Neutral Citation Number: [2021] EWHC 242 (Admin)

Case No: CO/4215/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2021

Before:

MR JUSTICE JAY

- -

Between :

R (on the application of C1)	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Amanda Weston QC and Anthony Vaughan (instructed by **Leigh Day**) for the **Claimant**
Robin Tam QC and Will Hays (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 29th January 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 10th February 2021 at 10.00am.

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. There are parallel proceedings before the Special Immigration Appeals Commission ("SIAC") where an anonymity order is in place and the Claimant is known by the cipher, C1. I make a further anonymity order under CPR r.39.2 in relation to these judicial review proceedings, and it is convenient to use the same cipher.

2. C1 has a complex immigration history. However, for present purposes it may be simplified in this way. On 3rd July 2017 C1 was granted indefinite leave to remain ("ILR"). On 21st November 2018 he caught a flight to Iran. On 27th November 2018 the Defendant cancelled C1's ILR and a decision was made on the same occasion to exclude him from the United Kingdom as well as to certify his case under s.2C of the Special Immigration Appeals Commission Act 1997.

3. Later, C1 travelled overland from Ukraine to Calais and crossed the Channel on a small vessel. He arrived in the United Kingdom on 27th April 2020. The following day he was served with a notice informing him that he was an illegal entrant and with a notice to detain. He has remained in Schedule 2 detention in HMP Belmarsh since then. Two bail applications have been refused in SIAC by different judges for reasons of national security and in reflection of the risk that he might abscond.

4. Under Article 13(2) of the Immigration (Leave to Enter & Remain) Order 2000 [2000 SI No 1161] ("the 2000 Order") C1's ILR did not lapse on his leaving the common travel area on 21st November 2018 which would have been the case under s.3(4) of the Immigration Act 1971 ("the 1971 Act"). C1 contends that the Defendant's purported cancellation of his ILR under Article 13(7) of the 2000 Order was a nullity, and that he had extant leave to enter the United Kingdom in April 2020.

5. More precisely, it is contended by C1 that Article 13(7) of the 2000 Order must be construed as being limited to cases of limited leave to remain, alternatively is *ultra vires* the empowering statute, namely s.3B Immigration Act 1971; and, in particular, that a "cancellation" of ILR under the Order is not a "variation" for the purposes of the relevant provisions of the primary statute.

6. Seized of an application for permission and interim relief on 20th January 2021, I decided to grant permission, refuse the application for interim relief, and order an expedited hearing. The parties had already set out their positions quite fully in the pleadings and the liberty of the subject was at stake. I was also informed that Flaux J (as he then was) had granted permission and interim relief in similar circumstances.

7. To provide the framework for an accurate consideration of the issue, it is necessary to begin with relevant provisions of primary and subordinate legislation.

The Statutory Framework

Immigration Act 1971

8. Section 3 of the 1971 Act originally provided in material part:

> "(3) In the case of a 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.
>
> (4) A person's leave to enter or remain in the United Kingdom shall lapse on his going to a country or territory outside the common travel area (whether or not he lands there), 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 leave to enter; but, if he does so return, his previous leave (and any limitation on it or conditions attached to it) shall continue to apply.
>
> (5) A person who is not patrial shall be liable to deportation from the United Kingdom—
>
> (a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or
>
> (b) if the Secretary of State deems his deportation to be conducive to the public good; or
>
> (c) if another person to whose family he belongs is or has been ordered to be deported."

9. Thus, the power to vary leave, which was vested in the Defendant rather than an immigration officer (see s.4), could only be exercised in respect of limited leave to enter or remain. Indefinite leave to enter or remain was defined in s.33 to mean leave without limit as to its duration, and given its inherent characteristics there was and could be no power to vary it. A person with such leave who was physically in the United Kingdom could only be removed by deportation action (see s.3(5)). If he practised deception in obtaining such leave, he could also be deemed an illegal entrant.

Subsequent Legislative Developments

10. The Immigration and Asylum Act 1999 ("the 1999 Act") interpolated further sections after s.3 of the 1971 Act. Section 3A sets out further provisions as to leave to enter. Section 3B provides in material part:

> "**3B. Further provision as to leave to remain**
>
> (1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to remain in the United Kingdom.
>
> (2) An order under subsection (1) may, in particular, provide for—
>
> (a) the form or manner in which leave may be given, refused or varied;
>
> (b) the imposition of conditions;
>
> (c) ***a person's leave to remain in the United Kingdom not to lapse on his leaving the common travel area***.
>
> (3) An order under this section may—
>
> (a) contain such incidental, supplemental, consequential and transitional provision as the Secretary of State considers appropriate; and
>
> (b) make different provision for different cases." (emphasis supplied)

11. It may be noted that s.3B is not limited on its face to cases of limited leave to remain. This may be contrasted with s.3C which is explicitly so limited. Further, under s.3C(3A), introduced into this section by the Immigration Act 2016, there is power to cancel limited leave on specified bases.

12. Para 2A of Schedule 2 of the 1971 contains relevant provisions which were also inserted by the 1999 Act:

> "2A.— **Examination of persons who arrive with continuing leave**
>
> (1) This paragraph applies to a person who has arrived in the United Kingdom with leave to enter which is in force but which was given to him before his arrival.
>
> (2) He may be examined by an immigration officer for the purpose of establishing—
>
> (a) whether there has been such a change in the circumstances of his case, since that leave was given, that it should be cancelled;
>
> (b) whether that leave was obtained as a result of false information given by him or his failure to disclose material facts; or
>
> (c) whether there are medical grounds on which that leave should be cancelled.

> …
>
> (3) He may also be examined by an immigration officer for the purpose of determining whether it would be conducive to the public good for that leave to be cancelled."

13. Article 13 of the 2000 Order provides in material part:

> "LEAVE WHICH DOES NOT LAPSE ON TRAVEL OUTSIDE COMMON TRAVEL AREA
>
> 13.—(1) In this Part "leave" means—
>
> (a) leave to enter the United Kingdom (including leave to enter conferred by means of an entry clearance under article 2); and
>
> (b) leave to remain in the United Kingdom.
>
> (2) Subject to paragraph (3), where a person has leave which is in force and which was:
>
> (a) conferred by means of an entry clearance (other than a visit visa) under article 2; or
>
> (b) given by an immigration officer or the Secretary of State for a period exceeding six months,
>
> such leave shall not lapse on his going to a country or territory outside the common travel area.
>
> …
>
> (4) Leave which does not lapse under paragraph (2) shall remain in force either indefinitely (if it is unlimited) or until the date on which it would otherwise have expired (if limited), but—
>
> (a) where the holder has stayed outside the United Kingdom for a continuous period of more than two years, the leave (where the leave is unlimited) or any leave then remaining (where the leave is limited) shall thereupon lapse; and
>
> (b) any conditions to which the leave is subject shall be suspended for such time as the holder is outside the United Kingdom.
>
> (5) For the purposes of paragraphs 2 and 2A of Schedule 2 to the Act (examination by immigration officers, and medical examination), leave to remain which remains in force under this article shall be treated, upon the holder's arrival in the United Kingdom, as leave to enter which has been granted to the holder before his arrival.

> (6) Without prejudice to the provisions of section 4(1) of the Act, where the holder of leave which remains in force under this article 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 permitted by the Act or this Order for the giving of leave to enter.
>
> (7) Where a person is outside the United Kingdom and has leave which is in force by virtue of this article, that leave may be cancelled:
>
> (a) in the case of leave to enter, by an immigration officer; or
>
> (b) in the case of leave to remain, by the Secretary of State.
>
> (8) In order to determine whether or not to vary (and, if so, in what manner) or cancel leave which remains in force under this article and which is held by a person who is outside the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may seek such information, and the production of such documents or copy documents, as an immigration officer would be entitled to obtain in an examination under paragraph 2 or 2A of Schedule 2 to the Act and may also require the holder of the leave to supply an up to date medical report.
>
> (9) Failure to supply any information, documents, copy documents or medical report requested by an immigration officer or, as the case may be, the Secretary of State under this article shall be a ground, in itself, for cancellation of leave.
>
> (10) Section 3(4) of the Act (lapsing of leave upon travelling outside the common travel area) shall have effect subject to this article."

14. In connection with leave to remain under the 2000 Order, the *vires* is stated to be s.3B(2)(c) and (3)(a) of the 1971 Act. In contrast with leave to enter cases, it is a curiosity that no reference is made to the rule-enabling power in s.3B(1). However, s.3B(2) refers in terms to s.3B(1), and in my view nothing turns on this.

15. I make three observations at this stage. The first is that Article 13 distinguishes between "variation" (see Article 13(6)) and "cancellation" (see Article 13(7)). The second is that Article 13 does apply to ILR, albeit only expressly in connection with lapsing leave: see Article 13(4). The third is that Article 13(7) is not explicitly confined to limited leave.

16. I should add for completeness that s.76 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") contains a power to "revoke" ILR.

C1's Case

17. The argument on behalf of C1 ably advanced by Ms Amanda Weston QC proceeded along the following lines:

(1) The Defendant's powers to vary or cancel leave are defined by the 1971 Act, which sets forth a comprehensive and detailed scheme to control the entry and exit of non-British citizens.

(2) There is no power to vary leave unless it has been conferred by Parliament.

(3) The statutory scheme clearly differentiates between limited leave and ILR.

(4) Section 3 of the 1971 Act confers an express power to vary limited leave; there is no such power in respect of unlimited leave. The Defendant has not purported to exercise her deportation or s.76 (of the 2002 Act) powers, and under these C1 would in any case enjoy specific safeguards.

(5) The enabling power under s.3B of the 1971 Act does not in terms cover cancellation of leave: the verb used is "varying". Accordingly, if cancellation of leave were to fall within the statutory *vires*, it would have to be a variation.

(6) However, s.3(3) of the 1971 Act only permits variation in the case of limited leave.

(7) Further, the rule-making power under s.3B is "administrative", and in particular does not afford the Defendant any additional powers outside or beyond those conferred by primary legislation.

(8) The application of the principle of legality demands that a construction with potentially draconian effects should be avoided unless it is made express or is required by necessary implication: see, for example, *R (PLP) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531, at paras 20-39. Here, there is no indication that Parliament intended to modify the 1971 Act so as to provide a power to cancel or vary ILR.

(9) It is well established that an Act or other instrument must be read as a whole: see, for example, *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] UKHL 7, at para 38.

(10) Article 13(7) must therefore be read as subject to an implied qualification that it only applies to limited leave. In the alternative, Article 13(7) is *ultra vires* s.3B.

(11) The decision to cancel C1's ILR under Article 13(7) is accordingly without lawful authority. Therefore, C1's leave remains valid and he is not detainable.

The Defendant's Case

18. Mr Robin Tam QC submitted that s.3(3) of the 1971 has always permitted what is in substance cancellation of leave, viz. restricting its duration to zero. He accepted that this provision permits only the variation of limited leave to enter or remain, but pointed out that this was not because the term had a restricted meaning; it was because its application was expressly confined to cases of limited leave. He invited

me to discern no practical differences between cases of variation, cancellation and revocation.

19. Mr Tam stressed that the pre-2000 regime for returning residents did not confer on them a fixed entitlement to be granted indefinite leave to enter on return provided that certain conditions were met. An immigration officer was empowered under the Immigration Rules to grant indefinite leave but could refuse to do so on, for example, conducive grounds. Mr Tam's headline submission was that s.3B confers self-contained powers which have nothing to do with s.3(3) of the 1971 Act. Further, the post-2000 regime "mirrored" the pre-2000 regime in all material respects. In particular, Article 13(7) was a necessary counterweight to the automatic conferment of non-lapsing leave under Article 13(2) and (4): if it did not exist, those with ILR would be in a privileged position.

20. I address further aspects of Mr Tam's argument below.

Discussion

21. I remain highly doubtful whether under the 1971 Act as originally enacted limited leave to enter or remain could be "cancelled", still less by the unilateral action of the Defendant. The effect of the statutory scheme, as expanded by subordinate legislation, was that an individual who made an in-time application for an extension of leave would either be granted or refused it by the Defendant. Although a refusal of leave to remain would bring the applicant's extant leave to an end, the statute and rules did not describe this process in terms of the language of cancellation. Mr Tam submitted that a leave whose duration is varied to zero has, in effect, been cancelled, and that the term "restricting" in s.3(3)(a) is apt to accommodate that state of affairs, but that in my view is a somewhat contrived way of describing what was happening when a migrant's application for an extension of his leave was refused.

22. HC395, promulgated in May 1994, did not use the term "cancel". The term "curtail" is deployed in para 322 in the context of applications to vary leave to enter or remain. I do not read this paragraph as applying to those with settled status. The power under s.3C(3A) of the 1971 Act to cancel an extended leave during its currency (e.g. for breach of a condition) was novel. It is a power capable of unilateral exercise by the Defendant and not contingent on any prior application by the migrant.

23. However, Ms Weston did not dispute that, at least in principle, "variation" can include "cancellation". Her position was that, albeit only in the context of limited leave to remain, the term "restricting" in s.3(3)(a) does permit the reduction of its duration to zero. Ms Weston drew my attention to *SSHD v MK (Tunisia)* [2011] EWCA Civ 333, [2012] 1 WLR 700 in which the Defendant conceded that this was so, although that was in the specific context of s.82 of the 2002 Act, not the 1971 Act. In *MF (Pakistan) v SSHD* [2013] EWCA Civ 768, the Court of Appeal, at para 34, declined to decide the issue.

24. I gave Ms Weston the opportunity to withdraw her concession, but she stuck to her metaphorical guns. In the circumstances, I must decide this application for judicial review on the basis of the parties' submissions alone.

25. The issue, then, is not whether s.3B does not permit cancellation of leave to remain *tout court* but whether it confers power on the Defendant to cancel ILR. On this premise, cancellation may be envisaged as a sub-species of variation, but if the latter were to bear the meaning or applicability in s.3B(1) that it possesses in s.3(3)(a) of the 1971 Act, it would follow that there would be no power to cancel ILR by the process of varying it.

26. In my view, Ms Weston's submission involves an issue of statutory construction, and it does not really matter whether the route to her conclusion is via the common law technique of construing a broad power strictly or as subject to an implied limitation, or by applying the principle of legality. If, but only if, s.3(3)(a) of the 1971 Act governs s.3B would it follow, in my opinion, that Article 13(7) was *ultra vires* the enabling power in cases of ILR, alternatively should be construed so as to avoid that consequence.

27. I begin with an historical perspective.

28. Mr Tam reminded me of the regime relating to returning residents under the 1971 Act. On leaving the common travel area, their leave lapsed under s.3(4). Provided that they applied for leave to enter for the purposes of settlement within two years of leaving, the relevant immigration rules created an expectation that they would be granted it. However, this was by no means a given because the Defendant could make an exclusion order (that was not the case in 1971 but subsequently); alternatively the immigration officer could refuse leave to enter at the port on conducive grounds or by reason of a change in circumstances. In short, a returning resident with a lapsed ILR was dependent on the grant of leave to enter by an immigration officer.

29. Under this legal structure a provision which might have enabled the Defendant to cancel ILR would have been redundant: that was the automatic effect of s.3(4).

30. For those with limited leave to remain whose leave lapsed on leaving the common travel area, the position on return to the United Kingdom was governed by rules made under s.3(2) of the 1971 Act which reflected s.3(3)(b).

31. Moving forward in time to the coming into force of the 2000 Order, the general power under s.3B(1) is not expressly confined to cases of limited leave. I have already highlighted the express reference to limited leave in s.3C. The specific power which applies to the present case is to be found in s.3B(2)(c), read in conjunction with s.3B(1), which permits the making of subordinate legislation that disapplies the effect of s.3(4). Section 3B(3)(a) is also relevant to the extent that it permits the making of secondary legislation that is incidental or supplemental to its main objects.

32. In oral argument I expressed the provisional view that s.3(4), which terminates all forms of leave on departure from the common travel area, could be conceptualised as a mode of variation or even cancellation of leave by operation of law. On reflection, I consider that this thought-process is an unnecessary complication. Section 3(4) is a *sui generis* provision as is s.3B(2)(c). Although the latter is described as being a particular application of s.3B(1), the disapplication of s.3(4) does not have to be a variation.

33. Next, I turn to examine the provisions of Article 13 of the 2000 Order.

34. The principal substantive provisions whose *vires* is located four-square within s.3B(2)(c), are sub-Articles (2) and (4). In the case of ILR, s.3(4) is disapplied but only to the extent that a non-lapsing leave may last for two years. This period reflected the Defendant's policy as set out in various iterations of the returning residents rule.

35. Article 13(5) is an incidental or supplemental provision. It was considered by the Upper Tribunal (Immigration and Asylum Chamber) in *Fiaz (cancellation of leave to remain-fairness)* [2012] UKUT 00057 (IAC), whose decision was upheld by the Court of Appeal in *MF (Pakistan)*. In that case Mr Fiaz's limited leave was cancelled by the immigration officer at the port. The submission advanced on his behalf was that s.3B did not confer power to cancel, as opposed to vary, limited leave.

36. Article 13(5) is in the nature of a deeming provision. It treats the holder of a non-lapsing leave to remain who seeks leave to enter at a port as holding leave to enter, thereby conferring power in the immigration officer to examine him under para 2A of Schedule 2 to the 1971 Act. In the absence of Article 13(5), the immigration officer would be bereft of power, given the terms of s.4(1) of the 1971 Act. The immigration officer's powers under para 2A of Schedule 2 of the 1971 Act to cancel leave (here the non-lapsing leave) are also expressly applied to Article 13(5).

37. The submission that Article 13(5) is *ultra vires* s.3B could readily be countered by the riposte that the power to cancel is conferred by primary legislation, namely para 2A of Schedule 2, and not by the sub-Article itself. However, the reasoning of Blake J for the Upper Tribunal went somewhat wider:

> "25. Where this submission falls down is the failure to place article 13(5) in the context of the other changes made by article 13 of the Order. Before the enactment of this provision, any leave to remain lapsed on a departure from the common travel area and the migrant had to apply for a fresh leave to enter on re-entry. The Order changed that and enabled leave of more than six months to continue in force and enable a migrant to re-enter without examination of their eligibility. However, just as an entry clearance or a previous leave to enter did not give an unqualified right of admission to the United Kingdom ***and could be set aside or cancelled on the basis of misrepresentation or change of circumstance, those long established powers were now being applied to leave to remain that still existed on return to the UK***.
>
> 26. In our judgment, therefore, the Secretary of State was not creating novel powers of cancelling a limited leave that was outside the purpose of s.3B. Rather her predecessor was creating a novel class of non-lapsing leave to remain that would justify admission to the United Kingdom after a trip abroad, but needed to temper this new provision by applying the same power of cancellation to it as if it had been a form of entry clearance or leave to enter. The power to cancel such leave was needed as an ancillary provision to the new class of non-lapsing leave." [emphasis supplied]

38. With respect, I do not entirely follow the reference in the passage I have highlighted to the cancellation of a previous leave to enter: under s.3(4) there was no need for this. The Upper Tribunal held that (1) Article 13(5) was in the nature of an ancillary provision falling within s.3B(3)(a) of the 1971 Act, and (2) it had been necessary to enact a "tempering" provision to avoid the holder of non-lapsing leave to remain being in a better position than he would have been under the previous regime.

39. Para 26 of *Fiaz* was expressly approved by the Court of Appeal: see para 31 of *MF (Pakistan),* where Pitchford LJ observed that Article 13(2)(b) was introduced to alleviate the draconian effects of s.3(4). Article 13(5) was described by him as being "a necessary qualification to the relaxation of s.3(4)".

40. I pressed Ms Weston on whether Article 13(5) is limited to cases of limited leave. She did not accept that it covers cases of ILR, converted to cases of ILE by its deeming effect. In my opinion, there is no reason to confine the scope of Article 13(5) to cases of limited leave to remain, particularly in circumstances where Article 13(4) applies expressly to ILR and its *vires* is planted in s.3B(3)(a) and not s.3B(1).

41. Article 13(6) deals, perhaps out of temporal sequence, with the case of the holder of a non-lapsing leave who is outside the United Kingdom. The Defendant has power to vary his leave "in such form and manner as permitted by the Act or this Order for the giving of leave to enter". The logic of Ms Weston's case must be that Article 13(6) applies only to cases of limited leave to remain, although she made no submission about this. In my view, Article 13(6), which cannot include "cancellation" as a sub-species of "variation" because the former is expressly catered for by Article 13(7) (on the assumption that it is *intra vires*), must be confined to cases of limited leave to remain. In any event, the default position under the 1971 Act applies: ILR is incapable of being varied. If Article 13(7) were *ultra vires*, the logic of Ms Weston's case must be that Article 13(6) permits *de facto* cancellation of limited leave to remain.

42. I should add that Article 13(6) generates no *vires* problem. It does not fall within s.3B(2)(c) because that does not address the disapplication of s.3(4). It is difficult to envisage a provision that permits a non-lapsing leave to be varied, in circumstances where the old law had no application to this situation, as an incidental or supplemental provision. However, s.3B(1) expressly caters for variation.

43. Mr Tam did not submit that Article 13(7) was in the nature of an incidental or supplemental provision, and in my view he was correct. Its effects are wide-ranging and significant. The provision is wide enough as a matter of language to cover cases of ILR, and Mr Tam contended that there are sound reasons of policy justifying a broad approach. His submission was that it could not have been the intention of Parliament that an individual with ILR would have an automatic right to return to the United Kingdom, whatever the circumstances, not least because that was not the position under the pre-existing regime. Such an outcome would be anomalous because those with ILR would be in a better position than holders of limited leave to remain, and even British citizens, whose entitlements may be terminated when they are outside the United Kingdom. Such an outcome would also prevent the Defendant excluding an individual on national security grounds when he was outside the United Kingdom, which was the position before the 2000 Order came into effect.

44. In my judgment, there is only modest force in Mr Tam's submissions, and they fail to address the *vires* question head-on. Practical considerations, however sound, cannot dictate the correct legal analysis. Furthermore, he overstated the policy argument militating in favour of his broad approach. Article 13(5) applies to those with ILR, and immigration officers have power to cancel deemed ILE on conducive grounds. Even so, I do take on board Mr Tam's submission that there are practical and public interest advantages inherent in the Defendant being empowered to order the exclusion of persons when they are outside the United Kingdom rather than at the port, as she sought to do in C1's case. The issue, though, is whether this web of secondary legislation has achieved what it may have set out to do.

45. Section 3B(2)(c) is limited to the making of secondary legislation that disapplies s.3(4). It does not permit the making of such legislation that varies or cancels a non-lapsing leave. Nor is it possible, in contrast with *MF (Pakistan)*, to invoke s.3B(3)(a). It follows that for Article 13(7) to be *intra vires* s.3B(1) it would have to be demonstrated that the cancellation powers it confers are in the nature of a variation.

46. Ms Weston's concession in relation to the cancellation of limited leave under Article 13(7) is predicated on the reference to "varying" in s.3B(1) impliedly covering only limited leave to remain, because that is consistent with s.3(3)(a). Mr Tam's counter to this is that the term "varying" in s.3B(1) is not so delimited, because this provision is part of a novel, self-contained code that is not governed by s.3(3).

47. I have not found this question at all easy to resolve. I have made the point that the substantive provisions of Article 13 apply to ILR, and I would add that if limited non-lapsing leave may be cancelled it would seem anomalous that ILR cannot be.

48. Ultimately, however, I have concluded that Article 13(7) does not permit the cancellation of ILR, and had Ms Weston given me licence to do so I would be minded to reach the same conclusion in relation to limited leave to remain. My reasons, which are interrelated, are three-fold.

49. First, Article 13 of the 2000 Order must be read as a whole. I consider that it is clear that the power to vary non-lapsing leave under Article 13(6) may only be exercised in connection with limited leave. If the power to cancel under Article 13(7) can only be justified because it is in the nature of a variation, it would be odd, in my view, if this term covered ILR in one case but not the other.

50. Secondly, Ms Weston was correct in submitting that there is no indication that in enacting s.3B, or the 1999 Act as a whole (see, for example, s.61), Parliament was intending to redefine the practical scope of the concept of variation expounded in s.3(3)(a) of the 1971 Act. Sections 3A-3D contain a series of *further* provisions which cannot be regarded as entirely self-contained. The purpose of s.3B(2)(c) was to disapply s.3(4), but a provision which confers a broad and general power in the Defendant to remove what has been bestowed would, in my view, require a clearer positive indication of Parliamentary intent.

51. Nor is it correct, in my judgment, to say that Article 13(7) "mirrors" the previous regime. Under s.3(4) there was no power in the Executive to abrogate or 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 2000 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 s.3(4) at the Defendant's option.

52. Thirdly, it is a general principle, albeit not one that can rigidly be applied, that an Act of Parliament must be read as of a piece. The verb "varied" in s.3(3) could as a matter of ordinary language cover cases of ILR, but the statute has expressly confined the sphere of application of this provision to cases of limited leave. I agree with Mr Tam that it is not the meaning of "varied" that has been delimited so much as its relevant orbit. However, this is a distinction without a difference, and unless the context requires otherwise, a consistent approach should be taken to all cases of variation within the 1971 Act. For the reasons I have given, the specific context does not demand a different approach to s.3B(1).

53. Finally, I cannot accept Mr Tam's submission that the concepts of "variation", "cancellation" and "revocation" are effectively interchangeable. If that were right, there would have been no need for Parliament to have conferred a power to revoke ILR in the 2002 Act.

54. I confess that I would have preferred to decide this case on the basis that the concept of "cancellation" of leave was introduced for the first time in the 1999 Act: see para 2A of Schedule 2, and by subsequent amendment s.3C(3A). It was no longer a sub-species of "variation", if it ever had been, and meant what it said. Further, Article 13 provided separately for "variation" and "cancellation". Although ILR could not be varied, there could at least be no reason in logic or principle why it could not be cancelled, and Article 13(7) sought to provide for that. However, Parliament failed to include a power to cancel in s.3B(1). Had it done so, all of Mr Tam's practical concerns would have been assuaged at a stroke. But given the ambit of the submissions I received, it must be clear that the foregoing may only be regarded as a provisional view and does not form part of the reasons for my decision.

The Post-Hearing Point

55. After the hearing, I raised with counsel the possibility that C1 was an illegal entrant even if he were to succeed on his *ultra vires* argument. The basis of my concern was that C1 arrived in this country unconventionally and thereby avoided his liability to be examined by an immigration officer pursuant to para 2A of Schedule 2. Accordingly, on this hypothesis he may have committed an offence under s.26(1)(a) of the 1971 Act.

56. I am grateful to Mr Tam and his junior Mr Will Hays for correcting my provisional thinking about this. The short point is that C1 was under no obligation to submit to examination. I understand that the small boat on which he was travelling was intercepted and escorted to a safe landing point.

57. It follows that if Article 13(7) is *ultra vires* s.3B of the 1971 Act, alternatively must be construed as to cover limited leave alone, C's ILR continued and he did not require the grant by an immigration officer of leave to enter the United Kingdom. He is not an illegal entrant and the power to detain him under para 16(2) of Schedule 2 falls away.

Conclusion

58. I have reluctantly come to the conclusion that C1's case is well-founded and that this application for judicial review must be allowed.

59. Had the case been decided on my preferred basis, declaratory relief to the effect that Article 13(7) was *ultra vires* s.3B would have been inevitable. On the footing that Article 13(7) permits the cancellation of limited leave to enter or remain, it would be sufficient, in my view, to order declaratory relief to the effect that Article 13(7) must be so interpreted. I will leave it to the parties to agree a form of Order that reflects my conclusions.