 15C) Iraq CG* [2012] UKUT 00409 (IAC) ('*HM (Iraq) 2*'). The Upper Tribunal found that the removal to Iraq would not place an individual at risk of treatment that would be contrary to Article 15, but confirmed that it would not be possible to enforce removal to Iraq of undocumented Iraqis. On 30 March 2013, the Court of Appeal granted permission to appeal the decision in *HM (Iraq) 2*.

12. By letter dated 30 September 2013, the decision in issue in the present application, the respondent refused to treat the fresh representations as a fresh claim. The respondent then proceeded to consider paragraph 353B of the Immigration Rules, taking into account all relevant factors as a whole, including:

    i) Character, conduct and associations. The applicant had provided no evidence of family or friends in the UK and had not enrolled in any college, joined any social groups or attended any religious institution. In November 2008 the applicant was admitted to a rehabilitation facility as a drug user, in both 2008 and 2012 he was convicted of theft and in 2009 he was convicted of using threatening and abusive words or behaviour to cause fear. The respondent therefore did not consider that the applicant's character, conduct and associations were conducive to the public good.

    ii) Compliance. The applicant's reporting history had been highly inconsistent and he had left the country on two occasions and on each occasion had claimed asylum again, despite not having a well-founded fear of persecution. The respondent therefore considered that the applicant was unable consistently to adhere to terms of his temporary release.

    iii) Length of residency. There had been no considerable delay in processing the applicant's applications and his claimed continuous residency had not been continuous. It was concluded that his length of stay had been prolonged by non-compliance and evasion.

    The respondent concluded that the removal of the applicant from the UK remained appropriate.

13. On 23 October 2013 the Court of Appeal delivered judgment in *HF (Iraq) v Secretary of State for Home Department* [2013] EWCA Civ 1276, upholding the reasoning of the Upper Tribunal in *HM (Iraq) 2*.

14. On 17 December 2013 the applicant's solicitors sent a pre-action protocol letter threatening judicial review proceedings in relation to the decision of 30 September 2013. This letter referred, for the first time, to entries in the applicant's immigration file (obtained pursuant to a Subject Access Request made in October 2010) in which the respondent had noted on numerous occasions between September 2005 and November 2010 that the applicant was '*not removable*' or words to similar effect. The applicant's solicitors criticised the respondent's decision that there were no exceptional circumstances within paragraph 353B (doing so despite the fact that the applicant had not previously advanced any claim under that paragraph), stating:

> "*...we return to the main point in this case that the [applicant] is non removable, he does not have documentation, he has given bio data information and previously issued with an EU letter yet [the respondent] has been unable to remove him since 2005. These are factors preventing his departure beyond his control.*"

15. The respondent replied on 31 December 2013, rejecting the contention that her decision of 30 September 2013 was unlawful, stating as follows:

> "*You have stated that [the applicant] is non-removable as an Iraqi national and argue he should be granted leave to remain under Chapter 53 of the Immigration rules. You also state that the [respondent's] assessment of Article 8 ECHR in your client's case is flawed due to a failure to give appropriate weight to non-removability. The recent judgment in the case of Hamzeh & Ors v Secretary of State for the Home Department [2013] EWHC 4113 (Admin) (20th December 2013), states; "If having considered "character" and "compliance", those factors weigh against the individual, they will weigh against a grant of leave to remain in the exercise of the Respondent's discretion (weighing heavily in the case of "character" factors, and heavily in the case of "compliance" factors unless there are strong countervailing reasons in the individual's favour), consistently with UK immigration law and policy. Moreover, again, consistently with UK immigration law and policy, any current inability to enforce removal is unlikely to make any difference to that consideration. "*

<u>These proceedings</u>

16. The applicant issued these proceedings on 24 December 2013, prior to the respondent's response to the applicant's solicitors' pre-action protocol letter of 31 December 2013. The claim sought to challenge both (i) the respondent's decision in relation to paragraph 353B on the grounds that the applicant is not removable and (i) the respondent's refusal to treat the applicant's fresh representations on Articles 3 and 8 of the ECHR and Article 15 of the Qualifying Directive as a fresh claim under paragraph 353.

17. Permission to proceed was refused on paper on 17 October 2014 by Upper Tribunal Judge Storey. The applicant renewed his permission application orally on 7 January

2015. Following the hearing, Upper Tribunal Judge Freeman granted permission to proceed solely to challenge the decision under paragraph 353B. Judge Freeman invited the applicant to amend his grounds to seek judicial review of the decision contained in the letter of 31 December 2013 and, on receipt of a draft amendment, granted permission to amend in that form.

The applicable law

(a) Paragraph 353B

18. Paragraph 353B of the Immigration Rules, which became effective on 13 February 2012, provides as follows:

> "*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:*
>
> *(i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;*
>
> *(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;*
>
> *(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;*
>
> *in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate...*"

19. The paragraph was considered by the Court of Appeal in *Qongwane v. Secretary of State for the Home Department* [2014] EWCA Civ 957. Sir Stanley Burnton (with whom Lewison and Underhill LJJ agreed) made a number of observations about the paragraph, including the following:

> "*24.… 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 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."*

20. Sir Stanley Burton further stated:

> *"32…. 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 [pursuant to 353B] 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 rights 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 fact should be required… 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.*"

21. Underhill LJ added that the essential purpose of paragraph 353B is to identify specific points which will weigh in the balance against the exercise of discretion not to remove a migrant, or to qualify the effect of factors which might otherwise weigh in its favour. He concluded as follows:

> "40 …. *I do not say that good character or compliance with conditions are wholly irrelevant to an exercise of discretion in question. But it is not the purpose of para. 353B to ensure they are considered; and they are hardly likely to be significant factors by themselves given the exceptional nature of the discretion as explained by Sir Stanley Burnton at para. 24 of his judgment. Migrants or advisers making representations against removal in the case of this kind will need themselves to identify with specificity exceptional circumstances on which they rely.*"

(b) Removability

22. The legal consequences of a migrant being 'irremovable' were considered in detail in *Hamzeh v Secretary of State for the Home Department* (above) by Simler J. Simler J stated, at [50], that:

> "*… no general policy or practice has been identified or established by the Claimants to the effect that persons whose removal from the UK cannot be enforced, should, for this reason alone, be granted leave. It is not difficult to see why this should be the case. A policy entitling a person to leave to remain merely because no current enforced removal is possible, would undermine UK immigration law and policy, and would create perverse incentives to obstruct removal, rewarding those who fail to comply with their obligations as compared to those who ensure such compliance. Moreover, in the same way as immigration policy may change, so too the practical situation in relation to enforcing removal may change or fluctuate over time so that any current difficulties cannot be regarded as perpetual.*"

23. Simler J then referred (at [51]) to a policy applicable to British Overseas Citizens ("BOCs") who claim to be unable to return to their former country of residence, referred to as the 'limbo policy'. That policy requires BOCs who makes such a claim to establish that they cannot be returned and genuinely finds themselves with nowhere to go, a burden which may be discharged by a letter from the appropriate authority of the country of normal residence confirming the person's non-returnability and a copy of their application to this authority if available. Similar J held (at [52]) that it would be anomalous to adopt a less restrictive approach in the case of non-BOC migrants than that identified in the limbo policy. Accordingly, when assessing the evidence of non-BOC migrants, the respondent is entitled to expect the burden to be on them and to expect it to be discharged only by letters (or equivalent) from the appropriate authority confirming non-returnability, together with copies of their applications to the relevant authority seeking re-documentation.

24. At paragraph 67 Simler J stated that she did not accept that is appropriate for the Administrative Court to conduct a rolling review of the position in relation to removability, by reference to material not before the decision-maker, stating: "*The lawfulness of the Respondent's decisions are to be judged at the time they were made and on the basis of material available at that time.*"

25. Simler J also rejected the contention that the fact that a migrant is irremovable means that he or she is in a state of "limbo", amounting to a breach of their Article 8 rights:

> "*74… In Khadir v. SSHD [2005] UKHL 39 at paragraph 4, Lady Hale observed that there may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily are so remote that it would be irrational to deny him the status that would enable him to make a proper contribution to the community in the UK. The short answer to this point is that no positive evidence has yet been adduced by the Claimants (on whom the burden must rest)*

> *to establish that voluntary departure is so remote as to be practically impossible.*
>
> 77… *Leaving aside the factual questions concerning the Claimants' identity documentation and removability, none of them came to the UK lawfully or compelled by any threat of persecution. All have remained here despite the refusal of leave and in circumstances where there is no evidence that they have established private and family life rights that would outweigh factors in favour of removal. In the circumstances, I cannot accept that the mere fact that their removal cannot currently be enforced, changes the balance so that such a decision amounts to a disproportionate interference of such rights under article 8 as they may establish. Article 8 does not confer the right to reside in the country of one's choice and there is nothing compelling any of these Claimants to remain here. The Defendant continues to hold the rational view that voluntary departure is still possible in each of these cases and accordingly, any state of limbo that they find themselves in is self-induced.*"

26. In relation to paragraph 353B, Simler J accepted (at [73]) that removability is one of the factors that may be relevant to the overall decision-making, but is not the only relevant factor. Simler J explained the proper approach as follows:

> "*81… In considering whether removal should be enforced, consideration is given to whether there is any basis for granting leave to remain in the UK outside the immigration rules by reference to the identified factors and the guidance in chapter 53 EIG. Unsurprisingly, consistently with such consideration being operated in a manner that does not undermine UK immigration law and policy, where an individual has failed to comply with UK immigration law (for example, by failing to maintain contact with the UKBA, working illegally, failing to report, being dishonest at any stage of the immigration process, overstaying, absconding) this is likely to weigh heavily against the individual in the chapter 53 EIG consideration; and by the same token, lengthy periods of residence in the UK achieved by non-compliance, is likely to weigh against the individual in this consideration.*
>
> *82. Chapter 53 EIG requires a "holistic" consideration of the relevant factors; no single factor is identified as an overriding or determinative factor, and the guidance expressly states that the discretion not to remove on the basis of exceptional circumstances will not be exercised on the basis of one factor alone.*
>
> *83. The guidance in chapter 53 addresses when removability is to be considered… the decision-maker must address the factors outlined in "character", "compliance" and "length of time in*

> *the UK accrued for reasons beyond the migrant's control." Removability does not appear as a factor in "character" or "compliance". If having considered "character" and "compliance", those factors weigh against the individual, they will weigh against a grant of leave to remain in the exercise of the Defendant's discretion (weighing heavily in the case of "character" factors, and heavily in the case of "compliance" factors unless there are strong countervailing reasons in the individuals favour), consistently with UK immigration law and policy. Moreover, again, consistently with UK immigration policy, any current inability to enforce removal is unlikely to make any difference to that consideration.*
>
> *84. Provided those factors do not weigh against the individual, the decision-maker is required to go on to consider whether there has been a significant delay by the UKBA, not attributable to the migrant, in deciding a valid application for leave to remain the same asylum on human rights grounds, or whether there are reasons beyond the individual's control why they could not leave the UK after their application was refused. At this stage the decision-maker is required to assess the prospects of enforcing removal, and in a case where there has been significant delay by the UKBA that has contributed to a significant period of residence (six years or more identified in 2012 EIG) and the factors in "character" and "compliance" do not weigh against the individual, following an individual assessment of the prospects of enforcing removal, a grant of leave may be appropriate and it may therefore be appropriate not to enforce removal…..*
>
> *86….. on any view the guidance does not say that if there are difficulties in relation to removal a grant of leave is appropriate. There is nothing in the rules or guidance that elevates removability into a factor that trumps other relevant considerations nor is removability a mandatory consideration that will change an otherwise negative assessment of an individual's case into a positive assessment…*
>
> *87…. in cases where notwithstanding a current inability to enforce removal, the Secretary of State concludes that the removal of the individual is still appropriate, the Secretary of State will nevertheless look to promote voluntary departure. This is both a rational and reasonable in the circumstances. Moreover, a current inability to enforce removal is something that may change at short notice, so that no assumption can be made that there will be no change of circumstances in relation to removal over time."*

27. In *SH (Iran) v Secretary of State for the Home Department* (above), on appeal from Simler J's decision above, Davies LJ (with whom Aikens and Clarke LJJ agreed) stated:

> "*38… there is no room for argument that these applicants and this appellant are to be treated as entitled to a grant of leave to remain simply because they otherwise (so it is said) will be left in a state of indefinite limbo. True it may be that there have been times when (for example) it has not proved possible for undocumented Iranians to be removed to Iran. But it does not follow that that will always remain the case; and, as found as a fact by Simler J, there at no stage has been in existence a policy that those whose removal from the United Kingdom cannot be enforced should for that reason alone be granted leave…"*

The challenge to the 30 September 2013 decision

28. Both the applicant's Amended Grounds and Ms Braganza's skeleton argument maintain a challenge to the respondent's original decision on 30 September 2013 on the grounds that the respondent failed to consider that the applicant could not be removed and had been recognised (by the respondent) to be irremovable since 2005.

29. To the extent that Ms Braganza maintained a separate challenge to that decision in oral argument (and it is not clear to me that she did), it is without merit for the following reasons:

    i) The decision of 30 September 2013 addressed the applicant's further representations in relation to his asylum and human rights claim. The applicant had not, at this stage, advanced any case that there were exceptional circumstances under paragraph 353B and had not referred to his irremovability;

    ii) Having rejected the applicant's asylum and human rights claim, and in the absence of any specific representations as to exceptional circumstances, the respondent was not required to undertake a separate review pursuant to paragraph 353B (see *Qongwane* at para [32], set out in paragraph 20 above);

    iii) The respondent nevertheless did undertake a separate review pursuant to paragraph 353B, deciding that the factors relevant to "character" and "compliance" both weighed against the applicant. In those circumstances the respondent was not required by the policy set out in Chapter 53 EIG to go on to consider whether there were reasons beyond the applicant's control why he could not leave the UK, including issues of enforcing removal (see *Hamzeh* at [83]-[84], set out in paragraph 26 above);

    iv) In any event, it was for the applicant and his solicitors to identify the specific facts on which he relied as amounting to exceptional circumstances (see *Qongwane* at para [40], set out in paragraph 21 above). The applicant contends that the entries in his immigration records dating back to 2005 demonstrate such circumstances, but copies of those records were not sent to the respondent until after the 30 September 2013 decision and the respondent cannot be expected to have searched for them without notice of their alleged relevance.

30. It follows that the respondent's decision of 30 September 2013 was reached in accordance with the rules and the respondent's guidance and, indeed, went further

than was strictly required. There is no basis on which it could be found to be unlawful.

The challenge to the respondent's 'decision' in the letter of 31 December 2013

(a) Whether the letter contained a reviewable decision

31. The respondent's letter of 31 December 2013 was a response to the applicant's contention that the 30 September 2013 decision was unlawful. The letter concluded that that decision was not unlawful, that any further submissions must be made in person and that applicant's case had been dealt with appropriately and no further action was required.

32. Ms Braganza contended that the respondent's response to the applicant's pre-action protocol letter was in itself a decision because it contained further reasoning in relation to issue of removability. However, all that the letter did in relation to that issue was to quote a passage from paragraph 83 of judgment of Simler J in *Hamzeh* (set out in paragraph 27 above), explaining that where (as in the applicant's case) factors relating to "character" and "compliance" weighed against the migrant, any current inability to enforce removal is unlikely to make any difference. That quotation was not new or further reasoning, but a justification of the approach taken in the decision letter of 30 September 2013 and a defence of the lawfulness of the decision.

33. It follows that I accept the submission of Mr Zane Malik, counsel for the respondent, that the letter of 31 December 2013 did not contain a reviewable decision. As the letter itself pointed out, it is open to the applicant to make further submissions, provided they are made in person.

(b) Whether any further reviewable decision was unlawful

34. In case I am wrong in the reaching the above conclusion, I propose to consider whether, on the assumption that the letter of 31 December 2013 constituted a further or fresh decision that there were no exceptional circumstances within paragraph 353B in the applicant's case (or a decision not to review the existing decision to that effect), such a decision was unlawful.

35. Ms Braganza's contention is that, in making such further decision, the respondent did not give any consideration to the evidence (supplied in the pre-action protocol letter of 17 December 20113) that it had been 'repeatedly flagged up' in the applicant's immigration files that he was not removable. Ms Braganza submitted that that history should have been considered together with the evidence that the applicant was destitute and suffered from mental illness. Whilst she accepted that such matters did not amount to the applicant being in a state of 'limbo' so as to interfere with his Article 8 rights, Ms Braganza argued that a point might be reached where such matters amounted to exceptional circumstances.

36. The respondent did, however, expressly recognise in the letter of 31 December 2013 that it was said the applicant was irremovable and gave an explanation as to why that did not affect her conclusion on exceptional circumstances, referring (correctly, but not perhaps fully) to the reasoning of Simler J in *Hamzeh*. It follows that the

applicant must establish that it was material for the respondent to consider not only present irremovability but also the applicant's 'history' of irremovability.

37. The fundamental difficulty facing the applicant in this regard is that paragraph 353B is concerned with whether it is presently appropriate to remove the migrant: the question of 'removability' in that context relates (at least primarily) to whether the migrant is now or will in the future be removable. Thus an important consideration in relation to 'irremovability' in the context of paragraph 353B is that a current inability to enforce removal is something that may change at short notice, so that no assumption can be made that there will be no change of circumstances in relation to removal over time: see *Hamzeh* at [87], paragraph 27 above. In that context, the fact that the applicant may have been irremovable at an earlier period when the respondent was not considering whether it was appropriate to remove him is irrelevant.

38. In seeking to rely on a history of 'irremovability', as opposed to merely current or foreseeable 'irremovability', the applicant is in reality relying on the alleged fact that, for a lengthy period, he has neither been granted leave nor could he be removed, in other words, he has been 'in limbo'. There are, in my judgment, two insuperable obstacles to such an argument succeeding:

    i) The suggestion that undocumented migrants should be granted leave because they are otherwise 'in limbo' was expressly rejected by the Court of Appeal in *SH (Iran)* at [38]: see paragraph 28 above;

    ii) Whilst Lady Hale in *Khadir* (see the reference in paragraph 26 above) observed that a time may come when the prospect of a migrant ever being able safely to return are so remote that it would be irrational to deny him leave, that approach is also focused on future prospect of removal (albeit that inference from the history may be relevant). As in the cases considered in *Hamzeh* (see [74] at paragraph 26 above), the applicant had not adduced evidence to establish that his voluntary departure is so remote as to be practically impossible;

39. It follows that I do not accept that the history of the applicant being regarded as 'irremovable' added anything material to the fact that the applicant is said to be presently non removable for the purposes of considering whether there are exceptional circumstances under paragraph 353B. The respondent was not obliged to give separate consideration to that history in the context of paragraph 353B, but was entitled to reject the relevance of all assertions as to 'irremovability' on the basis that factors relating to character and compliance weighed against the applicant.

40. Further, the applicant's contention that he had been irremovable for so long that his case had 'crossed a line' amounts, on proper analysis, to a challenge to the respondent's decision to refuse the applicant's Article 8 ECHR claim. The applicant was refused permission to challenge that aspect of the respondent's decision (or decisions) and the contention would, in any event, be hopeless for the reasons set out in paragraph 38(ii) above. The argument pursued on the present application under paragraph 353B is, in my judgment, an impermissible attempt to re-introduce that factor by the back door as an 'exceptional circumstance'.

41. I would add that, even if (contrary to my finding above) the respondent should have given separate consideration to the applicant's history of irremovability but did not do so, it is highly likely that the outcome for the applicant would not have been substantially different. Indeed, I am satisfied that the respondent would have made the same decision and could not have been challenged for so doing.

Conclusion

42. For the reasons set out above the application is dismissed.