Upper Tribunal
(Immigration and Asylum Chamber)

Khanum & Others (paragraph 353B) [2013] UKUT 00311 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 February 2013	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE ALLEN

Between

AYSHA KHANUM

RAHIM DHANANI

NARGISBANO DHANANI

ARYAN DHANANI

THANDIWE QONGWANE

VILAN PATEL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Mr Z Malik, instructed by Malik Law Chambers, Solicitors

For the Respondent: Mr D Hayes, Senior Home Office Presenting Officer

Paragraph 353B of HC 395 is not designed to replace paragraph 395C. In a case where there are no outstanding further submissions and appeal rights are exhausted, the decision whether or not to carry out a review (within the scope of para 353B) is entirely a matter of discretion of the Secretary of State and is not justiciable .

DETERMINATION AND REASONS

1. These appeals all raise common issues as to the scope of paragraph 353B of the Immigration Rules. All four principal appellants (Mr Dhanani's wife and son are dependants on his appeal) appealed to judges of the First-tier Tribunal against decisions of the Secretary of State to remove them from the

United Kingdom as overstayers. The appeals were all dismissed, but permission was granted to appeal to the Upper Tribunal on the basis of the arguments set out by Mr Malik in his grounds, and which he developed before us.

2. Mr Malik has identified three issues of principle which, he says, require determination.

(a) Whether a decision to remove an overstayer is, "not in accordance with the law", if the Secretary of State makes that decision without giving any consideration to paragraph 353B of the Statement of Changes in Immigration Rules HC 395 (as amended).

(b) Whether, on an appeal against a decision to remove an overstayer made by the Secretary of State after considering paragraph 353B, a First-tier Judge should determine whether the discretion should have been exercised differently.

(c) Whether a decision which is unlawful at common law is always incompatible with Article 8.

3. He developed these points further in his skeleton argument and in his submissions before us.

4. Mr Malik argued that although issue (b) had not been argued before the First-tier Judges, these were lead cases and there were other cases in the pipeline and it was desirable for the Tribunal to deal with the point today. The facts of the cases were not in dispute. All were people in respect of whom a decision to remove as overstayers had been made. There was not a question of any other breach while they were overstaying. It was beyond dispute that there was an in-country right of appeal in each case.

Law and Policy

Statute

Nationality, Immigration and Asylum Act 2002

"82. Right of Appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal;

(2) In this Part 'immigration decision' means –

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c.33) (removal of person unlawfully in United Kingdom).

…

84. Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds –

…

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules.

…

85. Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

…

86. Determination of appeal

(1) This section applies on an appeal under section 82(1), 83 or 83A

(2) The Tribunal must determine –

(a) any matter raised as a ground of appeal (whether or not by virtue of section 85 and

(b) any matter which section 85 requires it to consider.

(3) The Tribunal must allow the appeal in so far as [it] thinks that –

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

(4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.

(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.

(6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b).

87. Successful appeal: direction

(1) If the Tribunal allows an appeal under section 82, 83 or 83A it may give a direction for the purpose of giving effect to its decision.

…".

Immigration Rules

" 395C. Before a decision to remove under section 10 of the Immigration and Asylum Act 1999 or section 47 of the Immigration, Asylum and Nationality Act 2006 is given, regard will be had to all the relevant factors known to the Secretary of State, including:

(i) age;

(ii) length of residence in the United Kingdom;

(iii) strength of connections with the United Kingdom;

(iv) personal history, including character, conduct and employment record;

(v) domestic circumstances;

(vi) previous criminal record and the nature of any offence of which the person has been convicted;

(vii) compassionate circumstances;

(viii) any representations received on the person’s behalf.

In the case of family members, the factors listed in paragraph 365-368 must also be taken into account.

(deleted on 13 February 2012).

Fresh Claims

“353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas.

353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

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:

(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.

This paragraph does not apply to submissions made overseas.

This paragraph does not apply where the person is liable to deportation.”

(Inserted from 13 February 2012).

Policy Documents

5. At paragraph 7.7 of the Explanatory Memorandum to the Statement of Changes in Immigration Rules presented to Parliament on 19 January 2012 (HC 1733) it is said that the effect of the decisions of the Court of Appeal in Mirza [2011] EWCA Civ 159 and Sapkota [2011] EWCA Civ 1320 is to require the UKBA to make approximately 20,000 additional removal decisions every year. The Secretary of State's view is that if there are reasons why a person should not be removed the onus should be on him to make the relevant application rather than requiring the Secretary of State to have the responsibility of identifying and considering all factors known to her and identifying those which may be relevant. For these reasons paragraph 395C was being deleted, and the UKBA was changing its processes so that refusal and removal decisions could be made as required by Sapkota . It is said that the burden is on the migrant to apply specifically for consideration if he has other reasons why he claims he should not be removed from the United Kingdom, for example compassionate factors or protection issues.

6. Paragraph 7.10 refers to the situation where a migrant has unsuccessfully made an application on human rights or asylum grounds and the case is being reviewed. The notion of a review arises again in paragraph 53.1 of the Enforcement Instructions Guidance and of course in the wording of paragraph 353B itself.

7. Paragraph 53.1 of the Enforcement Instructions Guidance addresses the issue of when to consider exceptional circumstances. There is reference there to exceptional circumstances being 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 such cases it is said that paragraph 353B should be applied.

8. Mr Malik took us to the relevant statutory provisions. It was clear that there was a right of appeal under section 82(2)(g) of the Nationality, Immigration and Asylum Act 2002 against a decision that a person was to be removed from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999. As regards the relevant grounds of appeal, under section 84(1)(e) of the same Act, an appeal could be brought on the basis that the decision was "otherwise not in accordance with the law", and under sub-paragraph (f), on the basis that the person taking the decision should have exercised differently a discretion conferred by Immigration Rules. Section 85 of the same Act made it clear what matters were to be considered on an appeal under section 82(1), and it was clear from section 86(2) that any matter raised as a ground of appeal required to be determined by the Tribunal. It was clear from section 86(3)(a) that the appeal must be allowed if the Tribunal found that a decision against which the appeal was brought was not in accordance with the law (including the Immigration Rules), or under (b) that a discretion exercised in making a decision against which the appeal was brought or was treated as being brought should have been exercised differently. It was also clear from section 86(6) that a refusal to depart from or to authorise departure from Immigration Rules was not the exercise of a discretion for the purposes of section 86(3)(b). Under section 87(1) the Tribunal was empowered to make a direction for the purpose of giving effect to its decision if it allowed an appeal under section 82, section 83 or section 83A, and it was clear from (2) that a person responsible for making an immigration decision was required to act in accordance with any relevant direction under sub-section (1). It was therefore the case that if the judge were persuaded that a discretion should have been exercised differently he or she could require the Secretary of State to grant leave to remain.

9. Mr Malik went on to refer to the Explanatory Memorandum to the Statement of Changes in Immigration Rules of 19 January 2012 (HC 1733). This, among other things, explained why paragraph 395C of HC 395 had been deleted, as set out in particular at paragraphs 7.7 and 7.8 of the memorandum. It was clear from paragraph 7.9 that the burden was on the migrant to apply specifically for consideration of other reasons why they claimed they should not be removed from the United Kingdom.

10. Paragraph 7.10 explained the reasoning behind the enactment of paragraph 353B. The instant cases were examples of an unsuccessful application being reviewed. Letters had been sent requesting the Secretary of State to review their cases. There was nothing express in the Rules as to what was meant by the term "review" but it was perhaps implicit in the power to remove overstayers under section 10. There was not an obligation to review but a review had been carried out in these cases. There would be a review within paragraph 353B where the Secretary of State issued a removal decision after an application by an overstayer, and produced a decision reviewing all the circumstances of the case. If an application had been refused and then the Secretary of State did nothing, perhaps for a two year period for example, during those two years the matter would not be subject to review, but when the Secretary of State picked the case up and reviewed the circumstances then it would. In all four cases applications had been made but the removal decision was not the direct consequence of those applications.

11. There were two categories of case under paragraph 353B. The first was where further submissions had been made and the decision maker had established whether or not they amounted to a fresh claim under paragraph 353. The second category comprised cases with no outstanding further submissions whose appeal rights had been exhausted and which were subject to a review. In each case the decision maker would have regard to the matters set out in the three sub-paragraphs to paragraph 353B. It was argued that, for example in Mrs Khanum's case, the Secretary of State's letter of 22 March 2012 was a review of the case. Paragraph 353B had been taken into account in that letter. If a reasoned decision was issued by the Secretary of State then that was a review under paragraph 353B, not being a decision on an application but a subsequent decision. If the decision on 22 March 2012 in Mrs Khanum's case or the letter of 16 May 2012 in the Dhananis' case were not reviews then it was unclear what else they could be.

12. It was argued that paragraph 353B applied to all cases of overstayers. The words "before deciding to make a removal decision against an overstayer" could effectively be read into paragraph 353B. It was intended to extend to illegal entrants as well and was not limited to overstayers. If the Secretary of State was not reviewing the case then she was not obliged to take the factors set out in paragraph 353B into account.

13. Tab 3 of the bundle was chapter 53 of the Enforcement Instructions Guidance. Paragraph 53.1 set out the criteria for when to consider exceptional circumstances. In such cases paragraph 353B was to be considered. As regards the suggestion that this was the process with which the second part of paragraph 353B was concerned, there was nothing in the IDIs about what "review" meant. Paragraph 53.1.1 went on to set out how the discretion was to be exercised. The leave under chapter 53.1.2 could be leave under the Rules: paragraph 353B.

14. It was argued that what was said by the Court of Appeal in Mirza , which had approved the determination of the Tribunal in EO (Deportation appeals: scope and process) Turkey [2007] UKAIT 00062 was equally applicable to paragraph 353B. Mr Malik placed reliance on paragraphs 13 and 14 and also 18 and 19 in Mirza . If the Secretary of State granted leave without reference to paragraph

353B in a case to which it did not apply, the leave would be under paragraph 353B. It should be considered why paragraph 353B had been enacted if it did not apply at some stage in these cases. It was argued that paragraph 8 in TE (Eritrea) [2009] EWCA Civ 174 was equally applicable in this case, as was true of the strictures set out at paragraph 18. When assessing the Article 8 claim, the judge should have considered whether the decision was not in accordance with the law.

15. When the Secretary of State considered further submissions she exercised discretion in considering whether to grant leave or make an appealable decision. It was the same kind of discretion as set out at section 84(1)(f).

16. With regard to the Article 8 issue, Mr Malik argued that the issue of whether a decision which was unlawful at common law was always incompatible with Article 8 had been touched on in SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056 (IAC) and also more recently by the Court of Appeal in Gurung [2013] EWCA Civ 9. There was further support for the argument in Patel [2012] EWCA Civ 741 at paragraph 17. If a decision was unlawful at common law then it was unfair. Further support was to be found at paragraph 24 in ZH (Tanzania) [2011] UKSC 4. Failure to have regard to a relevant policy rendered the decision not in accordance with the law. There was a breach of the Convention in that case also.

17. Mr Malik also referred to what had been said in Halford v United Kingdom [1997] 2 EHRR 245 at paragraph 49. This was supported in MM v the Netherlands (application number 39339/98, 8 April 2003). If there was no compliance with the domestic law then the decision was not in accordance with the law. In Sorvisto v Finland [2009] ECHR 59 at paragraph 107, a similar point was made. A decision which was unfair at common law could not be lawful for the purposes of Article 8. As to the argument that the decision maker had been entitled to make the decision and there was an arguable failure of procedure only, Mr Malik referred to the decision in Patel where this had not been considered. There was an error by the judge in not identifying the argument which had not been put to him. There was an obligation on the judge to determine every issue.

18. In Mrs Khanum's case, there was reference to Odelola [2009] UKHL 25, at paragraph 10 of the decision letter. Paragraph 353B had been considered. The judge could review the exercise of discretion. The decision in Dhanani was in similar terms. The decision in Qongwane was slightly different in that there was no reference to paragraphs 353B as such, but there was a reference to the chapter 53 factors so the matter had been considered in the light of those factors. There had been consideration given to the issue as the precise wording of the Rule had been used and if not then in the alternative the decision was not in accordance with the law if the reference was seen as being limited to the chapter 53 criteria only. The natural meaning of the word "review" should be given.

19. In his submissions Mr Hayes relied upon and developed points made in his skeleton argument. He argued, with regard to Mr Malik's first ground, that there had been a substantial narrowing of the exercise of any pre-removal decision given the terms of paragraph 353B. Paragraphs 7.6 to 7.9 of the Explanatory Memorandum explained why paragraph 395C in particular had been deleted. It was a response to the decision of the Court of Appeal in Mirza and also the decision in Sapkota . It was not agreed that it was replaced by paragraph 353B. It was confined to a particularly narrow set of circumstances, as adumbrated at paragraph 10 of the skeleton. Further submissions did not come until after a removal decision had been made. There was support for that proposition within the Rule. Where leave was sought on the basis of Article 8 refusal after an overstayer decision there was no right of appeal and then there could be further submissions. There was required to have been a removal decision. There was nothing before the Secretary of State. The person had had a right of

appeal exercised and that was the intention behind the Rule. The term “subject to a review” was undefined. It was for the Secretary of State to decide when to review. With regard to chapter 53 of the Enforcement Instructions Guidance, the words “in all other cases” in the penultimate paragraph of paragraph 53.1 should have been deleted and should not have remained. It appeared to be the review in the Rule.

20. After the lunch adjournment Mr Hayes was able to assist with certain matters of which we had requested clarification. The word “review” in paragraph 353B was undefined. There was no definition in the legislation or the guidance. It was kept there so as to afford a wide discretion to the Secretary of State in reviewing paragraph 353B cases. Also, voluntary departure was seen as the initial choice of a migrant.

21. As regards the phrase “the process of asylum case owners keeping their cases under review” at paragraph 53.1, there were only two circumstances where the Secretary of State would hold a review without a triggering factor, and these were first family cases where the case was unconcluded, where there would be a review every 36 months, and secondly where a case was six years old and unconcluded. In any other case there were no circumstances where a cold review would occur. In these relevant cases the person concerned would neither have been removed nor granted leave.

22. With regard to the meaning of the phrase “appeal rights exhausted” this was not a statutory term and was not defined in any guidance. It could have similar circularity as section 104 and the notion of pending appeals. It was a question of there being no longer an appeal pending or the appeal process having ended. That did not include a person who had never had an appeal right.

23. He argued that paragraph 353B did not bite unless further submissions were made. It was not accepted that it applied as paragraph 395C had done to initial decisions. He referred to the points made at paragraphs 17 and 18 of his skeleton. The intention of the wording was that no-one with an appeal would be able to rely on paragraph 353B at all. To allow this would go against the decision to remove paragraph 395C and would influence what could be considered in a paragraph 353B decision. Mr Hayes argued that where there had never been a pending appeal paragraph 353B would not apply, referring to paragraph 18 of Mirza in this regard. The decision that would be made on a review under paragraph 353B would be that removal from the United Kingdom was no longer appropriate. It would not be an immigration decision, so it would not be appealable. He agreed that the words “no longer appropriate” implied that a removal decision had already been made. It was likely to have been a mistake that paragraph 353B was considered in Mrs Khanum and Mr Dhanani’s cases. There was a misinterpretation of chapter 53 or of the true interpretation to be made of paragraph 353B. The cases did not fall within section 84(1)(e) or (f). The use of the term “exceptional circumstances” denoted that it was discretionary and a matter for the Secretary of State. There was however the first sentence of paragraph 19 of Mirza which indicated that the judge as well as the Home Office would consider the criteria. However, Mr Hayes argued that on a proper interpretation there was a discretion outside the Rule. If there were errors in the decision concerning exceptional circumstances, such as in respect of whether a person had been imprisoned or not, it would be a matter of it being not in accordance with the law as opposed to involving a different exercise of discretion. The Rule did not intend judges to exercise discretion. Mr Hayes referred to paragraph 10 in Mahad [2009] UKSC 16.

24. It was a high test, as was argued at paragraph 25 and 26 of Mr Hayes’ skeleton and it was very unlikely that there would be a case falling within the exercise of discretion. With regard to Mr Malik’s third ground, this should not be allowed or permitted as a ground as it had not been argued before the judge.

25. By way of reply Mr Malik argued first that even on Mr Hayes' argument Mrs Khanum would succeed as there was an immigration decision made in her case and the appeal had been dismissed.

26. As regards the meaning of the phrase "appeal rights exhausted", this meant by statute that there was no right of appeal. There had to have been a decision, and there were decisions in these cases. That would not include, for example, refusal of an application where a person failed to pay a fee, but would in relation to merits. If a decision was made on merits and it was not an appealable decision then that would fall within it. Mrs Khanum had had an appealable decision. Miss Qongwane had not.

27. With regard to Mr Hayes' argument that the appellants had no appealable decision, Mr Malik disagreed. If the Secretary of State exercised a discretion in a person's favour then she would grant leave and, if not, then she would issue a removal decision which would be appealable. There was no obligation to make a decision, but if submissions were made to the Secretary of State and she was invited to take them into account she must take the factors in paragraph 353B into account in making a decision. The meaning of "further submissions" must mean the same in the second part as in the first part of paragraph 353B. If for example the Secretary of State was invited to review a person's case then that was different from further submissions. The Secretary of State would either grant leave or remove the person from the United Kingdom. Further submissions would have to amount to a fresh asylum or human rights claim. It would have to be a human rights or asylum claim for there to be a fresh claim.

28. With regard to exceptional circumstances, Mr Malik referred to paragraph 15 and onwards of Gurung . If there was a discretion then it could be considered. The judge would not be exercising the initial discretion, but reviewing it.

29. We reserved our determination.

30. Our main concern in these cases is as to the proper interpretation of paragraph 353B of the Immigration Rules. The paragraph was inserted into the Rules from 13 February 2012, the same date on which paragraph 395C of the Immigration Rules was deleted. Mr Malik has argued, basing himself on what was said by the AIT in EO (subsequently approved by the Court of Appeal in Mirza) that on determining an appeal against a decision to give directions under section 10 of the 1999 Act, the Tribunal should first consider whether the decision shows that the decision maker took into account the factors set out in paragraph 395C and exercise the discretion on the basis of them. If it did not the appeal should be allowed on the basis that it was not in accordance with the law: if the decision was made properly the Tribunal should next consider whether the removal of the appellant would breach his rights under the Refugee Convention or the European Convention on Human Rights and if not, thirdly, whether the discretion under paragraph 395C should be exercised differently. Mr Malik argued that what was true for paragraph 395C is equally true for paragraph 353B.

31. Mr Hayes tells us that the notion of review in the asylum process refers exclusively to family cases where the case is unconcluded i.e. there has never been removal nor a grant of leave, in which case the case is reviewed every 36 months, and in other cases where the case is six years old and is unconcluded. He says that in no other cases would a cold review occur. We understand a "cold review" to mean a review unprompted by any submissions or contact from an appellant or their representative.

32. The next paragraph in the Enforcement Instructions Guidance states that in all other cases where exceptional circumstances are claimed, officers must consider any representations submitted and have regard to the factors outlined in paragraph 353B. It may be that that is a reference to what we

have described above as the first part of paragraph 353B, where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim, in which case the three specific matters set out below at paragraph 353B are to be considered.

33. We do not think the argument that paragraph 353B is designed to replace paragraph 395C can properly be maintained. The reasons for deleting paragraph 395C are clearly set out in the Explanatory Memorandum. There is no suggestion there that paragraph 353B was designed to replace paragraph 395C. Paragraph 395C was concerned with a range of factors that the Secretary of State would take into account before making a decision to remove under section 10 of the 1999 Act or section 47 of the Immigration, Asylum and Nationality Act 2006. The more restricted list of factors set out at paragraph 353B comprises matters to be taken into account in deciding whether there are exceptional circumstances meaning that removal from the United Kingdom is no longer appropriate. As the Explanatory Memorandum makes clear, the Secretary of State regards the onus as being on the appellant to draw to her attention relevant factors, for example compassionate or protection issues, rather than herself being required to identify and consider factors known to her and identifying those which may be relevant. Whether the matters set out at (i), (ii), and (iii) are likely ever to identify exceptional circumstances must be a matter of some debate, but we think it is sufficiently clear that the Secretary of State at least envisages the possibility of relevant matters making out exceptional circumstances.

34. The fact that we have concluded that paragraph 353B cannot be regarded as the logical successor to paragraph 395C does not of course conclude matters. It remains necessary to consider the meaning of such phrases as “no outstanding further submissions”, “whose appeal rights have been exhausted”, and “subject to a review”.

35. Although paragraph 353B appears in part 12 of the Immigration Rules which is headed “Procedure and Rights of Appeal”, it seems to us to have very little to do with rights of appeal and perhaps not a great deal to do with procedure either. In two alternative situations the three relevant issues will fall to be considered.

36. The first of these is where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 and the second situation is the one with which we are particularly concerned in this case. The three phrases that we have set out above require consideration. The concept of “no outstanding further submissions” must, we think, simply mean that if further submissions have been made then they have been considered under the first part of the Rule. Paragraph 353A makes it clear that an applicant to whom that paragraph applies who has made further submissions shall not be removed before the submissions have been considered under paragraph 353 or otherwise. In our view the matters that arise for consideration under paragraph 353B occur by contrast when a person has reached the end of the line. If it has been found that the further submissions amount to a fresh claim then of course a fresh decision will be made which will attract a right of appeal. But where the decision maker decides that they do not give rise to a fresh claim he or she is nevertheless required to consider the three matters set out below at paragraph 353B. Equally, when a person has not made further submissions, these matters require to be considered in the case of a person whose appeal rights have been exhausted and which are subject to a review.

37. As regards the phrase “whose appeal rights have been exhausted”, we take this to refer to a person who has no further right of appeal before the Tribunal. No clear understanding emerged from our discussion with Mr Malik as to the applicability of this phrase to, for example a person who had an

application refused because a fee has not been paid or a person with a right of appeal who had never exercised it, but for all practical purposes we think it matters little if at all. This is because the case must be one which is subject to a “review”.

38. We have set out above what we are told by Mr Hayes about the meaning of this phrase as understood by the Home Office. We think this must be right, given that we are dealing with cases where there are no outstanding further submissions and where appeal rights have been exhausted. There is no formal process of review, and the matter seems to us to be entirely a matter of discretion of the Secretary of State as to whether a decision maker conducts a review or not. We understand Mr Malik to agree with this point. If there is a review then it would appear to be an entirely internal matter. If the Secretary of State chooses to write to a claimant indicating that she has carried out a review but does not consider that the matters set out at paragraph 353B are such as to identify exceptional circumstances, meaning that removal from the United Kingdom is no longer appropriate, that is clearly not an immigration decision within the meaning of section 82(2) of the 2002 Act. Such a case would be one where an immigration decision had (probably) previously been made, since paragraph 353B requires appeal rights to have been exhausted, and a decision not to exercise a discretion in the circumstances envisaged in paragraph 353B is not a decision coming within section 82(2), and it does not fall within the statutory appeals system. It is, of course, a world away from cases where a person has made an application (or submissions) and awaits a result; it would also be different if the result of any review was that a decision was taken that a person should be granted some sort of leave. But, given that there are people who choose to remain in the United Kingdom when they have no right to do so, the existence of an interval of time during which their case may or may not be reviewed is inevitable; and a person who does nothing in that time to bring his case to the notice of the Secretary of State is obviously not a person who is entitled to any sort of further decision.

39. We turn again then to the three issues identified by Mr Malik in his grounds and submissions.

40. On our understanding of paragraph 353B, the relevant part of which for the purposes of these appeals is the second part of the first paragraph, there is no obligation on the Secretary of State to give consideration to the three sub-paragraphs of paragraph 353B where the decision is made to remove an overstayer. There is no obligation to carry out a review and there is no obligation to reveal the outcome of any review that takes place. Properly applied, we can see no circumstances in which a person would become aware that his or her case had been considered by a decision maker in these particular circumstances. He would be a person who had no outstanding further submissions and whose appeal rights were exhausted. He would have no reason to suppose that a review would be carried out and would have no awareness of the outcome of any review.

41. This raises the question not so much of the generic issue which we have considered above, but what the position is when the Secretary of State refuses to consider paragraph 353B in the context of an appeal against a decision to remove an overstayer. It will be clear from what we have said above that we consider the Secretary of State was wholly wrong to give consideration to paragraph 353B in these cases. The paragraph did not, on its own terms, apply to them. On the other hand, it is difficult to see that a person could be disadvantaged in any way by consideration of the factors set out in that paragraph.

42. Clearly there is a right of appeal, under section 82(2)(g). A particular question following from that is whether, under section 84 of the Act there is a ground of appeal under (e) that the decision is otherwise not in accordance with the law, or under (f) that the person taking the decision should have

exercised differently a discretion conferred by Immigration Rules. We see no basis for either ground of appeal being remotely arguable in this context. Hence we do not see the paragraph 353B review process as involving the exercise of a discretion conferred by Immigration Rules; nor, in those circumstances, can the decision resulting from the review be said to be otherwise not in accordance with the law. It is not a decision that gives rise to any consequences in law.

43. As regards issue (c), the question of whether a decision which is unlawful at common law is always incompatible with Article 8, if engaged at all, the matter is not before us, as was argued by Mr Hayes. It is entirely academic to the outcome of these appeals for the reasons set out above. Bearing in mind what was said by Lord Dyson M R in Gurung , at paragraph 52, in view of our decision on the other matters, we do not see the point as requiring decision in these appeals.

The Individual Appeals

44. Mrs Khanum's appeal was heard by a First-tier Judge on 18 June 2012. She appealed against a decision of 22 March 2012 to remove her from the United Kingdom as an overstayer. The judge referred to a decision of 3 November 2011, but we are confident that the proper position is as set out above. In the removal decision at paragraph 10 there is reference to the decision of the House of Lords in Odelola [2009] UKHL 25 and the fact that paragraph 395C was deleted from the Immigration Rules on 13 February 2012. It was said that nonetheless consideration had been given to the issues that she had raised in accordance with the guidance in chapter 53 of the EIG and also that consideration had been given to paragraph 353B. It was not accepted that there were exceptional circumstances in her case which would mean that removal was inappropriate. At paragraph 76 of her determination the judge noted that the respondent had set out in the refusal consideration of paragraph 353B and that the conclusions following consideration had been challenged but not the accuracy of the factual basis for the conclusions and she therefore found that the facts were as stated.

45. As we have concluded above where there has been a decision giving rise to an appeal under section 82(2)(g), as there can be said to have been in this case, and where in the course of that review the factors set out at paragraph 353B have been considered, it is not open to an appellant to argue that the discretion should have been exercised differently. The appeal therefore remains dismissed.

46. As regards Miss Qongwane, she appealed to a panel of the First-tier Tribunal against the Secretary of State's decision of 23 May 2012 to remove her from the United Kingdom as an overstayer. In her case reference was again made in the decision letter to Odelola , and there is no reference to paragraph 353B. However the three factors set out at paragraph 353B are mentioned in the letter, together with the question of whether any representations had been received on the person's behalf, in the context of chapter 53 of the EIG. There is no mention of these matters in the panel's determination.

47. Again we consider that the Secretary of State was not required to consider paragraph 353B which in effect was however done, without citing it, in setting out the relevant considerations and coming to a conclusion on them. The grounds of appeal to the Upper Tribunal among other things argued that the discretion under paragraph 395C should have been exercised in the appellant's favour. This is somewhat surprising, bearing in mind that paragraph 395C had been deleted from the Immigration Rules on 13 February 2012, as the decision letter made clear. The ground was clearly wrong. In light of what we have had to say about paragraph 353B, we do not consider that the challenge to a discretion under a Rule which had already been deleted can properly be said to be a challenge to the exercise of discretion under an entirely different Rule which contains different criteria. We do not

think that the panel erred in not addressing an issue that was not before it. Again therefore the decision of the panel in this case dismissing the appeal is maintained.

48. Mr Dhanani and his wife and son appealed to a judge of the First-tier Tribunal against the Secretary of State's decision of 16 May 2012 to remove him from the United Kingdom as an overstayer. As in the cases of Mrs Khanum and Miss Qongwane, Odelola was considered together with the guidance in chapter 53 and specifically paragraph 353B. Again, somewhat curiously, the grounds of appeal contend that the Secretary of State should have exercised her discretion under paragraph 395C in the appellant's favour, despite that provision having already been repealed. In his determination the judge did not refer to the paragraph 353B consideration in the refusal letter. Again however the grounds of appeal to him did not challenge the Secretary of State's conclusions in that regard, addressing themselves rather to an already deleted provision and we do not consider an error of law in the judge's decision has been identified.

49. Mr Patel appealed against a decision of 14 August 2012 to remove him from the United Kingdom as an overstayer. There is no reference to paragraph 353B in any decision letter. It can be seen from what we have said above that we do not consider that there was a necessity or requirement for there to be any consideration of paragraph 353B in any of these cases, and as a consequence the judge cannot be said to have erred in not considering a failure to exercise a discretion by the Secretary of State. This appeal is also dismissed.

Signed Date

Upper Tribunal Judge Allen