Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Waqar) v Secretary of State for the Home Department (statutory appeals/paragraph 353) IJR [2015] UKUT 00169 (IAC)

Heard at Field House
On 10th February 2015

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Before

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE QUEEN ON THE APPLICATION OF

HIKMAT WAQAR

Applicant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ms S Akinbolu, counsel, for the applicant (instructed by M & K Solicitors)
Mr A Byass and Mr D Blundell, counsel, for the respondent (instructed by Treasury Solicitor)

1. *The current statutory appeal regime requires a decision to be made on a human rights claim. Without a claim and without a decision there is no appeal.*
2. *Where a claim has already been determined, submissions made subsequent to that require a decision as to whether they amount to a claim. Paragraph 353 of the Immigration Rules provides the mechanism to determine whether they amount to a claim the refusal of which enables a right of appeal.*

3. *Commencement Order 2014/2928 brings those whose deportation decision (which includes a decision to refuse to revoke a deportation order) was made after 10th November 2014 into the statutory scheme in the Nationality Immigration and Asylum Act 2002 as amended by the Immigration Act 2014, irrespective of when they were convicted of a criminal offence.*

JUDGMENT

1. The applicant is a foreign national offender who entered the UK in 2007 at the age of 13. In 2008 he was convicted of five counts of rape involving some 30 to 40 separate incidents in which he repeatedly raped a 7 year old boy. He was sentenced to four years detention in a Young Offenders Institution and a two year extended period on licence.

2. A deportation order was signed on 25th June 2014 subsequent to an unsuccessful appeal against a decision to make a deportation order. The applicant then made further submissions arguing that his deportation would result in a breach of his protected right to respect for family and private life. He relied, inter alia, upon the birth of two children since the date of the determination of the deportation appeal.

3. The submissions were treated as an application to revoke the deportation order. That application was refused for reasons set out in a decision dated 14th November 2014, supplemented by a further decision on 28th November 2014. In those letters the respondent said that no right of appeal arose because the applicant's submissions did not amount to a fresh claim.

4. On 2nd December 2014 the respondent set directions for removal on 9th December 2014. The applicant commenced the instant proceedings on 5th December 2014 and also sought a stay on his removal. On 9th December 2014 UTJ Kebede ordered a stay on removal pending determination of the application for permission to bring a judicial review of the decisions of 14th and 28th November 2014, or until further order. On 22nd December 2014 UTJ Coker refused permission on the grounds asserting that the decision to refuse to revoke the deportation order was an appealable immigration decision because the Nationality Immigration and Asylum Act 2002 applied unamended by the Immigration Act 2014 ("2014 Act"); she granted permission on the limited ground that it was arguable that the Immigration Act 2014 as it amends the Nationality, Immigration and Asylum Act 2002 ("2002 Act") may mean that if a human rights claim is raised it must, unless certified, attract a right of appeal and that paragraph 353 of the Immigration Rules does not operate as a gatekeeper preventing an appeal right. A copy of that decision is attached as Annex A.

Summary of the issue between the parties

5. The applicant's contention is that paragraph 353 of the Immigration Rules is now subsumed within the statutory provisions. The right of appeal that is now defined by s82 2002 Act enables all refused human rights claims to have an appeal,

such appeal rights only being limited if the claim is certified under s94 or s96. There is, it is contended no requirement for a "categorisation" step because the statutory framework now provides all the necessary safeguards to prevent repetitious or unmeritorious claims being pursued through the appellate system either within the UK, outside the UK or at all. The applicant contends that the amendment to s82 results in the respondent not having to make a separate immigration decision but she is limited to consideration of whether the removal of the applicant would breach his rights under the ECHR; having made such a claim then statute determines that he is thus entitled to a right of appeal and the respondent retains control over the location from which the applicant may exercise such right of appeal as he may have. The applicant relies upon R (BA (Nigeria)) v SSHD [2010] 1 AC 444 and submits that ZT (Kosovo) v SSHD [2009] 1 W.L.R. 348 and R (ZA (Nigeria)) v SSHD [2011] QB 722 were predicated upon the "old" construction whereby a human rights claim did not give rise to a right of appeal *per se* but rather the respondent was required to consider whether or not to make an immigration decision which would then attract a right of appeal – limited by s94 or s96 if considered appropriate.

6. The respondent contends that the 2014 Act has not altered the statutory appealable decision regime but, albeit radically, has significantly reduced the adverse decisions that have a right of appeal. Although the certification process (ss94 and 96) remains available to the SSHD that is only where there has been a claim that has been refused. The paragraph 353 process remains in force to enable the categorisation of submissions and it is only if the submissions are categorised as a claim that has been refused, is there an appeal. The SSHD disputes that the decisions of ZT Kosovo and ZA Nigeria, determined under legislation that has since been amended, support the contention that paragraph 353 is now no longer in force for cases such as the instant case. She contends that the history and purpose of paragraph 353 requires consideration in determining the various appeal rights that have been provided for over the years.

Legislative background

7. The Immigration Act 2014 amended Part 5 of the Nationality Immigration and Asylum Act 2002. The whole of the 2014 Act has not been brought into force. We have described the legislation and Rules in force prior to the commencement of the relevant sections of the 2014 Act as "old" and those provisions as amended by the 2014 Act as "new" and set them out in columns in Appendix B.

8. In R v SSHD, ex parte Onibayo [1996] QB 768, a decision made in relation to an appeal under the now repealed Asylum and Immigration Appeals Act 1993 ("1993 Act"), the SSHD contended that a person could only make one claim for asylum. This was rejected by the Court of Appeal, which held that a new or "fresh" claim for asylum could be made. This led to the introduction of paragraph 346 into the Immigration Rules. This was examined in by the Court of Appeal in Cakabay v SSHD (Cakabay No 2) [1988] Imm AR 176, [1998] EWCA Civ 1116 in which Schiemann LJ held:

THE NEED FOR CATEGORISATION

Before turning to consider these two questions *[how a categorisation question is to be challenged]* it is helpful to indicate why the need for categorisation arises. What follows is not substantially in dispute between the parties.
The background to the problem is the desire of the United Kingdom to abide by its obligations under the Geneva Convention.
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It is manifest that if a state acts in breach of its obligation the consequences to the individual can be disastrous. Parliament has therefore provided in s. 6 of the 1993 Act that

> "During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom."

Moreover Parliament has provided that the claimant may not be removed from or required to leave the United Kingdom whilst he is pursuing the appellate process.
The Statute makes no express provision as to what is to be done in the case of repeated claims for asylum by the same person. The second claim may be identical to the first ("a repetitious claim") or may be different ("a fresh claim"). It is common ground that a fresh claim attracts all the substantive and procedural consequences of an initial claim whereas a repetitious claim does not.
In the case of a repetitious claim no more is required to be done: the first decision has ensured that the United Kingdom has complied with its obligations under the Convention. S.6 of the 1993 Act creates no inhibition on the claimant's removal: the Secretary of State has on the occasion of his decision on the first claim decided the repetitious claim. So far as the decision on the claimant's repetitious application for leave to enter is concerned, the claimant will be told that leave has already been refused and that there is no need for any new decision.

9. Although the 1993 Act has since been repealed, there is reference in Cakabay to the lack of express provision in the 1993 Act to what is to be done in the case of repeated claims for asylum by the same person; this was covered by paragraph 346 Immigration Rules.

10. Paragraph 346 was subsequently amended and replaced by paragraph 353 and considered by the House of Lords in ZT (Kosovo). ZT (Kosovo) considered the issue of 'where the SSHD has certified a claim for asylum or human rights, how should she approach the consideration of further submissions made by the claimant from within the jurisdiction'. The House of Lords held that there was an ongoing requirement on the SSHD to consider further submissions in accordance with paragraph 353 where an applicant or appellant remained in the UK. Lord Phillips of Worth Matravers said at paragraph 15:

> Where a claimant remains in this country after the refusal of a claim that has been certified under section 94, the obligations of the Refugee Convention and the Human Rights Act leave the Secretary of State no alternative but to consider further submissions….It seems more sensible for rule 353 to apply in this situation just as in other situations where the secretary of State is called upon to consider fresh submissions.

11. BA (Nigeria) then followed. This case concerned an appeal against a decision to refuse to revoke a deportation order and whether such appeal could be brought in country having regard to whether s92(4) 2004 Act applies. Lord Hope gave the leading judgment:

> 28.Parliament might, of course, have stood still and left the matter to be dealt with under the Immigration Rules. But it has not stood still. The experience of the intervening years has been taken into account. First, there were the provisions against abuse in sections 73 to 77 of the 1999 Act. Now there is a set of entirely new provisions in the 2002 Act. As Lord Hoffmann said in A v Hoare [2008] UKHL 6, [2008] 1 AC 844, para 15, while there is a good deal of authority for having regard in the construction of a statute to the way a word or phrase has been construed by the court in earlier statutes, the value of such previous interpretation as a guide to construction will vary with the circumstances. In this case the phrase in question has remained, in essence, unchanged. But the system in which it must be made to work is very different. This is a factor to which full weight must be given.
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> 29. The new system contains a range of powers that enable the Secretary of State or, as the case may be, an immigration officer to deal with the problem of repeat claims. The Secretary of State's power in section 94(2) of the 2002 Act to certify that a claim is clearly unfounded, if exercised, has the effect that the person may not bring his appeal in country in reliance on section 92(4). The power in section 96 enables the Secretary of State or an immigration officer to certify that a person who is subject to a new immigration decision has raised an issue which has been dealt with, or ought to have been dealt with, in an earlier appeal against a previous immigration decision, which has the effect that the person will have no right of appeal against the new decision. It is common ground that the present cases are not certifiable under either of these two sections. Why then should they be subjected to a further requirement which is not mentioned anywhere in the 2002 Act? It can only be read into the Act by, as Sedley LJ in the Court of Appeal put it, glossing the meaning of the words "a...claim" so as to exclude a further claim which has not been held under rule 353 to be a fresh claim: [2009] 2 WLR 1370, paras 20, 30. The court had to do this in Ex p Onibiyo. But there is no need to do this now.
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> 30.It is not just that there is no need now to read those words into the statute. As Mr Husain pointed out, the two systems for excluding repeat claims are not compatible. Take the system that section 94 lays down for dealing with claims that the Secretary of State considers to be clearly unfounded. If he issues a certificate to that effect, the appeal must be pursued out of country. But the claimant will have the benefit of section 94(9), which provides that where a person in relation to whom a certificate under that section subsequently brings an appeal under section 82(1) while outside the United Kingdom the appeal will be considered as if he had not been removed from the United Kingdom. He will have the benefit too of the passage in parenthesis in section 95, which provides:
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> > "A person who is outside the United Kingdom may not appeal under section 82(1) on the ground specified in section 84(1)(g) (except in a case to which section 94(9) applies)."

31.If Miss Laing is right, the effect of a decision by the Secretary of State that the representations that a person makes against an immigration decision of the kind mentioned in section 82(1)(k) – a refusal to revoke a deportation order – is not a fresh claim will be that an appeal against that decision must be brought out of country. But the interpretative route by which she reaches that position does not save that person from the exclusionary rule in section 95, unless – which has not been done in these cases – the claims are also certified under section 94(2) as clearly unfounded. The ground of appeal referred to in section 84(1)(g) has been designed to honour the international obligations of the United Kingdom. To exclude claims which the Secretary of State considers not to be fresh claims from this ground of appeal, when claims which he certifies as clearly unfounded are given the benefit of it, can serve no good purpose. On the contrary, it risks undermining the beneficial objects of the Refugee Convention which the court in Onibiyo, under a legislative system which ha d no equivalent to section 95, was careful to avoid.

32.In my opinion Lloyd LJ in the Court of Appeal was right to attach importance to this point: [2009] 2 WLR 1370, paras 39-40. As he said, the development of the legislative provisions and the powers given to the Secretary of State to limit the scope for in country appeals deprive Miss Laing's submissions of the foundation which they need. There is obviously a balance to be struck. The immigration appeals system must not be burdened with worthless repeat claims. On the other hand, procedures that are put in place to address this problem must respect the United Kingdom's international obligations. That is what the legislative scheme does, when section 95 is read together with section 94(9). It preserves the right to maintain in an out of country appeal that the decision in question has breached international obligations. I would hold that claims which are not certified under section 94 or excluded under section 96, if rejected, should be allowed to proceed to appeal in-country under sections 82 and 92, whether or not they are accepted by the Secretary of State as fresh claims.

33.There is no doubt, as I indicated in ZT (Kosovo) v Secretary of State for the Home Department [2009] 1 WLR 348, para 33, that rule 353 was drafted on the assumption that a claimant who made further submissions would be at risk of being removed or required to leave immediately if he does not have a "fresh claim". That was indeed the case when this rule was originally drafted, as there was no equivalent of section 92(4) of the 2002 Act. But Mr Husain's analysis has persuaded me that the legislative scheme that Parliament has now put in place does not have that effect. Its carefully interlocking provisions, when read as a whole, set out the complete code for dealing with repeat claims. Rule 353, as presently drafted, has no part to play in the legislative scheme. As an expression of the will of Parliament, it must take priority over the rules formulated by the executive. Rule 353A on the other hand remains in place as necessary protection against premature removal until the further submissions have been considered by the Secretary of State.

12. BA (Nigeria) was concerned with an appealable decision as defined by s82 of the 2002 Act then in force. The issue was whether the appeal was suspensive in operation. BA claimed that ss94 and 96 were sufficient safeguards against abusive or unmeritorious claims. BA's claim was conceded not to fall within either of those categories. The court held that he should not be subject to a further hurdle to cross which is what would happen if paragraph 353 were to apply. Therefore in a case where there **is** a right of appeal ie an appealable

immigration decision, where s94 or s96 do not apply then 353 does not apply. It is the mere fact that a human rights claim has been made and refused that enables the appeal to be suspensive.

13. In ZA (Nigeria), the appeals raised the issue whether the SSHD is entitled to refrain from making an appealable immigration decision in response to a human rights claim which she reasonably concludes is merely a repetition of an earlier claim whose rejection has been unsuccessfully challenged in a concluded appeal. The contention by the claimants in ZA (Nigeria) was that the provisions of Part 5 of the 2002 Act (in force at that time ie prior to the 2014 Act) had either impliedly repealed paragraph 353 or it had been rendered of no further application. The SSHD contended that she was entitled to reject and did not need to decide the purported renewed claim as it relied on substantially the same facts as the earlier rejected claim. The applicants in ZA (Nigeria) did not have appealable immigration decisions as defined by s82 of the 2002 Act, as did the claimants in BA (Nigeria) and ZT (Kosovo). Lord Neuberger, who gave the lead judgment said

> "21. …If rule 353 can be relied on, then on receipt of a purported renewed claim (which I shall refer to hereafter as "further submissions") the Secretary of State can decide that it is not a "fresh claim", and then decline to make a decision on whether or not to refuse leave to enter etc; in that event there would be no decision which could give rise to a right of appeal under s82, as explained in *Cakabay v Secretary of State for the Home Department (Nos 2 and 3)* [1999] Imm AR 176, 180-181, per Schiemann LJ. A decision under rule 353 is not a decision to refuse the relief which the further submissions seek: it is a decision that the further submissions do not amount to a fresh claim – ie that it is not a claim at all….
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> …..
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> 23. I accept that it is obviously right to consider whether sections 94 and 96 render rule 353 valueless: that, indeed, is the central point on the first issue. However, I consider that SM and ZA put their case on the point too high. First, it overlooks the fact that Parliament has, albeit in a negative sense, approved subsequent amendments to the Rules, which do not include the deletion of rule 353. Further, it is rather paradoxical for the appellants to invoke the will of Parliament when the most recent relevant statute clearly proceeds on the basis that rule 353 is in force and has practical effect: on the appellants' case, when Parliament enacted section 53 of the 2009 Act, it was simply beating the air.
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> 24. Perhaps more importantly, the issue between the parties should not be determined simply by seeing whether sections 94 and 96 can be interpreted so as to cover every application and purported application falling within rule 353. It is equally valid to consider whether they can be construed consistently with rule 353 continuing to have an independent effect.
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> 25. Section 94(2) differs from rule 353 in that it is concerned with hopeless, or "clearly unfounded" claims, whether original or renewed, whereas rule 353 covers only purported renewed claims, i.e. further submissions, which merely repeat previous rejected claims by the same claimant. So section 94(2), unlike rule 353, can apply not only to a renewed claim (or purported renewed claim) but also to the original claim made by a particular claimant. That, no doubt, is the reason why section 94(2) envisages a claim to which it applies being treated as a valid, albeit hopeless, claim, which has to be considered on its merits: hence its

machinery involves the Secretary of State certifying that it is clearly unfounded, so as to prevent an appeal. On the other hand, as rule 353 is concerned with purported claims which repeat earlier, rejected, claims, it envisages that such purported claims are not to be considered or treated as claims at all.

26. Section 94(2) therefore does not relieve the Secretary of State from making a decision to refuse leave to enter or entry clearance in respect of a claim which she considers to be "clearly unfounded": she must consider it on its merits, and, having no doubt refused it, she is then entitled, by virtue of section 94(2), to prevent the claimant raising an appeal under section 82 by issuing a certificate. If she could rely on rule 353, however, and she considered that the further submissions she has received raise no issues other than those already raised by an earlier, rejected, claim, she would neither have to consider its merits nor formally refuse it: she could merely reject the submissions. Thus, rule 353 can be operated as a sort of gatekeeper by the Secretary of State to prevent further submissions amounting to, or being treated as, a claim, thereby not getting into Part 5 territory at all.

27. If further submissions on analysis merely repeat a claim which has already been made, it is a perfectly normal use of language to say that they do not really amount to a new claim, but should be treated as being no more than an attempt to revive a previous unsuccessful claim. Nonetheless, I accept that the description of a "clearly unfounded" claim in section 94(2) is capable, as a matter of language, of being applied to such further submissions which, on analysis, raise no new points over and above a previous, rejected, claim. However, given that the 2002 Act was passed at a time when rule 353 existed, I would incline to the view that it was not intended to apply to such further submissions which do not amount to a fresh claim.

28. Further, there appears to me to be some force in the contention that section 94(2) is unlikely to have been directed to further submissions which do not raise new issues over an earlier claim, when a claim which relies on evidence which should have been produced to support an earlier claim is expressly covered in the 2002 Act in section 96(1) (and claims which included, but extended further than, previous unsuccessful claims, were expressly covered in section 96(3)). However, I also accept that there is force in the point that Part 5 of the 2002 Act was intended to be a complete code.

29. As for section 96 itself, subsection (1) is clearly concerned with different territory from rule 353: the section is directed to new points which could and should have been raised in the claimant's original, rejected, claim – an administrative procedural equivalent of *Ladd v Marshall* [1954] 1 WLR 1489 – whereas rule 353 is directed to points which were raised in the claimant's original, rejected, claim – an administrative procedural equivalent of *res judicata*. As for the original section 96(3), it is of some interest, because it dealt expressly with renewed claims which included a ground which was identical to that raised in a previous claim which had already been considered. It was complementary to rule 353 as it concerned renewed claims which included such a ground, but, as I see it, also included other grounds which had not been raised in a previous claim. Section 96(3) operated by requiring such a renewed claim to be considered as a fresh claim, while enabling the Secretary of State to prevent an appeal on the previously raised ground. As mentioned, it tends to support the view that section 96, unlike section 94, is and was concerned with renewed claims which are defective because of the existence and contents of a previous claim by the same claimant.

30. Accordingly, while there is plainly a substantial argument to the effect that the words of section 94(2) are wide enough to catch further submissions which do not amount to a fresh claim within rule 353, I would hold, at least in the absence of binding authority to the contrary, that it does not do so. Section 94(2) is concerned to prevent appeals in relation to any claim (whether original or renewed) which has been considered and refused by the Secretary of State on its merits, where she concludes that the merits are so weak that the claim was "clearly unfounded". Rule 353 is concerned to prevent a purported renewed claim having to be considered on its merits and refused, where the Secretary of State considers that it is merely a repetition of a claim which has already been made and refused. As for section 96(1), it is concerned with a different aspect of renewed claims from rule 353.

31. Unless, as the appellants contend, there is a decision of the Supreme Court which precludes such a conclusion, I would therefore, in agreement with the Administrative Court, hold that it was, as a matter of principle, open to the Secretary of State to rely on rule 353 in relation to a purported renewed claim. The appellants say that there is such a case, namely *BA (Nigeria)* [2010] 1 AC 444.

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41. In each of the two cases *[BA(Nigeria)]*, in agreement with the Court of Appeal, the majority of the Supreme Court (Lady Hale dissenting) held that it was not open to the Secretary of State to rely on rule 353. It is thus clear that in *BA (Nigeria)* [2010] 1 AC 444, the Supreme Court decided that, where the Secretary of State receives further submissions, on which she proceeds to make an immigration decision within section 82, there will be an in-country right to appeal under section 92(4) (unless the Secretary of State has certified under section 94(2) or section 96) and it is not then open to the Secretary of State to invoke rule 353 in order to contend that the further submissions did not amount to a claim at all. So, once further submissions are treated as amounting to a claim and the claim is decided by the Secretary of State, the statutory code contained in the 2002 Act leaves no room for rule 353.

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52. Mr Tam is plainly right in his argument that the actual decision in *BA (Nigeria)* [2010] 1 AC 444 is not inconsistent with *ZT (Kosovo)* [2009] 1 WLR 348 or is not determinative of the present appeals in favour of the appellants. The actual decision was that rule 353 had no further part to play for the purposes of section 92 (4)(a) once there was an appeal against an immigration decision. The question therefore is whether, in the light of the passages in the judgment of Lord Hope relied on by the appellants, we should, as Mr Gill and Mr Jacobs contend, conclude that a wider interpretation of the reasoning in *BA (Nigeria**)*** is appropriate, so that the binding ratio is that rule 353 is effectively a dead letter. In my opinion, that contention, which I might very well otherwise have accepted, is one which should be rejected on the ground that it is plainly inconsistent with the reasoning and conclusion of the House of Lords in *ZT (Kosovo)* [2009] 1 WLR 348.

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58. In all these circumstances, unless it is pellucidly clear from the judgments in *BA (Nigeria)* [2010] 1 AC 444, and in particular the passages relied on by the appellants in paragraphs 29-33 in the judgment of Lord Hope, as set out above, that the reasoning and conclusion in *ZT (Kosovo)* [2009] 1 WLR 348 was being overruled it seems to me that we should dismiss this appeal. Those passages (and in particular the words I have emphasised) undoubtedly give support to the appellants' argument, if read on their own.

> 59. However, as with any observations contained in a judgment, one cannot properly interpret the passages other than in their factual and juridical context. Given all the factors I have mentioned, I have reached the conclusion that what was said in those passages can, and therefore should at any rate in this court, be read as being confined to cases where there is an appealable immigration decision. Once there is such a decision, the complete code contained in the legislative scheme applies and rule 353 has no part to play. However, as decided in *ZT (Kosovo)* [2009] 1 WLR 348, rule 353 still has "a part to play": the Secretary of State can decide that the further submissions are not a "fresh claim", in which case one does not enter the territory governed by the "complete code" of "the legislative scheme."

Conclusion

14. Paragraph 353 does not appear and is not alluded to in the legislative framework. It and its predecessor have never been alluded to. The two systems exist alongside each other. It remains in the Rules and, despite the amendment of s82 of the 2002 Act from 20th October 2014 and despite there being amendments to the Rules since that date there has been no amendment to paragraph 353. Although Ms Akinbolu submitted that the paragraph 353 process still applied in for example asylum cases and therefore the Rules could not be amended, this is not the case. Had there been an intention that the paragraph 353 process would cease to apply in certain categories of cases this could and would have been set out in amendments to the Immigration Rules.

15. Can paragraph 353 co-exist with the legislative scheme? Ms Akinbolu submits not, because the protections that exist in the statutory scheme mean that paragraph 353 is no longer required and thus the paragraph has been impliedly repealed or is of no effect and should not be utilised.

16. The current appeal scheme enables an appeal against a *decision* by the SSHD *refusing* the applicant's human rights *claim.* There has to be a claim and then a decision in order to enable an appeal. The current scheme no longer enables an appeal against a decision refusing to revoke a deportation order. The SSHD may, having decided to refuse a human rights claim, thereafter decide whether to invoke the certification process. Without a claim (and without a decision) there is no appeal.

17. The history of paragraph 353 and the jurisprudence is set out above. BA (Nigeria) was concerned with a *decision*, not whether there had been a decision. ZT (Kosovo) concerned the continuing responsibility of the respondent to consider representations made whilst an applicant remained in the UK even though the initial claim had been refused and certified – again there had been a decision and the issue was what to do with submissions. ZA (Nigeria) confirmed that the respondent was not obliged to issue an appealable immigration decision whenever further submissions were made.

18. If the applicant is correct and any submission made amounts to a claim, the response to which is an appealable decision, this would result in an applicant being able to make numerous consecutive claims that would result in numerous

consecutive appeals. Although each of those could be certified, the mere existence of such a scenario would result in it being virtually impossible to reach finality. BA (Nigeria) is not authority for the proposition that submissions amount to a claim and that the response to those submissions is a decision within the meaning of Part 5. The current statutory framework continues to provide for unmeritorious *claims* to be certified. There is nothing in this framework that precludes the making of a categorisation decision; paragraph 353 remains in force.

19. The current statutory appeal context requires a decision to be made on a human rights claim. Without a claim and without a decision there is no appeal. Submissions that purport to be a human rights claim do not without more trigger a right of appeal. There has to be an intermediate step, a categorisation, namely "do the submissions amount to a claim at all". Paragraph 353 of the Rules provides the mechanism to determine whether they amount to a claim; if not then the decision does not amount to a decision to refuse a human rights claim.

20. If an applicant is aggrieved by a decision not to categorise submissions as a claim, then s/he has a remedy in judicial review proceedings. Where a claim has already been determined, submissions made subsequent to that require a decision as to whether they amount to a claim. If determined to be a claim the decision to refuse that claim will trigger a right of appeal, subject to certification. If the submissions are determined not to be a claim, as here, there is no decision and thus no right of appeal.

21. For these reasons the claim must fail.

22. The parties chose not to attend the handing down of this judgment and no application for permission to appeal to the Court of Appeal has been made. We are however required by rule 44 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to consider whether permission should be granted. We are satisfied that there is no arguable point of law capable of affecting the outcome of this judgment and permission to appeal is therefore refused.

Costs

23. If either party wishes to make an application as regards costs such application, with submissions limited to 3 pages of A4, is to be received by the Tribunal within 7 days of the date of this order failing which such an application will not be entertained.

Date 25th March 2015

Upper Tribunal Judge Coker

ANNEX A

JUDGE COKER: The applicant entered the UK aged 13 in March 2007 and claimed asylum. He was refused asylum but granted discretionary leave until 1 August 2010. On 14 January 2008 he was convicted of five counts of rape against a child under the age of 13, the offences being committed whilst the applicant himself was aged 13. He was sentenced to four years' detention and two years extended licence. On 9 December 2010 he was notified of a decision to deport under Section 35A of the 1971 Act. He appealed. The appeal was dismissed by the First-tier Tribunal. He was granted permission to appeal to the Upper Tribunal. The appeal was dismissed by the Upper Tribunal. The Court of Appeal rejected an application for permission to appeal on 13 November 2013 and an oral hearing in front of the Court of Appeal refused him permission on 10 March 2014. The deportation order was signed on 24 June 2014. He married BC in an Islamic ceremony in November 2012. Child one was born on 4 August 2013, child two on 23 July 2014 and a third child is expected. There has been close monitoring from social services and probation.

2. He has appealed against conviction and that appeal was rejected by the Court of Appeal. The Criminal Convictions Review Committee has accepted that there are issues that needed to be reviewed and they are in the process of writing up that review.

3. On 11 July 2014 the applicant made a request to revoke the deportation order and set out a fresh claim submission.

4. On 14 November 2014 the respondent asserted that the representations did not amount to a fresh claim. There was no actual decision to refuse to revoke the deportation order but the letter states that the respondent considers deportation remains appropriate and proportionate.

5. On 19 November 2014 there was a request for a review and on 28 November 2014 the decision of 14 November 2014 was maintained by the respondent. The respondent said there were no compelling circumstances that would warrant revoking the deportation order. Also, following the Immigration Act 2014 ("2014 Act"), consideration had been given as to whether the submissions amounted to a fresh claim. The respondent stated that the decision made on 14 November 2014 concluded that the points now raised when taken together with the previously considered material would not create a realistic prospect of success before an Immigration Judge. Therefore it was not accepted that the applicant's representations met the test set out at paragraph 353 of the Immigration Rules. The applicant sought permission to judicially review the removal directions.

6. On 9 December 2014 Judge Kebede granted a stay on removal. The applicant sought to amend his grounds seeking permission to include a challenge to the decision to the failure to enable him to appeal against the refusal to revoke the deportation order signed on 24 June 2014 on four grounds.

7. Firstly, that the applicant was not caught by the amendments to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

8. Secondly, that the decision to refuse to revoke the deportation order signed on 24 June 2014 was an appealable decision as defined by Section 82(2)(k) of the 2002 Act and he thus had a right of appeal exercisable in country. The applicant in his skeleton specifically states that the treatment by the respondent of the representations set out in the letter of 11 July 2014 which were rejected by the respondent as a fresh human rights application with reference to paragraph 353 of the Immigration Rules is not subject to challenge at this stage. Rather, it is submitted that the applicant has a current human rights claim. Under the current legal provisions a deportation order may not now have been made and furthermore that because there is a current CCRC review his removal pursuant to the deportation order is premature. It is submitted that in the light of BA (Nigeria)[2009] 2 WLR 1370 as affirmed by the Supreme Court [2009] UKSC 7, there is no need for a human rights claim to meet the considerations of paragraph 353 of the Immigration Rules and thus absent certification the claim must attract a right of appeal.

9. The third ground is that if those two grounds are unsuccessful there is in any event nothing in the 2014 Act that changes the effect of BA (Nigeria)and its interpretation. It is submitted that if a human rights claim is raised it must, unless certified, attract a right of appeal.

10. Ground 4 is that on the basis the decision attracts a right of appeal the respondent has failed to comply with the Notices Regulations and thus the decision is rendered invalid.

11. Although no formal amended grounds have been produced, reference instead being made to the grounds as set out in the skeleton argument dated 15 December 2014, the respondent has stated there is no objection to the proposed amendment and so the hearing before me today proceeded on the basis of those four grounds.

12. It was also agreed that if ground 1 fell then 2 and 4 would also fall and so in essence the hearing before me is first of all whether the applicant is caught by the amendments to the 2002 Act. If he is not and he is caught by the 2014 Act amendments to the 2002 Act then the change in the 2002 Act does not affect the relevance of BA (Nigeria) which continues to be interpreted in the same way; the claim is not subject to a paragraph 353 Immigration Rules gateway test.

13. The grounds upon which it is asserted that the decision to refuse to revoke the deportation order are based on the construction asserted by the applicant of the 2014 Act, Commencement Order No. 3 2014/ 2771 made on 15 October 2014 and the Transitional and Savings Provision Order 2014/2928 made on 6 November 2014 coming into force on 10 November 2014. The applicant asserts that the provisions of the 2014 Act with regard to deportation only apply to those who become a foreign criminal as defined by Section 117D of the 2002 Act on or after 20 October 2014 i.e. if he had been convicted after 20 October 2014 and that those who were convicted prior to that date are not subject to amended Part 5 of the 2002 Act. Secondly that 2014/2928 specifically refers to and states that Commencement Order No. 3, Articles 9 and 10 continue to apply and refers to deportation decisions taken after 10 November 2014 and refers to those who are foreign criminals and commences the 2014 Act to those people. He asserts that both orders are forward looking and the

only way to read them that is non-contradictory and together is to consider a person who is a foreign criminal against whom a decision is taken after 10 November means those who become foreign criminals after 20 October.

14. Both orders refer to saved provisions and relevant provisions. Relevant provisions include those that amend the 2002 Act and include Section 10 Immigration and Asylum Act 1999 removals, Section 82 2002 Act amendments, Section 92 2002 Act amendment (the place from which an appeal may be brought). The saved provisions operate to stop particular amendments applying to, for example, Section 10 of the Immigration Act 1999, Section 62 of the 2002 Act in connection with detention and the way in which Part 5 appeals of the 2002 Act operate.

15. Article 9 of the No.3 Commencement Order reads insofar as is relevant:

> "Notwithstanding the commencement of the relevant provisions, the saved provisions continue to have effect, and the relevant provisions do not have effect, other than so far as they relate to the person set out respectively in Articles 10…."

16. So the saved provisions, i.e. the unamended 2002 Act provisions continue to have effect and the relevant provisions do not have effect other than insofar as they relate to Article 10. The Article 10 persons referred to in Article 9 are Article 10(a)

a person ("P1") who becomes a foreign criminal within the definition in section 117D(2) of the 2002 Act on or after 20 October 2014; ….

17. The respondent reserves her position as to whether the applicant is correct in his interpretation that Article 9 and 10 mean that Section 117D of the 2002 Act only applies to those convicted after 20 October 2014 but she asserts that even if that is correct, the effect of 2014/2928 is that deportation decisions, which is defined to include decisions to refuse to revoke a deportation order, made after 10 November 2014 fall within the 2002 Act as amended by the 2014 Act and thus a decision to refuse to revoke a deportation order is not an appealable decision.

18. The 2014/2928 Order confirms that the relevant and saved provisions have the same meaning as in the No.3 Commencement Order. Article 2 of the 2014/2928 Order reads:

> "(1) The saved provisions continue to have effect and the relevant provisions do not have effect other than –
>
> (a) in accordance with articles 9, 10 and 11 of the Commencement Order;
>
> (b) in relation to a deportation decision made by the Secretary of State on or after 10 November 2014 in respect of –
> (i)a person, ("P"), who is a foreign criminal within the definition in Section 117D(2) of the 2002 Act…."

19. The structure of Commencement Order No.3 appears to be consistent with a reading that those who were convicted or subject to a deportation decision prior to 20 October 2014 are subject to the unamended 2002 Act, i.e. they would have a right of appeal if the decision came within the unamended section 82 definition. This appears consistent with the explanatory note which reads, where relevant:

> "The persons referred to in article 10 are a person, ("P1"), who becomes a foreign criminal under section 117D(2) of the 2002 Act on or after 20 October 2014... The effect of the saving provision is that only the persons in articles 10 and 11 will be subject to the new appeals provisions in Section 82(2), as inserted by Section 15(2) of the 2014 Act, which provide a right of appeal to the First-tier Tribunal where a person's protection claim or human rights claim has been refused, or their protection status has been revoked."

Obviously however because the Secretary of State has reserved her position on this I did not hear argument on that and I make no decision on this.

20. Section 117D(2) reads so far as relevant:

> "In this part 'foreign criminal' means a person –
>
> (a) who is not a British citizen;
>
> (b) who has been convicted in the UK of an offence and
>
> (c) who –
> (i) has been sentenced to a period of imprisonment of at least twelve months.

21. I am satisfied that 2014/2928 plainly brings those whose deportation decision was made after 10 November 2014 into the new scheme. The scheme is plainly set up to remove rights of appeal from those whose rights of appeal were, it seems, arguably preserved by Commencement Order No.3. Article 2(1)(b)of 2014/2928 refers to "is a foreign criminal" within the definition of Section 117D and 117D refers to a person who "has been convicted" in the UK of an offence compared to Commencement Order No.3 article 10(a) which refers to those who become a foreign criminal on or after 20 October 2014. This applicant was already a foreign criminal prior to 20 October 2014. He did not become a foreign criminal on 10 November or 20 October. This interpretation of the 2014/2928 Order is consistent with the explanatory note which says, in so far as relevant:

> "This Order expands the circumstances in which the relevant provisions have effect so that they have effect in relation to deportation decisions made by the Secretary of State in relation to people who are foreign criminals within the definition set out in Section 117D(2)"

Deportation decision is defined to include a decision to refuse to revoke a deportation order.

Consequently, I am satisfied it is not arguable that the applicant has a right of appeal against the decision to refuse to revoke the deportation order. He is subject to the 2002 Act as amended by the 2014 Act.

22. Ground 2 and ground 4 therefore fall.

23. As far as ground 3 is concerned, I am satisfied that it is arguable that the 2014 Act as it amends the 2002 Act may mean that if a human rights claim is raised it must, unless certified, attract a right of appeal and that paragraph 353 Immigration Rules does not operate as a gateway to an appeal right. It is arguable this applicant has a right of appeal against a decision to refuse his human rights claim. So I grant permission on that ground and that ground only.

Costs reserved

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Appendix B

"OLD (Nationality, Immigration and Asylum Act 2002 in force immediately prior to the commencement of the Immigration Act 2014)"	**"NEW (As amended by Immigration Act 2014)"**
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— (a)…., (b)…., (c)…., (d)…., (e)…., (f)……, (g)……, (h)…… (i)…., (ia)……, (ib)……, (j)……, and (k)refusal to revoke a deportation order under section 5(2) of that Act	82Right of appeal to the Tribunal ***[effective from 20th October 2014]*** (1)A person ("P") may appeal to the Tribunal where— (a)the Secretary of State has decided to refuse a protection claim made by P, (b)the Secretary of State has decided to refuse a human rights claim made by P, or (c)the Secretary of State has decided to revoke P's protection status. (2)For the purposes of this Part— (a)a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom— (i)would breach the United Kingdom's obligations under the Refugee Convention, or (ii)would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection; (b)P's protection claim is refused if the Secretary of State makes one or more of the following decisions— (i)that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention; (ii)that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection; (c)a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection; (d)"humanitarian protection" is to be construed in accordance with the immigration rules; (e)"refugee" has the same meaning as in the Refugee Convention.
92 Appeal from within United Kingdom: general (1)A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies. (2)This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f) and (j). (3)……. (3A)…... (3B)…...	92 Place from which an appeal may be brought or continued ***[effective from 20th October 2014]*** (1)This section applies to determine the place from which an appeal under section 82(1) may be brought or continued. (2)In the case of an appeal under section 82(1)(a) (protection claim appeal), the appeal must be brought from outside the United Kingdom if— (a)the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe

(3C)…... (3D)….. (4)This section also applies to an appeal against an immigration decision if the appellant— (a)has made an asylum claim, or a human rights claim, while in the United Kingdom, or (b)…..	third country), or (b)….. Otherwise, the appeal must be brought from within the United Kingdom. (3)In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was in the United Kingdom, the appeal must be brought from outside the United Kingdom if— (a)the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country) or section 94B (certification of human rights claims made by persons liable to deportation), or (b)…... Otherwise, the appeal must be brought from within the United Kingdom. (4)In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was outside the United Kingdom, the appeal must be brought from outside the United Kingdom. (5)In the case of an appeal under section 82(1)(c) (revocation of protection status)— (a)the appeal must be brought from within the United Kingdom if the decision to which the appeal relates was made while the appellant was in the United Kingdom; (b)the appeal must be brought from outside the United Kingdom if the decision to which the appeal relates was made while the appellant was outside the United Kingdom. (6)If, after an appeal under section 82(1)(a) or (b) has been brought from within the United Kingdom, the Secretary of State certifies the claim to which the appeal relates under section 94(1) or (7) or section 94B, the appeal must be continued from outside the United Kingdom. (7)Where a person brings or continues an appeal under section 82(1)(a) (refusal of protection claim) from outside the United Kingdom, for the purposes of considering whether the grounds of appeal are satisfied, the appeal is to be treated as if the person were not outside the United Kingdom. (8)Where an appellant brings an appeal from within the United Kingdom but leaves the United Kingdom before the appeal is finally determined, the appeal is to be treated as abandoned unless the claim to which the appeal relates has been certified under section 94(1) or (7) or section 94B.”
94 Appeal from within United Kingdom: unfounded human rights or asylum claim	***[with effect from 20th October 2014]*** (1)Section 94 (appeal from within the United Kingdom) is amended as follows.

(1)This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both). (1A)A person may not bring an appeal against an immigration decision of a kind specified in section 82(2)(c), (d) or (e) in reliance on section 92(2) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) above is or are clearly unfounded. (2)A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded. (3)…. (4)…. (5)…. (5A)…. (5B)…… (5C)…. (5D)…. (6)…. (6A)… (7)A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that— (a)it is proposed to remove the person to a country of which he is not a national or citizen, and (b)there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country. (8)In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as— (a)a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and (b)a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention. (9)Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal under section 82(1) while outside the United Kingdom, the appeal shall be considered as if he had not been removed from the United Kingdom.	(2)In the heading, for "asylum" substitute "protection". (3)For subsections (1) to (2) substitute— "(1)The Secretary of State may certify a protection claim or human rights claim as clearly unfounded." (4)In subsection (3)— (a)for "an asylum claimant or human rights" substitute "a"; (b)for "subsection (2)" substitute "subsection (1)". (5)In subsection (6A) for "an asylum claimant or human rights" substitute "a". (6)In subsection (7), for the words from the beginning to "certifies that" substitute "The Secretary of State may certify a protection claim or human rights claim made by a person if". (7)In subsection (8)(b), at the end insert "or with the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection". (8)Omit subsection (9). **[*insert after s94A, with effect from 28th July 2014]*** 94BAppeal from within the United Kingdom: certification of human rights claims made by persons liable to deportation (1)This section applies where a human rights claim has been made by a person ("P") who is liable to deportation under— (a)section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or (b)section 3(6) of that Act (court recommending deportation following conviction). (2)The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention). (3)The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed."
96 Earlier right of appeal	***[with effect from 20th October 2014]*** (1)Section 96 (earlier right of appeal) is

(1)An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies— (a)that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined), (b)that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and (c)that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision. (2)An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies— (a)that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision, (b)that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and (c)that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice. (4)In subsection (1) "notified" means notified in accordance with regulations under section 105. (5)Subsections (1) and (2) apply to prevent a person's right of appeal whether or not he has been outside the United Kingdom since an earlier right of appeal arose or since a requirement under section 120 was imposed. (6)In this section a reference to an appeal under section 82(1) includes a reference to an appeal under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) which is or could be brought by reference to an appeal under section 82(1). (7)A certificate under subsection (1) or (2) shall have no effect in relation to an appeal instituted before the certificate is issued.	amended as follows. (2)In subsection (1)— (a)in the opening words, for the words from the beginning to "brought" substitute "A person may not bring an appeal under section 82 against a decision ("the new decision")"; (b)in paragraph (a), omit "immigration"; (c)in paragraph (b) for "matter" substitute "ground"; (d)in paragraph (c) for "matter" substitute "ground". (3)For subsection (2) substitute— "(2)A person may not bring an appeal under section 82 if the Secretary of State or an immigration officer certifies— (a)that the person has received a notice under section 120(2), (b)that the appeal relies on a ground that should have been, but has not been, raised in a statement made under section 120(2) or (5), and (c)that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in a statement under section 120(2) or (5)."
113 Interpretation	***[with effect from 20th October 2014]*** (1)Section 113 (interpretation) is amended as

(1)In this Part, unless a contrary intention appears— "asylum claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, …. "human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights, "the Human Rights Convention" has the same meaning as "the Convention" in the Human Rights Act 1998 and "Convention rights" shall be construed in accordance with section 1 of that Act, ….. "immigration rules" means rules under section 1(4) of that Act (general immigration rules), "prescribed" means prescribed by regulations, "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, …… (2)A reference to varying leave to enter or remain in the United Kingdom does not include a reference to adding, varying or revoking a condition of leave.	follows. (2)In subsection (1)— (a)in the definition of "human rights claim"— (i)after "Kingdom" insert "or to refuse him entry into the United Kingdom"; (ii)omit "as being incompatible with his Convention rights"; (b)at the appropriate places insert— ""humanitarian protection" has the meaning given in section 82(2);" ""protection claim" has the meaning given in section 82(2)"; ""protection status" has the meaning given in section 82(2)"; (c)…. (d)in the definition of "immigration rules", for "that Act" substitute "the Immigration Act 1971". (3)Omit subsection (2).
Immigration Rules, Paragraph 353 of HC395 as amended; in force immediately prior to 20th October 2014 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	***Immigration Rules, Paragraph 353 of HC395 as amended; in force on and after 20th October 2014*** 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

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.	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.