Neutral Citation Number: [2022] EWCA Civ 30

Case No: C4/2021/0457

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Jay
[2021] EWHC 242 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 January 2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ASPLIN
and
LADY JUSTICE ELISABETH LAING

- -

Between :

The Queen (on the application of C1)	**Claimant/ Respondent**
- and -	
Secretary of State for the Home Department	**Defendant/ Appellant**

- -
- -

Robin Tam QC and William Hays (instructed by **The Treasury Solicitor**) for the **Appellant**
Amanda Weston QC and Anthony Vaughan (instructed by **Leigh Day**) for the **Respondent**

Hearing date: 25 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am on Wednesday 19 January 2022.

Lady Justice Elisabeth Laing :

Introduction

1. This is an appeal for which Jay J ('the Judge') gave leave. It concerns the meaning and legal effect of section 3B of the Immigration Act 1971 ('the 1971 Act') and of article 13(7) of the Immigration (Leave to Enter and Remain) Order 2000 ('the Order'). The Judge allowed C1's application for judicial review of a decision of the Secretary of State to detain him under immigration powers. The Judge made a declaration that article 13(7) of the Order only permits the cancellation of limited leave to remain ('LTR') held by a person who is outside the United Kingdom and does not permit the Secretary of State to cancel indefinite leave to remain ('ILR') held by a person who is outside the United Kingdom; that the purported cancellation of C1's ILR was of no effect; and that C1's detention was unlawful as a result.

2. C1 was granted ILR in 2017. He left the United Kingdom for Iran on 21 November 2018. On 26 November 2018, while C1 was outside the United Kingdom, the Secretary of State in person decided to exclude C1 from the United Kingdom on the grounds that his presence in the United Kingdom was not conducive to the public good, and cancelled his ILR under article 13(7) of the Order and under paragraph 321A(4) of the Immigration Rules (HC 395 as amended) ('the Rules'). C1 tried to return to the United Kingdom several times, eventually, and successfully, in an inflatable boat. The Secretary of State then detained C1 on the grounds that he was an illegal entrant.

3. The Secretary of State was represented by Mr Tam QC and Mr Hays. Ms Weston QC and Mr Vaughan represented C1. I thank all counsel for their written and oral submissions. All counsel appeared before the Judge.

4. The Secretary of State's grounds of appeal are that
    i. the Judge erred in law in deciding that article 13(7) did not apply to ILR; and/or
    ii. if and to the extent that the Judge held that article 13(7) was ultra vires section 3B of the 1971 Act he did err, or would have erred.

5. Ms Weston contended that the Secretary of State did not have permission to rely on an argument which the Secretary of State raised for the first time in her skeleton argument for this appeal. That argument was whether article 13(7) was authorised by section 3B(3)(a) of the 1971 Act as an incidental or supplemental provision. The Court agreed that the Secretary of State needed permission to appeal on that point. The Court indicated that it would hear the arguments on the point and decide, as part of the judgment overall, whether to give permission to appeal. I consider this further at paragraphs 98 and 99, below. In short, for the reasons given below, the point is arguable. I would give permission to appeal on this point.

Summary of decision

6. For the reasons given in more detail below, I have reached five conclusions.
    i. The legislative scheme must be considered as a whole.

ii. In this legislative scheme, references to 'leave to remain', unless specifically expressed as 'limited leave to remain' or as 'indefinite leave to remain' include both concepts.
iii. In this legislative scheme, references to 'vary' (and to cognate terms) can include 'cancel' (and cognate terms) but the two words are not interchangeable. The meaning of 'vary' (but not its implied object) depends on the context.
iv. Section 3B of the 1971 Act authorises a power, and article 13(7) of the Order confers a power, to cancel both limited and indefinite leave to remain which are in force by virtue of article 13.
v. The Judge's decision was wrong in law.

The nature of the issues on this appeal

7. The issues on this appeal depend on the correct construction of primary and delegated legislation. I will therefore start by describing the legislative history, in so far as it is relevant, and the current provisions. The nature of this issue means that it is not necessary to consider the reasoning of the Judge in any detail. Paragraph references, nonetheless, are to the Judge's judgment, unless I say otherwise.

The Immigration Act 1971 and provisions amending it

8. As originally enacted, the 1971 Act was in four parts. Part I (sections 1-11) was entitled 'Regulation of entry into and stay in United Kingdom', Part II (sections 12-23), 'Appeals', Part III (sections 24-28), 'Criminal proceedings' and Part IV (sections 29-37), 'Supplementary'. One Schedule (Schedule 2) ('Administrative provisions as to control on entry and departure') is potentially relevant.

9. The side note to section 1 is 'General Principles'. Section 1(1) still provides that those who are expressed in the 1971 Act to have a right of abode are to be free to live and to come and go into and from the United Kingdom 'without let or hindrance except such as may be required under and in accordance with' the 1971 Act. By section 1(2), those who do not have that right

> *'may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, and stay and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter and remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter and remain).'*

10. Section 1(3) provides, in general, that journeys within the common travel area ('the CTA') 'shall not be subject to control under this Act', and that a person shall not 'require leave to enter the United Kingdom' when arriving after such a journey.

11. Section 1(4) requires '[t]he rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode' to 'include provision

for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to such conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for the purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom'.

12. Section 2 made detailed provision for the circumstances in which a person 'is under this Act to have a right of abode in the United Kingdom'. It has been significantly amended since enactment. Section 2(6) defined the term 'patrial' (a person having a right of abode). Section 2(2), in its current form, provides, with two express exceptions, for the term 'British citizen' in the 1971 Act to include Commonwealth citizens who had a right of abode immediately before the commencement of the British Nationality Act 1981.

13. Section 2A was inserted by the Immigration Asylum and Nationality Act 2006 ('the 2006 Act'). Section 2A(1) enables the Secretary of State to make an order removing a person's right of abode, but only if the Secretary of State thinks it would be conducive to the public good for a person to be excluded or removed from the United Kingdom.

14. The side note to section 3 is 'General provisions for regulation and control'. Where a person was not a patrial ('British citizen' in the current version of section 3), he 'shall not enter the United Kingdom unless given leave to do so in accordance with this Act' (section 3(1)(a)). Paragraph 44(1) of Schedule 14 to the Immigration and Asylum Act 1999 ('the 1999 Act') amended section 3(1)(a) by inserting 'the provisions of, or made under' after the phrase 'in accordance with'. Such a person could be given leave to enter ('LTE') the United Kingdom (or, when already there, LTR in the United Kingdom) either for a limited or for an indefinite period (section 3(1)(b)). If limited leave to enter or remain was given, it could be given subject to conditions restricting employment, or requiring its subject to register with the police, or both (section 3(1)(c)). Section 3(1)(c) has been supplemented since its enactment, but not in any way which is relevant to this case.

15. Section 3(2) has not been amended since its enactment. Its first paragraph requires the Secretary of State, 'from time to time (and as soon as may be)' to lay before Parliament

> *'statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as for other purposes of this Act), account may be taken of citizenship or nationality'.*

Its second paragraph provides, in short, that if a statement is disapproved by a resolution of either House, the Secretary of State must, as soon as possible, make such changes or further changes in the rules 'as appear to him to be required in the

circumstances' and to lay a further statement within forty days of the resolution disapproving the earlier statement.

16. Section 3(3) provides

> *'In the case of limited leave to enter or remain in the United Kingdom, -*
>
> *(a) a person's leave may be varied, whether by restricting, enlarging, or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and*
>
> *(b) the limitation on and any conditions attached to a person's leave may be imposed (whether originally or on a variation) so that they will, if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave.'*

Section 14(1) gave a person who had limited leave to enter or remain a right of appeal to an adjudicator against 'any variation of the leave (whether as regards duration or conditions), or against any refusal to vary it'.

17. Section 3(4) still provides for a person's leave to enter or remain to lapse if he goes to a country or territory outside the CTA unless 'within the period for which he had leave he returns to the United Kingdom in circumstances in which he is not required to obtain LTE; but if he does so return, his previous leave (and any limitation on it or conditions attached to it) shall continue to apply'.

18. Section 3(5) provides for liability to deportation. As originally enacted, it provided that a person who was not a patrial was liable to deportation if he had limited LTR and broke a condition of his leave, or overstayed, if the Secretary of State deemed his deportation to be conducive to the public good, or if another person whose family he belonged to was ordered to be deported. Paragraph 1(2) of Schedule 2 to the Immigration Act 1996 inserted paragraph (aa): 'if he has obtained leave to remain by deception'. The current provision applies to those who are not British citizens, and does not apply to those who break a condition of their leave or who are overstayers. A person is also liable to deportation if he is convicted of an offence punishable by imprisonment and a court recommends his deportation (section 3(6)). As originally enacted, section 3(6) applied to people who were not patrials. In its current form it applies to people who are not British citizens.

19. Section 1 of the 1999 Act is headed 'Leave to enter'. It inserted section 3A, headed 'Further provision as to leave to enter' after section 3 of the 1971 Act. Section 3A(1) gives the Secretary of State power, by order, to make further provision 'with respect to the giving, refusing, or varying of leave to enter the United Kingdom'. Such an order may provide for leave to be given or refused before a person arrives in the United Kingdom, for formalities, for the imposition of conditions and for a person's leave not to lapse on his leaving the CTA. The Secretary of State was also given power to provide by order for a visa or entry clearance to have effect as LTE the United Kingdom. An order might provide for an entry clearance to be varied by the

Secretary of State or by an immigration officer so that it ceased to have effect (section 3A(4)). An order might make such 'incidental, supplemental, consequential and transitional provision as the Secretary of State considers appropriate'. By section 3A(11) 'This Act and any provision made under it' had effect subject to any order made under section 3A. Any order is subject to the affirmative resolution procedure (section 3A(13)).

20. Section 2 of the 1999 Act is headed 'Leave to remain'. It inserted section 3B (headed 'Further provision as to leave to remain') in the 1971 Act. Section 3B(1) gives the Secretary of State power by order 'to make further provision with respect to the giving, refusing or varying of leave to remain'. By section 3B(2), an order under section 3B(1) might 'in particular provide for' three effects described in section 3B(2). Those were 'the form or manner in which leave may be given, refused or varied', 'the imposition of conditions' and 'a person's leave to remain in the United Kingdom not to lapse on his leaving [the CTA]'. By section 3B(3)(a), such an order may contain 'such incidental, supplemental, consequential and transitional provision as the Secretary of State considers appropriate'. By section 3B(4), 'This Act and any provision made under it has effect subject to any order made under this section'. Such an order is also subject to the affirmative resolution procedure (section 3B(6)).

21. Section 3 of the 1999 Act is headed 'Continuation of leave pending decision'. It inserts section 3C in the 1971 Act. The effect of section 3C is to extend a person's limited LTE if he applies, before it expires, for a variation of that leave, and the Secretary of State has not decided the application before the leave expires. Section 62(1) of the Immigration Act 2016 ('the 2016 Act) amended section 3C by inserting subsection (3A), which confers a power on the Secretary of State to cancel leave extended under section 3C.

22. Section 3D was inserted in the 1971 Act by section 11 of the 2006 Act. Section 11 is headed 'Continuation of leave'. Section 3D was headed 'Continuation of leave following revocation'. Section 3D applied if a person's LTE or LTR '(a) is varied with the result that he has no leave to enter or remain in the United Kingdom, or (b) revoked'. Section 3D(2) extended that leave while any appeal against the variation or revocation was pending. Any such leave would lapse if the person left the United Kingdom (section 3D(3)). Section 11(6) of the 2006 Act repealed section 82(3) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') '(variation and revocation: extension of leave pending appeal)'. Section 3D, in turn, was repealed by section 64(1) of the Immigration Act 2016.

23. Section 4(1) of the 1971 Act provided that 'the power under this Act' to give or refuse LTE is to be exercised by immigration officers, and the power to give LTR in the United Kingdom or to vary any leave under section 3(3)(a) '(whether as regards duration or conditions)' is to be exercised by the Secretary of State. In general, those powers are to be exercised by notice in writing. Section 4, in general, has not been amended to any great extent since enactment.

24. Section 4(1) has, however, been amended twice. Paragraph 45 of Schedule 14 to the 1999 Act amended section 4(1) by substituting 'by or under' for 'under' in the phrase 'under this Act'. Section 62(2) of the 2016 Act amended section 4(1) by inserting, after the word 'conditions' the words 'or to cancel any leave under section 3C(3A)'.

Section 5(1) provided and provides that where a person is liable to deportation under section 3(5) or 3(6), the Secretary of State may make a deportation order, and such an order 'shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force'.

25. Section 33(1) defined 'immigration laws' as 'this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands' and 'indefinite leave' ('for the purposes of this Act, except in so far as the context otherwise requires') as 'leave under this Act…to remain in the United Kingdom which…is not limited as to duration'.

26. Paragraph 2 of Schedule 2 now gives an immigration officer power to examine any person who has arrived in the United Kingdom to see whether he is a British citizen, whether, if not, he may enter the United Kingdom with, or without leave, and if he may not, whether he has leave which is still in force, whether he should be given leave and if so for what period and subject to what conditions (if any) or whether he should be refused leave, and whether, if he has leave which is still in force, his leave should be curtailed. When the 1971 Act was originally enacted, paragraph 2 did not confer a power to cancel leave. Paragraph 2A of Schedule 2 is headed 'Examination of persons who arrive with continuing leave'. It was inserted by paragraph 57 of Schedule 14 to the 1999 Act. It applies to a person who arrives in the United Kingdom with LTE which is in force but was given to him before his arrival (paragraph 2A(1)). An immigration officer may examine him in order to see whether leave should be cancelled on various grounds (paragraphs 2A(2), (2A) and (3)). The ground specified in paragraph 2A(3) is that it would be conducive to the public good for his leave to be cancelled. An immigration officer may cancel leave when he completes that examination (paragraph 2A(8)).

Other relevant immigration legislation

27. Section 10(1) of the 1999 Act is headed 'Removal of certain persons unlawfully in the United Kingdom'. As originally enacted, section 10(1) provided that a person who was not a British citizen could be removed from the United Kingdom, in accordance with directions given by an immigration officer if, among other things, (a) he had limited leave to enter or remain and had not observed a condition of that leave, or had remained beyond the time limited by it, or (b) he had obtained leave to remain by deception. By section 10(8), removal directions given under section 10 'invalidate[d] any leave to enter or remain in the United Kingdom given' to him before the directions were given or while they were in force. In submissions after the hearing, Ms Weston referred to the explanatory note for section 10. Section 10 was enacted to provide that those who no longer had any leave to remain in the United Kingdom should be subject to administrative removal rather than to deportation. She accepted that section 10(8) applied to limited LTR and to ILR. Section 10 has been extensively amended since then, in particular by the Immigration Act 2014. Section 10(8) is now, in effect, to be found in the current version of section 76(2) of the 2002 Act (see paragraph 29, below).

28. Section 61 of the 1999 Act (which was repealed when the 2002 Act came into force) gave a person a right to appeal against a decision to vary, or to refuse to vary, any

limited LTR in the United Kingdom if the result of that decision was that the person might be required to leave the United Kingdom within 28 days of being notified of that decision.

29. Section 76 of the 2002 Act is headed 'Revocation of leave to enter or remain'. Section 76 was amended by the 2014 Act. Section 76(1) provides that the Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if he is liable to deportation but cannot be deported for legal reasons. The Secretary of State may also revoke a person's indefinite leave to enter or remain in the United Kingdom if the leave was obtained by deception (section 76(2)). When originally enacted, the power conferred by section 76(2) was narrower and could only be exercised if the person would be liable to removal but could not be removed for various reasons. 'Indefinite leave' has the meaning given by section 33(1) of the 1971 Act.

30. After it came into force, immigration appeal rights were (and still are) provided for in the 2002 Act. The nature of those rights was substantially amended by the 2014 Act. Before its amendment, the general scheme was that section 82(1) gave a person a right of appeal against an 'immigration decision' listed in section 82(2). Those decisions included 'variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain' and 'revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom' (section 82(2)(e) and (f)). Section 82(3), until its repeal by section 11 of the 2006 Act, provided that 'A variation or revocation of the kind referred to in subsection (2)(e) or (f)' should not have effect while an appeal under section 82(1) against that variation or revocation was pending. *R (MK (Tunisia)) v Secretary of State for the Home Department* [2011] EWCA (Civ) 333; [2012] 1 WLR 700 concerned the cancellation of the claimant's non-lapsing indefinite leave to enter under article 13(7). The Secretary of State accepted (judgment, paragraph 11) that section 82(2)(e) applied to the decision cancelling the claimant's leave. This Court then decided that the claimant's indefinite leave to enter was extended by section 82 pending the determination of the appeal, with the result that he could return to the United Kingdom to exercise that right of appeal.

The Immigration (Leave to Enter and Remain) Order 2000

31. The Order is expressed to have been made in the exercise of powers conferred on the Secretary of State by sections 3A(1), (2), (3), (4), (6) and (10) and 3B(2)(a) and (c) and (3)(a) of the 1971 Act. Part IV is headed 'Leave which does not lapse on travel outside [CTA]'. Article 13(1) defines 'leave' as, in short, leave to enter or to remain in the United Kingdom. The definition is not confined to limited LTR.

32. Article 13(2) provides that, subject to article 13(3), where a person has 'leave' which is in force and was given by an immigration officer or by the Secretary of State for a period of more than six months, it 'shall not lapse on his going to a country or territory outside the [CTA]'. Article 13(3) creates an exception relating to limited leave which has been varied by the Secretary of State with the result that the period of leave left is six months or less.

33. Leave which does not lapse under paragraph 13(2) remains in force either indefinitely, if it is unlimited, or until the date when it would otherwise have expired, if limited, unless the holder stays outside the United Kingdom for a continuous period of more than two years. If he does, the leave (if unlimited) lapses, and (if limited) the remaining period of leave lapses (article 13(4)). By article 13(5), for the purposes of paragraphs 2 and 2A of Schedule 2 to the 1971 Act, LTR which remains in force under article 13 shall be treated, on the holder's arrival in the United Kingdom, as LTE which has been granted to the holder before his arrival.

34. By article 13(6), and without prejudice to section 4(1) of the 1971 Act, where the holder of leave which remains in force under article 13 is outside the United Kingdom, the Secretary of State may vary that leave (including any conditions to which it is subject) in such form and manner as is permitted by the 1971 Act, or by the Order, for the giving of LTE. Where such a person is outside the United Kingdom and has leave which is in force under article 13, it may be cancelled, in the case of LTE, by an immigration officer, and, in the case of LTR, by the Secretary of State (article 13(7)). In order to decide whether to vary or cancel such leave in such a case, an immigration officer, or the Secretary of State, as the case may be, may ask for such information and documents as could be sought by an immigration officer in an examination under paragraph 2 or 2A of the 1971 Act (article 13(8)).

35. Article 13(10) provides that 'Section 3(4) of the Act (lapsing of leave upon travelling outside the [CTA]) shall have effect subject to this article'.

The Judge's judgment

36. The Judge acknowledged that this was not an easy question. The substantive provisions of article 13 apply to ILR. It would be an anomaly if limited non-lapsing leave could be cancelled but non-lapsing ILR could not. He had decided 'ultimately' that article 13(7) did not permit the cancellation of non-lapsing ILR. Had Ms Weston not made a concession, which he recorded in paragraph 23, that 'variation' can, 'at least in principle' include 'cancellation', he would have been 'minded' to reach the same conclusion in relation to limited LTR. There were three reasons why (paragraph 48).

37. First, article 13 had to be read as a whole. It was clear that the power to vary non-lapsing leave under article 13(6) could only be exercised in relation to limited LTR. If the power to cancel under article 13(7) could only be justified if cancellation is a kind of variation, it would be 'odd' if 'this term' covered ILR in one case but not in the other (paragraph 49).

38. He accepted, second, Ms Weston's submission that 'there was no indication' that in enacting section 3B, or the 1999 Act as a whole, including section 61 (see paragraph 27, above), Parliament intended to

> *'re-define the practical scope of variation expounded in section 3(3)(a) of the 1971 Act. Sections 3A-D contain a series of **further** [original emphasis] provisions which cannot be regarded as entirely self-contained. The purpose of section 3B(2)(c) was to disapply section 3(4), but a provision which confers a broad and general power in [sic] [the Secretary of*

> *State] to remove what has been bestowed would…require a clearer positive indication of Parliamentary intent'.*

39. Article 13(7) did not 'mirror' the previous regime. The Secretary of State did not have power under section 3(4) to cancel ILR. The fact that it lapsed by force of law 'does not create equivalence between the old and the new'. The purpose of the Order was to 'remove the harshness of lapsing leave, particularly for those with ILR'. The enabling legislation permitted incidental supplementary and 'tempering' adjustments 'but not the making of a general provision which effectively reinstated section 3(4) at [the Secretary of State's] option' (paragraph 51).

40. The Judge's third point was that 'an Act of Parliament must be read as a piece'. 'Varied' in section 3(3) could cover cases of ILR. But section 3(3) is expressly confined to limited leave: '…unless the context otherwise requires, a consistent approach must be taken to all cases of variation within the 1971 Act'. The approach to section 3B(1) should be the same (paragraph 52). The Judge could not accept that the concepts 'variation', 'cancellation' and 'revocation' were essentially interchangeable. If that was right, 'there would have been no need for Parliament to have conferred a power to revoke ILR in the 2002 Act' (paragraph 53).

41. The Judge would have preferred to decide the case on the basis that the concept of 'cancellation' was first introduced by paragraph 2A of Schedule 2 to the 1971 Act and 'by subsequent amendment, section 3C(3A). It was no longer a sub-species of variation, if it ever had been, and meant what it said'. Further, article 13 provides separately for 'variation' and 'cancellation'. He added that although ILR could not be varied, there was no reason in principle or logic why it could not be cancelled, which was what article 13(7) sought to do. Parliament, however, had failed, in section 3B(1) to provide a power to cancel. That was a provisional view only, and not the basis of his decision (paragraph 54).

Submissions

The Secretary of State

42. The 'simple proposition' at the heart of the Secretary of State's appeal is that section 3B permitted a fundamental change (by secondary legislation) to the position of a person who had LTR in the United Kingdom, and who then left the CTA. Before the enactment of section 3B and the promulgation of the Order, all LTR lapsed when a person left the CTA. Section 3B introduced a new entity: leave which did not lapse. Article 13(2) of the Order did that, by providing that 'such leave shall not lapse'. It was agreed that article 13(2) applied both to limited LTR (which was in the scope of article 13(2)) and to ILR. The remaining paragraphs of article 13 define the scope of the substantive change made by article 13(2). Non-lapsing leave could be brought to an end when the person returned to the United Kingdom (article 13(5)) or while the person was outside the United Kingdom (article 13(7)). Article 13(7) clearly provides for non-lapsing leave to be cancelled when a person is outside the United Kingdom. Neither article 13(5) nor (7) is expressly confined to limited LTR. Each is apt to include ILR. Article 13(7) permitted the Secretary of State to cancel C1's ILR when he was outside the United Kingdom, and the Judge was wrong to decide otherwise.

43. Mr Tam described the position before the commencement of section 3B in section 5 of his skeleton argument. Section 3(4) provides (with limited exceptions) that leave to remain (all leave) lapses if a person leaves the CTA. On his return, any person who formerly had leave would have had to apply again for LTE. A person who formerly had ILR could apply for LTE as a returning resident; but any grant of leave would be subject to the provisions of the Rules about giving LTE, including the mandatory grounds for refusal. Those include the making of a direction that the person be excluded from the United Kingdom, and circumstances in which exclusion would be conducive to the public good. Mr Tam submitted that the power to exclude derives from the prerogative and existed when the 1971 Act came into force (see *G1 (Sudan) v Secretary of State for the Home Department* [2012] EWCA (Civ) 867; [2013] QB 1008 at paragraphs 4 and 11). Before the relevant amendments, there was no provision in the 1971 Act enabling the Secretary of State to cancel ILR when its holder left the CTA; there was no need for any such provision, as his ILR lapsed automatically.

44. Mr Tam accepted that ILR could not be varied under section 3(3)(a), which only applies to limited LTR. ILR could be brought to an end if a deportation order was made (section 5(1)). The limitation on the application of section 3(3)(a) imposed by its opening words has no effect on the meaning of 'varied'. The specific power conferred by section 3(3)(a) could not apply to ILR, because ILR is a binary concept; a person either does, or does not, have it. That analysis did not entail that the verb 'vary' can only apply to limited LTR, or limit the potential application for 'vary' to limited LTR.

45. Mr Tam emphasised, as he did below, the significance of the change made by sections 3A and 3B. As well as creating non-lapsing leave, the provisions meant that LTE could be granted before a person arrived in the United Kingdom. LTE was no longer the preserve of immigration officers and could be granted by the Secretary of State. Sections 3A(11) and 3B(4) underline the importance of the changes: the existing primary legislation was to give way to the provisions of any order. It 'would be natural to expect the new schemes to retain control over the grant or termination of leave' in circumstances analogous to those set out in the Rules, including by enabling the Secretary of State to exclude a person from the United Kingdom by refusing, or ending leave on the grounds that it would be conducive to the public good.

46. Mr Tam made three broad points about the new provisions.
    i. Nothing in section 3B restricts it to limited LTR.
    ii. Section 3B(2) treats the creation of non-lapsing leave as a 'particular' provision for 'the giving, refusing or varying' of LTR referred to in section 3B(1). It was a 'variation' of leave, because it was neither a 'giving' or a 'refusal' of leave. The Order varied ILR by providing for it not to lapse if its holder left the CTA. The LTR in both provisions must include ILR as well as limited LTR. Thus, 'varying' in section 3B(1) is a verb which applies to LTE and to ILR. Section 3B permits the variation of ILR by the creation of non-lapsing ILR. Section 3B could not have any effect when leave is given, because it only has effect when a person who has leave departs from the CTA.
    iii. Parliament did not, by enabling the Secretary of State to create non-lapsing leave, intend such leave to be open-ended. Article 13(4)

provides for non-lapsing leave to lapse in some circumstances. That is akin to cancellation.

47. He also relied on a variety of purposive arguments, the general thrust of which was that it would make no sense for the Secretary of State to create a non-lapsing leave but at the same time to open up the possibility that a person whose exclusion the Secretary of State considered to be conducive to the public good could return to the United Kingdom with his ILR intact (skeleton argument, paragraphs 7.10-7.13 and section 9). Once such a person has entered the United Kingdom, it may be very difficult, or impossible, to remove him. That is the mischief at which article 13(7) is aimed. The power of cancellation is not unfettered. Like any other similar power, it must be exercised in accordance with the Rules (and with public law principles). Parliament cannot have intended that the Secretary of State should be able to cancel non-lapsing limited LTR, but not non-lapsing ILR. That would put the holders of non-lapsing ILR in a more privileged position than those who leave the CTA and are British citizens (and who are dual nationals or who, there are reasonable grounds to believe, are entitled to a second citizenship), those with a right to abode in the United Kingdom, and those who have limited LTR.

48. Mr Tam submitted that little turns on differences in language in the different legislative provisions. First, C1 did not argue that anything turned on the difference between 'varying' and 'cancelling'. 'Varying' can include varying so that the length of leave is reduced to nothing, which, in substance, is a 'cancellation' (as well as a variation). Two statutory provisions make that clear: section 82(2)(e) of the 2002 Act, as originally enacted (see paragraph 30, above) and section 3(3)(a). The reference to 'variation' in the latter includes reducing the length of the limited LTR to nothing. ILR is indefinite, not permanent. Before the changes in 2000 it could be brought to an end by the making of a deportation order, and it would lapse, by section 3(4), if its holder left the CTA.

49. Nothing turns on the use of different verbs to refer to the same underlying concept. That usage recurs in the legislation. Section 5(1) of the 1971 Act uses the word 'invalidate'; section 76 of the 2002 Act, 'revocation', section 7 of the Asylum and Immigration Appeals Act 1993, 'curtail', a word which is used in several different provisions of the Rules. The right question is to ask is what the Secretary of State has done. When the Secretary of State cancelled C1's leave, she reduced its length to nothing. That is a variation. He submitted that section 76 of the 2002 Act was enacted to fill a particular gap, which would have existed even if the Secretary of State's submissions are correct. It applies to in-country cases, not to those who are outside the United Kingdom. Without it, the Secretary of State could not bring ILR to an end if its holder is in the United Kingdom, unless she made a deportation order. In some cases, deportation is not possible for legal reasons. Nothing turns on the word 'revocation' (as opposed, for example, to 'cancellation').

50. Mr Tam argues, finally, that if, contrary to his submissions, article 13(7) is ultra vires the other rule-making powers in section 3B, it is a power which is incidental or supplemental to the creation of non-lapsing leave. *MF (Pakistan) v Secretary of State for the Home Department* [2013] EWCA (Civ) 768, which binds this Court, is a decision that article 13(5) is an incidental and supplemental provision (judgment, paragraphs 31-33). No proper distinction can be drawn between articles 13(5) and (7)

in this respect. The effect of article 13(5), which is delegated legislation, is to apply new statutory powers, which would not otherwise apply to non-lapsing leave, to non-lapsing leave, including the power to cancel that leave. That is a broad power to end non-lapsing leave by executive action. If such a power is 'incidental or supplemental' to the creation of non-lapsing leave, so is the cancellation power conferred by article 13(7).

C1

51. Ms Weston started her skeleton argument with three points which are common ground.
    i. There has always been an express statutory power to vary limited LTR. This includes a power to vary it so that no leave remains.
    ii. There has never been an express power to vary ILR.
    iii. Section 3B is a broadly worded enabling power.

52. Parliament has given holders of ILR a privileged position. The Secretary of State cannot impose conditions on it. It is not surprising that, without clear words, the Judge rejected the Secretary of State's argument that section 3B enabled her to make secondary legislation giving her power to do what the primary legislation had not previously authorised, and something which conflicted with the express statutory scheme. Parliament could have conferred such a power and did not. The statute should be read as a whole, and provisions which impinge on individual rights should be construed strictly.

53. She also made two preliminary points.
    i. The Secretary of State goes further than she did before the Judge, now submitting that section 3(3)(a) is 'subordinate' to section 3B. The Secretary of State's submission is that the Order has amended section 3(3)(a) even though neither section 3B nor the Order say so. The language of the provisions is too wide to have that effect.
    ii. The Secretary of State's purposive arguments cannot fill that gap. Those purposes, can, in any event, be met in other ways.

54. Ms Weston described C1's case below.
    i. The Secretary of State's powers to vary or cancel leave are defined by the 1971 Act.
    ii. There is no power to vary leave unless it is conferred by Parliament.
    iii. The statutory scheme clearly distinguishes between limited LTR and ILR.
    iv. Section 3 of the 1971 Act confers a power to vary limited LTR.
    v. There is no such power in relation to ILR.
    vi. Section 3B does not refer to cancellation, but rather, to variation.
    vii. If article 13(7) is to be intra vires, cancellation must be a variation.
    viii. Section 3(3) only permits the variation of limited LTR.
    ix. The section 3B power is 'administrative' and does not give the Secretary of State wider powers than those conferred by the primary legislation.

x. The principle of legality demands that a construction with potentially draconian effects should be avoided unless it is supported by express words or necessary implication.
xi. There is no sign here that Parliament intended to modify the 1971 Act by creating a power to cancel or vary ILR.
xii. A statute must be read as a whole.
xiii. Article 13(7) should therefore be read as subject to an implied qualification that it only applies to limited LTR.
xiv. If not, it is ultra vires.
xv. There was no lawful authority to cancel C1's ILR and he was unlawfully detained.

55. The Secretary of State's 'simple proposition' (see 42, above), that section 3B creates a self-contained scheme, is flawed. It is inconsistent with the principle that a statutory scheme should be construed as a whole. The powers are 'further' to those in the 1971 Act. The Secretary of State's submission is that section 3B is a 'Henry VIII clause' which, by implication, amends section 3(3)(a).

56. The more broadly such a clause is drafted, the less likely it is to authorise a particular modification of primary legislation (per Lord Neuberger in paragraph 26 of *Public Law Project v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531). A delegation of power to modify primary legislation must be an exceptional course, and any doubt about the scope of the delegation must be resolved by taking a restrictive approach (approving a statement by Lord Donaldson MR in *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133 at 140). The question is whether the provisions of the Order are in the class of action 'Parliament must have contemplated when delegating' (paragraph 26 of the *Public Law Project* case).

57. Thus in the *Public Law Project* case, a power to 'vary or omit' services from the scope of legal aid did not authorise the imposition of a residence test to enable litigants to qualify for legal aid. In that case, as a matter of ordinary language, the enabling power did not 'vary or omit' services but disqualified a group of people on the grounds of residence; the language could 'just about extend' to such a measure if the statutory context was strong enough; the natural meaning of the words was an important factor in the context of a Henry VIII clause; and the wider statutory context supported the ordinary natural meaning of the words in the enabling power.

58. The purpose of section 3B is to prevent leave which would otherwise lapse from lapsing. The words of section 3B, in their ordinary meaning, do not authorise the removal of ILR. The features of the statutory context referred to in paragraphs 51 and 52, above, point strongly against such an outcome. Most importantly, the power to vary leave in section 3(3)(b) only applies to limited LTR. 'Variation' must mean the same thing whenever it used in the legislative scheme, according to well-recognised canons of construction. 'Variation' is a fundamental concept in Part I of the 1971 Act.

59. The effect of the Secretary of State's argument is, in effect, that section 3 has been amended by implication on the purported authority of section 3B. The Secretary of State did not, in terms, rely on sections 3A(11) and 3B(4) before the Judge. This is a bootstraps argument. Section 3B(4) is a 'drafting device designed to ensure that the subordinate instrument has effect within its permitted scope.' This bold submission

can only be right if the criteria in the *Public Law Project* case are satisfied. Section 3B(1) is very broad. Even if a variation to zero is included in the word 'vary', the obvious tension with section 3(3)(a) is a reason to reject the argument that section 3B authorises an amendment to section 3(3)(a) so as to remove the limitation to limited LTR. The consequential amendments in paragraphs 43-45 of Schedule 14 to the 1999 Act apply to section 3(1)(a) and section 3(5) and not to section 3(3)(a).

60. Section 3B(2)(c) is designed to authorise secondary legislation which mitigated the harsh effects of section 3(4). This is 'entirely the opposite purpose to the one for which the Secretary of State claims it is authority. As noted by [the Judge] section 3B(2)(c) did not authorise the removal of any pre-existing right'. There is doubt about the scope of the power which should be resolved by a restrictive approach. To do so is to uphold Parliament's supremacy. If Parliament had wanted to authorise the cancellation of ILR, it would have provided for this in section 3, or have done so using clear words in section 3B(2). The Judge was right to hold (paragraph 50) that it had not done so.

61. Those submissions are supported by the principle of legality. Under the new scheme, once a person leaves the CTA his leave is 'automatically extended', if it is for more than six months. ILR only now lapses if a person is outside the CTA for more than two years. The purported cancellation of ILR before the end of the two-year period 'undeniably has the effect of removing a right which they would otherwise have continued to hold. The Secretary of State is wrong to suggest otherwise…' Individual rights cannot be overridden by general and ambiguous words. Parliament has not considered, in terms, whether the Secretary of State should have a power to cancel the ILR of a person who is outside the United Kingdom.

62. Apart from the Secretary of State's main argument, based on a 'simple proposition' (see paragraph 42, above), the rest of the Secretary of State's arguments why article 13(7) should apply to ILR are purposive and should be rejected. She relies, by analogy, on *B (Algeria) v Secretary of State for the Home Department (No 2) v Secretary of State for the Home Department* [2018] UKSC 5; [2018] AC 418. Parallels with the position of British citizens under the British Nationality Act 1981 ('the BNA') are not useful, as the BNA is a different statutory scheme. The 1971 Act applies precisely to those who are not British citizens.

63. The case based on section 3B(2)(c) is inconsistent with, and undermines, the Secretary of State's argument that section 3A and 3B fundamentally changed the position. Article 13(5) does not 'create or cancel leave to remain in itself'. It is therefore fundamentally different from article 13(7). It is inherently a supplementary provision, since it enables 'pre-existing powers' (of examination) to apply to non-lapsing leave created under article 13. 'It could not be further from a provision which substantively impacts upon leave, as Article 13(7) does'. Ms Weston therefore submits that *MF (Pakistan)* is not in point.

64. Orally, Ms Weston emphasised that the 1971 Act clearly distinguished between limited LTR and ILR. Section 3(3)(b) only gave the Secretary of State an express power to vary ILR. The 1971 Act did not give the Secretary of State a power to cancel ILR. The vice of the Secretary of State's argument was that it blurred that distinction between limited LTR and ILR and it relied on treating words with different meanings

as though they are interchangeable. She resisted the suggestion that, as a matter of language, the power conferred by section 3B(2)(c) is a power to vary leave. C1's case was that Parliament had straightforwardly permitted the Secretary of State to provide for section 3(4) not to have effect, and in that respect only, to disapply the primary legislation. A variation was a decision taken by the Secretary of State, and that was not what was authorised by section 3B(2)(c). What was authorised was a change by operation of law, which was not in the same field as a decision by the Secretary of State to vary leave.

65. *MK (Tunisia)* did not help the Secretary of State because the decision of this Court turned on a concession by the Secretary of State that cancellation was a kind of variation. Moreover, without that concession, the Secretary of State would not have had power to cancel MK's leave.

66. She ended her oral submissions with seven points. I have already described two, in paragraphs 55-61, and 64, above.
    i. *MF (Pakistan)* concerned limited LTR. Paragraph 2A of Schedule 2, not article 13(5), created the relevant power.
    ii. The position before 2000 was that a person whose ILR had lapsed would have had to present himself for examination under paragraph 2 of Schedule 2. After 2000, the effect of paragraph 2A was that a person with continuing leave would also be subject to examination. On the Secretary of State's case, there was no protection gap, and the power conferred by article 13(7) was an additional power.
    iii. Parliament has made express provision to bring ILR to an end in section 5(1) of the 1971 Act and section 76 of the 2002 Act. These powers were limited to specific cases and contained procedural protections. She reserved her position about whether the powers in paragraphs 2 and 2A of Schedule 2 enabled ILR to be curtailed or cancelled. The mischief addressed by the power to cancel limited LTR was the potential accrual of further rights by its holder. Ms Weston advanced no positive case on whether articles 13(5) and (6) were intra vires section 3B.
    iv. Section 82 of the 2002 Act does not permit the variation of ILR.
    v. If Mr Tam was given permission to rely on section 3B(3)(a), it was plain that article 13(7) did not 'fill in details' or provide 'machinery'. It did not make incidental or supplemental provision.

Discussion

67. I start with five preliminary points.

68. First, it is common ground, and I agree, that the original provisions of the 1971 Act did not permit the variation of ILR. It is important to understand why that is so, however. Section 3(3)(a), the provision which authorises the variation of leave, starts by making clear that it only applies to limited LTR. There is no express prohibition of the variation of ILR in the 1971 Act. There is, at most, an implied prohibition on the variation of ILR. There was, moreover, no need for any provision in the 1971 Act permitting the Secretary of State to vary ILR (or to cancel it; see further, paragraph

71, below) while its holder was outside the CTA, as such a person's ILR would have lapsed when he left the CTA.

69. Second, when the 1971 Act (including the amendments introduced by the 1999 Act), and the Order refer to 'leave to remain', I consider it clear that such references (unless differentiated by the adjectives 'limited' and 'indefinite', both of which are used in the 1971 Act, and are therefore available to the draftsman) can include both limited LTR and ILR. Any other approach to the interpretation of the phrase 'leave to remain', which left the characterisation of leave to remain as limited or indefinite to some process of contextual inference, would be intolerably uncertain, and cannot be attributed to the draftsman.

70. Third, it is common ground, and I agree, that no conditions can be attached to ILR, and that its length is indefinite.

71. Fourth, it is common ground, and I agree, that the meaning of the term 'vary' in this context 'can in principle', or does, include 'cancel'. The two words are not 'interchangeable', however; nor does the Secretary of State submit that they are. 'Vary' means 'change'. 'Vary' is a broad term. Its precise meaning depends on the context. In particular, 'vary' can mean different things when applied to limited LTR and to ILR.
    i. As I understand her argument, Ms Weston accepts that the word 'vary' can in principle include reducing the length of leave to nothing, which is the same as cancellation.
    ii. 'Varying' can also mean reducing the length of leave so that some period remains. That meaning could apply, as a matter of language, both to limited LTR and to ILR. Because ILR has no conditions and its length is indefinite, the only way it could be varied is by reducing its length, either to a finite period, or to nothing. Neither side contended for the former possibility.
    iii. The intrinsic characteristics of limited LTR and of ILR are different. Limited LTR, to which conditions are attached, can be varied by changing or removing those conditions. That meaning of 'vary', for obvious reasons, does not apply to ILR.

72. Fifth, while the focus of this appeal is the 1971 Act and Order, light may be shed on the issues by considering the legislative scheme as a whole. There is some support for this approach in the definition of 'immigration laws' in section 33(1) of the 1971 Act. The phrase 'immigration laws' is used in section 9(1) and (5), section 34(1)(b) and (4), and paragraphs 1(1) and (3) and 4 of Schedule 4. The definition is wide. It includes any 'law for purposes similar to this Act'. It also includes laws which were in force before the passing of the 1971 Act, and laws which have come into force and been repealed since then. This suggests that the body of immigration law should, if possible, be interpreted as a whole. I reject Ms Weston's submission that the relevant scheme only includes the 1971 Act. I consider that it can include other legislation 'for purposes similar to' the purposes of the 1971 Act, whenever passed, and whether or not it is in force now. That means that the construction of the 1971 Act and of the Order can be informed by other provisions of the statutory scheme, whether or not they are now in force.

73. I consider that that legislation includes, for example, the BNA. Section 2 of the 1971 Act originally dealt with the right of abode, and related it to citizenship; and see Schedule 1, and in particular, Appendix A, which amends the British Nationality Act 1948. The current provisions which confer a right of abode and deal with British citizenship are in the BNA; see section 2 of the 1971 Act as substituted by the BNA, and the deeming provision in the current version of section 2(2). Although I do not give this point much weight, Mr Tam is right to submit that one consequence of Ms Weston's argument is surprising. That is, a holder of non-lapsing ILR who is outside the United Kingdom is in a stronger position than some British citizens. I will say a little more, below, about the provisions in other parts of the immigration laws which are relevant to the issues in this case. If and to the extent that the Judge considered that his focus should be the 1971 Act alone (see eg, judgment, paragraph 23), he was wrong.

74. I now consider the issue in this appeal. The issue must be described accurately. It is not whether section 3B authorises a power to cancel ILR or whether article 13(7) of the Order gives the Secretary of State such a power. Neither purports to do that. The issue, rather, is narrower. It is whether section 3B authorises, and article 13(7) gives, the Secretary of State a power to cancel ILR 'which is in force by virtue of this article' (or 'non-lapsing ILR') when its holder is outside the United Kingdom. In this respect, the Judge framed the issue which he had to decide too widely (paragraph 25).

75. The 1971 Act as originally enacted does not provide for non-lapsing ILR, which is a creation of section 3B and of the Order. Article 13 clearly limits its own effects to 'leave which does not lapse under paragraph (2)', or to 'leave to remain which remains in force under this article' (article 13(4), (5), (6), (8)), or 'which is in force…' (article 13(7)). I do not consider that section 3(3)(a) can answer the questions raised by this appeal. Section 3(3)(a) does not apply to non-lapsing leave. It applies, instead to leave to remain which would, and did, lapse (in accordance with section 3(4)), if its holder left the CTA.

76. It is necessary therefore to construe section 3B and the Order, although it is also necessary to check that construction against the 1971 Act to ensure that it is consistent with the 1971 Act, to the extent that that is required by section 3B(4). I therefore largely accept Mr Tam's submission that section 3B and the Order are a self-contained scheme, designed to create a regime for the operation of a new concept, non-lapsing leave. I add that section 3B does not oblige the Secretary of State to create a scheme for non-lapsing leave, and that, if she chooses to create such a scheme, section 3B does not prescribe the shape or details of that scheme.

77. I also accept Mr Tam's submission that the creation of non-lapsing leave is a way of 'varying' leave. Any relevant leave, whether limited LTR or ILR, will have already been 'given' to its holder at a time when the Secretary of State did not know whether or not he would or might leave the CTA. It is inapt to describe the effect of the Order as a further 'giving' of leave (as the deeming provision in article 13(5) recognises). By making the Order in the form in which he did, the Secretary of State contingently varied all existing leaves from lapsing leaves to non-lapsing leaves in a way which would take effect if and only if their holders left the CTA. C1's forensic dilemma is that for his argument to get off the ground, he has to accept that, to use a neutral word, the 'creation' of non-lapsing ILR is intra vires section 3B, while resisting the idea that

it is a 'variation' of that leave. This led Ms Weston to submit that article 13(2) does not effect a variation of leave, even though section 3B(2)(c) and section 3B(1), read together, indicate that the creation of non-lapsing leave is a 'particular' example of 'giving, refusing, or varying leave to remain'.

78. The language of section 2 of the 1999 Act and of section 3B, which it inserts into the 1971 Act, is not confined to limited LTR. The headings of both refer to 'leave to remain'. The Secretary of State is given power to make 'further provision' about 'varying' leave to remain. 'Further' means provision which adds to the provisions in the 1971 Act. Again, the power is not confined to limited LTR. Indeed, C1 must accept that, because his case depends on the proposition that section 3B enabled the Order to create non-lapsing ILR in his case. Without the provisions of the Order, his ILR would automatically have lapsed when he left the CTA. On its face, and in the light of what I have said in paragraph 71, above, the language of section 3B is capable of conferring on the Secretary of State a power to vary non-lapsing ILR, which must, as a matter of language, include a power both to reduce its length to a finite period, and to reduce its length to nothing.

79. Consistently with this view of the meaning of section 3B, article 13(1) defines 'leave', for the purposes of Part IV of the Order, in terms which do not distinguish between limited leave to enter and remain or between unlimited leave to enter or remain. I consider that section 3B authorises, and article 13(7) confers on the Secretary of State, a power to cancel non-lapsing ILR. I do not consider that that interpretation is contradicted by section 3(3)(a), both because section 3(3)(a) only deals with limited LTR, and, more significantly, because neither section 3(3)(a) nor the 1971 Act in its original form is a scheme for non-lapsing leave of any type. In section 3B Parliament gave the Secretary of State the power to create such a scheme, and, importantly, left its details to him.

80. There is no textual or other reason for construing article 13(7) so as to apply only to limited LTR. Neither section 3B, nor the Order, uses the phrase 'leave to remain' so as only to refer to limited LTR; and when either differentiates between limited LTR and ILR, it does so expressly, either by using the adjectives 'limited' and 'indefinite' or by reference to the characteristics of limited LTR (ie that it has conditions attached to it). I note that the Judge recognised this to an extent, by accepting Mr Tam's submission that article 13(5) applied both to limited LTR and to ILR, and rejecting Ms Weston's submission that it did not. I reject the submission that the existence of the limited power to vary leave to remain in section 3(3)(a) entails, either, that section 3B cannot authorise the Secretary of State to create a power to cancel non-lapsing ILR, or that article 13(7) fails to do so. In particular, I reject the submission that 'vary' somehow has to be read in some contexts as only capable of having limited LTR as its object and in others as having limited LTR and ILR as its object, not least because there is no criterion in the text of either instrument for telling when 'vary' may have one object and not the other, or both. I also reject the related submission that this construction involves amending section 3(3)(a) in some way, or is inconsistent with section 3(3)(a). It does not and is not, precisely because section 3(3)(a) does not apply to non-lapsing leave.

81. This construction is supported by two of Mr Tam's purposive arguments, in particular, but I have formed that view independently of those arguments. First, it

would be odd if Parliament and the Secretary of State had created a scheme one effect of which was that a person who has ILR, has left the CTA, who is outside the United Kingdom, and whose exclusion is conducive to the public good, can now freely return to the United Kingdom, whereas under the old regime, he would have had to apply for entry clearance or leave to enter, applications which the Secretary of State or an immigration officer could have refused. Second, it would be odd, as I have already said, if the holder of non-lapsing ILR who is outside the United Kingdom and whose exclusion the Secretary of State considers to be conducive to the public good is better off than some British citizens in that position (that is, those who also have, or could acquire, another citizenship). They can, in that situation, be deprived of their British citizenship and be made the subjects of exclusion orders.

82. This construction is supported by other features of the overall statutory scheme, which I am construing as it now stands, but having regard to all the provisions which have been in that scheme and which can cast light on its current meaning. First, as Mr Tam points out, Parliament has recognised, in other primary legislation, that varying can include cancellation (see section 82(3) of the 2002 Act and section 2D of the 1971 Act, both now repealed). I would also mention section 3A(4) of the 1971 Act, and section 61 of the 1999 Act. Second, article 13(7) did not introduce the concept of cancelling ILR, and was not, when the Order was made, the only such provision.

83. From its enactment, section 5(1) of the 1971 Act has provided that a deportation order invalidates any leave to enter or remain. It is agreed that that provision applied to ILR. Section 10(8) of the 1999 Act, enacted at the same time as section 3B of the 1971 Act, in its original form enabled the Secretary of State to cancel existing leave, and applied to ILR as well as to limited LTR, as, I think, both sides accept. Moreover, paragraph 2A of Schedule 2 to the 1971 Act, also inserted by the 1999 Act, gives an immigration officer express power to cancel existing leave to enter, including indefinite leave to enter, on entry to the United Kingdom. Paragraph 21 of the judgment suggests that the Judge did not understand the difference between refusing an application for leave and cancelling existing leave. Further, it follows from the existence of the provisions I have just described that he was wrong, in paragraph 22, to suggest that the power conferred by section 3C(3A) (introduced only by the 2016 Act) to cancel any leave which was extended by section 3C, was 'novel'.

84. I do not consider that this approach is supported, however, by the decision of this Court in *MK (Tunisia) v Secretary of State for the Home Department* [2011] EWCA (Civ) 333; [2012] 1 WLR 700. The relevant point was conceded by the Secretary of State, and it is at least possible that that concession was made for tactical reasons. At all events, the point was not the subject of any argument to, or reasoning, or decision, by this Court.

85. I will now consider three potential objections to this approach.

86. The first is that the terms of article 13(6) undermine this approach. Article 13(6) is not expressly confined to limited LTR. Any such restriction is implied from the context. Article 13(6) envisages variation including, but not limited to, a change in conditions. It could also include reducing the length of leave to less than nothing. Neither party had any enthusiasm for the idea that, in the real world, ILR could be varied by

reducing its length to more than nothing; but that is, at least, a theoretically possible construction of article 13(6).

87. Whether or not article 13(6) is, by implication, confined to limited LTR, the contrast between the use of words 'vary' in article 13(6) and 'cancel' in article 13(7) cannot cast light on the meaning of 'vary' in section 3B. It is trite that a provision of delegated legislation is not a legitimate aid to the construction of primary legislation. That would be for a small tail vigorously to wag a large dog. Moreover, it is important to understand that articles 13(6) and 13(7) are in the Order for two purposes; to make it clear that non-lapsing leave may be varied in a way which does not result in its cancellation, and that it may be varied in a way which does cancel it; and in the case of each type of variation, to identify who (the Secretary of State or an immigration officer) can exercise that power.

88. Even if that view is wrong, the presence of these two provisions in the Order is not necessarily incongruous. If I were to suppose that article 13(6) only applies to limited LTR, it was open to the Secretary of State to decide, when making the Order, both to create a power to vary limited LTR and in addition, a power to vary ILR. It was a matter for the Secretary of State how to craft that power, and open to the Secretary of State to decide to confine the power to one subset of variation (ie cancellation) rather than two types (reduction in length and cancellation). It was also open to him to decide, and to specify, which of immigration officers and the Secretary of State could exercise which power.

89. Second, Ms Weston's arguments would have more force if the effect of article 13(7), as interpreted by the Secretary of State, was to undermine an existing right. But non-lapsing leave did not exist before the commencement of section 3B and the promulgation of the Order. The regime for non-lapsing leave was created by section 3B and by the Order. It is a self-contained regime in the sense that it is a scheme which operates in parallel to the primary scheme about leave to remain in the 1971 Act, and has its own rules about variation (and a subset of variation, cancellation). Provisions in the 1971 Act, inserted by the 1999 Act, recognise that the legislative scheme can be modified by delegated legislation. These include sections 3A(11), 3B(4) and the amendments to sections 3(1)(a) and to 4(1) of the 1971 Act made by paragraphs 44(1) and 45 of Schedule 14 to the 1999 Act, respectively (see paragraphs 14, and 24, above).

90. Third, Ms Weston's related argument about Henry VIII clauses does not persuade me that this approach is wrong. The premise of that argument, which I do not accept, for reasons which I have already given, is that article 13(7) is in conflict with, or amends, section 3(3)(a). For similar reasons, I am not persuaded by her legality arguments. There is nothing ambiguous or doubtful about these provisions. Their meaning is clear.

The Judge's reasoning

91. I now briefly consider the Judge's reasons for his decision.

92. I agree that article 13 must be read as whole. For the reasons given in paragraphs 86-88, above, I do not consider that it matters whether article 13(6) applies only to non-

lapsing limited LTR or both to non-lapsing limited LTR and non-lapsing ILR. The Judge's first reason for his conclusion (summarised in paragraph 37, above) seems to be that, if it is assumed that the power to cancel is an exercise of a power to vary, it is odd that one power to vary applies to limited LTR and the other does not. I do not find that persuasive.

93. The second reason seems to have two parts.
    i. When the verb 'vary' is used, its object must be limited LTR and cannot be ILR. I have already explained why I do not accept that approach (paragraph 80, above).
    ii. The Judge rejected a submission that article 13(7) 'mirrored' the previous regime. He was right to the extent that before this scheme came into effect, the Secretary of State had no power to cancel ILR at all. He was wrong, however, if he supposed that under the previous regime, the executive had no power to control the entry of people whose ILR had lapsed on leaving the CTA, which is what the Order achieves. A holder of ILR which had lapsed could apply for entry under the provisions of the Rules dealing with returning residents, but neither an immigration officer nor the Secretary of State was obliged to give him leave to enter or remain, and could refuse either on conducive grounds. The Order does not 'effectively reinstate section 3(4) at [the Secretary of State's] option'. What it does, instead, is to enable immigration officers and the Secretary of State, as the case may be, to exercise some control, under the terms of the Order, over the circumstances in which those whose leave has not lapsed can return to the United Kingdom from outside the CTA. That control is not unfettered as it is subject both to the Rules and to principles of public law.

94. The third reason seems to be an echo of the first part of the second reason. It seems to be that section 3(3)(b) of the 1971 Act requires 'vary' to be limited to limited LTR. I have explained in paragraph 80, above, why I do not accept that approach.

95. The Judge's final (potential) reason is a rejection of what he describes as Mr Tam's submission that 'variation', 'cancellation' and 'revocation' are 'effectively interchangeable'. That is not how I understand Mr Tam's submission, as I have already said. Mr Tam's point, rather, is that 'variation' means 'change' and that it can include, but is not coterminous with, 'cancellation' and 'revocation', which are, self-evidently, narrower concepts. I accept Mr Tam's explanation for the enactment of section 76 of the 2002 Act (see paragraphs 29 and 49, above).

Is the 1971 Act 'subordinate' to the Order?

96. I do not consider that it is necessary to express a view on Mr Tam's submission that section 3 of the 1971 Act is subordinate to section 3B. I need only say that I consider that section 3B(4) (to which the Judge did not refer in paragraph 10) makes it clear that the 1971 Act 'and any provision made under it' is to have effect subject to the Order, and that section 3(4) of the 1971 Act was to have effect subject to the Order (article 13(10) of the Order) (and see also the amendments to sections 3(1)(a) and 4(1) to which I refer in the last sentence of paragraph 89, above). My preliminary view is

that those provisions do not subordinate section 3 to section 3B. Their effect, rather, is that the scheme about leave to enter and remain in the 1971 Act has effect subject to the provisions of the Order, and the scheme which it creates for non-lapsing leave, and that section 3(4), which provides that leave would lapse when its holder left the CTA, has effect subject to the scheme for non-lapsing leave created by the Order.

Does article 13(7) apply to non-lapsing ILR and is it authorised by section 3B(1) and 3B(2)(c) of the 1971 Act?

97. For these reasons, I consider that article 13(7) of the Order applies to non-lapsing ILR as a matter of language, and that, if it so applies, it is authorised by section 3B(1) and 3B(2)(c) of the 1971 Act.

Is article 13(7) an incidental or supplemental provision?

98. I do not need to decide this point, in view of what I have already decided. For what it is worth, I incline to the view, if my primary conclusion is wrong, that article 13(7) is an incidental or supplemental provision which is authorised by section 3B(3)(a). Section 3B confers a wide power on the Secretary of State, in effect, to make a new scheme for non-lapsing leave to remain. By conferring that wide power on the Secretary of State, Parliament left whether to create such a scheme, and if so, by what means, to the Secretary of State. Parliament also gave the Secretary of State considerable latitude with the details and machinery of any such scheme, by giving him power to make such incidental and supplemental provision 'as the Secretary of State considers appropriate'. It is not necessary to resolve the differences between Mr Tam and Ms Weston about whether, if article 13(7) is ultra vires section 3B(1) and (2)(c) as respects non-lapsing ILR, there would be a protection gap. Parliament cannot be expected to have engaged with a detailed issue of that kind. I do consider, at least provisionally, article 13(7) is authorised by section 3B(3)(a), as the type of detailed machinery which the Secretary of State might well consider appropriate so as to ensure that the benefits of the new scheme were tempered by suitable protections, and that Parliament has authorised him to make it. It follows that this point is at least arguable, and that I would give the Secretary of State permission to appeal on this extra ground.

99. This approach is supported by the decision of this Court in *MF (Pakistan)*. That support is not undermined by the fact that the leave at issue in that case was non-lapsing limited LTR, as opposed to non-lapsing ILR, for the reasons I have given in paragraphs 69 and 80, above. One issue in *MF (Pakistan)* was whether section 3B(3)(a) authorised the Order to the extent article 13(5) gave an immigration officer power to cancel limited LTR. The appellant argued that a power with respect to 'giving refusing or varying' of LTR did not authorise its cancellation. The Secretary of State submitted that article 13(5) was an incidental or supplemental power, and was thus authorised by section 3B(3)(a). The Court of Appeal accepted that argument, holding that article 13(5) was incidental to article 13(2), because it 'had the effect of defining the ambit of the relaxation intended from the effects of section 3(4) of the Act' (paragraph 32, per Pitchford LJ, giving a judgment with which the other members of the Court agreed). Beatson LJ added a judgment, with which Mummery LJ agreed. He said that a premise of the appellant's argument was that article 13(5) took away a right which a person would otherwise have. It was clear from section 3(4), however, that there was no such right. The Court was not required to give a

conditional preservation of non-lapsing leave the 'strict and limiting construction for which' the appellant contended (judgment, paragraphs 47 and 48).

Conclusion

100. For those reasons I would allow the Secretary of State's appeal.

Lady Justice Asplin

101. I agree.

Lord Justice Underhill

102. I agree.