Neutral Citation Number: [2019] EWCA Civ 92

Case No: C2/2016/4706

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE RINTOUL
JR/7953/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HOLROYDE
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

THE QUEEN on the application of HERSI GULED	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Stephen Knafler QC and Galina Ward (instructed by **Joint Council for the Welfare of Immigrants**) for the **Appellant**
Sarabjit Singh QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 23rd October 2018

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APPROVED JUDGMENT

Lord Justice Holroyde:

1. The claimant Hersi Guled ("Mr Guled") brought judicial review proceedings in the Upper Tribunal challenging a decision of the Secretary of State for the Home Department ("the SSHD") on 27th March 2015 by which he granted Mr Guled limited leave to remain ("LTR") but refused his application for indefinite leave to remain ("ILR"). On 1st December 2016 the claim for judicial review was determined by Upper Tribunal Judge Rintoul. Mr Guled now appeals against Judge Rintoul's decision.

2. In order to address the issues raised in the appeal, it is necessary to begin by summarising as briefly as possible the long history of applications made by Mr Guled, and of the decisions, or failures to make decisions, of the SSHD.

   The relevant chronology:

3. Mr Guled, a native of Somalia, is now 51 years old. The key features of his immigration history, and of the chronology of relevant events, are as follows:

   i) Mr Guled entered the UK on 29th April 1995, using an Ethiopian passport. Two days later he claimed asylum.

   ii) On 3rd April 1996 the SSHD refused the asylum application but granted Mr Guled LTR until 3rd April 1997.

   iii) Over the following years the SSHD granted a series of extensions to Mr Guled's LTR. The last of those extensions granted leave until 27th July 2002.

   iv) On 11th April 2000 Mr Guled was convicted of an offence of wounding with intent to cause grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861. On 25th May 2000 he was sentenced to 4 years' imprisonment, and a recommendation was made that he be deported. He was eligible to be released from that sentence on 20th May 2002. It should be noted that Mr Guled had no previous convictions and has not subsequently been convicted of any offence.

   v) On 8th May 2001 the SSHD issued a deportation order against Mr Guled. As it is not the only deportation order which is material to this appeal, I shall refer to it as "DO1".

   vi) On 14th May 2001 the SSHD issued directions for Mr Guled to be removed to Ethiopia. The notice served on Mr Guled informed him that he had no right of appeal against the deportation order, but that he could appeal against the proposed destination.

   vii) Mr Guled immediately appealed, on the grounds that he was not Ethiopian and could not be removed to that country.

   viii) On 29th November 2001 the SSHD revoked DO1. A file copy of the formal notice of that decision merely states -

> "In pursuance of the power conferred upon him by section 5(2) of the Immigration Act 1971, the Secretary of State hereby revokes this deportation order."

The circumstances surrounding the decision to revoke, insofar as they can be gleaned from the available evidence, will be considered later in this judgment.

ix) On 9th January 2002 the SSHD issued a second deportation order ("DO2") and directed that Mr Guled be removed to Somalia. A letter was sent to Mr Guled on 15th January 2002, informing him of those decisions, and of the further decision to detain him under the Immigration Act when he would otherwise be due to be released from his prison sentence. At the time when DO2 was issued, the circumstances in Somalia were such that removals to that country were suspended. The SSHD's intention was to enforce DO2 when circumstances in Somalia improved.

x) On 22nd January 2002 Mr Guled gave notice of appeal against the destination. His notice stated his grounds of appeal in the same terms as he had used in his earlier appeal against the removal directions issued on 14th May 2001: "I am not Ethiopian. I am from Somalia. I cannot go to Ethiopia". Mr Guled appears to have been proceeding in the mistaken belief that the SSHD again intended to remove him to Ethiopia. It does not appear that the SSHD ever sent any response to Mr Guled, or ever issued any decision on the appeal. In a letter sent to Mr Guled's solicitors on 30th April 2003, the SSHD stated that the appeal "was deemed invalid", as the deportation notice referred to removal to Somalia and not to Ethiopia.

xi) On 19th June 2002 the SSHD wrote to inform Mr Guled that it had been decided that he should remain in immigration detention. Confusingly, this letter referred to Mr Guled being liable to detention because of a deportation order made on 8th May 2001. That order, DO1, had been revoked in November 2001, and DO2 had subsequently been made.

xii) On 25th June 2002 solicitors acting for Mr Guled submitted his application (signed by Mr Guled on 14th June 2002) for ILR. I shall refer to this as the "June 2002 application for ILR". The solicitors noted that Mr Guled's current LTR would expire on 27th July 2002. The application was acknowledged on 10th July 2002, when Mr Guled was told it would be considered within 3 weeks.

xiii) Mr Guled remained in immigration detention until 28th July 2002.

xiv) Many years then passed, during which no decision was made on Mr Guled's June 2002 application for ILR. Solicitors acting for Mr Guled sent a number of letters asking for a decision on that application and emphasising the urgency of the matter, given that Mr Guled was not eligible for benefits. In October 2003 the solicitors sent urgent letters by fax indicating that Mr Guled was displaying symptoms of mental disorder and that his physical state was deteriorating as a result of living on the streets. They submitted that the delay in dealing with Mr Guled's outstanding appeal against DO2 was a factor in his poor mental health. Further chasing letters were sent in 2004. In April 2004

Mr Guled was for a time sectioned under the Mental Health Act. Mr Guled's solicitors continued to write to the SSHD at intervals. Most of their letters appear to have received no reply. For example, a letter sent by the solicitors in April 2005, referring to the exacerbation of Mr Guled's psychiatric problems and pointing out that nearly 4 years had passed without any decision being made, appears not to have received any reply; and a letter sent on 16th March 2006, asking for a decision within 14 days on Mr Guled's June 2002 application for ILR, received only a bland response saying "I am sorry that you felt cause to complain" and merely indicating that the letter had been forwarded to "the relevant business area to deal with the issues that you have raised". A letter sent on 22nd August 2006, in which the solicitors pointed out that Mr Guled had been waiting since 2002 for decisions on two outstanding matters, namely his June 2002 application for ILR and his appeal against DO2, appears not to have received a reply.

xv) During this period, letters were also sent to the SSHD by more than one MP who had become interested in Mr Guled's case. These too referred to Mr Guled's mental health. On 24th June 2004 an enquiry made by Mr Dobson MP received a reply from the Minister of State which included the following:

> "I have now had the position regarding Mr Guled's appeal against the removal directions reviewed. The appeal was not submitted to the Immigration Appellate Authority for determination, as it should have been, and this will now be rectified. In relation to Mr Guled's application for indefinite leave to remain and his claim that the removal would breach the UN Convention on Refugees and ECHR, this will be given urgent consideration. Mr Guled will be served with the relevant appeal notices and this will be his opportunity to put forward the full facts of the case and any compassionate circumstances. If the application is refused he will be served with a refusal to revoke the deportation order which he will be entitled to appeal against. Any appeal would be heard at the same time as his appeal against the removal directions."

As is apparent from the preceding sub-paragraph, the steps indicated by the Minister were not in fact taken.

xvi) Eventually on 22nd February 2007 the SSHD wrote to the solicitors saying that Mr Guled's June 2002 application for ILR was invalid because DO2 had been signed before the application was made. The letter indicated that Mr Guled did not have a right of appeal against DO2, only a right of appeal against the destination. It stated that before removal directions could be set, removals to Somalia were suspended because of the situation in that country, but that Mr Guled's removal to Somalia would take place as soon as practicable.

xvii) On 8th May 2007 Mr Guled's solicitors wrote asking the SSHD to consider revoking DO2 and granting LTR to enable Mr Guled to work and to access benefits, as the situation in Somalia remained serious and Mr Guled had been in limbo for some 5 years. It appears that a reply to this letter was drafted but never sent, and time continued to pass without any action being taken. In September 2009 the solicitors wrote to the SSHD, enclosing a document which

indicated that Mr Guled had been diagnosed with schizophrenia. They again asked that the SSHD review the decision to deport and grant LTR, and indicated (not for the first time) that judicial review proceedings would be commenced if that was not done.

xviii) That letter was acknowledged on 20th October 2009, when an indication was given that the case had been referred to a caseworker and the solicitors would hear from that caseworker "shortly". That indication was not fulfilled. On 13th April 2010 the SSHD issued a notice granting temporary admission to Mr Guled, subject to conditions as to residence and reporting, and on 16th December 2010 a letter was sent to Mr Guled asking him to provide certain information and warning him that if he did not do so within 14 days "a decision will be made on the information already available". At much the same time, however, an internal note of 3rd February 2011 disclosed by the SSHD indicates that the files had been lost and that it would be necessary to start the deportation process afresh.

xix) On 4th November 2011 the solicitors sent further medical information, confirming the diagnosis of Mr Guled's schizophrenia. On 13th April 2012 they wrote pressing for a reply. On 27th April 2012 they received a reply, apologising for the delay and asking that Mr Guled complete a questionnaire. The completed questionnaire was returned on 21st May 2012.

xx) On 6th July 2012 the SSHD gave notice of her decision to refuse to revoke DO2. The decision letter indicated that the solicitors' letter of 13th April 2012 had been treated as an application to revoke the deportation order. It had been considered in accordance with paragraphs 390 and 391 of the Immigration Rules, and the SSHD had concluded that there were no grounds for revocation. In particular, whilst it was accepted that Mr Guled required medical treatment, "an appropriate level of care" would be available to him in Somalia. The decision letter included a summary of Mr Guled's immigration history, in which reference was made to both the appeal against DO2 and the June 2002 application for ILR: the former was said to have been "deemed invalid", and nothing was said about the current status of the latter.

xxi) Mr Guled appealed against that decision to the First-tier Tribunal. An initial hearing date was adjourned at the request of the SSHD, in order to allow time for further consideration of the risk on return to Somalia and of Mr Guled's Article 8 rights.

xxii) On 15th January 2013 the SSHD indicated that she intended to proceed with the hearing of the appeal, but would make a new decision including the up to date information on Somalia and on Mr Guled's mental health.

xxiii) Notice of that fresh decision was given on 25th January 2013. It was again to the effect that there was no ground for revoking DO2. The decision letter stated that difficulty in moving Mr Guled to Somalia was not a valid reason for revoking DO2, and that the SSHD "will continue to attempt to procure a valid travel document" for him. The letter did not address the level of any risk on return.

xxiv) On 27th June 2013 the SSHD wrote to the First-tier Tribunal stating that she had decided to withdraw the decisions of 6th July 2012 and 25th January 2013, and to make a fresh decision "in due course". Two months later, on 21st August 2013, the SSHD wrote to Mr Guled's current representatives, asking for certain information. The representatives replied on 17th September 2013, providing such information as they could and asking for further time to provide medical evidence. An extension of time was granted for that purpose.

xxv) Mr Guled's representatives made further representations on 27th June 2014, asking that DO2 be revoked ("if indeed this was ever validly made") and that he be granted ILR. They asked that their representations be dealt with timeously, "given the egregious delay and mishandling of our client's case to date".

xxvi) No response was received to that letter. In August 2014, in response to a request from Mr Guled's representatives, the SSHD provided a copy of the case file. No other action appears to have been taken before the representatives sent a pre-action protocol letter on 1st December 2014 challenging the ongoing failure of the SSHD to make a decision on the issues raised. Having set out the history of the matter to date, the letter observed that there had been a delay of over 12 years in determining Mr Guled's claim against deportation. It asked the SSHD to acknowledge that there was no final deportation order against Mr Guled and that he had a valid and extant application for ILR which should be decided without further delay by the granting of ILR. In the alternative, the SSHD was asked to revoke DO2 and grant ILR.

xxvii) In response to that letter, the SSHD wrote on 12th December 2014 saying –

> "Your client's case has been reviewed by a Senior Officer. I can confirm that the deportation order signed against your client on 9 January 2002 has been revoked as it has been invalidly obtained. Your client's case is to be reconsidered."

The letter went on to state that the SSHD had decided to make a new deportation order ("DO3"). The accompanying notice of decision to deport indicated that the June 2002 application for ILR had not been considered within this decision, and gave a time limit for the provision of any further information or evidence on which Mr Guled might wish to rely in that regard.

xxviii) Further representations were made by letter dated 9th January 2015. The SSHD requested some further information, which was provided on 24th January 2015.

xxix) On 27th March 2015 the SSHD notified Mr Guled's representatives that he would be granted humanitarian protection and 5 years' LTR.

xxx) On 2nd April 2015 Mr Guled's representatives sent a pre-action protocol letter challenging that decision.

4. Having summarised that lengthy history, I must add some detail in relation to the SSHD's decision in November 2001 to revoke DO1, which had been issued some 6 months previously, and in relation to the subsequent making of DO2. It is clear, from internal documents provided by the SSHD, that the decision to revoke DO1 was taken in the light of Mr Guled's appeal against the destination to which he was to be removed. A memo dated 12th September 2001 records that it had been decided to revoke DO1 "in order to write a more detailed submission, outlining the fact that we don't normally remove to Somalia, but given the violent conviction which Mr Guled has received we would consider this case outside normal policy". The documents provided by the SSHD do not however include any submission, detailed or otherwise, to the minister who signed DO2. As to whether any such submission was indeed made to that minister, the SSHD relies in this appeal on a redacted file note of 10th December 2002, which states:

> "Following discussions between [redacted] resulted in a decision that this case be dealt with outside the normal policy. A substantive summary was submitted to Lord [redacted] and on 9 January 2002 a fresh DO was signed."

5. It is also necessary to add some detail in relation to the SSHD's treatment of Mr Guled's appeal against DO2. As I have indicated, it was treated as "invalid" because the grounds of appeal related to a removal to Ethiopia when the SSHD's stated intention was to remove him to Somalia. However, the letter from the Minister of State to Mr Dobson MP accepted in June 2004 that the appeal had not been determined as it should have been. The contents of that letter are consistent with internal memos in May and June 2004, in which the SSHD's officials acknowledged that Mr Guled's appeal should have been dealt with as a substantive appeal. The point was expressed bluntly in a memo of 8th June 2004:

> "If someone appeals in time on the right forms, it is considered a valid appeal and must go to IAA. Although the appeal is nonsensical, it is for IAA to say that. He has indicated a desire to appeal and it is not for caseworker to decide it is invalid."

6. I can now turn to the claim for judicial review (hereafter, "JR").

The claim for JR:

7. The claim was filed in the Upper Tribunal on 26th June 2015, challenging the decision of 27th March 2015 by which the SSHD granted 5 years' LTR but refused ILR. The relief sought was an order quashing that decision and a mandatory order compelling the SSHD to grant Mr Guled ILR, together with any other relief the court may order. The sole ground of the claim was that the SSHD had failed, without giving any reason, to apply her own policy to Mr Guled's case. It was contended that Mr Guled had made an in-time application to extend his exceptional leave to remain to ILR; the applicable policy provided for him to be granted ILR; the deportation order made against him was invalid, but the SSHD had failed to recognise that for over 12 years; he could not safely be removed to Somalia; and even if his criminal conviction would have been a bar to his being granted ILR in 2002, he would have become eligible for ILR long ago under the applicable policy.

8. After further delay in engaging with this case, the SSHD filed Detailed Grounds of Defence dated 18th March 2016, inviting the court to dismiss the claim. She contended that by virtue of section 5(1) of the Immigration Act 1971, a deportation order invalidates any leave to remain; there was a valid deportation order in force at the time of Mr Guled's June 2002 application for ILR; the subsequent revocation of DO2 did not revive Mr Guled's previous LTR; his application for ILR was therefore invalid, and did not remain outstanding; and in any event, Mr Guled had no automatic right to ILR, and he had been convicted of a serious crime and recommended for deportation by the judge in the criminal proceedings.

9. The claim was heard by Upper Tribunal Judge Rintoul on 15th April 2016.

The decision of Judge Rintoul:

10. In his written judgment handed down on 12th July 2016, the judge noted that Mr Guled's case was that DO1 and DO2 were of no legal effect and that his June 2002 application for ILR was therefore still outstanding as at the date of the SSHD's decision of 27th March 2015. He considered the provisions of sections 3 and 5 of the Immigration Act 1971 and the cases of *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147, *Boddington v British Transport Police* [1999] 2 AC 143, *R (Lumba) v SSHD* [2011] UKSC 12 and *R (George) v SSHD* [2014] UKSC 28 (hereafter, "*Anisminic*", "*Boddington*", "*Lumba*" and "*George*" respectively), to which I refer below. He assumed, without deciding, that if DO2 was made unlawfully, it was void ab initio [22]. He noted, at [46-47], a distinction between an application for ILR which was invalid (for example, because it did not comply with the relevant rules, or because no applicable fee was paid), and an application which was validly made but bound to fail. He noted that there was little said on file as to why the decision was taken to make DO2, and referred to the note of 10th December 2002 (see paragraph 4 above). Having reflected upon the submissions of the parties, he decided that it was not necessary to reach a conclusion as to whether DO2 was void ab initio, because his review of the documents led him to reach the following conclusion:

> "43. There is, however, nothing in the material to demonstrate that the submissions identified as necessary were not prepared prior to the deportation order being put before the Minister for his signature of the Deportation. Moreover, there is no indication that any policy in place at the time was not considered. While it would appear that the normal policy was not to deport people to Somalia, there is no indication that there were no exceptions to that policy.
>
> 44. Drawing all these strands together, I conclude that it has not been shown the respondent acted irrationally in making the deportation order. Thus, the applicant cannot succeed under this limb of the challenge, even assuming that an irrational exercise of that power to make a deportation order would render that decision invalid."

11. On the second issue, as to whether a valid application for ILR remained outstanding, the judge concluded at [57] –

> "In the circumstances, I am not satisfied that the fact that no leave could be granted was a sufficient basis on which to say that the application had been refused or was no longer pending. I am not satisfied either that there was any basis on which the Secretary of State could have found that the application was invalid. It may have been bound to fail but that is not the same thing. Accordingly, I consider that the application for ILR is outstanding, the respondent not having the power to reject it as a nullity, and not having made a decision on the substance of the application."

12. Judge Rintoul then considered the appropriate relief, and made a declaration that the June 2002 application for ILR remained outstanding and must be determined by the SSHD.

13. Mr Guled was aggrieved by this decision, in particular because the issue of whether DO2 was void ab initio remained undetermined, and sought permission to appeal to this court. His grounds of appeal contended in particular that the judge's approach had been wrong in law, because it required Mr Guled to prove a negative despite the SSHD having described DO2 as being invalidly obtained. Permission was refused by Judge Rintoul himself, but later granted by McCombe LJ.

14. Before coming to the submissions of the parties before this court, it is convenient to set out the legal framework.

The legal framework:

15. So far as is material for present purposes, the relevant provisions of sections 3, 3C and 5 of the Immigration Act 1971 ("IA 1971") are in the following terms:

> "3(5) A person who is not a British citizen is liable to deportation from the United Kingdom if –
>
> (a) the Secretary of State deems his deportation to be conducive to the public good…
>
> 3(6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.
>
> 3C (1) This section applies if –
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and

> (c) the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when -
>
> (a) the application for variation is neither decided nor withdrawn,
>
> (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),
>
> (c) an appeal under that section against that decision (brought while the appellant is in the United Kingdom) is pending (within the meaning of section 104 of that Act), or
>
> (d) an administrative review of the decision on the application for variation
>
> (i) could be sought, or
>
> (ii) is pending. …
>
> 5 (1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person 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.
>
> (2) A deportation order against a person may at any time be revoked by a further order of the Secretary of State, and shall cease to have effect if he becomes a British citizen. …"

16. A number of cases have been cited by the parties in relation to the issue of whether a deportation order which was invalidly obtained is a nullity and void ab initio. I shall refer to the following, in chronological order.

17. In *Smith v East Elloe Rural District Council* [1956] AC 736 (hereafter, "*East Elloe*") the House of Lords held that the jurisdiction of the courts had been ousted by a statutory provision which prohibited any challenge to the validity of a compulsory purchase order. In a passage on which the SSHD relies in this appeal, Lord Radcliffe, at p769, said this:

> "At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in

> paragraphs 15 and 16 must be treated as references to such orders only as had been made in bad faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

18. In *Anisminic* the plaintiffs, whose property in Egypt had been sequestrated before the Suez incident, contended that they were entitled to participate in a compensation fund, and that the Commission responsible for the administration of that fund had misconstrued a relevant statutory instrument. They applied to the High Court for declarations. The Commission contended that, under section 4 of the Foreign Compensation Act 1950, the court had no jurisdiction to entertain the proceedings. On appeal, the House of Lords held that the court did have jurisdiction to determine whether the order of the commission was a nullity, and further held that the Commission had misconstrued the statutory instrument. At p171B, Lord Reid said this:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

19. In *Boddington*, the appellant was convicted of an offence contrary to a byelaw of smoking in a railway carriage. He appealed by way of case stated, contending that the byelaw, and the administrative act by which the railway company implemented it, were invalid. On further appeal, the House of Lords held that there was nothing unlawful in the bringing into operation of the byelaw. All members of the House were agreed that there was no bar to a defendant in criminal proceedings arguing in his defence that a byelaw was invalid. For present purposes, the important aspect of

Boddington is in relation to the application of the decision in *Anisminic*. Lord Irvine of Lairg LC said at p154G that Lord Reid in *Anisminic* had made it clear that all forms of public law challenge to a decision have the same effect, to render it a nullity. At p155B he said –

> "Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all."

Lord Irvine went on to say, at p158D, that *Anisminic* established that there is a single category of errors of law, all of which rendered a decision ultra vires:

> "No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legitimacy is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever."

20. Lord Browne-Wilkinson agreed with Lord Irvine on all points except this. He said, at p164B, that he was "far from satisfied" that an ultra vires act was incapable of having any legal consequence during the period between the doing of the act and the recognition of its invalidity by a court:

> "During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity."

Lord Browne-Wilkinson added that the status of an unlawful act during the period before it was quashed is "a matter of great contention and of great difficulty", and he preferred to express no view on the point as it was not necessary to do so in order to decide the appeal.

21. Lord Slynn similarly found it unnecessary to reach a decision on that point, saying at p165A:

> "I consider that the result of allowing a collateral challenge in proceedings before courts of criminal jurisdiction can be reached without it being necessary in this case to say that if an act or byelaw is invalid it must be held to have been invalid from the outset for all purposes and that no lawful consequences can flow from it. This may be the logical result and will no doubt sometimes be the position but courts have had to grapple with the problem of reconciling the logical result

> with the reality that much may have been done on the basis that an administrative act or a byelaw was valid. The unscrambling may produce more serious difficulties than the invalidity. The European Court of Justice has dealt with the problem by ruling that its declaration of invalidity should only operate for the benefit of the parties to the actual case or of those who had begun proceedings for a declaration of invalidity before the court's judgment. In our jurisdiction the effect of invalidity may not be relied on if limitation periods have expired or if the court in its discretion refuses relief, albeit considering that the act is invalid. These situations are of course different from those where a court has pronounced subordinate legislation or an administrative act to be unlawful or where the presumption in favour of their legality has been overruled by a court of competent jurisdiction. But even in these cases I consider that the question whether the acts or byelaws are to be treated as having at no time had any effect in law is not one which has been fully explored and is not one on which it is necessary to rule in this appeal and I prefer to express no view upon it. The cases referred to in Wade and Forsyth, Administrative Law 7th ed. (1997), pp. 323-324, 342-344 lead the authors to the view that nullity is relative rather than an absolute concept (p. 343) and that "void" is meaningless in any absolute sense. Its meaning is "relative." This may all be rather imprecise but the law in this area has developed in a pragmatic way on a case by case basis."

22. The speech of Lord Steyn was principally concerned with the issue of whether the appellant had been entitled to challenge the validity of the byelaw in his defence to the criminal proceedings. He said at p171E that it was not possible, in the context of that case, to review the "confusing and contradictory dicta" on the issue of whether a statutory order such as a byelaw remained valid until quashed. He accepted however that an unlawful byelaw "is a fact and that it may in certain circumstances have legal consequences", and at p172B he quoted with approval a passage in an academic work by Dr Forsyth:

> "it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act, and it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void."

23. Lord Hoffmann agreed with the reasons given by Lord Irvine and Lord Steyn for dismissing the appeal, but did not refer to the issue of whether an unlawful act is void ab initio.

24. In *Lumba*, deportation orders were made against the claimants, and they were detained pending their removal. They challenged the lawfulness of their detention. Of relevance to the present case is the following passage in the judgment of Lord Dyson, at [66]:

> "A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission* … established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the *Wednesbury* sense, it is unlawful and a nullity. The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see *Boddington v British Transport Police* …"

25. In *SSHD v Draga* [2012] EWCA Civ 842 (hereafter, "*Draga*") the respondent had been granted ILR. A deportation order was subsequently made against him, and he was detained. The deportation order was made on the basis of a statutory instrument which was later found by this court to be ultra vires and unlawful. In High Court proceedings, the respondent was granted a declaration that he had been unlawfully detained. The SSHD appealed against that declaration, contending that the flaw in making the deportation order did not invalidate the separate decision to detain. The appeal was allowed in part. The principal judgment was given by Sullivan LJ, with whom the other judges agreed. At [60] Sullivan LJ said that in the great majority of cases, a successful appeal against a deportation order would not mean that the decision to make that order was unlawful in a way which was relevant to the decision to detain. He continued:

> "There will, however, be some cases where appeals are allowed by the Tribunal on the basis that there was a breach of a rule of public law in the process of making the decision to make the order, where the nature of the breach will be such as to render the detention unlawful. Examples of such breaches are mentioned in *Ullah*: where the Tribunal concludes that the appellant was not a person liable to deportation, or the decision to make a deportation order was made in bad faith …. It must however be acknowledged that it is difficult to identify any principled basis for distinguishing between those public law errors which will render the decision to detain unlawful and those which will not. Errors of law are many and various and, as Lord Dyson said in paragraph 66 of *Lumba*: 'The importance of *Anisminic* is that it established that there was a single

> category of errors of law, all of which rendered a decision ultra vires'."

26. In *George*, the claimant had come to the UK in 1995, at the age of 11 and had been granted ILR in 2000. He was subsequently convicted of offences and a deportation order was made against him. The SSHD decided that his deportation would be conducive to the public good, and gave notice to that effect. The claimant's challenges to the decision were unsuccessful, and the deportation order was made in 2008. The claimant then made a further application, seeking revocation of the deportation order on the ground that his deportation would involve a disproportionate interference with his private and family life. On an appeal against the SSHD's refusal to revoke the order, the Upper Tribunal held that deportation would breach the applicant's Article 8 rights, and the deportation order was consequently revoked. However, the Home Secretary refused to reinstate the applicant's ILR. The applicant sought JR of that refusal. His appeal to the Supreme Court raised the issue of the status of his previous ILR: did it revive on the revocation of the deportation order? The Supreme Court held that the effect of section 5 of IA 1971 is that, if a deportation order is revoked, the invalidation by section 5(1) of previous LTR is not retrospectively undone. Accordingly, the applicant's ILR had not revived on revocation of the deportation order. Lord Hughes, with whose judgment the other members of the court agreed, said at [29]:

> "The terms of section 5 of the 1971 Act are, as words, capable either of importing revival of leave or of not doing so. Revival is not their natural meaning, because the natural meaning is that revocation takes effect when it happens and does not undo events occurring during the lifetime of the deportation order. Revival is a significant and far reaching legal concept, and it is much more likely that it would have been specifically provided for if it had been intended."

Lord Hughes went on to say, at [31], that construction of the section against revival was consistent with the overall scheme of IA 1971 in relation to deportation. He continued:

> "The position of Mr George is not analogous to someone with a pending appeal. His status as a person liable to deportation has long since been established; his appeal challenging it failed long ago. Persons are liable to be deported, under any of the procedures which may apply, because their presence in the United Kingdom is judged not to be conducive to the public good. That is true of Mr George. If it turns out that there is a legal obstacle to actual removal, for example because of Convention rights which cannot be infringed, that does not alter the fact he is a person whose presence is not conducive to the public good. There is no legal symmetry in indefinite leave to remain co-existing with the status of someone whose presence is not conducive to the public good. It makes perfectly good sense, whilst the legal obstacle remains, for the Secretary of State to be in a position to re-visit the terms of leave to enter. Moreover, the legal obstacle is not necessarily, or even usually,

> permanent. If it arises from conditions in the individual's home country, those conditions may change or he may come into favour with the authorities when previously he was not. If it arises from his family connections in the United Kingdom, those may easily change. If someone in his position cannot at present be deported because to do so would infringe his article 8 rights, and if indefinite leave to remain were thereupon to revive, he would remain irremovable if he turned his back on his family, or they on him, as may not infrequently occur. Whilst there may be different routes by which the Secretary of State could now achieve a similar result, for example via section 76 of the 2002 Act, it is clear that this was also the coherent result of the 1971 Act, from the time that it was enacted.
>
> 32. On its correct construction, section 5(2) of the 1971 Act does not mean that if the deportation order is revoked, the invalidation by section 5(1) of leave to remain is retrospectively undone and the previous leave to remain does not revive. Mr George remains liable to deportation, even though it cannot at present be carried out. His position in the United Kingdom must be regularised, but that does not entail a recognition of indefinite leave to remain. The Secretary of State's grant to him of successive limited leaves is perfectly proper. Whether or not it may become appropriate after the passage of time to re-grant indefinite leave is a matter for her."

27. I can now turn to the submissions of counsel before this court.

The submissions on appeal:

28. The skeleton argument of the SSHD begins with a convenient summary of the parties' cases, which I substantially adopt. Mr Guled's case is that DO2 was infected with a public law error; DO2 was therefore a nullity; because it was a nullity, DO2 did not invalidate the LTR which had been granted to Mr Guled; his application for ILR was made before that LTR expired, and by virtue of section 3C of IA 1971 his LTR has continued; if the SSHD had applied her own policy she would have granted Mr Guled ILR in or around 2007 (by which time he would have been resident in this country with LTR for 10 years); her decision of 27th March 2015 was unlawful because it should have been a decision to grant ILR, and the Upper Tribunal erred in not so finding. The SSHD's case is that DO2 had the effect of invalidating Mr Guled's LTR; DO2 must be presumed to be valid, and cannot be impugned by a collateral attack such as is made in this case; in any event, DO2 was not infected by any public law error; even if it had been, that would not have had the effect that Mr Guled's LTR should be treated as never having been invalidated, because such an outcome would be inconsistent with the decision in *George*; in any event, Mr Guled had no automatic entitlement to ILR under any of the SSHD's policies; and the decision of 27th March 2015 was lawful, and the Upper Tribunal correct in not finding otherwise.

29. Those core points have been developed in the written and oral submissions of counsel, for which I am grateful. I summarise them as follows.

30. On behalf of Mr Guled, three broad issues have been argued by Mr Knafler QC and Ms Ward in their oral submissions. First, they submit that Judge Rintoul was wrong to hold that DO2 was lawfully made. At the material time, the SSHD's policy – contained in an Operational Guidance Note: Somalia – was that persons could only safely be returned to certain limited areas in Somalia (none of which were relevant to Mr Guled's case), and that Somalis who originated from other areas, and who were refused asylum, should be granted one year's exceptional LTR. That policy did not present any obstacle to the making of DO1, because DO1 was made on the basis of removal to Ethiopia; but DO2 could only lawfully be made by a minister on the basis of a submission setting out the policy relating to Somalia and the relevant circumstances of Mr Guled's individual case. Counsel point to the SSHD's letter of 12th December 2014 (see para 3(xxvii) above) and emphasise that it contains an admission that DO2 was revoked because it was invalidly obtained – and not, for example, because the papers had been lost and the circumstances surrounding the making of DO2 were unclear. The reference to review by a Senior Officer appears to relate to a recent (ie, 2014) review, of which there ought to be a record; and yet no such record has been disclosed. It must be assumed that the Senior Officer must have had a proper reason to revoke DO2. In the absence of any evidence being filed by the SSHD, and in the absence of any document containing a detailed submission, it is suggested that the most likely reason for the accepted invalidity of DO2 is that it was issued without taking material considerations into account. In those circumstances, it is submitted, there was no basis on which Judge Rintoul could properly find that it had not been shown that the SSHD acted irrationally in making DO2. In order to reach that conclusion Judge Rintoul wrongly placed reliance on the file note of 10th December 2002, which was not a document on which the SSHD had relied before the UT. That file note could not justify Judge Rintoul's decision; and in any event, it was wrong in principle for him to rely on it without warning the parties.

31. Counsel accordingly submit that DO2 was not lawfully made. That being so, their second submission is that DO2 was void ab initio, and therefore could not and did not end Mr Guled's existing LTR. It is accepted that the effect of *George* is that LTR which has been brought to an end by a validly-made deportation order is not revived if that deportation order is subsequently revoked. It is however not accepted that the same is true if the deportation order was not validly made. Counsel seek to distinguish *George* on the basis that in that case, unlike this, the relevant deportation order had been validly made, and was only revoked because of new arguments put forward in reliance on Article 8 considerations which post-dated the making of the deportation order. The decisions in *Anisminic*, *Boddington* and *Lumba* establish that a decision reached in breach of a public law consideration is a nullity and void ab initio, subject to a proviso in relation to third parties who have acted on the basis that the decision was lawful. Counsel submit that in this regard, there is no distinction in principle between a decision which is declared by a court to have been unlawfully made, and a decision which is withdrawn by the public authority concerned because it is conceded to have been invalidly obtained. In support of that submission, counsel make the point that Mr Guled could not know that DO2 had been invalidly obtained until the SSHD told him so; and he could not then apply to a court to quash DO2, because it had already been withdrawn. For that reason, these proceedings cannot be regarded as an improper collateral challenge to DO2. They distinguish a situation in which a public authority chooses to withdraw an earlier decision on pragmatic grounds, without any admission that it was unlawfully made: in this regard, they point

to *R (Tesfay) v SSHD* [2016] 1 WLR 4853, where a withdrawal of earlier decisions was held to amount to an acceptance that they were materially flawed.

32. The third broad submission is that in those circumstances, Mr Guled's existing LTR has continued throughout by virtue of section 3C of Immigration Act 1971. The decision of 27th March 2015 was made on the premise that Mr Guled was the subject of a valid deportation order and therefore had no continuing LTR. That was wrong, and the decision should therefore be quashed. Counsel invite this court to declare that Mr Guled's existing LTR was not invalidated by DO2, and that his application for ILR must be determined.

33. Mr Singh QC's oral submissions on behalf of the SSHD advanced five points. First, he submits that as a result of his conviction and sentence, Mr Guled was liable to deportation under section 3(6) of the 1971 Act. Such liability was the only precondition to the exercise by the SSHD of the power to make a deportation order under section 5(1): there is no statutory precondition that immediate removal must be practicable. Thus the minister was entitled to make DO2, and the making of it invalidated Mr Guled's LTR.

34. Secondly, he submits that the validity of DO2 cannot be challenged by Mr Guled in these proceedings. Relying on Lord Radcliffe's words in *East Elloe*, it is submitted that a deportation order is an administrative order assumed to be valid and effective unless a court declares otherwise, and that good administration requires that any challenge to the validity of such an order must be made promptly: hence the strict time limit for claiming JR. Mr Guled could have taken JR proceedings in 2002 alleging a breach of the SSHD's policy in relation to Somalia, but no JR challenge to DO2 was made then or after the provision of all relevant documents in August 2014. Even now, the challenge is to the much later decision of 27th March 2015. Mr Guled is therefore seeking to make a delayed collateral attack against DO2 long after the decision to issue that order was made, thus making it difficult to establish what was or was not before the decision-maker. That delay has caused prejudice to the SSHD: the memo of 3rd February 2011 (see paragraph 3(xviii) above) refers to the loss of the files. Mr Singh submits, in effect, that these proceedings - which challenge the March 2015 decision - are being used to make a belated and collateral attack on DO2 when on Mr Guled's own case, a direct attack could and should have been made. In those circumstances, it is submitted, DO2 should continue to be treated as invalidating Mr Guled's LTR. Mr Singh argues that the phrase "invalidly obtained" in the letter of 12th December 2014 cannot be taken as meaning that DO2 was void ab initio: that would be contrary to the decision in *George*, and it is clear that the SSHD, far from treating DO2 as never having had any effect, had continued to treat it as invalidating Mr Guled's LTR.

35. Thirdly, Mr Singh submits that there was in any event no public law error in the making of DO2. He relies on the redacted file note of 10th December 2002 referred to in paragraph 4 above. He concedes that this point was not fully argued by the SSHD before the UT, but supports Judge Rintoul's reasoning and conclusion. He submits that the surviving documents show that DO1 was revoked because a more detailed submission was required in support of the decision to remove to Somalia rather than to Ethiopia; there is a clear inference that a decision was then taken to return Mr Guled to Somalia as an exception to the normal policy then in force; and there is a clear inference that a submission supporting that decision must have been sent to the

minister before he signed DO2, though the written submission has subsequently been lost. It is not clear exactly what was meant by the phrase "invalidly obtained", but all information held in August 2014 has been disclosed (in compliance with the duty of candour) and there is nothing to show that DO2 was unsupported by a submission. It therefore cannot be assumed that the use of the phrase "invalidly obtained" means that the decision to make DO2 was affected by a public law error.

36. Fourthly, Mr Singh submits that even if there was a public law error in the making of DO2, the decision in *George* shows that it is nonetheless to be treated as effective for its ostensible purpose. He submits that Mr Guled's case is inconsistent with the reasoning of Lord Hughes in *George*: the effect of Mr Guled's argument would be that whenever a deportation order was infected by any *Anisminic*-type public law error, any previous LTR would be revived, which is such a significant consequence that one would expect it to have been specifically provided for by IA 1971. He accepts that in *George* the revoked deportation order was not said to be a nullity, but contends that its reasoning is nonetheless applicable to the present case: there is nothing in *George* to suggest that its application depends on the precise reason for the revocation of the earlier decision. Mr Guled's status was determined long ago, and – if Mr Guled's argument is correct - the legal asymmetry referred to in *George* would arise equally in this case. There is no good reason to treat Mr Guled's previous LTR as never having been invalidated, and the argument on his behalf would lead to anomalous results. Mr Singh does not challenge the *Anisminic* principle that a public law error in the making of a decision renders it a nullity, but submits that the principle does not apply in the present situation because the statute clearly intends otherwise. He submits that a straightforward application of the principle in *George* to the circumstances of this case removes the anomalies which would arise if Mr Guled's argument was correct.

37. Finally, Mr Singh points out that it is now conceded that Mr Guled is not automatically entitled to ILR: it is a matter for the discretion of the SSHD. He submits that the relevant policy at the time provided, even after a period of years of LTR, for a refusal of ILR where a serious crime had been committed. It is therefore likely that at the time when Mr Guled applied for ILR, it would have been refused. Accordingly, it is submitted, Mr Guled is wrong to claim that he was entitled to ILR or would have been granted ILR in or about 2007. It was therefore not wrong in law for Judge Rintoul to refuse to grant the relief which Mr Guled had sought. Mr Singh therefore invites this court to dismiss the appeal. He acknowledges that the 2002 application for ILR remains to be determined.

Discussion:

38. I consider first the challenge made to Judge Rintoul's decision that it had not been shown that the SSHD acted irrationally in making DO2. In my view, and with all respect to the judge, that decision was wrong. My reasons are as follows.

39. I do not accept Mr Singh's argument that these proceedings represent an improper collateral attack upon the making of DO2, and that it was incumbent upon Mr Guled – if he wished to challenge DO2 – to do so much earlier than he did. The simple answer to that argument, in my view, is that which was given by Mr Knafler: namely, that Mr Guled had no substantial basis for challenging the lawfulness of DO2 until the SSHD himself revoked it as having been invalidly obtained. I would add that the

argument is in any event unattractive, given that Mr Guled's appeal against DO2 has never received any formal adjudication and that many of his representatives' letters received no, or no substantive, response. Moreover, the validity of DO2 is an issue which properly arises in the challenge to the decision of 27th March 2015, and *Boddington* shows that the lawfulness of an act or decision of a public authority may be challenged by routes other than JR.

40. By reason of his conviction and sentence, and the recommendation made by the judge in the Crown Court, Mr Guled was undoubtedly liable to deportation: see IA 1971 section 3(6). The SSHD was therefore entitled pursuant to section 5(1) to make a decision to deport, and did so by making DO1. But in DO1, an error was made as to the appropriate country to which Mr Guled should be deported, and the order was accordingly revoked. At that stage, there was a clear intention to prepare a submission with a view to making a decision to deport Mr Guled to Somalia as an exception to the general policy. It seems to me that the redacted file note of 10th December 2002 (see paragraph 5 above) could fairly be regarded as evidence that a "substantive summary" was in fact submitted to the minister, and - notwithstanding the difference in terminology - I would be prepared to accept that the "substantive summary" was (or fulfilled the purpose of) the "submission". I would also accept that the judge was entitled to attach weight to that file note in his judgment, even though it had not been the subject of specific submissions.

41. However, the file note provides no information at all about the contents of the submission. As Mr Knafler pointed out, there is a complete absence of any documentation which can assist the court as to what information was relied upon by the minister in making DO2. Although it was noted in 2011 that the files had been lost (see paragraph 3(xviii) above), that is not a complete explanation, because the documents placed before the court in this appeal show that it was clearly possible at some later stage to recreate the files at least in part. As Mr Knafler made clear, he does not suggest that there has been any breach of the SSHD's duty of candour; but the fact is, there is neither a copy of the submission, nor any other document recording or summarising its contents, nor any explanation of what has happened to it.

42. That being so, the letter of 12th December 2014 (see paragraph 3(xxvii) above) is in my view very important. First, it is a formal letter, written to Mr Guled's representatives in response to a pre-action protocol letter: it is not, for example, an internal note in which the author may have expressed himself or herself less formally. Secondly, it is signed by a named individual, of whom enquiries could be made for the purposes of this appeal. Thirdly, it appears to relate to a recent review by the Senior Official, from which it can be inferred that enquiries could also be made of that official: he or she would not have to be asked to try to recall matters from many years earlier. Fourthly, the extraordinary chronology of Mr Guled's immigration history is such that the Senior Official could fairly be expected to have a recollection of his or her review of the case, even if (inexplicably) no documentary record of that review was available. I accept that the phrase "invalidly obtained" is imprecise, and it is certainly necessary to be cautious about treating an imprecise phrase as a clear admission that a decision was made *ultra vires*. Nonetheless, I am unable to accept that the judge was entitled to conclude that no public law error had been shown in the making of DO2. On its face, the letter of 12th December 2014 is an admission of public law error, probably (as Mr Knafler suggests) as a result of a failure to take

relevant matters into account. Why else would the phrase "invalidly obtained" have been used? The author of the letter could, if appropriate, have said that the case was being reviewed because documents had been lost and it was no longer possible to be sure exactly what had happened; and if there was some other explanation for the decision to revoke DO2, it is very surprising that none has been put before either the judge or this court.

43. In those circumstances, I conclude that the only information as to the contents of the submission made to the minister is contained in the letter of 12th December 2014, and that the inference to be drawn from that letter is that the submission did not provide a sufficient basis for a lawful decision to deport. I accept Mr Knafler's submission that the SSHD cannot rely on a presumption of validity in respect of a deportation order which was revoked for the express reason that it was invalidly obtained. The judge was accordingly wrong to find that the SSHD had not been shown to have acted unlawfully in making DO2.

44. I therefore turn to the issue of whether the public law error in the making of DO2 rendered that order a nullity, void ab initio, which accordingly did not invalidate Mr Guled's existing LTR. Lord Dyson's words in *Lumba* expressed the *Anisminic* principle in broad terms, and relied upon *Boddington*. However, as I have indicated in paragraphs 20-23 above, Lord Irvine's broad statement of the *Anisminic* principle did not receive explicit support from the other Law Lords in *Boddington*. Lords Browne-Wilkinson, Slynn and Steyn made observations which recognised that even an unlawful decision or act may in some circumstances have legal consequences. Other judges, and academic writers, have similarly proposed that nullity in this context should be treated as relative rather than absolute. That seems to me to be the correct approach, not least because I am uncomfortable with the use of the word "nullity" once it is recognised that the unlawful act may have legal consequences, at least for third parties, during the period before it is declared unlawful. Mr Knafler, whilst of course relying on the words of Lord Dyson in *Lumba* and on *Draga* (see paragraphs 24 and 25 above), accepted that the application of the *Anisminic* principle is subject to a proviso where innocent third parties have acted in reliance on the validity of the relevant act or decision before it is declared to be unlawful. I would therefore wish to focus upon the very unusual circumstances of the present case, and not seek to anticipate every situation in which the consequences of an unlawful deportation order may have to be considered.

45. In deciding whether DO2 was void ab initio, with the consequence that it did not have the effect of invalidating Mr Guled's LTR, the following considerations are in my view important. First, in the circumstances of this case, the issue only affects the parties: no innocent third party has acted to his detriment in reliance on the apparent lawfulness of DO2. Secondly, I see no reason in principle why an admission by the SSHD that DO2 was unlawfully made should not have the same consequences as a finding by a court that it was unlawfully made. Thirdly, Mr Singh has not sought to challenge the *Anisminic* principle itself, but has argued that it does not apply in this case. In those circumstances, I accept Mr Knafler's submissions on this issue, and conclude that application of the *Anisminic* principle to the circumstances of this case has the consequence that DO2 was void ab initio and therefore did not invalidate Mr Guled's existing LTR.

46. It is then necessary to consider Mr Singh's submission that such a conclusion would be inconsistent with the decision in *George*. That submission was cogently made, but in the end I am not persuaded by it. Mr Knafler is in my view correct to emphasise that the deportation order in *George* was not made in breach of public law: it was properly made, but a later refusal to revoke it was quashed on the basis of new legal arguments and on grounds relating to Article 8 considerations which were then prevailing. That, I assume, is why *Anisminic* and related cases were neither cited to the Supreme Court nor referred to in the judgment. The present case, in contrast, involves a deportation order which was made in breach of public law. I accept Mr Singh's point that the judgment in *George* does not contain anything which specifically states that the precise reason for revocation may be important, but it seems to me that the circumstances of *George* did not make it necessary to address that issue. I respectfully agree with all that was said in *George* in the context of a deportation order which had lawfully been made; but the feature that the decision to deport was here reached in breach of public law is to my mind a decisive one. Mr Guled was at all material times a person who was liable to deportation; but the legal asymmetry of which Lord Hughes spoke does not arise if there has been no lawful decision to deport. If Mr Singh's argument were correct, the effect would be that Mr Guled lost the benefit of his existing LTR as a result of a decision to deport which was made in breach of public law, and which therefore should not have been made. I am not persuaded by Mr Singh that the decision in *George* can be applied to different circumstances in such a way as to achieve that result.

47. For those reasons, I conclude that Mr Guled's LTR has continued throughout. It is accepted on his behalf that he does not have an automatic entitlement to ILR, and his June 2002 application must now be determined. The declaration to that effect made by Judge Rintoul should continue.

48. I would therefore allow this appeal to the extent of declaring that the making of DO2 did not invalidate Mr Guled's existing LTR.

Lady Justice Nicola Davies:

49. I agree.

Lord Justice David Richards:

50. I also agree.