Neutral Citation Number: [2022] EWHC 1402 (Admin)

Case No: CO/4106/2021 & CO/315/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 June 2022

Before :

MRS JUSTICE LANG DBE

- -

Between :

CO/4106/2021

THE QUEEN	**Claimant**
on the application of	
S	
- and -	
(1) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT** **(3) SECRETARY OF STATE FOR DEFENCE**	**Defendants**
(1) N1 **(2) N2** **(3) N3**	**Interested Parties**

CO/315/2022

THE QUEEN	**Claimant**
on the application of	
AZ	
- and -	
(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT **(2) SECRETARY OF STATE FOR FOREIGN,**	**Defendants**

COMMONWEALTH AND DEVELOPMENT AFFAIRS
(3) SECRETARY OF STATE FOR DEFENCE
(1) AZZ **Interested Parties**
(2) KZ
(3) SZ
(4) MZ
(5) HZ
(6) SZZ
(7) ZZ
(8) NZ

- -
- -

Sonali Naik QC, Irena Sabic and Emma Fitzsimons (instructed by **Wilsons LLP**) for the **Claimant in CO/4106/2021**
Irena Sabic, David Sellwood and Maha Sardar (instructed by **Wilsons LLP**) for the **Claimant in CO/315/2022**
Lisa Giovannetti QC, Edward Brown QC and Hafsah Masood (instructed by the **Government Legal Department**) for the **Defendants**

The **Interested Parties** did not appear and were not represented

Hearing dates: 17 & 18 May 2022
- -

Approved Judgment

(Anonymity Orders made)

Mrs Justice Lang :

1. The Claimants, who were judges in Afghanistan prior to the defeat of the Afghanistan government by the Taliban in August 2021, seek judicial review of the Defendants' decisions refusing their application for leave to enter the United Kingdom ("UK"). It is not in dispute that the Claimants are at risk of serious harm or death at the hands of the Taliban.

2. The issues may be summarised as follows:

   i) Was any difference in treatment between the Claimants, and the comparator judges irrational or otherwise unlawful? The comparator judges were relocated to the UK, during and after Operation Pitting, under the Afghan Relocation and Assistance Policy ("ARAP") or under a grant of Leave Outside the Rules ("LOTR").

   ii) Were the procedural requirements imposed by the Defendants in respect of LOTR applications irrational and/or in breach of the applicable LOTR policy (version 1.0, dated 27 February 2018).

3. In the case of S, permission to apply for judicial review was refused on the papers by Lane J. on 9 December 2021, but granted at an oral renewal application on 18 March 2022.

4. In the case of AZ, permission to apply for judicial review was granted on the papers by Bennathan J. on 8 February 2022.

Factual background

History of events

5. Following the terrorist attacks against the United States of America ("USA") on 11 September 2001, the USA led a military intervention against Al Qaeda groups, and the Taliban government in Afghanistan. The UK took a significant part in the USA's initial intervention. Subsequently, the operation was supported by NATO and a joint international force, collectively called the International Security Assistance Force ("ISAF"), in which the UK played a leading political, diplomatic and military role.

6. Mr Tim Foxley MBE, in his witness statement dated 28 April 2022, set out a helpful chronology, based upon 'The UK and Afghanistan', House of Lords Select Committee on International Relations and Defence, p.11-12 (13 January 2021) and Farrell, T. 'Unwinnable: Britain's War in Afghanistan, 2001 – 2014', (The Bodley Head, London 2017). He said, at paragraph 23:

> "The mission evolved and expanded between 2001 and 2021. The emphasis of the UK mission changed focus over the years, with several overlapping themes:
>
> a. 2001 – 2002 - defeating the Taliban and hunting Al Qaeda.

> b. 2002 – 2005 – establishing democratic Afghan government processes and supporting infrastructure (a judiciary, an army, a police force, counter narcotics and a democratic electoral process).
>
> c. 2005 – 2006 – major British force deployment into Helmand province.
>
> d. 2007 - 2014 – Helmand: ongoing combat operations against Taliban guerrilla resistance in southern Afghanistan.
>
> e. 2011 – 2014 – preparing for departure from Afghanistan, transitioning to Afghan government and enabling the Afghan National Security Forces to take over responsibility for protecting the country.
>
> f. 2014 – 2021 – The withdrawal of ISAF. A drawdown of UK military forces to a non-combat, residual military presence, mentoring, coaching, training the Afghan security forces. Continued support for Afghan government capacity building, support for negotiations with the Taliban."

7. On 29 February 2020, the USA and the Taliban signed the Doha Agreement (officially titled the "Agreement for Bringing Peace to Afghanistan") that provided for the withdrawal of all USA and allied military forces and civilian personnel from Afghanistan by 1 May 2021. The withdrawal was conditional upon the Taliban upholding the terms of the agreement that included not to allow Al Qaeda or any other extremist group to operate in the areas they controlled. The withdrawal of the USA was later deferred to 31 August 2021.

8. In May 2021, the Taliban launched a major offensive against the Afghan Armed Forces, and then made rapid advances. By 15 August 2021, the Taliban had seized Kabul. USA and NATO troops retreated to Kabul airport from where they operated an emergency airlift for all NATO's civilian and military personnel, other foreign nationals, and at-risk Afghan nationals. The final British flight from Kabul took place on 28 August 2021. The last USA military planes left Afghanistan on 30 August 2021. Taliban soldiers then entered the airport and declared victory. The Taliban government has been in total control of Afghanistan since that date. The UK Embassy and other NATO Embassies have remained closed.

Operation Pitting

9. "Operation Pitting" was the name given to the UK Government's mission to evacuate British nationals, and others at risk from the Taliban, when Kabul fell. It was initially planned with the intention of evacuating two groups. First, British nationals and their families, who were the responsibility of the Foreign and Commonwealth Development Office ("FCDO"). Second, Afghans who were given leave to enter the UK under the ARAP, who were the responsibility of the Ministry of Defence ("MoD").

10. From the week beginning 9 August 2021, Ministers were seeking to evacuate other at-risk Afghan nationals, who were not likely to be eligible for ARAP, to take advantage of spare flight capacity not required to evacuate the two groups originally identified. To achieve this objective, it was agreed that selected persons, who appeared to meet the agreed criteria, would be eligible for a grant of LOTR by the Secretary of State for the Home Department ("SSHD"), and would be called forward to board evacuation flights, subject to security checks. The Government did not have time or capacity to process their applications for LOTR in Afghanistan: applications had to be approved either at a staging post at Dubai, or on arrival in the UK. This scheme became known informally as "Pitting LOTR".

11. According to Mr Philip Hall, who led the FCDO team responsible for Operation Pitting, three selection criteria were applied, as set out in paragraph 20 of his witness statement:

> "(i) **Contribution** to HMG objectives in Afghanistan: evidence of individuals making a substantial impact on operational outcomes, performing significant enabling roles for HMG activities and sustaining these contributions over time.
>
> (ii) **Vulnerability** due to proximity and high degree of exposure of working with HMG: evidence of imminent threat or intimidation due to recent association with HMG/UK;
>
> (iii) **Sensitivity** of the individual's role in support of HMG's objectives: where the specific nature of activities/association leads to an increased threat of targeting. Or where there would be specific threat to HMG from data disclosure."

Mr Hall stated that the Contribution criterion had to be met in all cases and then either the Vulnerability criterion or the Sensitivity criterion.

12. In his witness statement (paragraph 17), Mr Hall said that, on 19 August 2021, FCDO officials recommended to Ministers the following cohorts for evacuation under Pitting LOTR, flight capacity permitting:

> "(i) 232 journalists and media
>
> (ii) 80 contractors working in exposed roles for the Embassy
>
> (iii) 44 women's rights activists
>
> (iv) 23 female members of the Afghan National Army
>
> (v) 160 Afghan Government officials with close connection to the UK
>
> (vi) 24 Afghan officials working in Anti-Terrorism Prosecutions Department, National Directorate of Security and Counter Narcotics police
>
> (vii) 50 ARAP family members

> (viii) A very few named individuals working for NGOs and implementing partners who had a base outside the UK. which we believed they would likely return if we enabled them to leave Afghanistan."

13. Each of these cohorts was linked to a list of individuals, drawn up by FCDO staff. Further lists of extremely vulnerable people and their dependants were added in the following days.

14. An Evacuation Handling Centre ("EHC") was set up at the Baron Hotel, located near the airport in Kabul. Support was provided from a Crisis Centre, housed at the FCDO in London, and military support was also provided there. The logistics operation was co-ordinated by the MoD and Permanent Joint Headquarters ("PJHQ").

15. Operation Pitting was challenging. The FCDO received thousands of requests for evacuation, both directly from Afghans, and by way of recommendation from Ministers, Members of Parliament, military officers, senior officials, judges and others. It is estimated that the ten relevant mailboxes in the FCDO received 175,000 communications from 13 to 31 August 2021. The FCDO did not have the capacity to fully scrutinise or prioritise all these applications within the short time available. The numbers applying far exceeded the capacity of the airplane seats available, and so potentially eligible persons were left behind. Approximately 1,000 people were called forward for evacuation under Pitting LOTR (that figure includes the dependants of eligible persons).

16. Conditions outside the airport in Kabul were chaotic, and at times dangerous, because of the huge crowds of people who had gathered at the airport, seeking to flee the country. There were also threats of attacks on the airport, which materialised on one occasion when a suicide bomber exploded a bomb in the crowd, causing injuries.

17. Some people who had been called forward for evacuation were prevented from reaching the Baron Hotel or the airport, either because of Taliban checkpoints on the roads to the airport, or because of the huge crowds of people gathered at the airport, blocking their access.

Public statements concerning Afghan judges

18. The Claimants referred to a number of public statements, made in the UK, concerning the predicament of Afghan judges. Among these were statements from the Lord Chancellor and the President of the Law Society, published in an article in the Law Society Gazette on 26 August 2021:

> **The Lord Chancellor:**
>
> "In a letter yesterday to Lord Carlile of Berriew CBE QC and Lord Anderson of Ipswich KBE QC, both former independent reviewers of terrorism legislation, Robert Buckland said he aimed to do all he can to protect Afghan judges 'in recognition of their dedication to establishing and protecting the rule of law in the country'. Buckland said: 'Legal professionals in

> Afghanistan have done this in the face of risks to their personal safety and that of their families, with particularly grave risks to the lives of female members of the judiciary and it is right that we do what we can to help them.' 'The government is currently working at pace with international partners to develop a system to identify those most at risk and resettle them. I have been working with cabinet colleagues and can confirm that members of the Afghan judiciary are among those eligible to relocation to the UK as a result of their close work with the UK government and the immediate threat to their safety.' 'I have been in contact with the home secretary about the situation and my officials are working closely with the Home Office and other colleagues on the government's plans for supporting this vulnerable cohort of judges and legal professionals."

The Law Society:

> "Law Society President Stephanie Boyce said she was pleased that the government has responded to calls by Chancery Lane and other legal organisations to provide sanctuary to Afghan judges by including them in the ARAP (Afghan Relocations and Assistance Policy) scheme. She said: 'This is excellent news as we consider Afghan judges – particularly women of whom there are around 270 – to be at grave risk from the new Taliban regime. There are also women lawyers and prosecutors, including those who have put members of the Taliban in jail for terrorist and other offences, whom we consider to be at particular risk. We understand they may be eligible too, although outside of the ARAP scheme, and emphasise that they should receive safe passage and resettlement. 'All of these women have significantly contributed to the rule of law in their country and to the UK government's objectives of counterterrorism over the last two decades, at great risk to themselves and their families. The UK government can only seek to repay that debt by granting them the safety and support they need."

The UK's role in promoting the rule of law in Afghanistan

19. A joint governmental policy paper, published on 14 January 2014, described the extensive development aid projects, supported and funded by the UK and its partner nations, in Afghanistan. It describes the UK's work to support and build more accountable and democratic institutions, including a written constitution and a democratic government, at both national and local levels. The paper stated:

> "Across Afghanistan the UK continues to support legal and institutional reform and invests in training, including on human rights."

20. It described in particular the introduction of an effective justice system in Helmand Province, where British troops were stationed. Prior to 2006, Helmand had no effective formal justice system. It explained that:

> "As the Afghan justice system was unable to demonstrate its credibility by resolving disputes, the Taliban filled this vacuum. Their informal system was severe, including barbaric punishments such as amputation."

21. Mr Foxley describes the UK's engagement with the Afghan courts and the judiciary, at paragraphs 52 to 58 of his witness statement. Rule of law initiatives included financial support for training of judges; developing capacity for the successful investigation and prosecution of terrorism; establishing the Anti-Corruption Justice Centre to investigate and prosecute serious corruption cases; establishing the Criminal Justice Task Force to prosecute drug-related crimes; and ongoing mentoring and training for judges and prosecutors.

22. Mr Foxley states, at paragraph 27, that, although there was always a major British diplomatic, civilian, military and administrative presence in Kabul, it did not mean that the UK was solely focused on developing Kabul at the expense of the rest of the country. It is evident that the goal of the UK and its NATO allies was to implement a reformed justice system across Afghanistan.

23. The importance of the work of the Afghan justice system to the UK's mission and operations in Afghanistan was acknowledged by the UK Government in "The UK and Afghanistan", published by the House of Lords Select Committee on International Relations and Defence Government Response 12 March 2021:

> "Since 2001, the UK has provided significant support to the people of Afghanistan; this has in turn helped to protect the UK…The Afghan government has the capability to lawfully investigate and prosecute terrorism, organised crime and corruption. These gains have been achieved through a decade of multinational investment and are designed to operate alongside wider initiatives to address economic reform, poverty and agriculture. A loss of these capabilities would be irreversible and undermine any UK or international efforts to strengthen the Afghan state."

24. As Mr Foxley observes at paragraph 73:

> "Without a justice system, Afghanistan's security situation would have deteriorated further and quicker. Confidence in governance would have evaporated. Local groups – Taliban, Islamic State and warlords – would have filled the justice "vacuum". International forces would not have been capable of running a justice system and would have increasingly been viewed as an occupying force if they had tried. The UK's presence in Afghanistan would have been untenable and the mission – stabilising Afghanistan and rebuilding the government structures - would have failed. The risk to the UK mainland from

> terrorism, narco-trafficking and illegal migration would have increased."

25. However, there were risks for judges involved in implementing an effective justice system in Afghanistan, as Mr Foxley describes at paragraph 72:

> "The work of Afghan judges – particularly those who worked on terrorism, counter-narcotics and security matters – was difficult and very dangerous because the Taliban and other insurgent groups were hostile to the prosecution of their fighters and also opposed to the justice system being established. Other groups, such as warlords and corrupt government officials, were also benefiting from the narcotics trade and other criminal activities. Judges were targeted by the Taliban for assassination….."

The UK's role in supporting women's rights in Afghanistan

26. The UK Government summarised the support it gave to women's rights in its review "The Future of Afghanistan: Development Progress and Prospects after 2014":

> "Securing women's rights was one of the main goals of the UK's intervention in Afghanistan in 2001. In addition, the Department for International Development (DFID) has prioritised the rights of women and girls in its work. The status and security of women can therefore be used as a litmus test of the UK's impact and legacy in the country…..Over the past decade, the UK government has helped achieve much towards this effort, including:
>
> · Establishing a new constitution which enshrines equal rights for women and men
>
> · Enacting a new landmark Elimination of Violence against Women (EVAW) law
>
> · Initial endorsement of a new National Action Plan for the Women of Afghanistan (NAPWA)
>
> · Establishing women's shelters for the first time
>
> · Ensuring just over 27% of MPs are women
>
> · Ensuring 25% of government jobs are filled by women
>
> · Ensuring over 2 million girls are now in school
>
> · Ensuring more women are free to participate in public life and to work outside their homes as doctors, teachers, entrepreneurs and lawyers – a situation once made impossible by the Taliban…"

Risk of harm from the Taliban

27. There is credible evidence of the continued threat posed by the Taliban towards those perceived as associated with the previous government and its institutions, including judges. The Taliban also perceive women in the public sphere, such as female judges, as transgressing Taliban cultural and religious mores.

28. This threat was identified by the United Nations High Commissioner for Refugees ("UNCHR") in August 2021 ("Position on Return to Afghanistan") and confirmed in the detailed "**Country Policy and Information Note** Afghanistan: Fear of the Taliban" published by the Home Office in October 2021 (see paragraphs 2.4.7, 2.4.8, 5.1.1, 5.2.4, 5.2.5) and April 2022 (see paragraphs 2.4.4, 2.4.9, 2.5.1, 5.7.4, 6.5.3, and section 6.9).

29. The April 2022 Note states, at paragraph 6.5.3:

> "Former female Afghan lawyers and judges claim that ex-prisoners, freed by the Taliban, have been searching for them to take revenge for their convictions and imprisonment. The women have been unable to return to work following the Taliban takeover and now live in fear of reprisals from both the Taliban and convicted criminals, some saying they received death threats on a daily basis."

30. In a section on lawyers, judges and human rights defenders, the April 2022 Note reports as follows:

> "6.9.2 In its 'Afghanistan: Country Focus', dated January 2022 and based on a range of sources covering events between 15 August and 8 December 2021, the European Asylum Support Office (EASO) noted:
>
> 'IAJ [International Association of Judges] and IAWJ [International Association of Women Judges] published a joint statement in which judges were stated to be in "very grave danger", and stressed that revenge killings might occur, and that judges had been subjected to house-searches, threatening messages and physical harassment, and had their bank accounts suspended. Also, family, friends and neighbours were said to have been pressed to reveal judges' whereabouts. A similar account was published by Business Insider quoting a former judge, who claimed that "Taliban fighters went into his house looking for him and searched the homes of his families, friends, and colleagues." Another former judge in hiding told Business Insider that some Taliban fighters were pursuing 'personal vendettas' against judges, and could not be controlled by the Taliban leadership'."
>
> "6.9.3 On 25 December 2021, Sky News reported:

> 'More than 100 female Afghan judges and their families have been rescued by a team of pro-bono lawyers in the UK following the Taliban takeover. 'The women held senior roles in the Afghanistan judiciary and were vital in upholding the equal rights of women and girls. They were judges and prosecutors in the courts of domestic violence, rape cases, forced and child marriages and in cases involving the trafficking of women.'
>
> 6.9.4 The same source noted that Baroness Helena Kennedy, an expert in human rights law who arranged the rescue, said 'The women who were contacting me were terrified for their lives, they were hiding with their families, with their children in basements. They had moved out of their houses and gone to stay with relatives and they were getting these threats on their phones, and through relatives they would be receiving threats…'."

31. The 100 or so female Afghan judges referred to above were evacuated from Afghanistan to Greece, from where they were assisted to re-settle in countries including the UK, the USA, Germany, Iceland, Ireland, and Australia. The Defendants estimated that a small number came to the UK, and they were all or mainly among the group who had been identified during Operation Pitting, but had not been successfully evacuated.

32. Mr Foxley summarises, at paragraph 69 of his witness statement, the potential risk of Afghan judges being targeted by the Taliban where one or more of the following factors are present:

> "a. co-operated with HMG [Her Majesty's Government];
>
> b. was involved in highly sensitive cases of particular UK interest (including national security, terrorist, corruption, narcotics, criminal cases);
>
> c. presided over trials of members of the Taliban/ISIL/Al Qaeda/Haqqani network, or combatants from those organisations;
>
> d. sentenced members of those organisations to terms of imprisonment/decided whether detention should continue under Afghan law
>
> e. presided over the trial of combatants captured by ISAF forces including the UK on the battlefield (inc. nationals of countries such as Pakistan, Uzbekistan);
>
> f. heard/ resolved cases criminal cases involving: public security; corruption; drug trafficking; and violence against women;
>
> g. attended programmes/seminars etc delivered or sponsored by ISAF/HMG;

> h. was appointed to a judicial position/roles within an institution/court/justice centre that received donor funding and other technical support from ISAF/HMG."

The Court system in Afghanistan

33. There are three tiers of courts – the Primary Courts, the Appeal Courts, and the Supreme Court. Primary Courts are courts of first instance, and exist in each District. Appeals from Primary Courts are heard at the Appeal Court designated for the relevant provincial area.

34. The Supreme Court is the final appellate court for the entire country, comprising nine members, presided over by the Chief Justice. It is divided into divisions, according to subject-matter. The Supreme Court also has an original jurisdiction in various matters including matters pertaining to the constitution and judicial review.

35. The Supreme Court is also the institution that employs the judiciary of Afghanistan, and has responsibility for the appointment and transfer of judges to all courts, and for their training. Thus, Afghan judges refer to themselves as "Judges of the Supreme Court of Afghanistan", whatever level of court they sit in.

The case of AZ

36. AZ is an Afghan national, born in 1979. He is married and has six children, aged between 6 and 17 years old. His elderly mother lives with the family.

37. AZ has a law degree and he qualified as a judge in 2008. Later in his career, he attended a lengthy judicial training course in Kabul with some 130 judges, organised by the Supreme Court. He has also attended various training courses organised by other bodies, such as the United States Agency for International Development, the Max Planck Institute, and the Norwegian Refugee Council.

38. He has sat in the Primary Court throughout his career, mainly hearing criminal cases. He has worked in Nangarhar province and Nuristan province. In Jalalabad (Afghanistan's third largest city), he sat in the public security court. A number of judges there had been killed by the Taliban, and he felt he would be safer in a more rural area, so he requested and was granted a transfer.

39. Most recently he has been working in the Spinghar district in Nangarhar. At the beginning of 2021, there was an increase in the number of targeted killings carried out by the Taliban and ISK, including three judges who were his colleagues. He was warned by the Supreme Court in Kabul that he was on a Taliban list of planned killings, and he was given a gun and two armed bodyguards.

40. AZ believes that his life is in danger because of the decisions he has made as a judge over the course of his career. He has made over 40 decisions in counter-terrorist cases, mostly against Taliban and ISK members. He has passed lengthy prison sentences for terrorist offences on members of the Taliban who have now been released from prison and hold positions of power and influence. Since the Taliban gained power, he has

received direct threats to his safety, and he is now in hiding, and no longer able to work. He has no future in Afghanistan.

41. AZ applied for leave to enter the UK under ARAP, for him and his dependants, on 26 October 2021. AZ's solicitors wrote their first letter before action on 27 October 2021, enclosing his witness statement and supporting documentation. They applied for a grant of leave under ARAP, and in the alternative, under the Afghan Citizens Resettlement Scheme ("ACRS") or LOTR.

42. On 17 November 2021, the Government Legal Department ("GLD") sent a letter in reply, accompanied by an FCDO Decision Maker's Assessment dated 5 November 2021, which found that AZ was not eligible under ARAP. The letter stated:

> "22….[his] application has not provided evidence of any link to an HMG sponsoring unit, nor involvement in cases of special UK interest. [AZ] was serving his country; does not suggest that he made a material contribution to HMG's mission in Afghanistan (and so, without his work, the UK's operations would not have been adversely affected); and, as such, the threat to [AZ] is not heightened as a consequence of any engagement with the UK.
>
> 23. For these reasons, therefore, it has been decided not to "sponsor" [AZ's] application and, because his application is not supported by the relevant HMG unit, he is not eligible under Category 4 (nor, for the avoidance of doubt, Categories 1 – 3) and the application can proceed no further. [AZ] is therefore not eligible for relocation under ARAP."

43. The letter advised that the ACRS was not yet in force and indicated that would not have an individual application process, but rather eligible people would be prioritised and referred in co-operation with UNCHR, international parties and NGOs in the region.

44. As to LOTR, the letter stated as follows:

> "**Leave Outside the Rules ("LOTR")**
>
> 26. During the evacuation process, the LOTR process and security checks for individuals coming to the UK were expedited due to the deteriorating situation in Afghanistan. However, following the end of the evacuation on 28 August 2021, the usual policy in respect of LOTR applies.
>
> 27. The SSHD has a discretionary power to grant leave outside the Immigration Rules, including on compelling compassionate grounds. That power will not normally be exercised in a way which would undermine the objectives of the Immigration Rules or create a parallel regime for those who do not meet them. The usual policy in respect of applications for LOTR is that:

> 27.1 Applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges;
>
> 27.2 The application will not be complete, and will not be considered, until biometrics are provided at a Visa Application Centre.
>
> 28. The requirement to provide biometrics is underpinned by legislation. Under Immigration (Biometric Registration) Regulations 2008 reg 3A, a person who is subject to immigration control and makes an application for entry clearance which will have effect as leave to enter for a period exceeding 6 months, and who specifies in that application that they will enrol their biometric information outside the United Kingdom, must make an application for the issue of a biometric immigration document. An application on the application form referred to above would fall within the scope of that regulation. The making of such an application gives rise to a discretion under reg. 5 whether to require the provision of biometrics. The SSHD has the power under reg. 5 to decide not to require biometrics.
>
> 29. Since neither [AZ] nor his dependants have, so far as we are aware, submitted an application form, the time for deciding whether to waive or defer the provision of biometrics under reg. 5 has not yet arisen, and no such decision is being made at this time. However, the general policy is that biometrics will be required except in certain limited categories of case: those who are excused are generally physically incapable of doing so, for example amputees or those who are unconscious and require life-saving medical treatment. The SSHD will only diverge from that general position in very exceptional circumstances. The use of biometrics is critical to protecting the UK and its residents, and therefore the threshold for waiving the requirement is commensurately high.
>
> 30. In the absence of (a) an application form; and (b) a decision to waive or defer biometrics, no decision whether or not to grant LOTR is being made at this time."

45. In their letter of 3 December 2021, AZ's solicitors challenged the GLD's refusal to accept the application for LOTR by letter, stating:

> "It is manifestly impossible for an application to made from Afghanistan or in any neighbouring country since the client is in hiding and there [is] no British embassy in Afghanistan. In these circumstances it is perverse to fail to consider the application where there is no physical possibility of submitting an application or providing biometrics…"

46. The GLD replied, in their letter of 14 January 2022, as follows:

> "12. As you are aware, there is currently no option to give biometrics in Afghanistan. The British Embassy in Kabul has suspended in-country operations and all UK diplomatic and consular staff have been temporarily withdrawn. The UK is working with international partners to secure safe routes out of Afghanistan as soon as they become available, but while the security situation remains extremely volatile, we recommend people in Afghanistan do not make applications and pay application fees at this time as they will not be considered until biometrics are provided, save in exceptional circumstances.
>
> 13. Where an applicant makes an urgent application notwithstanding the above, they must use the online application form and select the country where they would normally expect to enrol their biometrics, even if they consider they are or may be unable to do so. Using the form in this way to select the country where an applicant would normally expect to enrol their biometrics will not be used by SSHD as adverse evidence in any decision-making process.
>
> 14. Once an application is made using the online form, applicants will have an opportunity to contact the Home Office and inform it of any issues they face enrolling their biometrics. SSHD will then consider the applicant's individual circumstances; however, we repeat what we have said earlier about the requirement to give biometrics being deferred or waived in exceptional circumstances only. Those Afghans who are outside of Afghanistan and able to get to a VAC to provide their biometrics are able to make an application in the usual way.
>
> 15. In the absence of a completed application in accordance with the process described above, no decision whether or not to grant LOTR will be made at this time."

47. In the letter of 3 December 2021, AZ's solicitors also challenged the refusal under ARAP, and referred to a report by Mr Foxley, in support of their submission that senior judges, such as AZ, had made a meaningful contribution to the UK Government's work, and that Category 4 had been too narrowly interpreted and applied.

48. The GLD, in its letter of 10 December 2021, responded as follows:

> "15. Your proposed 'wider' interpretation takes [AZ's] work as a judge entirely out of context. As the decision-maker stated at paragraph 4 of the ARAP Decision, "[AZ] has not provided evidence of any link to Her Majesty's Government (HMG) sponsoring unit, nor involvement in cases of special UK interest", adding that "[t]he multiple courts in which he presided are Afghan institution[s]."
>
> 16. The "work" referred to is the work in a meaningful enabling role either employed by or alongside HMG with a sponsoring

> unit. This is clear both as a matter of language and in the light of the purpose of the policy, which is (as stated in the published ARAP guidance) "based on recognition of service and an assessment of likely current and future risk to [locally employed staff] due to the nature of their work for the UK government in the evolving situation in Afghanistan".
>
> 17. Our clients do not accept that simply being part of the Afghan judiciary is the kind of contribution to HMG's mission contemplated by the policy. It was no doubt desirable from the UK's point of view for Afghanistan to have a functioning judiciary (and indeed court staff, prosecutors, police, army and a multitude of other Afghan institutions), but the ARAP policy cannot plausibly be understood as referring to a "material contribution to HMG's mission in Afghanistan" at that level of abstraction. Your construction of the policy would potentially cover all judges, prosecutors, court clerks, police and at least most of the Afghan armed forces. If it had been the intention of our clients to include this cumulatively enormous group of people, the wording of the policy would have been very different. Nor can that criterion be considered in isolation from the requirement to have worked alongside HMG with a sponsoring unit."

The case of S

49. S is a 57-year-old Afghan female judge. She is married with two children aged 19 and 17 years old. She is a member of the International Association of Women Judges ("IAWJ") and its affiliated association, the Afghan Women Judges Association ("AWJA").

50. S served as a judge in the Juvenile Court of Kabul City, which is a Primary Court. Over the course of her career, in various courts, she investigated criminal and national security cases, including cases involving the Taliban and Daish. Her family have been the target of Taliban violence as a result of her judicial work. In 2004, her husband was abducted, beaten and interrogated about S's whereabouts, when she was investigating a case against the Taliban. Some years later, S's husband became paralysed.

51. When the Taliban took power in Kabul, S was prevented from returning to her judicial office to retrieve her documents and records, due to the risk. Her neighbours informed her that the Taliban had come to her neighbourhood, looking for a female judge. She and her family went into hiding and have changed location more than once. She has received calls and messages, from unknown numbers, asking for her location. The Supreme Court has sent a letter warning of terrorist attacks against judges by the Haqqani Network. She fears for her life and for the lives of her family.

52. S states that she completed an online ARAP application on 24 September 2021. The Defendants have not been able to trace it, but have decided to determine it nonetheless.

53. On 9 September 2021, her solicitors Mishcon de Reya wrote to the Defendants asking for their clients (who were 27 Afghan judges and lawyers, including S), to be issued with entry visas relying on the ARAP, ACRS and LOTR routes, in the alternative. On 20 September 2021, the GLD sent a general reply refusing the requests.

54. On 8 October 2021, Mishcon de Reya sent a pre-action letter to the Defendants on behalf of S, together with a bundle of evidence. On 27 October 2021, the Defendants refused S's ARAP application, enclosing the FCDO Decision Maker's Assessment, dated 19 October 2021. The reasons given for refusal in the Assessment were as follows:

> "4. I note [S's] statement that she had investigated criminal and national security cases, including cases involving the Taliban and Daesh/ISKP.
>
> However, [S] has not provided any further details on these cases. [S] has not provided evidence of ever having worked with the UK or identify a possible HMG sponsoring unit. Nor does she provide evidence of involvement in cases of special UK interest (e.g. national security). As such, I do not consider that she worked in a role that made a material contribution to HMG's mission in Afghanistan, or that UK operations would have been adversely affected without her work.
>
> 5. I note that [S] attended a number of training courses supported by international organisations, including USAID. [S] does not claim to have received training or other support provided by HMG.
>
> 6. I note that the Letter Before Action (para 21) refers to [S's] "high profile activism for women's rights". However, no evidence of this activism is provided in the evidence bundle, nor is any evidence provided that such activism was conducted working with or alongside the UK.
>
> 7. In light of these considerations, whilst I accept that [S] is at risk, I am not satisfied that the threat to [S] is heightened as a consequence of working with or alongside the United Kingdom."

55. In the letter of 27 October 2021, the Defendants advised that ACRS was not yet in force, and in any event, it would not have an individual application process.

56. In the letter of 27 October 2021, the Defendants declined to make a decision on S's application for LOTR, stating:

> "**Leave Outside the Rules "LOTR"**
>
> 9. The SSHD has a discretionary power to grant leave outside the Immigration Rules, including on compelling compassionate grounds. That power will not normally be exercised in a way

> which would undermine the objectives of the Immigration Rules or create a parallel regime for those who do not meet them. The usual policy in respect of applications for LOTR is that:
>
> (1) Applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges;
>
> (2) The application will not be complete, and will not be considered, until biometrics are provided at a Visa Application Centre.
>
> 10. The requirement to provide biometrics is underpinned by legislation. Under Immigration (Biometric Registration) Regulations 2008 reg 3A, a person who is subject to immigration control and makes an application for entry clearance which will have effect as leave to enter for a period exceeding 6 months, and who specifies in that application that they will enrol their biometric information outside the United Kingdom, must make an application for the issue of a biometric immigration document. An application on the application form referred to above would fall within the scope of that regulation. The making of such an application gives rise to a discretion under reg. 5 whether to require the provision of biometrics. The SSHD has the power under reg. 5 to decide not to require biometrics.
>
> 11. Since your client has not submitted an application form, the time for deciding whether to waive or defer the provision of biometrics under reg. 5 has not yet arisen, and no such decision is being made at this time. However, the general policy is that biometrics will be required except in certain limited categories of case: those who are excused are generally physically incapable of doing so, for example amputees or those who are unconscious and require life-saving medical treatment. The SSHD will only diverge from that general position in very exceptional circumstances. The use of biometrics is critical to protecting the UK and its residents, and therefore the threshold for waiving the requirement is commensurately high.
>
> 12. In the absence of (a) an application form; and (b) a decision to waive or defer biometrics, no decision whether or not to grant LOTR is being made at this time."

57. S's solicitors challenged the Defendants' conclusions in respect of ARAP in their letter of 12 November 2021. On 24 November 2021, the Defendants sent a detailed response, maintained their decision, for reasons similar to those given to AZ in the letter of 10 December 2021, referred to above.

Policies

ARAP

58. ARAP was introduced jointly by the Secretary of State for Defence ("SSD") and the SSHD with effect from 1 April 2021. Its stated purpose was to "offer relocation or other assistance to current and former Local Employed Staff ["LES"] in Afghanistan to reflect the changing situation in Afghanistan".

59. ARAP replaced the Intimidation Policy which was introduced in 2010. The ex-gratia scheme, which provides redundancy payments, will continue alongside ARAP until November 2022, when it will close.

60. ARAP is routinely updated. The relevant version of the policy at the date of the decisions under challenge was 15 September 2021. It provided:

> "**Eligibility under the ARAP scheme**:
>
> All current and former LES employed directly by HMG are eligible for assistance under the ARAP. Within this eligibility criteria, there are four categories for assistance:

	Cohort	**Assistance offered**
Category 1	High risk / imminent threat	Urgent relocation
Category 2	Eligible for relocation by default	Routine relocation
Category 3	Not eligible for relocation	Other support offered
Category 4	Special cases	Case-by-case basis

> **Category 1**
>
> The cohort eligible for urgent relocation comprises of those who are assessed to be at high and imminent risk of threat to life.
>
> **Category 2**
>
> The cohort eligible for relocation by default comprises of those who were employed by HMG in exposed meaningful enabling roles. Or those who were contracted to provide linguistic services in support of the UK Armed Forces.

> 1. Exposed meaningful enabling roles are roles that made a material difference to the delivery of the UK mission in Afghanistan, without which operations would have been adversely affected, and that exposed LES to public recognition in performance of their role, leaving them now at risk due to the changing situation in Afghanistan.
>
> 2. Examples of such roles are patrol interpreters, cultural advisors, certain embassy corporate services, and development, political and counter-terrorism jobs, among others. This is not an exhaustive list, nor are all those who worked in such roles necessarily eligible by default.
>
> ……
>
> **Category 3**
>
> The cohort eligible for other support are those who are neither assessed to be at high and imminent risk of threat to life nor eligible by default due to holding exposed meaningful enabling roles. This cohort are eligible for all other support short of relocation as deemed suitable by the ARAP team.
>
> **Category 4**
>
> The cohort eligible for assistance on a case-by-case basis are those who worked in meaningful enabling roles alongside HMG, in extraordinary and unconventional contexts, and whose responsible HMG unit builds a credible case for consideration under the scheme (in some cases this includes people employed via contractors to support HMG defence outcomes).
>
> Where relocation is offered to Category Four individuals, circumstances dictate whether it is urgent or routine, as assessed by the ARAP team."

61. The only material amendment from the 1 April 2021 version was that, under Category 4, the second sentence referred to "those who worked in meaningful enabling roles <u>for</u> HMG" whereas in this version the word "for" had been replaced by "alongside".

62. The wording of Category 4 was significantly revised on 16 February 2022 to read as follows:

> "The cohort eligible for assistance on a case-by-case basis are those who:
>
> · on or after 1 October 2001 were directly employed in Afghanistan by an HMG department; provided goods or services in Afghanistan under contract to an HMG department; or worked in Afghanistan alongside an HMG department, in partnership with or closely supporting that department; and

> · in the course of that employment or work or provision of services they contributed to the UK's military objectives or national security objectives (which includes counter-terrorism, counternarcotics and anti-corruption objectives) with respect to Afghanistan; and
>
> · because of that employment or work or provision of services, the person is or was at an elevated risk of targeted attacks and is or was at a high risk of death or serious injury; or
>
> • hold information the disclosure of which would give rise to or aggravate a specific threat to HMG or its interests
>
> Checks will be made with the HMG department or unit by whom the applicant was employed, contracted to or worked alongside, in partnership with or closely supported or assisted."

63. ARAP was also introduced into the Immigration Rules ("IR") from 1 April 2021. The 6 October 2021 version was in place at the date of the decisions concerning the Claimants. It read as follows:

> "276BA1 A person seeking to come to the UK as a relevant Afghan citizen must apply for and obtain entry clearance as a relevant Afghan citizen before they arrive in the UK.
>
> 276BA2 Where the requirements for entry clearance as a relevant Afghan citizen are met, they will be granted entry clearance, which will have effect on arrival in the UK as indefinite leave to enter, unless the application falls for refusal under paragraph 276BC1.
>
> **Definition of a "relevant Afghan citizen"**
>
> 276BB1. A relevant Afghan citizen is a person who:
>
> (i) is an Afghan citizen; and
>
> (ii) is aged 18 years or over; and
>
> …
>
> (iv) if applying on the basis of the Relocations and Assistance Scheme:
>
> a) is or was employed in Afghanistan directly by the Ministry of Defence, the Foreign and Commonwealth Office, the Department for International Development or the Foreign, Commonwealth and Development Office for any period since 2001; and
>
> b) submits an application on or after 1 April 2021; and

> c) qualifies under one of the following categories:
>
> i) imminent risk to life; or
>
> ii) eligible for relocation; or
>
> iii) special cases; and
>
> d) if applying because they qualify under c) ii) above, is or was employed in an exposed, meaningful or enabling role that made a substantive, material difference to the delivery of the UK mission in Afghanistan and without which operations would have been adversely affected;
>
> e) and has been determined by the Secretary of State as being in need of relocation to the UK;"

64. Neither the April 2021 nor the September 2021 versions included provision for those who were not employed by the UK Government. Such provision was introduced for the first time in a version introduced on 14 December 2021. The material provision is as follows:

> "276BB5. A person falls within this paragraph if the person meets conditions 1 and 2 and one or both of conditions 3 and 4. For the purposes of this paragraph:
>
> (i) condition 1 is that at any time on or after 1 October 2001, the person:
>
> (a) was directly employed in Afghanistan by a UK government department; or
>
> (b) provided goods or services in Afghanistan under contract to a UK government department (whether as, or on behalf of, a party to the contract); or
>
> (c) worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department;
>
> (ii) condition 2 is that the person, in the course of that employment or work or the provision of those services, made a substantive and positive contribution towards the achievement of:
>
> (a) the UK government's military objectives with respect to Afghanistan; or
>
> (b) the UK government's national security objectives with respect to Afghanistan (and for these purposes, the UK government's national security objectives include

> counter-terrorism, counter-narcotics and anti-corruption objectives);
>
> (iii) condition 3 is that because of that employment, that work or those services, the person:
>
> (a) is or was at an elevated risk of targeted attacks; and
>
> (b) is or was at high risk of death or serious injury;
>
> (iv) condition 4 is that the person holds information the disclosure of which would give rise to or aggravate a specific threat to the UK government or its interests."

Afghanistan Resettlement and Immigration Policy Statement September 2021

65. After the end of Operation Pitting, the Home Office published its "Afghanistan Resettlement and Immigration Policy Statement" dated 13 September 2021.

66. Paragraph 2 of the Introduction stated:

> "Following rapid work by the Foreign, Commonwealth and Development Office (FCDO), Home Office and Ministry of Defence (MoD) during Op PITTING, we were able to 'call forward' a number of other people for evacuation, in addition to the ARAP contingent and British nationals. These people were identified as being particularly at risk. They included female politicians, members of the LGBT community, women's rights activists and judges. Those who were called forward will form part of the Afghan Citizens Resettlement Scheme (ACRS) cohort."

67. Paragraph 17 confirmed that the ARAP scheme remained open to eligible applicants who would be given indefinite leave to remain ("ILR").

68. Paragraphs 21 – 27 introduced the new ACRS (see below).

69. Paragraph 44 made clear there was "no change" to the Home Office's "longstanding policy that a person can only claim asylum from within the UK. We will not accept asylum claims at our Embassies, High Commissions or VACs overseas or otherwise; whether by online application or through other correspondence."

ACRS

70. ACRS was described in the Afghanistan Resettlement and Immigration Policy Statement as follows:

> "21. On 18 August 2021, the Prime Minister announced the ACRS. This scheme will resettle up to 20,000 people at risk, with 5,000 in the first year. This is in addition to those brought

to the UK under ARAP and is in line with the New Plan for Immigration commitment to expand legal and safe routes to the UK for those in need of protection, whilst toughening our stance against illegal entry and the criminals that endanger life by enabling it.

22. This makes the UK's humanitarian response to the crisis in Afghanistan one of the most ambitious in the world to date and builds on our proud record of resettling more people than any other European country since 2015.

Eligibility and referrals

23. The ACRS will provide those put at risk by recent events in Afghanistan with a route to safety. The scheme will prioritise:

a. those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights and freedom of speech, rule of law (for example, judges, women's rights activists, academics, journalists); and

b. vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT).

24. There will be many more people seeking to come to the UK under the scheme than there are places. It is right that we take a considered approach, working with partners to resettle people to the UK. There will not be a formal Home Office owned application process for the ACRS. Instead, eligible people will be prioritised and referred for resettlement to the UK in one of three ways.

25. First, some of those who arrived in the UK under the evacuation programme, which included individuals who were considered to be at particular risk – including women's rights activists, prosecutors and journalists - will be resettled under the ACRS. People who were notified by the UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK. Efforts are being made to facilitate their travel to the UK.

26. Second, the government will work with the United Nations High Commissioner for Refugees (UNHCR) to identify and resettle refugees who have fled Afghanistan, replicating the approach the UK has taken in response to the conflict in Syria, and complementing the UK Resettlement Scheme which resettles refugees from across the world. UNHCR has the global mandate to provide international protection and humanitarian

> assistance to refugees. UNHCR has expertise in the field and will refer refugees based on assessments of protection need. We will work with UNHCR and partners in the region to prioritise those in need of protection, such as women and girls at risk, and ethnic, religious and LGBT minority groups at risk. We will start this process as soon as possible following consultations with UNHCR.
>
> 27. Third, the government will work with international partners and NGOs in the region to implement a referral process for those inside Afghanistan, (where safe passage can be arranged,) and for those who have recently fled to countries in the region. This element will seek to ensure we provide protection for members of Afghan civil society who supported the UK and international community effort in Afghanistan. This category may include human and women's rights activists, prosecutors and others at risk. We will need some time to work through the details of this process, which depends on the situation in Afghanistan."

71. ACRS was formally opened on 6 January 2022.

LOTR

72. The SSHD, at all times, is entitled to consider the grant of LOTR. Such power derives from section 3 of the Immigration Act 1971: *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32 [2012]; 1 WLR 2192, at [41].

73. The SSHD from time to time publishes guidance as to how to make a LOTR application. Version 1.0 of the guidance "Leave outside the Immigration Rules", which was published on 27 February 2018, remained in force at the date of the decisions in the Claimants' cases.

74. The guidance sets out the principles of LOTR as follows:

> "**Background**
>
> The Immigration Rules are designed to provide for the vast majority of those wishing to enter or remain in the UK however, the Secretary of State has the power to grant leave on a discretionary basis outside the Immigration Rules from the residual discretion under the Immigration Act 1971.
>
> …..
>
> LOTR on compelling compassionate grounds may be granted where the decision maker decides that the specific circumstances of the case includes exceptional circumstances. These circumstances will mean that a refusal would result in unjustifiably harsh consequences for the applicant or their

> family, but which do not render refusal a breach of ECHR Article 8, Article 3, refugee convention or other obligations.
>
> Not all LOTR is granted for the same reason and discretion is applied in different ways depending on the circumstances of the claim and the applicant's circumstances….
>
> **Important principles**
>
> A grant of LOTR should be rare. Discretion should be used sparingly where there are factors that warrant a grant of leave despite the requirements of the Immigration Rules or specific policies having not been met. Factors raised in their application must mean it would not be proportionate to expect the person to remain outside of the UK or to leave the UK.
>
> The Immigration Rules have been written with clear objectives and applicants are expected to make an application for leave to enter or remain in the UK on an appropriate route under the relevant Immigration Rules and meet the requirements of the category under which they are applying – including paying any fees due.
>
> Considerations of whether to grant LOTR should not undermine the objectives of the rules or create a parallel regime for those who do not meet them.
>
> …
>
> The period of LOTR granted should be of a duration that is suitable to accommodate or overcome the compassionate compelling grounds raised and no more than necessary based on the individual facts of a case. Most successful applicants would require leave for a specific, often short, one-off period. Indefinite leave to enter or remain can be granted outside the rules where the grounds are so exceptional that they warrant it. Such cases are likely to be extremely rare. The length of leave will depend on the circumstances of the case. Applicants who are granted LOTR are not considered to be on a route to settlement (indefinite leave to remain) unless leave is granted in a specific concessionary route to settlement."

75. The process to be followed for an overseas application is as follows:

> "**Applying overseas for LOTR**
>
> Applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry

> clearance on their chosen route. Any dependants of the main applicant seeking a grant of LOTR at the same time, must be included on the form and pay the relevant fees and charges."

76. A revised version 2 of the guidance was issued on 9 March 2022. It contains new guidance in respect of ARAP:

> "**Afghanistan Relocations and Assistance Policy (ARAP)**
>
> Applicants (whether overseas or in the UK) cannot use the Afghanistan Relocations and Assistance Policy online application form to apply for leave outside the Immigration Rules. This form is only for relevant Afghan citizens who meet the requirements of the ARAP policy, as a principal applicant or a dependent family member of a relevant Afghan citizen who is eligible under the policy. Any application for LOTR should be made via a valid application on the application form for whichever other route most closely matches the applicant's circumstances."

Legal principles

Rationality

77. The test for irrationality was described by the Divisional Court (Leggatt LJ and Carr J.) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649:

> "98. ….The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see eg *Boddington v British Transport Police [1999] 2 AC 143*, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

78. In *R v Parliamentary Commissioner for Administration ex parte Balchin* [1998] 1 PLR 1, Sedley J. described "irrationality" as "a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic".

79. Inconsistency, unequal treatment, unfairness or arbitrariness in public decision-making are contrary to good administration, and may lead to a conclusion that a decision is irrational. However, such flaws are not to be treated as free-standing grounds for judicial review.

80. This distinction was clarified by the Supreme Court in *R (Gallagher Group Ltd) v Competitions and Markets Authority* [2018] UKSC 25, [2019] AC 96, per Lord Carnwath, as follows:

> "Equal treatment and fairness
>
> *The submissions*
>
> 19. It was central to the reasoning of both courts below that the OFT was subject (as Collins J put it) to "public law requirements of fairness and equal treatment". That analysis was not seriously challenged by counsel for the appellant in this court. They accepted that "the principle of equal treatment" applied to the OFT, but submitted that it did not require it to replicate a mistake, at least in the absence of "conspicuous unfairness". They rely on the approach of Lord Bingham in *R (O'Brien) v Independent Assessor [2007] 2 AC 312*, para 30:
>
> > "It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed. But the assessor's task in this case was to assess fair compensation for each of the appellants. He was not entitled to award more or less than, in his considered judgment, they deserved. He was not bound, and in my opinion was not entitled, to follow a previous decision which he considered erroneous and which would yield what he judged to be an excessive award."
>
> ……
>
> *Equal treatment*
>
> 24. Whatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law. Consistency, as Lord Bingham said in the passage relied on by the appellant (para 19 above), is a "generally desirable" objective, but not an absolute rule.
>
> …..

26. ….. in domestic administrative law issues of consistency may arise, but generally as aspects of rationality, under Lord Diplock's familiar tripartite categorisation.

27. The authorities cited by the respondents provide illustrations. The passage cited by Lord Pannick from Lord Sumption's judgment in *Bank Mellat (No 2)* (above) at para 25 was concerned directly with the question of proportionality under the European Convention on Human Rights, but it was expressed in terms which could be applied equally to common law rationality. Lord Sumption spoke of a measure which, while responding to a real problem, may nevertheless be "irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification". He gave as the "classic" illustration *A v Secretary of State for the Home Department [2005] 2 AC 68*, in which it was held by the House of Lords that a derogation from the Human Rights Convention permitting the detention of non-nationals considered a risk to national security, was neither a proportionate nor a rational response to the terrorist threat, because it applied only to foreign nationals; it was not explained why, if the threat from UK nationals could be adequately addressed without depriving them of their liberty, the same should not be true of foreign nationals. He quoted Lord Hope (para 132): "the distinction … raises an issue of discrimination…But, as the distinction is irrational, it goes to the heart of the issue about proportionality also."

28. At a more mundane level, *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales [2004] EWHC 1447 (Admin)* …. concerned a statutory order under the Agricultural Wages Act 1948, which established a new category of worker, the Manual Harvest Worker (MHW), whose minimum wage was lower than that of a Standard Worker, but the order uniquely excluded mushrooms from the definition of produce the harvesters of which might be paid at the lower rate. This was challenged successfully by the mushroom growers. Having rejected as baseless the various reasons put forward for the distinction, the judge (Stanley Burnton J) concluded that there was no lawful justification for the exclusion of mushroom pickers from the lower rate. He cited inter alia Lord Donaldson's reference to the "cardinal principle of public administration that all persons in a similar position should be treated similarly" (para 74) (*R (Cheung) v Hertfordshire County Council, The Times, 4 April 1986*). He concluded that the exclusion of manual harvesters of mushrooms from the MHW category was "*Wednesbury* unreasonable and unlawful", or in other words irrational.

……

Fairness

> 31. Fairness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law. Addition of the word "conspicuous" does not obviously improve the precision of the concept. Legal rights and remedies are not usually defined by reference to the visibility of the misconduct.
>
> 32. Simple unfairness as such is not a ground for judicial review. This was made clear by Lord Diplock in *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617*, 637:
>
> > "judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of *only as being unfair* or unwise, …" (Emphasis added)
>
> 33. Procedural fairness or propriety is of course well-established within Lord Diplock's trilogy. *R v National Lottery Commission, Ex p Camelot Group plc [2001] EMLR 3*, relied on by the respondents, is a good example. It concerned unequal treatment between two rival bidders for the lottery, one of whom was given an unfair procedural advantage over the other. That was rightly seen by Richards J as amounting to a breach of procedural fairness (see paras 69-70). Although he used the judgment to discuss principles of fairness in a wider context, that was not essential to his decision, which ultimately turned on the proposition that the Commission had "decided *on a procedure* that results in conspicuous unfairness to Camelot - such unfairness as to render the decision unlawful": para 84, emphasis added.
>
> …..
>
> 41. In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson's words at para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

81. In *R (Patel) v Secretary of State for the Home Department* [2012] EWHC 2100 (Admin), Mr John Howell QC (sitting as a Deputy High Court Judge) found unlawfulness by reason of failing to provide a 'rational reason' for treating the Claimant less favourably than others (at [141]). He said, at [114]:

> "The "principle of equality" thus simply means that distinctions between different groups or individuals must be drawn on a rational basis. It is thus no more than an example of the application of *Wednesbury* rationality …."

82. In *R (Hussain) v Secretary of State for the Home Department* [2012] EWHC 1952 (Admin), Mr James Dingemans QC (then sitting as a Deputy High Court Judge) said, at [46]

> "There is an established principle of public law that "all persons in a similar position should be treated similarly", see Stanley Burnton J. in *R(Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 144 at [74], quoting Lord Donaldson MR in *R(Cheung) v Hertfordshire County Council*, The Times 4 April 1998. Any discretionary public law power "must not be exercised arbitrarily or with partiality as between individuals or classes potentially affected by it", see Sedley J. in *R v MAFF, ex parte Hamble Fisheries* [1995] 2 All ER 714 at 722a-b. One reason for that rule is that it provides consistency in decision making, and some certainty about the application of rules."

83. Where there are divergent decisions in materially the same situations, the Court is required to '*consider with the greatest care how such a result can be justified as a matter of law*': *R v Department of Health, ex p Misra* [1996] 1 FLR 128 at 133 and see also *R (Gurung) v Ministry of Defence* [2002] EWHC 2463 (Admin), a successful challenge on rationality grounds by Nepalese nationals and survivors of Japanese prison camps from their exclusion in the ex-gratia compensation scheme, having served in a Gurkha brigade.

Policies

84. As a general principle, a person's case falls to be considered according to the policy and criteria applicable as at the date of decision (*Odelola v SSHD* [2009] UKHL 25; [2009] 1 WLR 1230).

85. In *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098, Hickinbottom LJ held at [72]:

> "Therefore where there is a policy with published criteria against which the conferring of a potential benefit will be assessed, an individual is entitled to be assessed against the criteria which were in place at the time of the assessment, with a reasonable expectation that, if he satisfies them, he will obtain the benefit…."

86. The operation of an unpublished policy is procedurally unfair and unlawful: *R (Lumba) v SSHD* [2011] UKSC 12.

Procedural unfairness

87. It is well-established that procedural unfairness is a distinct ground for judicial review (see *Gallagher*, per Lord Carnwath at [33]).

88. The Claimants referred to *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 which concerned a challenge to the procedures adopted by the SSHD before and after the closure by the French Government in October 2016 of the tent encampment in Calais, known as 'the jungle'. The process was expedited in light of the time limitation for the demolition. Singh LJ held:

> "86. …It could be said that, because the expedited process was one which was entirely discretionary and which the Secretary of State had no obligation to introduce in the first place, the duty of procedural fairness did not apply. If that were the argument, I would not accept such a sweeping proposition of law. The point can be tested by reference to the facts of a case such as *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213, which concerned an ex gratia compensation scheme for civilians who had been interned by the Japanese during World War II. That ex gratia scheme of compensation was administered by reference to certain criteria which had been set out in exercise of the Royal Prerogative. There can be no doubt that the Government had no obligation to introduce any such scheme but the fact is that it had chosen to do so and it had set up for itself certain criteria which had to be met by an applicant before compensation was payable under the scheme. In those circumstances, if the Secretary of State had failed to act fairly, for example by failing to give a person any opportunity to make representations as to why he or she qualified for compensation according to the criteria set out in the scheme, that would appear to be a breach of a legal duty to act fairly. It seems to me that it would be no answer to say that the Secretary of State was under no obligation to set up the scheme in the first place. That is irrelevant to the question of whether fairness is required once the decision has been taken to set up such an ex gratia scheme."

Grounds of challenge

89. It is convenient to consider Grounds 1 and 2 together because of the overlap between them.

Submissions

90. In S's case, Ground 1 initially challenged the Defendants' construction of Category 4 of ARAP on two grounds. First, that the decision-maker had erred by applying a test of 'heightened risk'. Second, that there was no requirement that the risk must be as a

consequence of engagement with the UK. Lane J. refused permission on this ground, and the Claimant did not pursue it further, substituting an amended Ground 1.

91. Both Claimants challenged the refusals in their cases on the ground that they were inconsistent with decisions that the Defendants made during Operation Pitting in respect of other comparator judges whose circumstances were not materially different. They submitted that the Defendants provided no rational reason as to why they had not been granted leave under ARAP or LOTR, on the same criteria and in the same way as the comparator judges. The Claimants referred to the revisions to the wording of the ARAP policy in February 2022, and to the ARAP IR in December 2021, and contended that they resembled the Pitting LOTR criteria.

92. The Claimants did not pursue any challenge in respect of the ACRS, presumably because the Claimants are not currently eligible under its "gateways".

93. The Claimants submitted that the Defendants' policies and processes were incoherent and unfair. The criteria adopted during Operation Pitting were not published, and so the Claimants' failure to apply for leave during Operation Pitting could not be a reason to treat them less favourably. The inconsistent and arbitrary use of LOTR during Operation Pitting favoured those who had the benefit of lobbying by influential persons on their behalf.

94. Both Claimants submitted that the Defendants' refusal to accept their applications for LOTR by using the ARAP online application form, when there was no other visa form which remotely matched their circumstances, was procedurally unfair and irrational. The Claimants and their dependants (including AZ's six young children and elderly mother and S's paralysed husband) could not reasonably be expected to provide biometrics at a Visa Application Centre, when the British Embassy in Kabul was closed, nor to travel to another country without being detected by the Taliban.

95. In response, the Defendants submitted that the decisions made were lawful. They were a legitimate exercise of discretion by the Defendants, applying the relevant policies. The Defendants acknowledge that the Claimants are at risk of harm from the Taliban because of their judicial roles. However, none of the applicable policies operate on the basis that risk alone creates an entitlement to enter the UK. The extent of the UK's responsibility to various individuals or cohorts was a matter for the Defendants to determine. Afghan judges may be eligible under ARAP or LOTR, but whether they are in fact eligible depends upon a case-specific evaluation of the individual facts.

96. In regard to ARAP, the decision-maker's view on the specific facts of the application by Judge W, a judge in the Anti-Terrorism Court in Kabul, was that the criteria for relocation under ARAP were satisfied. The facts of Judge W's case are distinguishable from the facts of the Claimants' cases.

97. In regard to LOTR, "Operation Pitting LOTR" was the term used to refer to the immigration leave granted to those evacuated under Operation Pitting. It was plainly lawful for the Defendants to adopt specific criteria and processes for the emergency evacuation from Afghanistan, so as to utilise the spare capacity in UK military aircraft leaving Kabul during the short period of time available. Equally, it was lawful to discontinue that approach once the evacuation had ended, whilst taking into account any commitments that had been made.

98. The cases of the comparator judges who were granted LOTR are distinguishable from the Claimants, as they were called forward for evacuation during Operation Pitting, but were unable to board an aircraft. As the Claimants have not made an application for LOTR in the prescribed manner, no substantive decision has yet been made to refuse the Claimants LOTR.

99. As Operation Pitting has concluded, the SSHD is entitled to require the Claimants to follow the normal procedure for a LOTR application, by completing the visa form which most closely matches their circumstances. The ARAP application form is not acceptable because ARAP applications are assessed by the MoD, not by the SSHD. Before the application is considered, Claimants must either attend a Visa Application Centre to provide biometrics or obtain a waiver or deferral of that requirement. Since the date of the decisions in the Claimants' cases, the forms had been modified so as to add an option to seek a deferral of the biometrics requirement.

Conclusions

ARAP

100. The Defendants accept that some Afghan judges have been granted leave to enter the UK under ARAP. A letter from the GLD, dated 4 February 2022, stated as follows:

> "To the best of our clients' knowledge, a total of 13 members of the Afghan judiciary have been relocated to the UK under ARAP. As we have previously informed you, some other Afghan judges were relocated under LOTR.
>
> At least 12 of the 13 worked directly alongside HMG and made a material contribution to the UK's national security objectives in Afghanistan. The one possible exception was referred to in our letter of 20 September 2021 ("a judge who was hiding with other ARAP Category 4 special cases"). Although that judge worked at a court which received support from the UK Government, we have not seen evidence that that particular judge worked directly alongside HMG.
>
> The lives of all 13 were regarded as being at risk.
>
> They were sponsored by either FCDO or MoD.
>
> Although your questions were limited to "members of the Afghan judiciary who have been relocated to the UK", for completeness we would add that we are aware of one further case of a judge (not in fact relocated to the UK to date) who was approved under ARAP Category 4 where we have not seen evidence that they worked directly alongside HMG."

101. Judge W was granted leave to enter the UK under ARAP during Operation Pitting. He has since been granted indefinite leave to remain in the UK. He explains in his witness statement that he was a judge in the Anti-Terrorism Court in Kabul, hearing cases of

detainees who had been arrested under terrorism law. His identity was well-known. Like all judges in Afghanistan, he was employed by the Supreme Court. He did not work directly or indirectly for the UK Government or military. He and his fellow judges were invited to the British Embassy and elsewhere to attend events and training seminars, and they met British officials on those occasions. The UK Government also provided logistical and operational support for the Anti-terrorism Court in Kabul.

102. When the Taliban came to power, Judge W felt very vulnerable and feared for his life. He and his fellow judges in the Anti-Terrorism Court telephoned the Counter-Terrorism team at the British Embassy, who they knew, and asked them for help. They were invited to complete the ARAP application form, and all of them were called forward for evacuation. They were told by the Counter-Terrorism team at the British Embassy that their work had helped the UK mission in Afghanistan. Upon arrival in the UK, he and his fellow judges were taken to meet the Foreign Secretary, and they were informed by the British officials they had previously met in Kabul that they were granted visas because they worked in the Anti-Terrorist Court.

103. Mr Hall explained the Defendants' reasoning at paragraph 46 of his witness statement:

> "As GLD explained in their letter of 4 February 2022, a total of 13 members of the Afghan judiciary have been relocated to the UK under ARAP (some were sponsored by FCDO, others by MOD)…..This included some judges who had worked closely with the UK in the area of Counter Terrorism and were agreed for resettlement under Category 4 of ARAP. Judge W, for example, was relocated to the UK through the ARAP scheme following a detailed assessment of his individual facts. There is no statement or principle that the status of being an Afghan judge is sufficient to establish eligibility under ARAP. Afghan judges may be eligible under ARAP, but whether they are in fact eligible depends on a case-specific evaluation of the individual facts."

104. The Defendants declined to disclose individual details of the 13 judges, and the Claimants decided not to pursue their CPR Part 18 application for further information on this issue, as that would have delayed the expedited hearing of their claims.

105. The 1 April 2021 version of the ARAP policy was in force when the decision was made in Judge W's case. The 15 September 2021 version of the ARAP policy was in force when the decisions in the Claimants' cases were made. There are some differences in the wording of Category 4, in particular, the April version referred to "those who worked in meaningful enabling roles for HMG" whereas the September version substituted the word "alongside" in place of the word "for".

106. When considering the terms of the ARAP policy, it is important to bear in mind that it is primarily aimed at local staff and other personnel employed directly by the UK Government, as expressly stated on the face of the policy. It replaced other policies which were also directed at locally employed staff. It originated as a means of showing commitment to those who worked for and supported the UK Government, and reflects responsibilities owed by the UK to individuals in Afghanistan as a result. Category 4

also acknowledges the importance of work carried out by Afghan individuals alongside the UK Government, rather than as a Government employee.

107. In my judgment, Mr Hall is correct in saying that an Afghan judge may be eligible for ARAP, under the terms of the scheme, but that the status of being an Afghan judge is not of itself sufficient to establish eligibility. Eligibility will depend on a case-specific evaluation of the individual facts to see whether the criteria are met.

108. In the case of Judge W, and his fellow judges at the Anti-Terrorism Court in Kabul, the Defendants appear to have been satisfied that they met the criteria in Category 4 in the ARAP policy because of their role in presiding over the Anti-Terrorism Court, which benefited the UK Government. The judges had a working relationship with UK officials in Kabul, in particular, the Counter-Terrorism Unit which arranged for their sponsorship under ARAP. The UK Government provided the Anti-Terrorism Court with logistical and operational support, and organised training and meetings for the judges. Their roles were public and high profile and they were at risk from the Taliban.

109. I was referred by Ms Giovannetti QC to the judgment of Lieven J. in *R (JZ) v Secretary of State for the Home Department & Ors* [2022] EWHC 771 (Admin), at [11], where she quoted from the decision letter, written by the former head of the Counter-Terrorism team at the British Embassy in Kabul who said:

> "I have no evidence to lead me to believe that [JZ] was an employee of Her Majesty's Government, not does it refer to work alongside or in cooperation with HMG units. The Justice Centre in Parwan was not a UK or HMG led intervention and from June 2010 was indeed an Afghan institution - albeit one that benefitted from extensive donor support.
>
> ….The UK's capacity building effort around justice and the rule of law over the last nine years was focussed in Kabul – that was also the focus of HMG's counter terrorism mission in Afghanistan. As [JZ] does not claim to have worked in the anti-terrorism courts within Kabul he did not make a material contribution to HMG's mission there….
>
> ….the UK's counter-terrorism mission was focussed in Kabul. As [JZ] did not work there, his contribution to the UK's counter-terrorism mission was minimal…."

110. However, whilst Kabul was the centre of the UK's counter-terrorism mission in Afghanistan, the evidence indicates that British engagement with the justice system, and anti-terrorist measures, were not limited to Kabul (see paragraphs 17 to 23). In my view, decision-makers should not assume that Afghan judges deciding anti-terrorist, anti-narcotics, and security cases were not contributing to the UK mission merely because they were working in the provinces, rather than Kabul. Each case deserves careful examination on its own facts.

111. The decision letter of 17 November 2021 distinguished AZ from the judges in the Anti-Terrorism Court, pointing out that they were judges "who were publicly known to have

co-operated with the UK, or had been involved in highly sensitive cases of particular UK interest (including national security), and were at significant risk as a result".

112. AZ was a judge in a Primary Court of first instance, who worked in provincial areas, without any connection to the UK Government's Counter-Terrorism mission in Kabul.

113. The Defendants concluded, in the decision-maker's assessment of 5 November 2021, and the covering letter of 17 November 2021, that AZ had not demonstrated any link to a UK Government Sponsoring Unit, as required by the policy. His case was considered by the FCDO Head of Counter-Terrorism Afghanistan Task Force which would be the unit responsible for sponsoring Counter-Terrorism judges under Category 4 of ARAP, and so would be able to identify them. AZ had not been involved in cases of special UK interest. AZ had not received training or other support from the UK Government. Based on the evidence reviewed, it did not appear that he made a material contribution to the UK Government's mission in Afghanistan, and it was not apparent that UK operations would have been adversely affected without his work.

114. Thus, the Defendants concluded that the accepted threat to AZ from the Taliban was not a consequence of working with or alongside the UK Government.

115. In my judgment, the Defendants' decision in respect of AZ cannot be characterised as an irrational application of the ARAP policy on grounds of inconsistency. There were distinguishing factors between AZ and the judges of the Anti-Terrorist Court in Kabul, which explained and justified the decision to grant leave to them, under the terms of the ARAP policy, but to refuse it to AZ.

116. Prior to the Taliban seizing control, S was a judge in the Juvenile Court in Kabul City. She has previously investigated criminal and national security cases, including cases involving the Taliban and Daesh/ISKP. However, she has not worked with the UK Government in any capacity, or had any connection with UK Government officials, and so it was not possible to identify an HMG sponsoring unit for her. She did not receive training or support from the UK Government. Based on the evidence reviewed, the decision maker concluded that it did not appear that she worked in a role that made a material contribution to HMG's mission in Afghanistan, or that UK operations would have been adversely affected without her work. It was accepted that S was at risk, but the decision-maker was not satisfied that the threat to S was heightened as a consequence of working with or alongside the UK.

117. In my judgment, there were distinguishing factors between S and the judges of the Anti-Terrorist Court in Kabul which explained and justified the decision to grant leave to them under the terms of the ARAP policy, but to refuse it to S. Therefore, the Defendants' decision in respect of S cannot be characterised as an irrational application of the ARAP policy on grounds of inconsistency.

LOTR

118. In my account of Operation Pitting, at paragraphs 9 to 17 above, I have described the scheme for evacuating at-risk Afghans to the UK which became known informally as "Pitting LOTR".

119. Mr Hall explained that the FCDO mailboxes received 175,000 communications from 13 to 31 August 2021. Staff did not have the capacity to fully scrutinise or prioritise all these applications in the short time available. As Mr Hall fairly accepted, at paragraph 31 of his witness statement:

> "I emphasise that these decisions were taken at speed and in full knowledge that the number of people hoping for evacuation was bound to exceed the evacuation capacity available. Inevitably this meant that difficult decisions needed to be taken in short order and many deserving cases would not be identified or called forward."

120. The process on the ground has since been described by junior FCDO staff as "disorganised", "slow", "no ability to access the systems, often just to find out the very basics in a very unstructured and chaotic environment" with "thousands of emails going unread" or not actioned (see the witness statement of Ms Kucharikova, dated 24 January 2022, which exhibits a transcript of a BBC interview).

121. In my judgment, as it was impossible to assess and prioritise the huge numbers of people seeking evacuation from Afghanistan, in the limited time available, the selection of persons for Pitting LOTR was likely to be inconsistent and arbitrary, despite the commendable efforts of the staff involved. It is also apparent from the evidence that the process strongly favoured those who had the benefit of lobbying by influential persons on their behalf. That was not an objective or fair means of selection as it was likely that others who did not have influential sponsors were deserving too. The Claimants did not have anyone to lobby for them and they were unaware that they could be eligible under Pitting LOTR, as this was not a published policy.

122. The Claimants have identified five comparator judges who were called forward during Operation Pitting, and later granted LOTR. In each case, the FCDO was lobbied on their behalf by the UK Afghanistan Women Judges Association ("UKAWJA"). Under the auspices of the IAWJ, the UKAWJA had set up an online mentoring scheme for female judges in Afghanistan, which is how they came to know the Afghan judges. According to the Defendants, a total of twelve judges and one prosecutor were evacuated to the UK, following lobbying by the UKAWJA.

123. The details of five of those judges are summarised below:

i) **Judge X** was appointed as a judge in 2010, and worked most recently in the Juvenile Violations Primary Court in Kabul, where she presided over trials against members of the Taliban. She did not have any direct or indirect contact with the UK Government. She had received death threats from the Taliban before they seized power. She and her family were unable to enter Kabul airport in time to be evacuated under Operation Pitting. The International Bar Association ("IBA") helped them to flee to Greece, from where they obtained visas to enter the UK on 7 December 2021.

ii) **Judge Y** worked in the Primary Court in Kabul, hearing family and civil law cases. She did not have any direct or indirect contact with the UK Government. She received a threatening telephone call from the Taliban, after Kabul fell. She and her family were unable to enter Kabul airport in time to be evacuated under

Operation Pitting. The IBA helped them to flee to Greece, from where they obtained visas to enter the UK on 21 October 2021.

iii) **Judge A** worked in the Primary Court in Kabul, hearing family and civil cases. She did not have any direct or indirect contact with the UK Government. She and her family were very fearful after the Taliban took power. She and her family were unable to enter Kabul airport in time to be evacuated under Operation Pitting. The IBA helped the family to flee to Greece, from where they obtained visas to enter the UK on 25 November 2021.

iv) **Judge B** worked in the Primary Court in Kabul, hearing commercial cases. She did not have any direct or indirect contact with the UK Government. She and her family were unable to enter Kabul airport in time to be evacuated under Operation Pitting. The IBA helped the family to flee to Greece, from where they obtained visas to enter the UK on 12 November 2021.

v) **Judge C** worked in the Military Criminal Division of the Primary Court at Parwan, and she also heard family and civil cases. She did not have any direct or indirect contact with the UK Government. She had previously been threatened by the Taliban, and feared for her safety after the Taliban took power. She and her brother went to the Baron Hotel and were evacuated from Kabul airport on a UK military plane to Dubai, and then on to Birmingham.

124. In my judgment, there was no rational distinction between the comparator judges and the Claimants which could justify a grant of Pitting LOTR to the comparator judges but not to the Claimants. They were all judges who were implementing the rule of law in Afghanistan, consistently with the UK's mission, but none of them had any direct or indirect connection with the UK Government. Their membership of the IAWJ and their participation in the mentoring scheme, neither of which are UK Government schemes, could not rationally justify the grant of LOTR to them, but refuse it to the Claimants. In any event, S was also a member of the IAWJ and its affiliated association, the AWJA. They were all at risk from the Taliban because of their occupation. As female judges they were at greater risk than AZ. On the other hand, AZ's anti-terrorist work had made him a Taliban target to a much greater extent than some of the comparator judges, particularly those sitting in civil jurisdictions. The sole reason why the comparator judges were selected was because they had contacts in the UK who were able to lobby the FCDO on their behalf. This illustrates the inconsistency and arbitrariness of Operation Pitting, and the extent to which lobbying and connections influenced the selections made, instead of the application of fair and objective criteria.

125. In my view, both S and AZ could have been eligible under Pitting LOTR criteria, if their names had been put forward. In their work as judges, hearing counter-terrorism and national security cases, they contributed to the UK Government's objectives in Afghanistan to promote the rule of law, and to combat terrorism (albeit not working for or alongside the UK Government, so as to meet the ARAP criteria). In doing so, they placed themselves and their families at considerable personal risk. That risk has heightened since the Taliban seized power. They and their families are in hiding, but realistically they will be found by the Taliban at some point. There is verified evidence that other judges have been summarily executed by the Taliban.

126. However, the Pitting LOTR criteria are no longer in operation as they were only introduced for the purposes of Operation Pitting, which has now concluded. The Claimants' applications had to be considered in accordance with LOTR policy as at the date of the decisions made in their cases in October and November 2021 respectively. However, I consider that factors such as their role in promoting the rule of law, and the risks to their safety arising from their work as judges, will still be relevant in any assessment of their cases. In my view, the factors set out at paragraphs 124 and 125 above are also relevant considerations to take into account in the Claimants' favour, in any substantive consideration of their applications for LOTR.

127. Insofar as the Afghan Girls Development Football team were treated in line with Operation Pitting cases, despite their evacuation taking place in November 2021, this demonstrates the wide discretion which the SSHD enjoys under LOTR. No meaningful comparison can be drawn between the position of the football team and the Claimants.

128. The relevant policy was described in version 1.0 of the guidance "Leave outside the Immigration Rules", published on 27 February 2018. It explains that the SSHD had power to grant leave on a discretionary basis, outside the IR, exercising the residual discretion under the Immigration Act 1971. The discretion will be applied in different ways depending on the circumstances of the claim and the applicant's circumstances.

129. The guidance requires applicants "to apply on the application form for the route which most closely matches their circumstances ….. Any compelling compassionate circumstances they wish to be considered …. must be raised within the application for entry clearance on their chosen route."

130. I agree with the Claimants' submission that there is an obvious reason why LOTR policy directs that applications be made on the form for the visa type which most closely matches their circumstances. That is because any compelling compassionate circumstances will be decided by reference to the IR which most closely matches their circumstances, and the criteria in the rules which they are unable to meet. The visa route which most closely matches their circumstances is ARAP, but their applications for LOTR using the ARAP online form have been rejected. The explanation given is that ARAP is not principally an immigration policy. ARAP applications are initially screened by officials from the MoD, who are best placed to identify who worked for or with the UK Government in Afghanistan, whereas the grant of LOTR is a decision for the SSHD, and so applications have to be screened by Home Office officials. It would delay the MoD in dealing with valid ARAP applications if they had to filter out LOTR applications and refer them to the Home Office. Therefore the Claimants were advised to apply via the standard online visa routes e.g. for those seeking to visit, study, or work in the UK or join family members.

131. The online visa routes do not remotely match the Claimants' circumstances. If they made false entries on such forms, they would be exposed to the risk of permanent refusal of entry on mandatory grounds and even criminal prosecution. Any attempt to enter the UK on false pretences in order to apply for asylum would be illegal. In my judgment, it is irrational to put law-abiding legal professionals in a position where they have to falsify their applications, for the sake of their own and their family's safety.

132. The option suggested by the GLD, namely, that they enter "not applicable" in answer to the questions on the form, is misleading by omission. It also carries the clear and

grave risk that their LOTR applications will be considered and dismissed without any meaningful reference to the criteria which the SSHD has applied in other comparable cases, in the exceptional circumstances pertaining in Afghanistan. This is procedurally unfair.

133. In my judgment, the Defendants' justification is irrational. ARAP is in the IR, so it cannot sensibly be said that it is not an immigration policy. Whilst it may be inconvenient for the MoD officials to have to refer LOTR applications on to the Home Office for consideration, I consider it is irrational and disproportionate for the Defendants to prioritise their own administrative convenience in this way when it is acknowledged that the Claimants are at risk of serious harm at the hands of the Taliban.

134. I note with concern that the revised LOTR policy which came into effect on 9 March 2022, after the decisions were made in the Claimants' cases, expressly excludes applications for LOTR using the ARAP online form. In my view, this policy is at risk of a future legal challenge for the reasons I have set out above.

135. The Claimants were also unable to proceed with their applications for LOTR in October and November 2021 because of the general rule that an application is not complete, and will not be considered, until biometrics are provided at a Visa Application Centre. However, the British Embassy in Kabul closed in August 2021, and since then there has not been a Visa Application Centre in Afghanistan. In my view, the Claimants and their dependants (including AZ's six young children and elderly mother, and S's paralysed husband) had a strong case for a deferral of the requirement to provide biometrics until such time as they could safely reach a Visa Application Centre in a third country, without being detected by the Taliban. Under regulation 5 of the Immigration (Biometric Registration) Regulations 2008, the SSHD has power to waive or defer biometrics testing. However, the application form in force at the time required applicants to identify the Visa Application Centre at which they intended to provide their biometrics, and made no provision to apply for a waiver or deferral. In my view, this was irrational and procedurally unfair.

136. The GLD advised the Claimants to resolve this problem by making a false entry on the form, by naming the Visa Application Centre at which they intended to provide biometrics, when they knew they could not do so. They were advised that they should then "contact the Home Office and inform it of any difficulties they face enrolling their biometrics". The GLD advised that "using the form in this way … will not be used as adverse evidence in any decision-making process". In my judgment, it was irrational for the GLD to expect the Claimants to take the risk of making a false entry on the form, given the penalties for making false statements in immigration applications, on the basis of such a limited and unenforceable assurance contained in a solicitor's letter. It was far from clear that Home Office officials would permit a subsequent amendment to the application to correct the false statement and apply for waiver/deferral instead, without any authorised procedure for doing so.

137. In my view, the rational and fair course of action was for the SSHD to amend the online form so as to include the option of applying for a waiver/deferral of biometrics testing. The SSHD has now done this, but only after the decisions in the Claimants' cases were made.

138. Regrettably, the Defendants' refusal to consider the Claimants' applications for LOTR, on procedural grounds, has resulted in delay, leaving the Claimants in a dangerous situation as they are at risk of harm from the Taliban.

Final conclusions

139. The two issues identified at paragraph 2 above were as follows:

i) Was any difference in treatment between the Claimants, and the comparator judges irrational or otherwise unlawful? The comparator judges were relocated to the UK, during and after Operation Pitting, under ARAP or under a grant of LOTR.

ii) Were the procedural requirements imposed by the Defendants in respect of LOTR applications irrational and/or in breach of the applicable LOTR policy (version 1.0, dated 27 February 2018).

140. On the first issue, the claims for judicial review fail in respect of the Claimants' applications under ARAP, for the reasons set out above. In respect of LOTR, although I found that many of the Claimants' allegations were well-founded, no order for judicial review has been made. The reason is that, because the SSHD unlawfully refused to consider the Claimants' applications for LOTR, there were no substantive decisions on LOTR which were capable of being quashed.

141. On the second issue, the claims for judicial review of the SSHD's refusal to consider the Claimants' applications under LOTR, on procedural grounds, succeed, for the reasons set out above. In the case of AZ, the refusal was communicated in the GLD's letter of 17 November 2021 and confirmed in the letter of 14 January 2022. In the case of S, the refusal was communicated in the letter of 27 October 2021. Those decisions are to be quashed.

142. It will now be for the SSHD to determine how the Claimants' applications for LOTR should be dealt with, both procedurally and substantively, in the light of this judgment.