Upper Tribunal
(Immigration and Asylum Chamber)

Neshanthan (cancellation or revocation of ILR) [2017] UKUT 00077 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 1 December 2016	
	....

Before

UPPER TRIBUNAL JUDGE GILL

Between

KULARATNA NESHANTHAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

IMMIGRATION OFFICER, HEATHROW AIRPORT
(TERMINAL 3)

Respondent

Representation:

For the Appellant:	Mr. S Ahmed, of Counsel, instructed by Amirthan & Suresh Solicitors
For the Respondent:	Mr. J Fletcher, of Counsel, instructed by the Government Legal Department.

i) *Article 13 of the Immigration (Leave to enter and Remain) Order 2000/1161 (the "2000 Order") applies to holders of indefinite leave to remain ("ILR") who travel to a country or territory outside the common travel area so that their ILR does not lapse but continues if Article 13(2)-(4) are satisfied.*

ii) *If the leave of such an individual continues pursuant to Article 13(2)-(4) of the 2000 Order, an immigration officer has power to cancel their ILR upon their arrival in the United Kingdom.*

iii) *The grounds upon which such leave may be cancelled are set out at para 321A of the Immigration Rules.*

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iv) *Section 76 of the Nationality, Immigration and Asylum Act 2002 Act is an alternative and additional power, available to the Secretary of State, to revoke indefinite leave to enter or ILR in the circumstances described at s.76(1)-(3) of the 2002 Act.*

DECISION AND REASONS

Introduction:

1. The appellant is a national of Sri Lanka born on 5 September 1984. Upper Tribunal Judge ("UTJ") Blum granted him permission to appeal to the Upper Tribunal, limited to the first issue (as described below), against the decision of Judge of the First-tier Tribunal Afako (hereafter the "judge" unless otherwise stated) promulgated on 1 December 2015 dismissing his appeal against the respondent's decision of 24 September 2014 cancelling his indefinite leave to remain ("ILR") that had been granted to him by the Secretary of State on 21 February 2014.

2. Following the appellant's arrival in the United Kingdom on 23 September 2014, he was required to submit to further examination and was interviewed. The respondent decided to cancel the appellant's ILR because he concluded that, in his previous application for leave to remain as a student made on 25 May 2012, the appellant had submitted an English language test certificate that the respondent considered had been fraudulently obtained. The decision was made under para 321A of the Statement of Changes in the Immigration Rules HC 395 (as amended) (hereafter referred to individually as a "Rule" and collectively the "Rules"). It was not in dispute before me that, if the appellant had fraudulently obtained the English language test certificate which he used in his previous application of 25 May 2012, this amounted to a false representation under para 321A(2) in relation to his application for ILR of 26 October 2013.

3. This case raises two issues. The first issue is whether the judge materially erred in law in deciding that an immigration officer has power to cancel a person's ILR when the individual arrives at a port of entry after an absence abroad. The judge decided that the respondent had power to cancel the appellant's ILR following his arrival in the United Kingdom on 23 September 2014 after a short absence abroad. The appellant contends that only the Secretary of State has power to cancel ILR.

4. If the first issue is decided in the appellant's favour, this would be determinative of the appeal before the Upper Tribunal. The judge's decision would be set aside and the appellant's appeal against the respondent's decision allowed on the ground that the decision was not in accordance with the law, a ground that was available to him at the time he lodged his appeal (on 2 October 2014) and which he did raise in his grounds of appeal. There would be no need to consider the second issue.

5. The second issue is whether permission to appeal to the Upper Tribunal should be granted on the appellant's renewed application, made at the hearing before me, for permission to challenge the judge's finding that the appellant had fraudulently obtained the English language test certificate

which he had used in the previous application of 25 May 2012. If the renewed application for permission is granted, then whether the judge materially erred in law in reaching his finding that the appellant had fraudulently obtained his English language test certificate. UTJ Blum had refused permission on this ground.

6. UTJ Blum also refused permission to appeal against the judge's decision to dismiss the appellant's appeal on human rights grounds. This was not renewed before me.

7. I heard submissions on the second issue *de bene esse*.

8. I shall deal first with the first issue and then the second issue. The relevant factual background can be briefly stated at this stage.

Relevant background

9. The appellant arrived in the UK on 23 September 2014. He presented a valid Sri Lankan passport and a United Kingdom Biometric Residence Permit which showed that he had been granted ILR on 21 February 2014. This was granted following his application for ILR on 26 October 2013 on the basis of his length of residence. On his initial examination on arrival on 23 September 2014, he said that he had been away from the United Kingdom for three weeks and that he had qualified for his grant of ILR on the basis of having been a student in the United Kingdom for ten years. The appellant was required to submit to further examination because UK Visas & Immigration records indicated that an English language test certificate used by the appellant in support of his previous application of 25 May 2012 had been fraudulently obtained.

10. The English language certificate in question was a "*Test of English for International Communication*" (hereafter "*TOEIC*") certificate issued by Educational Testing Services ("*ETS*") after a test was taken on 18 April 2012 at Portsmouth International College. The appellant had used this certificate in support of his application on 25 May 2012 for leave to remain as a student which was granted from 11 June 2012 until 31 December 2014.

The first issue

(i) Relevant legal framework

11. The wording of the relevant provisions referred to below relate to the versions in force as at the date of the decision in the instant case. Any amendments made since that date are indicated.

12. Section 3(1) of the Immigration Act 1971 (the "*1971 Act*") provides that a person who is not a British citizen may not enter the United Kingdom unless given leave to do so (s.3(1)(a)). He may be given leave to enter the United Kingdom or, when already in the United Kingdom, leave to remain in the United Kingdom, either for a limited period or for an indefinite period (s.3(1)(b)). If limited leave to enter or remain is given, conditions may be attached (s.3(1)(c)).

13. Section 3(3)(a) of the 1971 Act provides that, in the case of limited leave to enter or remain in the United Kingdom, "*a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave cease to apply".*

14. Pursuant to s.4(1), the power under the 1971 Act to give or refuse leave to enter the United Kingdom *"shall be exercised by immigration officers"* and "*the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a)*[1] *(whether as regards duration or conditions), shall be exercised by the Secretary of State…".*

15. Section 3(4) of the 1971 Act provides:

> (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.

16. No authority is needed for the proposition that leave to enter or remain is either limited as to duration or indefinite. This is supported by the definition of "*limited leave*" and "*indefinite leave*" in s.33(1) of the 1971 Act, the interpretation section in the 1971 Act, which defines "*limited leave*" and "*indefinite leave*" as follows:

> "limited leave" and "indefinite leave" means respectively leave under this Act to enter or remain in the United Kingdom which is, and one which is not, limited as to duration;"

17. Indeed, s.3(1)(b) of the 1971 Act specifically provides that leave to enter or remain is given either for a limited period or for an indefinite period.

18. Article 13(10) of the Immigration (Leave to Enter and Remain) Order 2000/1161 (the "2000 order") provides that s.3(4) of the 1971 Act has effect subject to the provisions of Article 13. Article 13 provides as follows.

> 13.—
> (1) In this [article][2] [article and article 13A][3] [Part][4] *"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.

[1] With effect from 1 December 2016, the following words inserted by Immigration Act 2016 c.19 Pt 3 s.62(2): "*or to cancel any leave under 3C(3A)*"
[2] version in force from 30 July 2000 to 17 March 2015
[3] version in force from 18 March 2015 to 22 November 2016
[4] version in force from 23 November 2016 to present

(3) Paragraph (2) shall not apply:
(a) where a limited leave has been varied by the Secretary of State; and
(b) following the variation the period of leave remaining is six months or less.

(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)[5] & [6] 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.

19. It is not necessary to quote para 2 of Schedule 2 of the 1971 Act which makes provision for the examination of individuals by immigration officer and medical examinations.

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[5] From 18 March 2015 to 22 November 2016, the following words inserted by art.2(4)(b) of the Immigration (Leave to Enter and Remain) Amendment Order 2015/434: “*subject to article 13A”.* Article 13A concerns persons who have leave as partners and children of members of HM Forces.

[6] From 23 November 2016 to present, the following words inserted by art.2(4)(b) of the Immigration (Leave to enter and Remain) Amendment Order 2015/434 and art.2(5)(b) of the Immigration (Leave to Enter and Remain) Amendment Order 2016/1132: *“subject to articles 13A and 13B*”. Article 13B concerns persons who have leave as partners and children of certain Crown servants etc.

20. It is necessary to quote para 2A of Schedule 2 to the 1971 Act which provides:

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.

(2A) Where the person's leave to enter derives, by virtue of section 3A(3), from an entry clearance, ….

(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.

(4) He may also be examined by a medical inspector or by any qualified person carrying out a test or examination required by a medical inspector.

(5) A person examined under this paragraph may be required by the officer or inspector to submit to further examination.

(6) …

(7) An immigration officer examining a person under this paragraph may by notice suspend his leave to enter until the examination is completed.

(8) An immigration officer may, on the completion of any examination of a person under this paragraph, cancel his leave to enter.

{(9) Cancellation of a person's leave under sub-paragraph (8) is to be treated for the purposes of this Act and [Part 5 of the Nationality, Immigration and Asylum Act 2002 (immigration and asylum appeals)][7] [Part 5 of the Nationality, Immigration and Asylum Act 2002 (appeals in respect of protection and human rights claims)][8] as if he had been refused leave to enter at a time when he had a current entry clearance**}**[9]

(10) A requirement imposed under sub-paragraph (5) and a notice given under sub-paragraph (7) must be in writing.

21. Para 321A of the Rules reads:

Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom

[7] version in force from 1 October 2004 to 19 October 2014; words inserted by the Nationality, Immigration and Asylum Act 2002 c.41 Sch.7 para.2

[8] version in force from 20 October 2014 to 30 November 2016; words inserted by the Immigration Act 2014 c.22 Sch.9(4) para.23, subject to savings and transitional provisions as specified in SI 2014/2771 arts 9-11)

[9] Para 2A(9) deleted with effect from 1 December 2016 by Immigration Act 2016 c.19 Pt 4 s.65(1). Repeal has effect subject to c.19 c.67(3) and SI 2016/1037.

321A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply;

(1) there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled; or

(2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder’s knowledge), or material facts were not disclosed, in relation to the application for leave, or in order to obtain documents from the Secretary of State or a third party required in support of the application; or

(3) save in relation to a person settled in the United Kingdom or where the Immigration Officer or the Secretary of State is satisfied that there are strong compassionate reasons justifying admission, where it is apparent that, for medical reasons, it is undesirable to admit that person to the United Kingdom; or

(4) where the Secretary of State has personally directed that the exclusion of that person from the United Kingdom is conducive to the public good; or

(4A) Grounds which would have led to a refusal under paragraphs 320(2), 320(6), 320(18A), 320(18B) or 320(19) if the person concerned were making a new application for leave to enter or remain (except where this sub-paragraph applies in respect of leave to enter or remain granted under Appendix Armed Forces it is to be read as if for paragraphs 320(2), 320(6), 320(18A), 320(18B) or 320(19)” it said “paragraph 8(a), (b), (c) or (g) and paragraph 9(d)”); or

(5) The Immigration Officer or the Secretary of State deems the exclusion of the person from the United Kingdom to be conducive to the public good. For example, because the person’s conduct (including convictions which do not fall within paragraph 320(2)), character, associations, or other reasons, make it undesirable to grant them leave to enter the United Kingdom; or

(6) where that person is outside the United Kingdom, failure by that person to supply any information, documents, copy documents or medical report requested by an Immigration Officer or the Secretary of State.

22. Mr Ahmed relied upon the returning residents rule in the Rules, i.e. para 18 of the Rules, which reads:

Returning Residents

18. A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:

(i) had indefinite leave to enter or remain in the United Kingdom when he last left; and

(ii) has not been away from the United Kingdom for more than 2 years; and

(iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and

(iv) now seeks admission for the purpose of settlement.

(ii) Discussion

23. Immigration officers are appointed pursuant to s.4 of the 1971 Act. The power of an immigration officer to examine persons who arrive in the UK with continuing leave is derived from para 2A of Schedule 2 of the 1971 Act. Para 2A(1) provides that para 2A 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*". Under para 2A, such a person may be examined by an immigration officer for the purpose of establishing whether there has been such a change in the circumstances of his case since that leave was granted that it should be cancelled or whether that leave was obtained as a result of false information given to him or his failure to disclose material facts or whether there are medical grounds on which that leave should be cancelled.

24. The Upper Tribunal's decision in Fiaz (cancellation of leave to remain – fairness) [2012] UKUT 00057 (IAC) concerned a national of Pakistan. On 9 September 2011, the Secretary of State granted him leave to remain as a student valid until December 2011. Shortly after 26 February 2011, he travelled to Pakistan where he remained until his arrival in the United Kingdom on or about 10 April 2011. He was questioned about his intentions. Following further enquires, his leave to remain as a student was cancelled on 11 April 2011 on the basis of a change of circumstances since it was granted.

25. The question arose in Fiaz whether an immigration officer has power to cancel limited leave to remain that had been granted by the Secretary of State. A panel of the Upper Tribunal comprising of the then President, Blake J, and Upper Tribunal Judge King, decided that an immigration officer does have power to cancel leave to remain which remains in force under Article 13(5) of the 2000 Order (which states that "*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",* my emphasis). The Upper Tribunal also decided that the provisions of Article 13(5) were not unlawful for being *ultra vires*.

26. The Upper Tribunal's decision in Fiaz was upheld on appeal by the Court of Appeal in MF (Pakistan) v SSHD [2013] EWCA Civ 768. The Court of Appeal decided that a person with limited leave to remain as a student granted to him by the Secretary of State in-country and who travels outside the common travel area but who returns within the currency of that limited leave to remain was a person who fell within para 2A of Schedule 2 of the 1971 Act and thus a person who may be examined by an immigration officer. The Court of Appeal concluded that an immigration officer had the power to cancel his limited leave to remain and, further, that Article 13(5) of the 2000 Order was not *ultra vires*.

27. The reasons for the Court of Appeal's conclusions (insofar as material to the issues in the instant case) may be summarised as follows:

    i) The Court of Appeal noted that, under s.3(4) of the 1971 Act, a person's leave to enter or leave to remain lapses upon his travelling

outside the common travel area *"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*; …"

ii) Article 13 of the 2000 Order relaxed the effect of s.3(4) so that:

a) Pursuant to Article 13(2) and Article 13(3), where such a person has leave which is in force and which was given by an immigration officer or the Secretary of State for a period exceeding six months, such leave does not lapse on his going to a country or territory outside the common travel area except in cases where the person's limited leave to remain was varied by the Secretary of State and the remaining period of such leave at the time the person leaves the United Kingdom is six months or less. In the case of a person whose leave is deemed not to lapse pursuant to Article 13(3) and the person stays outside the United Kingdom for a continuous period of more than 2 years, his leave lapses at the end of the period of two years pursuant to Article 13(4)(a).

b) Pursuant to Article 13(5), leave that remains in force under Article 13 is treated, upon the holder's arrival in the United Kingdom, as *"leave to enter which had been granted to the holder before his arrival"* for the purposes of paras 2 and 2A of Schedule 2 of the 1971 Act.

c) Accordingly, the holder of such leave may be examined by an immigration officer for the purpose of establishing the matters set out at para 2A(2) of Schedule 2 of the 1971 Act, which include whether there has been such a change in circumstances such that leave to enter should be cancelled.

d) Para 10 of the Rules provides that the power to cancel leave to enter or remain which is already in force must be exercised on the authority of the Chief Immigration Officer or immigration inspector. The grounds upon which leave to enter or remain may be cancelled are stated at para 321A of the Rules. Those grounds include, at para 321A(1), the ground that "*there has been such a change in the circumstances of that person's case since the leave was given that it should be cancelled…*"

28. It has not been argued before me that, if I were to decide that Article 13 did apply to the appellant so that his ILR did not lapse upon his travelling to Sri Lanka, Article 13 is unlawful as being *ultra vires*. Nevertheless, it is relevant to have in mind the reasoning in <u>MF (Pakistan)</u> on the issue of whether Article 13 was *ultra vires* insofar as it applied to someone with limited leave to remain whose leave does not lapse upon his travelling outside the common travel area. Pitchford LJ agreed with the Upper Tribunal in <u>Fiaz</u> that Article 13 was not *ultra vires* and said, at paras 31 and 32 of the judgment, as follows:

"31. In my judgment Article 13(5) was incidental and supplemental to the relaxation of the effect of section 3(4) of the Act achieved by Article 13(2)(b) under the express power so to order granted by section 3B(2)(c). I do not for

my part consider that Article 13(5) amounted to an unlawful extension of the power to examine arrivals. It was, in the view of the then Secretary of State, a necessary qualification to the relaxation of section 3(4). All Article 13(5) does is to place in the same position those with advanced leave to enter and those with limited but extant leave to remain who return to the United Kingdom following a period abroad. The President of the Upper Tribunal, Blake J, and Upper Tribunal Judge King described the position at paragraph 26 of their determination as follows:

> "26. In our judgment, therefore, the Secretary of State was not creating novel powers of cancelling the limited leave that was outside the purpose of section 3B, rather her predecessor was creating a novel class of non-lapsing leave to remain that would justify admission to the United Kingdom after the trip abroad but needed to temper this new provision by applying the same powers 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 "

32. I agree, with respect. Article 13(2)(b) was introduced to alleviate the draconian effects of section 3(4) of the Act. At paragraph 4.6 of the eighth edition of *MacDonald’s Immigration Law and Practice* the editors drew attention to those unwanted effects of section 3(4). Students might take a short break in the middle of term and return to sit examinations. They would be refused leave to enter on their return. Appeals against that decision would have to be conducted out of country. However, if Mr Malik's argument is correct, the Act empowered the Secretary of State to remove the restriction on return to the United Kingdom, but it did not empower the Secretary of State to provide the safeguard to that relaxation by enabling an immigration officer to examine the student on his return so as to ensure that he intended to resume his period of study and that his course of study remained open to him, as would be the case with a student arriving with advanced leave to enter to take up a course of study for the first time. This is not a construction of section 3D(2) of the Act which I am able to accept. The terms of Article 13(5) were in my view incidental to Article 13(2) because they had the effect of defining the ambit of the relaxation intended from the effects of section 3(4) of the Act.”

29. In short, a person who arrives in the United Kingdom with leave *that remains in force under Article 13* is treated as having leave to enter with the result that he or she may be examined by an immigration officer pursuant to paras 2 and 2A of Schedule 2 of the 1971 Act for the purpose of establishing the matters set out at para 2A(2)of Schedule 2 of the 1971 Act.

30. Whereas Fiaz concerned a person who has been granted limited leave to remain as a student, the appellant in the instant case had ILR granted to him by the Secretary of State by way of variation of his previous limited leave to remain. As with the instant case, Fiaz concerned para 321A of the Rules.

31. I turn to the instant case. It was not in dispute between the parties that the appellant's ILR did not lapse when he travelled to Sri Lanka in September 2014. Given that:

    i) s.3(4) of the 1971 Act provides that leave shall lapse if a person travels to a country or territory outside the common travel area; however,

ii) Article 13(10) of the 2000 Order provides that s.3(4) of the 1971 Act shall have effect subject to the provisions of Article 13;

iii) pursuant to Article 13(2) and Article 13(3) of the 2000 Order, where a person has limited leave which has been varied by the Secretary of State and, following the variation, the period of leave remaining exceeds six months and is in force, such leave shall not lapse on his going to a country or territory outside the common travel area;

iv) Article 13(4) of the 2000 Order provides, inter alia, that leave which does not lapse under Article 13(2) shall remain in force indefinitely if it is unlimited;

v) the Court of Appeal's reasoning in MF (Pakistan)

I formed the preliminary view that the appellant's ILR had not lapsed under Article 13 when he arrived in the United Kingdom on 23 September 2014 and therefore that Article 13(5) applied so that his leave fell to be treated as leave to enter upon his arrival in the United Kingdom on 23 September 2014. I therefore asked Mr Ahmed to direct my attention to the provision(s) other than Article 13 which could have led to the appellant's ILR not lapsing.

32. Mr Ahmed advanced four principal arguments, the first two of which were about the appellant's ILR lapsing or not lapsing. The remaining two were not. I shall with these arguments in turn, although not necessarily in the order in which they were advanced. However, I should say at this stage that, whilst the arguments advanced on the appellant's behalf are complex, the correct analysis and answer to the first issue are in fact relatively simple, as explained at para 31 above and 57-69 below.

33. In relation to the first argument, Mr Ahmed submitted that the words "*within the period for which he had leave*" in s.3(4) of the 1971 Act do not apply to persons with ILR because their leave is not limited in duration. This argument does not help the appellant in any way for the following reasons:

i) This submission is *an attempt* to argue that the general rule in the first part of s.3(4) – i.e. that 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)"* – does not apply to someone who has ILR even if he travels outside the common travel area. If this attempt is successful, it would not be necessary to have recourse to Article 13(2) of the 2000 Order to relax the effect of s.3(4) of the 1971 Act, with the result that Article 13(5) would not apply and therefore the reasoning in Fiaz and MF (Pakistan) would not apply.

ii) The difficulty is that this submission is directed not at the first part of s.3(4) which provides for the general rule that leave shall lapse if a person goes to a country or territory outside the common travel area but the second part of s.3(4) which makes provision for the exception to that general rule. Thus, if Mr Ahmed is correct, that the words "*within the period for which he had leave*" in s.3(4) of the 1971 Act

and Article 13(2) of the 2000 Order do not apply to persons with ILR, this would mean that, whenever a person with ILR travels to a country or territory outside the common travel area, his or her leave would lapse however brief their absence abroad, with the result that they would have to apply for, and obtain, leave to enter if they return to the United Kingdom. This achieves the opposite of what Mr Ahmed hoped to achieve, i.e. that the respondent should have permitted the appellant to re-enter the United Kingdom with his ILR and leave it to the Secretary of State to cancel his ILR after entry.

iii) Furthermore, this submission is misconceived because the fact is that a person with indefinite leave who leaves the United Kingdom and travels outside the common travel area and who then returns is someone who is returning "*within the period for which he had leave*" precisely because there is no limit to the duration of his leave.

iv) As stated above (at paras 16-17 above), leave is either "*limited leave*" or "*indefinite leave*". There is nothing in s.3(4) of the 1971 Act which limits its operation to persons with *limited* leave to enter or remain and no basis at all to read into s.3(4) the word "*limited*" before the words "*leave to enter or remain*" in the opening words of s.3(4).

34. The second argument relies upon the returning residents' rule in para 18 of the Rules. Mr Ahmed submitted that the provision under which the ILR of a person who leaves the United Kingdom and travels outside the common travel area remains in force is the returning residents rule in para 18 of the Rules. However, it is plain that there is absolutely nothing in para 18 of the Rules which states that the leave of such a person continues to remain in force when the person travels to a country or territory outside the common travel area. Nor can it do so, given that para 18 is in the Rules whereas the provision that would otherwise result in such leave lapsing is contained in primary legislation, i.e. s.3(4) of the 1971 Act. It is plain from the ordinary language of para 18 of the Rules that the Rule is concerned with when a returning resident may be admitted for settlement: it says nothing about the person's ILR continuing and not lapsing when the individual leaves the United Kingdom and travels to a country or territory outside the common travel area. Indeed, para 18 of the Rules fits in with Article 13 of the 2000 Order and the correct interpretation as explained below. I therefore reject the second argument.

35. The third argument relies upon the Secretary of State's guidance entitled: "*Home Office, General grounds for refusal, section 3 of 5 – Considering entry at UK port, v26.0, Published for UK Visas & Immigration staff on 19 April 2016*" (hereafter the "Guidance"). Mr Ahmed relied upon pages 65 and 66 of this Guidance which read:

> **"General grounds for refusal**
> **Cancelling when the passenger has continuing leave to enter or remain: false representations or material facts not disclosed**
>
> This page explains what to consider when you need to cancel continuing leave to enter or remain because a passenger seeking entry has used deception to get entry clearance that has effect as leave to enter. This relates to general grounds for refusal under paragraph 321A(2) of the rules. For visitors, this relates to V 9.4 of Appendix V. When a passenger has used deception, for example, made false

representations, submitted false documents or not disclosed material facts, you must cancel leave to enter under paragraph 321A(2). For cases involving false representations or false documents, you must consider cancelling leave to enter whether or not they were material (relevant) to the application and whether or not the passenger was aware that their representations or documents were false.

False representations
False representations can have been made by the applicant or a third party and may include:
- spoken or written statements
- statements written on the application form or in supporting documents

When a passenger has lied to get entry clearance, you must not consider whether the false representations played a part in the entry clearance officer granting that entry clearance.

To justify cancelling leave to enter under paragraph 321A(2), you will need to show that false (inaccurate) representations were made for the purpose of getting the entry clearance. You must consider the proportionality of your decision. Minor representations which have no bearing on the case can be ignored as long as the passenger is generally acceptable for their purpose of entry.

False documents
When a passenger's passport or entry clearance is forged or was fraudulently obtained you must cancel their leave to enter if:
- they admit the document is not genuine
- they admit they are not the rightful holder of the passport or entry clearance
- you have confirmation from a report from a qualified forgery officer
- you have confirmation from a fingerprint check
- you have confirmation from a facial photographic comparison

When you cancel leave to enter, the entry clearance will stop being valid.

Failure to disclose material facts
You can refuse leave to enter when a passenger has failed to disclose a fact to the entry clearance officer that would have been material to the decision to grant entry clearance. However, you cannot cancel a passenger's leave on these grounds if the entry clearance officer did not tell the passenger what kind of information was needed to consider their application.

(Mr Ahmed's emphasis)

36. Mr Ahmed submitted that the respondent had failed to follow the Secretary of State's guidance at pages 65-66 of the Guidance, which applies to para 321A(2) of the Rules and which he asked me to note does not mention ILR at all. He submitted that the Guidance is an aid to understanding and applying para 321A. He submitted that pages 65-66 of the Guidance as a whole and in particular the text underlined above show that para 321A applies only to those who have "*entry clearance*". He submitted that the reference to "*continuing leave*" in the heading of para 321A means, on an ordinary meaning, limited leave which is derived from entry clearance. He submitted that para 321A as a whole does not apply to anyone who has indefinite leave, whether their indefinite leave is indefinite leave to enter or ILR. Para 18 of Mr Ahmed's skeleton argument contends that the guidance *"is a statement which identifies the circumstances in which the broad statutory criteria (namely para.321A) would be exercised. That criteria plainly refers to continuing leave being cancelled arising from an entry clearance application...... the guidance reflects the intention of the*

Secretary of State, and must be construed as being consistent with the intention behind [para 321A]".

37. I reject these submissions for the following reasons:

38. The submissions ignore the fact that para 321A(3) plainly makes provision to exempt settled persons from having their leave cancelled "*where it is apparent that, for medical reasons, it is undesirable to admit that person to the United Kingdom*". The reference to "*settled persons*" in para 321A(3) plainly shows para 321A is *not* limited to those who have been granted entry clearance.

39. Importantly, Mr Ahmed's approach, in deploying the respondent's Guidance as an aid to interpreting para 321A is fundamentally misconceived. The leading authorities on the interpretation of IRs include Mahad (Ethiopia) v Entry Clearance Officer [2010] 1 WLR 48, [2009] UKSC 16 and Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230. Para 25 of Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC) sets out the relevant passages from Mahad and Odelola, as follows (the emphasis is mine):

> "25. The law is settled as to the proper approach to the construction of the Rules. As observed by Lord Brown in *Ahmed Mahad v ECO* [2009] UKSC 16 at paragraph [10]:
>
> > "There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffman said in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (paragraph 4):
> >
> > > 'Further, like any other question of construction, this [whether a Rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the Rule, construed against the relevant background. That involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy.'
> >
> > That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the Rules) had said in *Odelola* in the Court of Appeal [2009] 1WLR 126 and indeed, with what Laws LJ said (before the House of Lords decision in *Odelola*) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or statutory instrument but, instead sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's Counsel readily accepted that what she meant in her written case by the proposition 'the question of interpretation is … what the Secretary of State intended his policy to be' was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under s.3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament, which then has the opportunity to disapprove them. True, as I observed in *Odelola* (paragraph 33): **'The question is what the Secretary of State intended. The Rules are her Rules'. But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of**

> **the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:**
>
>> **'In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (*not inconsistent with the immigration rules)* as may be given them by the Secretary of State …' (emphasis added)."**

40. It can therefore be seen that Mr Ahmed's approach of using the Guidance to interpret the ambit of para 321A is inconsistent with Mahad.

41. There were two further submissions that Mr Ahmed made in relation to the Guidance.

42. Firstly, that the guidance had to be given weight. In this respect, Mr Ahmed relied upon Walumba Lumba (previously referred to as WL) (Congo) 1 and 2 (appellant) v SSHD (respondent) [2011] UKSC 12 where the Supreme Court said at [34]:

> "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements."

43. However, Lumba concerned an unlawful detention claim. In the passage quoted above, the Supreme Court mentioned the fact that immigration powers are required to be transparently identified through immigration rules as one of the reasons for the conclusion that detention powers need to be transparently identified through formulated policy statements. However, the immigration power in question in the instant case – the power to examine someone who arrives at a border – *is* transparently identified through a Rule, i.e. para 321A.

44. Furthermore, the passage from Lumba quoted above and relied upon by Mr Ahmed does not assist with identifying the source of the provision that ameliorates the effect of s.3(4) of the 1971 Act, in the absence of which the appellant is in the position of someone with no leave and who required leave to enter when he arrived in the United Kingdom on 23 September 2014.

45. Secondly, Mr Ahmed relied upon the following comments of Jackson LJ in Pokhriyal [2013] EWCA Civ 1568 at [34]:

> "I respectfully agree with paragraph 70 of Rix LJ's judgment in *Adedoyin*. I would, however, add this comment. I do not think it is possible for the Secretary of State to rely upon extraneous material in order to persuade a court or tribunal to construe the rules more harshly or to resolve an ambiguity in the Government's favour. The Secretary of State holds all the cards. The Secretary of State drafts the Immigration Rules; the Secretary of State issues IDIs and guidance statements; the Secretary of State authorises the public statements made by his/her officials. The Secretary of State cannot toughen up the rules otherwise than by making formal amendments and laying them before Parliament. That follows from the Supreme Court's reasoning in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208."

46. This submission is also misconceived. The passage relied upon in Pokhriyal plainly relates to the principle in R (Alvi) v SSHD [2012] UKSC 33. In Alvi, the Supreme Court considered s.3(2) of the 1971 Act and held (in summary) that any requirement that must be satisfied for leave to enter or remain to be granted that is in the nature of a rule as to the practice to be followed in the administration of the 1971 Act must be laid before Parliament and that it is not permissible for a rule to refer to a document outside the Rules which sets out the requirement to be satisfied. Mr Ahmed, on the other hand, seeks to do that which is not permitted pursuant to Alvi: he seeks to rely upon the Guidance to effectively re-write para 321A. I use the word "*re-write*" because, if his submission is accepted, it would mean that para 321A must be read as if para 321A(3) did not exist.

47. For all of these reasons, there is nothing in the Guidance which assists the appellant. It is of no relevance in deciding the issues in this case, in my judgement.

48. Mr Ahmed's fourth and final argument concerned s.76 of the 2002 Act.

49. I shall first set out s.76 of the 2002 Act. Effective from 20 October 2014, the provisions of s.76 that are underlined below were repealed by the Immigration Act 2014[10] subject to certain savings and transitional provisions[11] which do not apply in this case because the decision in the instant case was made on 24 September 2014 and the appellant lodged his appeal on 2 October 2014. Accordingly, the version of s.76 that falls for consideration in the instant case is the version that was in force prior to the deletion of the provisions that are underlined below:

76 Revocation of leave to enter or remain

(1) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person—

(a) is liable to deportation, but
(b) cannot be deported for legal reasons.

(2) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if—

(a) the leave was obtained by deception.,
(b) the person would be liable to removal because of the deception, but
(c) the person cannot be removed for legal or practical reasons.

(3) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person, or someone of whom he is a dependant, ceases to be a refugee as a result of—

(a) voluntarily availing himself of the protection of his country of nationality,
(b) voluntarily re-acquiring a lost nationality,
(c) acquiring the nationality of a country other than the United Kingdom and availing himself of its protection, or
(d) voluntarily establishing himself in a country in respect of which he was a refugee.

[10] c. 22 Sch.9(1) paras. 3(3)(a) and (b) and Sch.9(1) para.7
[11] as specified in SI 2014/2771 arts 9-11

(4) In this section—
"indefinite leave" has the meaning given by section 33(1) of the Immigration Act 1971 (c. 77) (interpretation),
"liable to deportation" has the meaning given by section 3(5) and (6) of that Act (deportation), [and]
"refugee" has the meaning given by the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol., and
"removed" means removed from the United Kingdom under—
(a) paragraph 9 or 10 of Schedule 2 to the Immigration Act 1971 (control of entry: directions for removal), or
(b) section 10(1)(b) of the Immigration and Asylum Act 1999 (c. 33) (removal of persons unlawfully in United Kingdom: deception).

(5) A power under subsection (1) or (2) to revoke leave may be exercised—

(a) in respect of leave granted before this section comes into force;
(b) in reliance on anything done before this section comes into force.

(6) A power under subsection (3) to revoke leave may be exercised—

(a) in respect of leave granted before this section comes into force, but
(b) only in reliance on action taken after this section comes into force.

(7) In section 10(1) of the Immigration and Asylum Act 1999 (removal of persons unlawfully in United Kingdom) after paragraph (b) (and before the word "or") there shall be inserted—
"(ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2002 (person ceasing to be refugee);".

50. As can be seen, s.76 confers on the Secretary of State discretion to revoke a person's indefinite leave to enter or ILR in the circumstances listed in s.76(1)-(3).

51. Mr Ahmed submitted that, given that s.76 makes provision for the Secretary of State to revoke a person's indefinite leave to enter or ILR, para 321A must be interpreted so that it is limited to apply only to those who have limited leave to enter or remain. He submitted that, by enacting s.76 of the 2002 Act, Parliament prescribed the procedure by which the ILR of a person who arrives at a port of entry may be cancelled, i.e. the immigration officer must permit the individual to re-enter the United Kingdom on his or her existing ILR and leave it to the Secretary of State to subsequently revoke the individual's ILR under s.76. He submitted that any risk of the appellant absconding could have been dealt with by detaining him. Mr Ahmed submitted that not only was it inappropriate for the respondent to use para 321A to cancel the appellant's ILR, he had no power to do so given that Parliament has prescribed a different procedure in the form of s.76 of the NIAA 2002. Mr Ahmed submitted that there were very good reasons for limiting the ambit of para 321A in the case of an individual arriving at a UK port of entry with ILR to give preference to the use of s.76 after re-entry, as follows:

i) Those who have ILR enjoy certain rights. They are on a path to naturalisation. Their children would qualify for registration as British citizens, unlike the children of those with limited leave to remain. A person who has ILR has the status of a person who is "*present and settled*" whereas a person who has limited leave to remain is "*subject to immigration control*". He submitted that these differences were

recognised by Parliament which is why the Secretary of State was conferred a discretionary power to revoke ILR.

ii) In contrast, para 321A makes it mandatory for an immigration officer to cancel leave if any of the grounds set out at para 321A(1)-(6) are satisfied. Revocation of leave under s.76 would permit the individual concerned to challenge the exercise of discretion.

52. I can see some force in Mr Ahmed's submission that someone who has ILR has rights which are distinct from the rights of someone with limited leave. Rights are also conferred on persons who may be innocent of any wrongdoing that triggers revocation or cancellation of leave.

53. However, the fact is that the version of s.76 that was in force as at the date of the decision in the instant case (24 September 2014) and the date that the appellant lodged his appeal (2 October 2014) could not have been applied to the appellant. This is because he was not a person who "*cannot be deported for legal reasons*" (s.76(1)) or who "*cannot be removed for legal or practical reasons*" (s.76(2)). Further, and in any event, since he was a person who had not entered the United Kingdom, he could not be removed under s.76.

54. Furthermore, Mr Ahmed's interpretation of para 321A of the Rules by having recourse of s.76 as the only power available or that should have been used – as opposed to an *additional* power, as advanced by Mr Fletcher - does violence to the language of para 321A of the Rules and Article 13(4) of the 2000 Order, in that, it requires one to either completely ignore the existence of para 321A(3) entirely and the fact that Article 13(4) refers in terms to leave which does not lapse under Article 13(2) remaining in force "*either indefinitely (if it is unlimited) or …".*

55. The application of s.76 as advanced by Mr Fletcher does not require one to ignore the existence of para 321A(3) of the Rules and the wording in Article 13(4) of the 2000 Order. I consider this to be the correct application. That is, that it is an alternative and additional power, available to the Secretary of State, to revoke indefinite leave to enter or ILR in the circumstances that are governed by s.76(1)-(3) of the 2002 Act. I do not accept that the mere existence of the power in s.76 can justify or warrant ignoring the existence of para 321A(3) of the Rules and the wording in Article 13(4) of the 2000 Order as I have explained above.

56. Mr Ahmed contended that, given that para 321A of the Rules was mandatory whereas s.76 of the 2002 Act conferred a discretion, the Upper Tribunal should be slow to permit the mandatory power in para 321A to be used where the discretionary power in s.76 was available. However, this argument cannot have any utility in the instant case given that s.76 was not available, as I have explained above.

57. I have concluded that the correct position is that s.3(4) of the 1971 Act, Article 13 of the 2000 Order and para 2A of Schedule 2 of the 1971 Act, taken together, apply in the case of someone who has been granted ILR by the Secretary of State and who travels to a country or territory outside the common travel area so that, if they return to the United Kingdom in

circumstances where their leave remains in force pursuant to Article 13(2)-(4), Article 13(5) applies so that their "*leave to remain which remains in force*" under Article 13 "*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*" (Article 13(5)). My reasons are given at paras 58-69 as follows:

58. When the appellant left the United Kingdom and travelled to Sri Lanka in the beginning of September 2014, his leave either lapsed pursuant to the first part of s.3(4) of the 1971 Act (the words: *"a person's leave to enter or remain in the United Kingdom shall lapse"*) or it did not lapse as a result of a combination of the exception in the second part of s.3(4) and some other provision. If I decide that that other provision is Article 13(10) read together with Article 13(2) and 13(4) Article 13(2) of the 2000 Order, then it must follow, from Article 13(5) and the Court of Appeal's judgment in MF (Pakistan), that such leave is treated as leave to enter upon the person's arrival in the United Kingdom. It must further follow that, if such leave is treated as leave to enter upon his arrival in the United Kingdom, an immigration officer has power to cancel the leave pursuant to Article 13(7) and para 321A of the Rules.

59. In my judgement, that other provision is Article 13(2) of the 2000 Order. Firstly, because I have rejected Mr Ahmed's first and second arguments by which means he sought to argue that Article 13(2) did not apply. His remaining arguments – concerning the Guidance and s.76 of the 2002 Act – are irrelevant to this issue for the reasons given above.

60. Secondly, and more importantly, as a matter of construction, section 3(1)(b) of the 1971 Act is relevant in construing s.3(4). Section 3(1)(b) makes it clear that leave may be granted either for a limited period or an indefinite period. If s.3(4) was intended to apply only to those with limited leave, one would have expected that to have been made clear. Not only does s.3(4) follow on from s.3(1)(b) which makes the distinction between limited leave and indefinite leave clear, it also follows on from s.3(3) which applies *in terms* only to those with limited leave and makes reference to the removal of the limit to the duration of leave. Yet, s.3(4), following on as it does ss.3(1)(b) and 3(3), does not make any reference *in terms* to its application being confined only to those with limited leave.

61. Article 13(10) of the 2000 Order provides that s.3(4) of the 1971 has effect subject to the provisions of Article 13. Since I have decided that s.3(4) of the 1971 is not confined only to those with limited leave, it follows that, pursuant to Article 13(10), the application of Article 13(1)-(9) is not confined to those with limited leave.

62. Article 13(1) provides that, for the purposes of Article 13, "*leave*" means "*leave to enter the United Kingdom … and leave to remain in the United Kingdom*".

63. Thus, Article 13 applies to those with indefinite leave, whether indefinite leave to enter or ILR. Indeed, Article 13(4) specifically refers to "*indefinitely*".

64. ILR which is in force at the date of the individual's departure from the United Kingdom is therefore leave "*given by an immigration officer or the Secretary of State for a period exceeding six months*" – because it is leave which is not limited by duration (s.33(1)of the 1971 Act) - within the meaning of Article 13(2) and therefore such leave does not lapse upon the individual travelling outside the common travel area pursuant to Article 13(2).

65. This interpretation – that Article 13 applies to those with indefinite leave, whether indefinite leave to enter or ILR – is consistent with the fact that Article 13(4) is plainly intended to apply to those with indefinite leave as well as those with limited leave. To decide otherwise would be to ignore the words: "*either indefinitely (if it is unlimited)*" in Article 13(4).

66. Given that the provision under which the ILR of such a person remains in force and not lapsing is Article 13(2), it follows that Article 13(5) must apply to such a person upon his arrival in the United Kingdom. It further follows that such a person is someone who may be examined by an immigration officer pursuant to para 2A(2) of Schedule 2 of the 1971 Act.

67. Accordingly, the respondent did have power to cancel the appellant's ILR.

68. This conclusion is not only consistent with the analysis in MF (Pakistan) but also consistent with the judgment of Dobbs J in Ogilvy v SSHD [2007] EWHC 2301 (Admin) where, at [17], Dobbs J held, inter alia, that " "*indefinite leave to remain*" *under Article 13(5) in the circumstances in which we find ourselves, is to be read as "leave to enter" ".*

69. There is nothing in Article 13 (7) of the 2000 Order which justifies taking a different view. I agree with Mr Fletcher that, Article 13(5) and (7) read together, lead to the result that it is the immigration officer who has power to cancel whenever a person has leave – whether such leave when granted was leave to enter or remain - which is in force by virtue of Article 13 *upon the person's arrival in the United Kingdom* and it is the Secretary of State who has power to cancel leave to remain in other cases.

70. I have therefore concluded that the judge did not err in law when he rejected the submission advanced on behalf of the appellant that the respondent did not have power to cancel the applicant's ILR. It has not been necessary to explain the judge's reasons since the arguments before me were not the same. I have nevertheless reached the same conclusion.

71. To summarise my conclusions on the first issue:

    i) Article 13 of the 2000 Order applies to holders of ILR who travel to a country or territory outside the common travel area so that their ILR does not lapse but continues if Article 13(2)-(4) are satisfied.

    ii) If the leave of such an individual continues pursuant to Article 13(2)-(4) of the 2000 Order, an immigration officer has power to cancel their ILR upon their arrival in the United Kingdom.

    iii) The grounds upon which such leave may be cancelled are set out at para 321A of the Rules.

iv) Section 76 of the 2002 Act is an alternative and additional power, available to the Secretary of State, to revoke indefinite leave to enter or ILR in the circumstances described at s.76(1)-(3) of the 2002 Act.

The second issue

(i) The appellant's interview

72. As part of his further examination, the appellant attended an interview. At the commencement of the interview, the appellant confirmed that he was fit and well and happy to be interviewed. At the end of his interview, he again confirmed that he was fit and well. In the course of his interview, he admitted that he had not taken the test on 18 April 2012 at Portsmouth International College.

73. The following is an extract from the interview record:

> Qn 24: The testing centre that administered the test has used voice recognition software to determine your test was taken by a proxy. Can you explain why that is
> Ans: I written the exam.
>
> Qn 25: The results of your English test have been declared invalid because ETS, the organisation that administered the test, are satisfied that you did not sit the test yourself. Do you still maintain you sat the test yourself?
> Ans: I took the exam
>
> Qn 33: Are you sure you wish to maintain you took the test.
> Ans: No I didn't take the test.
>
> Qn 34: Who took the test for you.
> Ans: I don't know
>
> Qn 35: Who did you pay in order for someone to take the test for you.
> Ans: I don't know the person.
>
> Qn 36: Can you explain to me how someone else ended up taking your English test for you, the TOEIC English test for you.
> Ans: I don't know who sat the exam. Someone I know arranged it.

(ii) The judge's decision

74. Having concluded that an immigration officer has power to cancel a person's ILR, the judge considered whether the respondent was correct to cancel the appellant's ILR. He concluded that the respondent was correct to cancel the appellant's ILR. He gave his reasons at paras 20-29, which read:

> ***Grounds for cancellation of leave***
>
> 20. The next question is therefore whether the immigration officer was in fact right to cancel the leave of the appellant. It should be noted that the decision was (as it should be) a collective one, having been taken by Officer Bistro and then confirmed by Higher Officer Ricketts.
>
> 21. In this case, the appellant was interviewed at the port and in the course of his interview he accepted that a third party had sat the test for him. The interview unfolded as follows: At Question 33 of the interview he is asked: "*Are you sure you wish to maintain you took the test? A33 "No I didn't take the test"; Q34:*

Who took the test for you? A34: I don't know; Q36 Can you explain to me how someone else ended up taking the TOEIC English test for you? A36 I don't know who sit the exam. Someone I know arranged it." The appellant then confirmed that he was still fit and well. He signed at the bottom of each of the four pages of the interview.

22. However, the appellant's now argues that he was jet-lagged at the time he was questioned and that the record of the interview is therefore unreliable. Effectively, he recants his evidence. In his statement has now sought to provide the true answers to those questions.

23. Having regard to the material before me, including the full record of the interview and particularly the steps taken to confirm that the appellant was well and willing to be interviewed, I am satisfied that the interview is reliable. I further note that the interview was countersigned by the appellant. There is nothing in the content of the interview, or in the surrounding circumstances to suggest that he was under pressure or that he was so exhausted or jet-lagged to be interviewed. I shall deal with the appellant's claim to be suffering from illness shortly.

24. If the appellant had fundamentally disagreed with its contents, one would have expected a more immediate and robust repudiation of its contents.

25. To support his case, the appellant has now produced for the first time a medical certificate (in his bundle) from a Colombo clinic; the Wellawata Medicare, where the appellant was purportedly treated by the doctor, according to the certificate, between 22 September 2014 and 6 October 2014. It is said he was suffering from a viral flu with severe vomiting and loose motion (the writing is not very legible). In a certificate, countersigned by the appellant, by the doctor (G. Katheeswaranathan?) indicates that he needs a fortnight off work.

26. The problem is that the appellant was at Heathrow on 24 September 2014, and could not have been in Colombo under the care of the doctor until 6 October 2014. The appellant told me at the hearing that the certificate was in his bag at the time but that he did not think to provide it to the immigration officer as he was not asked for it. This report is an inept forgery. The appellant was asked more than once he was fit and well and happy to interviewed, he said nothing of being ill or under the recent care of a doctor.

27. If, as I have found, the interview was an accurate representation of what the told the immigration officer on arrival, then there are no good grounds for not placing reliance of its contents. In these circumstances, it is not necessary for me to undertake any detailed appraisal of the reliability of the ETS forensic assessments of his TOEIC test results. The appellant's admission is clear, compelling and conclusive.

28. This is a person who is willing to mislead the authorities with false information in order to remain in this country. The appellant knew that he did not sit his TOEIC test, and should not have relied on that certificate to obtain a CAS or further leave to remain. When applying for indefinite leave to remain, he failed to disclose, what he would have known to be a material matter, that he had not in fact sat his language test and had thus obtained previous leave fraudulently.

29. In these circumstances, the respondent was right to cancel the appellant's leave to remain.

75. In summary, the judge considered the appellant's evidence to the effect that his interview was not reliable and, in particular, that his admission at his interview that he had not taken the test was not reliable. He rejected the appellant's explanation that he was jetlagged at the time of his interview and also that he was not well. He rejected a medical report

produced by the appellant in support of his evidence that he was unwell at his interview as "*an inept forgery*". This was because the appellant was at Heathrow on 24 September 2014 and therefore could not have been in Colombo under the care of the doctor until 6 October 2014. He found that the interview was reliable. In the circumstances, he decided that it was not necessary for him to undertake a full assessment of the reliability of the ETS evidence. He relied instead on the appellant's admission which he considered was "*clear, compelling and conclusive*". He concluded that the respondent was right to cancel the appellant's ILR.

(iii) The written grounds, refused by UTJ Blum

76. Paras d.-f. of the written grounds contend, in summary, as follows:

   d) The judge's finding that the medical report was an "*inept forgery*" was perverse, given that the appellant's evidence in respect of the medical evidence was not challenged by the respondent.

   e) The judge failed to deal with the appellant's evidence that he had attended the test. He focused principally upon the respondent's evidence and did not address the appellant's evidence. He accepted the evidence of the respondent in its entirety and failed to consider the shortcomings in the respondent's evidence, as disclosed by the Upper Tribunal in SM and Qadir.

   f) The judge's finding at para 23 of his decision, that the interview was reliable, "missed the point". The interview record was a written document which could not display how the appellant had felt at his interview. The evidence provided by the appellant was conclusive that he was unwell. In the absence of a challenge to the appellant's evidence, the judge was wrong to attach weight to the interview record.

   g) The judge had failed to assess the evidence in the round.

(iv) The renewed application for permission

77. Mr Ahmed accepted that an application for permission to renew the application for permission on the ground that had been refused had not been made. He was unable to assist with the explanation for the failure to make such an application. Nevertheless, he wished to pursue an oral application for permission to renew the application for permission on the grounds refused by UTJ Blum and which related to paras 3-6 of his skeleton argument. Paras 3-6 of the skeleton argument relate to paras d.-f. of the written grounds, summarised above.

78. I did not hear submissions whether the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules") make provision for an appellant to renew his or her application for permission on grounds that have been refused by the Upper Tribunal in an application to it for permission. Neither party was ready to deal with the issue, as it only arose at the hearing. This is why I heard submissions on the second issue *de bene esse*, as an adjournment would not have been in keeping with the overriding interest given that the

parties were ready to deal with the first issue and Counsel on both sides had been instructed.

79. However, I am aware that, in an unreported but published decision of the Upper Tribunal (Holgate J and Upper Tribunal Judge Martin) in Hamza Zeyadi v SSHD (appeal number: DA/01744/2014), the Upper Tribunal concluded (para 13), having considered the UT Rules, that "*the clear implication*" was that the Immigration and Asylum Chamber of the Upper Tribunal does not have power to reconsider a paper decision refusing or limiting permission to appeal made by it. Para 13 reads:

> "13. We have not been shown anything in the 2008 Rules which would enable us to entertain an application to pursue ground 1. The Appellant relied upon Rule 5 which is concerned with general case management powers. But rule 5 has to be read alongside Rule 22. Where the Upper Tribunal makes a decision "on the papers" to refuse permission to appeal or to grant permission on limited grounds, Rule 22(3) and (4) enable an Appellant to apply for the reconsideration of permission to appeal at a hearing before the Upper Tribunal. This provision only applies to appeals from the Tribunals listed in sub-paragraph (3), which do not include the Immigration and Asylum Chamber. The clear implication is that this Chamber in the Upper Tribunal does not have the power to reconsider a paper decision refusing or limiting permission to appeal made at that level."

80. However, even if the Upper Tribunal has power to reconsider a decision which refuses permission on certain grounds, I would have refused the application. Before giving my reasons, I shall summarise Mr Ahmed's submissions on the second issue.

81. Mr Ahmed relied upon R (Opoku) v (1) The Principal of Southwark College and (2) the Governors of Southwark College (QBD) [2002] EWHC 2092 (Admin). Mr Ahmed submitted that there had been a change of circumstances since UTJ Blum refused permission on paras 3-6 of the grounds. As at the date of UTJ Blum's decision on 23 June 2016 to refuse permission, the Upper Tribunal had delivered its decision in SM and Qadir v SSHD (ETS – Evidence – Burden of proof) [2016] UKUT 00229 (IAC) which was delivered on 13 May 2016. Mr Ahmed submitted that the circumstances have changed since then, in that, the Court of Appeal resolved the matter in its judgment in Sharif Ahmed Majumber & Ihsan Qadir v SSHD [2016] EWCA Civ 1167, by affirming the approach of the Upper Tribunal in SM and Qadir.

82. Mr Ahmed acknowledged that the appellant's grounds before UTJ Blum were not comprehensive enough. In the light of those grounds, he accepted that the decision of UTJ Blum was correct.

83. However, he submitted that, in the light of the decision of the Court of Appeal in Majumber & Qadir, the judge had erred by taking the approach he took, i.e. that he considered that it was unnecessary for him to consider the Secretary of State's evidence as to the alleged deception because he was satisfied that the appellant's admission that he had not sat for the test on 18 April 2012 was reliable. Mr Ahmed submitted that this approach was incorrect. He submitted that the judge should have considered the Secretary of State's evidence as to the alleged deception. He submitted that the judge should have decided whether it was sufficient to discharge

the evidential burden to establish the alleged deception. He should then have considered whether there was an innocent explanation advanced by the appellant and whether the Secretary of State had discharged the overall legal burden of proof upon her to establish the alleged deception.

84. Furthermore, the judge had incorrectly placed the burden of proof upon the appellant by relying upon his admission. The respondent was not represented at the hearing before the judge. There was therefore no cross-examination of the appellant's evidence. Nevertheless, Mr Ahmed accepted that it was for the judge to decide the contradiction in the appellant's evidence, as between the admission in his interview and his witness statement where he said that he had been feeling jetlagged at his interview. He submitted that the judge should have considered whether the Secretary of State's generic evidence taken together with the appellant's interview record and his witness statement was such that the respondent discharged the overall legal burden of proof to establish deception.

85. Mr Ahmed submitted that, given that the evidence relating to the *"ETS Look up Tool"* was incomplete, that the TOEIC certificate had not been submitted and that there were no witness statements from Mr. Peter Millington or Ms Rebecca Collings before the judge to explain how the ETS results were connected to the appellant, there was insufficient evidence to discharge the initial evidential burden upon the respondent.

(v) Discussion

86. Opoku was a decision of Lightman J in the Administrative Court. In that case, two grounds were advanced in the application for permission to apply for judicial review, to which I shall refer as grounds (a) and (b). Permission was refused on the application on paper on both grounds. At a renewed oral hearing, permission was granted on ground (a) but refused on ground (b). At the substantive hearing and having heard oral argument on ground (a), Lightman J dismissed the application. The claimant thereupon applied for permission on ground (b) notwithstanding that permission to challenge on ground (b) had been refused both on paper and at the renewed oral hearing.

87. Lightman J considered the approach that the Court should follow when dealing with a renewed application for permission on grounds that had been refused by another judge in the same proceedings. A decision which grants permission on limited grounds is an interlocutory decision. It does not bring into play the doctrine of res judicata. Accordingly, a renewal of the application for permission on the grounds refused is not precluded. Nevertheless, a repeat application may be dismissed as an abuse of process (para 9 of Opoku).

88. Paras 14 and 16 of the judgment in Opoku are helpful, although it is necessary to bear in mind that in Opoku, the decision refusing permission on ground (b) was made at an oral hearing of the renewed application for permission, whereas UTJ Blum's decision refusing permission on certain grounds was made on the papers. Paras 14 and 16 of Opoku, which are self-explanatory, read as follows:

> "14. It is important that there should be read into the [CPR] no limitation on the jurisdiction of the High Court to grant permission on a fresh application. There may be circumstances where notwithstanding the previous refusal of permission a second application may be appropriate or necessary. The previous decision may have been correct and not open to challenge at the time the decision was made, but circumstances may have materially altered, new evidence may have come to light or the law may have significantly changed (e.g. by a reversal of a decision of the Court of Appeal by the House of Lords). It would be calculated to cause inconvenience and injustice if the High Court were precluded from granting permission in such circumstances (consider Spencer Bower, Turner and Handley on Res Judicata 3rd edition paragraph 172). Rather than reading any such limitation into the Rules it is appropriate to reflect the need for caution in the exercise of the jurisdiction and the need for respect for the legitimate expectations of previously successful defendants in the principles governing the exercise of the discretionary jurisdiction.
>
> 15. …
>
> 16. Following the guidance afforded by Buckley LJ [in Revlon v Cripps [1980] FSR 185], the relevant principle must be that the court should give proper respect to the provisions of CPR 52.15 which lays down the normal appropriate route to be followed where an application for permission has been refused and to the legitimate expectation of the defendant that in the absence of an appeal to the Court of Appeal the threat of litigation is at an end. The court should only exercise its discretion to grant permission where the claimant establishes that there has been a significant change of circumstances or that he has become aware of significant new facts which he could not reasonably have known or found out on the previous unsuccessful application or that a proposition of law is now maintainable which was not previously open to him. If the fresh application merely relies on evidence which was available and on propositions of law which were reasonably maintainable on the previous unsuccessful application, permission should be refused as an abuse of process."

89. However, in Smith v Parole Board [2003] EWCA Civ 1014, the Court of Appeal agreed with para 14 of Opoku but considered that para 16 was too restrictive. The important passages of Smith v Parole Board are at paras 16-18 of the judgment, which read:

> "16. Mr Scrivener did not criticise the approach of Lightman J in relation to paragraph 14, but did not accept his approach in relation to paragraph 16. This court is concerned as to whether Lightman J's approach is an appropriate one. I have already indicated that I approve of the broad discretion to which he referred in paragraph 14 of his judgment, but I have very real reservations as to the limitations upon that discretion which he inserts in paragraph 16. Certainly the matters to which he refers in paragraphs 16 are ones which, if satisfied, could cause a judge to grant permission for a further argument to be advanced in relation to an additional ground. However, in my view what is referred to by Lightman J is not exhaustive. The discretion of a judge hearing an application for judicial review is wider than that indicated in paragraph 16. Of course, where, as here, a judge has heard detailed argument, any judge who is conducting the hearing of the main application is going to be require significant justification before taking a different view from the judge who granted permission. However, if he comes to the conclusion that there is good reason to allow argument on an additional ground, bearing in mind the interests of the defendant, the judge can give permission for that to happen. It is not unusual for a situation to arise, even in the course of a hearing, where it becomes apparent to the judge conducting that hearing that the interests of justice would be best served by the hearing taking into account arguments on matters which relate to a ground in respect of which permission has been refused. There obviously has to be real justification for permitting that to happen; but judges can be relied upon to ensure that the discretion is not

misused. It is the obligation of parties to applications for judicial review, as in the case of oral litigation, to give as much notice as possible of their full case and to bring forward their full case at the start. However, quite apart from the specific circumstances indicated in paragraph 16 of Lightman J's judgment, there are going to be other situations where good sense makes it clear that the argument should be wider than it would otherwise be if it was confined to the grounds where permission has been granted. I would not seek to anticipate all the situations where that could happen. As long as a judge recognises the need for there to be good reason for altering the view of the single judge taken at the permission stage, no further sensible guidance can be provided. The circumstances which can occur are capable of varying almost without limit, and so each case must be considered having regard to its circumstances. The idea that there has to be a new situation for the permission to be extended is one which I would regard as wrong.

17. In exercising discretion it is sometimes necessary to bear in mind that if permission is refused in respect of a particular ground, the Court of Appeal on an appeal from the hearing at first instance will not be able to consider that matter where it is clearly desirable that it should be considered.

18. Turning to the facts of the present case, and bearing in mind the discretion which Goldring J in fact had, I have come to the conclusion that if he had not applied the guidance given by Lightman J in Opoku, the right conclusion for him to have come to is that the argument upon which Mr Scrivener wished to rely in relation to Article 5 was so closely related to the argument in regard to Article 6 that it was preferable in everybody's interests that the full argument was heard. Mr Crow submits that the argument in regard to Article 5 is hopeless, not least because it had been dealt with by Turner J in The Queen on the application of West v the Parole Board (CO/350/01, 26.4.92). Mr Crow is right that Turner J had dealt with the point. If his judgment is correct, that may well mark the demise of the Article 5 point. However, the Article 5 point and the Article 6 point are very closely interrelated. It would be highly undesirable, in my judgment, for the Article 6 point to be considered without also considering the Article 5 point. The desirability of the points relating to Articles 5 and 6 being heard together is emphasised by Regina (Giles) v Parole Board and another [2003] 2 WLR 196. That case has been the subject of appeal to the House of Lords where argument has been heard but the opinion of their Lordships as to the outcome has not yet been given. Giles is again a case which is capable of being distinguished from the present case. The decision in Giles is not likely to be finally determinative of the outcome of the present case, but it could be influential. It is difficult for this court today to forecast what will be the relevance of the decisions of their Lordships' House in relation to Giles on the outcome here. Accordingly it would be preferable to know their Lordships' views before reaching a conclusion as to the argument Mr Scrivener wishes to raise under Articles 5 and 6."

90. If there is power to reconsider a decision to refuse permission on certain grounds, the key points which emerge from Smith v Parole Board are as follows. There is a wide discretion. A judge should consider factors such as whether there was full oral argument when permission was refused on some grounds and whether any circumstances have changed materially. If there was full oral argument and the circumstances have not changed, the judge hearing the renewed application should require significant justification before taking a different view from the judge who granted permission on limited grounds. However, the Court of Appeal considered that the idea that there has to be a new situation, i.e. that the circumstances must be shown to be materially different, was wrong and that the only guidance that could be given is that each case is to be decided on its own circumstances and that it is necessary for there to be

good reasons for taking a different view from the view of the single judge who granted permission on limited grounds.

91. However, the judgment of Lightman J in Opoku has more recently been referred to or cited without any adverse observations in, for example, R (Ewing) v Secretary of State for Justice [2008] EWHC 3417 (Admin) (at para 22) and BA & Others v SSHD [2012] EWCA Civ 944 (at para 27 (f)).

92. If there is power to reconsider a decision to refuse permission on certain grounds, I draw the inference that the issue is not settled as to whether a material change in circumstances is necessary. On the assumption that it is necessary, I reject Mr Ahmed's submission that the judgment of the Court of Appeal in Majumder and Qadir represents a material change in circumstances since UTJ Blum's decision was made, given that the Court of Appeal upheld the decision of the Upper Tribunal in SM and Qadir and that UTJ Blum had the benefit of the decision in SM and Qadir when he made his decision to refuse permission.

93. However, even if there is power to reconsider a decision to refuse permission on certain grounds and even if it is unnecessary to require a material change of circumstances since permission was refused by UTJ Blum, I would still have reached the same decision for the following reasons:

94. Paras d.-f. of the appellant's written grounds are entirely hopeless, as are paras 3-6 of his skeleton argument before me. Both are predicated on the incorrect assumption that, as the respondent was not represented at the hearing and thus the appellant was not cross-examined, the judge should have accepted his explanation that he was not feeling well at his interview and that he had attended his test and that the medical report he relied upon had probative value. Both are predicated on the incorrect assumption that, as the appellant was not cross-examined at the hearing, all such evidence was unchallenged.

95. This assumption is simply wrong. The respondent's position was clear. He relied, inter alia, on the appellant's admission at his interview, that he had not attended the test on 18 April 2012 and that someone he knew had arranged for someone else to attend that interview on his behalf, to reach the conclusion that the appellant had practised deception, in that, he had obtained the English language test certificate fraudulently. The mere fact that the respondent's non-attendance at the hearing led to the appellant not being cross-examined did not mean that there was no challenge to the medical report or the appellant's explanation that he had not felt well at his interview or his evidence in his witness statement that he had attended the test on 18 April 2012.

96. The argument at para f. of the written grounds, that the appellant's medical report was conclusive, is simply hopeless and ignores the judge's reasoning, that the appellant could not have been under the care of the doctor in October 2014 because the appellant was in the United Kingdom on 24 September 2014. It was for this reason that the judge rejected the contents of the medical report as unreliable and "*an inept forgery*".

97. There is no substance in the contention at para f. of the written grounds, that, as the interview record was a written document, it could not display how the appellant had felt at his interview. Judges of the First-tier Tribunal are frequently called upon to decide the weight to be given to answers given at interview even in circumstances where the interviewee states that he or she was not feeling well.

98. Contrary to para e. of the written grounds, the judge did not simply focus on the respondent's evidence and ignore the appellant's evidence. To the contrary, he focused only on the appellant's evidence and did not take into account the respondent's evidence because he considered that, if as he had found, the interview was an accurate representation of what the appellant had told the immigration officer on arrival, there were no good grounds for not placing reliance on its contents. He had earlier considered the appellant's answers at his interview, his explanation that he had not been feeling well at his interview, the medical report and concluded that the interview was reliable and the medical report an "*inept forgery*".

99. Para 6 d. of Mr Ahmed's skeleton argument states that the appellant has completed a BSc in Computing and Information Systems along with other qualifications obtained in the United Kingdom and that he is a highly educated person who has no reason to use a proxy. In the particular circumstances of this case – i.e. the appellant's admission at his interview that he had not attended his test and someone else had instead – and the judge's finding that the interview was reliable, para 6. d of the skeleton argument amounts to no more than an attempt to re-argue the evidence and the judge's finding.

100. The instant case is an exceptional one, in that, if the interview record was reliable as found by the judge, the appellant's admission at his interview that he had not attended the test on 18 April 2012 and that someone had arranged someone else to attend the test on his behalf is, as the judge said: "*clear, compelling and conclusive*". Notwithstanding that it is evidence that emanates from the appellant, it is nevertheless evidence that the respondent can rely upon to discharge the initial burden as well as the overall legal burden to establish deception on the part of the appellant to the standard of the balance of probabilities, whatever the shortcomings in the generic evidence in the instant case and the "*ETS Look up Tool*" at Appendix E to the respondent's Explanatory Statement, although I should say that my copy of the respondent's bundle did in fact contain a witness statement from Mr Millington and a witness statement from Ms Collings.

101. The mere fact that the judge had relied upon the appellant's admission does not mean that he placed the burden of proof upon the appellant. This submission, advanced by Mr Ahmed, is simply wrong.

102. I have therefore concluded that paras d-f. of the written grounds and paras 3-6 of the appellant's skeleton argument are entirely hopeless.

103. On the basis of the appellant's own admission and the judge's finding that the interview was reliable, it is wholly unarguable that the judge erred in law in reaching his conclusion that the respondent had established that the applicant had practised deception.

104. I therefore reject the renewed application for permission. Even if I have power to reconsider UTJ Blum's refusal of permission on paras d-f of the written grounds, paras d-f of the written grounds and paras 3-6 of the skeleton argument are wholly unarguable.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

Signed
Upper Tribunal Judge Gill

Date: 16 January 2017