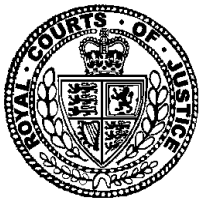

Neutral Citation Number: [2022] EWHC 2757 (Admin)

Case No: CO/2996/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2022

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

THE KING (on the application of) **(1) BAL** **(2) BAL 1** **(3) BAL 2** **(4) BAL 3** **(5) BAL 4**	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR DEFENCE **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Defendant**

- -
- -

Tim Owen KC and Emma Daykin (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Edward Brown KC and Richard Evans (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 25 October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A. Introduction

1. The first claimant was a judge in Afghanistan prior to the Taliban takeover of that country in August 2021. He had worked as a judge in Afghanistan for many years. In view of the anonymity order that is in place to protect his identity and that of his family, the description I will give of his role is necessarily limited. Parts of the factual background described below, including information as to the roles played by the First Claimant and his family, and of security incidents, have also been omitted in the interests of preserving anonymity. His work involved a close partnership with the British Embassy in Kabul and many of the criminals he convicted, including dangerous drug producers and dealers, have been released by the Taliban. The British Embassy paid part of his salary and provided him and his family with assistance with personal protection due to the risks associated with his work.

2. In recognition of the role he played in delivering the UK mission in Afghanistan, and the high risk of serious harm he faces as a consequence, he and his wife were assessed by the Defence Afghan Relocation and Resettlement ('DARR') team (which is part of the Ministry of Defence) as being eligible for relocation to the United Kingdom under the Afghan Relocations and Assistance Policy ('ARAP'). The first claimant and his wife were evacuated from Afghanistan in early August 2022 and are now in the United Kingdom.

3. The second and fifth claimants are daughters, and the third and fourth claimants are sons, of the first claimant. They are all young adults. The claimants seek judicial review of the defendants' decisions dated 15 July 2022, 12 August 2022, and 7 September 2022 ('the decisions') to refuse the first claimant's application under ARAP for the second to fifth claimants to be given Leave Outside the Rules ('LOTR'), enabling them to relocate to the UK as "additional family members".

4. On 16 September 2022, Heather Williams J granted the claimants permission to apply for judicial review on two grounds, namely, whether the decisions are (1) irrational or (2) tainted by procedural unfairness.

5. In addition, the claimants renew their application for permission on two of the three further grounds on which it was refused on the papers. By grounds (3) and (4) the claimants contend that the defendants failed correctly to apply the Afghan Citizens Resettlement Scheme ('ACRS') Pathway 1 policy to the second and fifth claimants and breached their legitimate expectation that they would be recognised under the same.

B. The Afghan Relocations and Assistance Policy (ARAP)

6. The Afghan Relocations and Assistance Policy was launched in April 2021 for Afghan Locally Employed Staff ("LES") and other personnel who had worked with the UK in Afghanistan. It followed on from two previous schemes, the "ex-gratia scheme" and the "intimidation policy". The intimidation policy was introduced in 2010 to support Afghan staff locally employed by the UK whose safety was threatened in Afghanistan due to their work for the UK. The intimidation policy ran until 31 March 2021, when it was replaced by ARAP. The ex gratia scheme was announced on 4 June 2013 and was designed to make ex-gratia offers to eligible locally employed staff including financial

packages, training and the possibility of relocation to the UK. The ex gratia scheme will continue to run alongside ARAP until November 2022 at which point ARAP will be the sole route.

7. The guidance entitled "*Afghan relocations and assistance policy (ARAP) and ex gratia scheme (EGS)*" ('the ARAP Guidance') notes in the introduction:

> "Following the drawdown of UK military operations in Afghanistan in 2012, the Government introduced 2 schemes to support those Afghans who worked with or alongside British Forces, often in dangerous and challenging situations. This was in recognition of the commitment and bravery shown by local staff who supported the UK in Afghanistan. These policies were designed to provide appropriate support that honours their service and properly reflects their work and the risks involved.
>
> …
>
> During August 2021, the Home Office played a vital role in the UK's response to the fast-moving and challenging events in Afghanistan, including supporting the biggest and fastest evacuation in recent history. Some 15,000 people were airlifted out of Afghanistan in a fortnight under Operation Pitting.
>
> In response to the changing situation in Afghanistan during the summer of 2021, the ARAP was expanded to allow for applications from those contracted to provide linguistic services to UK Armed Forces and further to those who worked with UK Government departments in exposed, meaningful, enabling roles that made a material difference to the delivery of the UK mission in Afghanistan." (Emphasis added.)

8. The ARAP Guidance states:

> "The ARAP is administered by the Defence Afghan Relocation and Resettlement team (DARR) in the Ministry of Defence (MoD).
>
> There are four categories of eligibility for people under ARAP:
>
> - Category 1 (set out in Part 7, paragraph 276BB3 of the Immigration Rules): those at high and imminent risk of threat to life due to their current or previous direct employment with HMG
>
> - Category 2 (set out in Part 7, paragraph 276BB4 of the Immigration Rules): those directly employed by HMG or contracted to provide linguistic services in support of the UK Armed forces where the roles performed were such that the UK's operations in Afghanistan would have been materially less efficient or materially less successful

without them, and who are at risk from being publicly recognised as a result of performing those roles.

- Category 3: for those not eligible for relocation but where other support is offered. This category does not have provision under the Immigration Rules and is currently suspended due to the situation in Afghanistan.

- Category 4 (set out in Part 7, paragraph 276BB5 of the Immigration Rules): special cases. To be eligible, a person must meet at least three conditions in paragraph 276BB5: conditions 1 and 2 and either condition 3 or 4. These conditions are as follows:

  - Condition 1. A relevant Afghan citizen who:

    (i) was/is directly employed by HMG

    (ii) provided goods and services under contract, or

    (iii) who worked alongside a UK government department, in partnership with or closely supporting and assisting that department

  - Condition 2. A relevant Afghan citizen who made a substantive and positive contribution to the achievement of the UK government's military or national security objectives with respect of Afghanistan in the course of their work

  - Condition 3. A relevant Afghan citizen who must be or have been at an elevated risk of targeted attacks or be or have been at high risk of death or serious injury

  - Condition 4. A relevant Afghan citizen who holds information the disclosure of which would give rise to or aggravate a specific threat to the UK government or its interests." (Emphasis added.)

9. It can be seen that categories 1-3 apply to those who were directly employed by the Government (save to the extent that category 2 also covers those who were contracted to provide linguistic services in support of the UK's Armed Forces). Those in category 4 worked alongside rather than being directly employed by the Government.

10. An application for support under ARAP is not itself an application to the Home Secretary for entry clearance to the UK. An applicant who is assessed as eligible for relocation under ARAP categories 1, 2 or 4 is eligible to apply for entry clearance and, subject to security checks and the potential grounds for refusal in Part 9 of the Immigration Rules, will be granted entry clearance and indefinite leave to remain in the UK. An eligible Afghan citizen who meets the requirements for relocation to the UK under the ARAP policy (an 'ARAP principal') is able to relocate with immediate family

members, that is, one partner and dependant children under the age of 18 (again, subject to Part 9 of the Immigration Rules).

C. Eligibility for Leave Outside The Rules (LOTR) of additional family members of an ARAP principal

11. The eligibility criteria for "additional family members" of an ARAP principal (i.e. other than the principal's partner and any dependant minor children) who seek to relocate to the UK with leave granted *outside* the Immigration Rules are addressed in guidance published by the Home Office: "*Additional family members under the Afghan relocation and assistance policy (ARAP) and ex-gratia scheme (EGS)*" ('the AFM Guidance').

12. The background section to the AFM Guidance explains:

> "Following the introduction on 1 April 2021 of the ARAP scheme, international forces, including those from the UK, announced their intention to withdraw from Afghanistan by the Autumn of 2021.
>
> Owing to the deteriorating security situation in Afghanistan at that time, the guidance was expanded to provide for additional family members asking to join the relevant Afghan citizen being relocated to the UK. These cases will be exceptional to the relevant Afghan citizen and their immediate family member cases which are considered under the Immigration Rules, although all such cases must similarly be deemed eligible for relocation by the Government Department or Unit for whom, or with whom the relevant Afghan citizen worked in Afghanistan ("the sponsoring department or unit")." (Emphasis added.)

13. The AFM Guidance addresses the process for consideration of additional family members, stating:

> "An additional family member of a relevant Afghan citizen seeking relocation who is under the EGS or the ARAP schemes must apply using the online application form and will be considered for leave outside the Immigration Rules on compelling grounds.
>
> …
>
> The ARAP is administered by the Defence Afghan Relocation and Resettlement team (DARR) in the Ministry of Defence (MoD), who decide whether a relevant Afghan citizen, and their family members are eligible under the ARAP or outside the rules because of compelling grounds. Such decisions may be informed by the sponsoring department or unit.
>
> …

> Key factors when assessing a grant of leave for additional family members include the proximity of the family relationship, the family circumstances of the individuals involved (including the nature and extent of any dependency), the way in which the employment or [sic] the relevant Afghan citizen has led to any risk to the family member and what those risks are.
>
> …
>
> The final decision on whether additional family members can relocate to the UK will be taken by the Home Office Joint Afghan Caseworking Unit (JACU), who will be strongly guided by the initial assessment made by the sponsoring department or unit." (Emphasis added.)

14. The key section of the AFM Guidance outlining the test to be applied in determining whether to grant LOTR under ARAP to additional family members states:

> "**What constitutes compelling reasons?**
>
> Compelling reasons must be provided along with any supporting documentation to confirm both the relationship between them and the link to risk faced by the family members as a result of the work of the relevant Afghan citizen eligible for relocation under the ARAP.
>
> LOTR should only be considered where either there are genuine, verifiable, compelling reasons relating to the family member's safety and security, or vulnerabilities. It is not intended to provide for all additional family members." (Underlining added)

15. The AFM Guidance then expands on those alternative bases on which compelling reasons may be found. First, under the heading "Security concerns", the AFM Guidance states:

> "There may be compelling reasons where the work of the relevant Afghan citizen has led to specific threats or intimidation of members of their family who would not normally qualify for relocation under the Immigration Rules.
>
> If the relevant Afghan citizen makes a request for additional family members to accompany them on that basis, the sponsoring department or unit, normally the MoD or FCDO, must obtain all available and relevant information to enable the DARR to make an assessment of the level of risk faced by those family members and decide whether the reasons are sufficiently compelling to warrant leave outside the rules.
>
> If the reasons are deemed sufficiently compelling, the sponsoring department or unit may recommend to the Home

> Office that they are granted entry clearance to allow them to relocate with the relevant Afghan citizen in the UK.
>
> The assessment must confirm that the risk is specific to the additional family member(s) and related to the work undertaken by the relevant Afghan citizen in order for relocation to be considered."

16. Secondly, under the heading "Additional Vulnerabilities" the AFM Guidance states:

> "There may be instances where the relevant Afghan citizen asks for individual family members to be relocated because of specific vulnerabilities faced by that family member which have led to an exceptional level of family dependence, and that the family member would be unable, even with practical and financial help of the sponsor, to obtain the required level of care or protection in Afghanistan because it is not available and there is no person there who can reasonably provide it, or because it is not affordable.
>
> The expectation is that the normal rules on dependency will apply in all but the most exceptional and unusual circumstances which the relevant Afghan citizen must be able to demonstrate."

17. The AFM Guidance states that if a decision is made that additional family members do not fall within the existing criteria, they "*may request a review of this decision and will be advised to put any additional compelling reasons in writing*".

D. The Afghan citizens resettlement scheme (ACRS)

18. In addition to the ARAP scheme, the Government formally opened the ACRS on 6 January 2022. The ACRS is not application-based. The ACRS guidance states that "*eligible people will be prioritised and referred to resettlement to the UK through one of 3 referral pathways*". The only pathway in issue in this case is Pathway 1. The ACRS guidance states:

> "Under Pathway 1, vulnerable and at-risk individuals who arrived in the UK under the evacuation programme have been the first to be settled under the ACRS. Eligible 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." (Emphasis added.)

E. The facts and decisions

Operation Pitting

19. The history leading up to Operation Pitting was described by Lang J in *R (S and AZ) v Secretary of State for Foreign, Commonwealth and Development Affairs & ors* [2022] EWHC 1402 (Admin) ('S and AZ') at [5]-[8]. As Lang J stated at [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."

20. It is helpful to consider the evidence as to what occurred in this case against the background of the description of Operation Pitting given by Lang J in *S and AZ* at [9]-[17].

> "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. …

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." (Emphasis added.)

21. On 5 August 2021, the first claimant made an application through the British Embassy in Kabul to be evacuated and relocated to the United Kingdom. He was advised to make a second application for evacuation including his wife and family members which he submitted the same month, probably on 22 August 2021. The application form shows that he applied for LOTR, as additional family members under ARAP, for the second and fifth claimants (and one other daughter who was then single but has subsequently married). The first claimant stated in the application form:

> "My daughters are single, financially dependent upon me and live with me[.] [W]ithout me they would not survive with the Taliban threats."

22. The first claimant states that on 22 August he received an email from Emily White, the Chief of Staff at the British Embassy in Kabul in which she said she had "asked the team to provide you with an update on your application". The same day, the first claimant began communicating via WhatsApp with Ms White's secretary, 'Louise'.

23. On 23 August 2021, at 11.19am, a Home Office official, John Willis, emailed colleagues:

> "Grateful if you can carry out WI and PDCS/ATC/'No Fly List' checks for all of the individuals below as a matter of priority." (Original emphasis.)

The 5th – 9th entries on the list were the first claimant, his wife and the three daughters in respect of whom he had made an application for LOTR.

24. It appears from these messages, read in the context of emails from Home Office officials on 20 August 2021, one of which attached a Ministerial Submission, that the

first claimant, his wife and three daughters were in one of the "*additional cohorts*" in respect of whom the Home Secretary approved the offer of LOTR, subject to security checks, on 20 August 2021. Moreover, I note that in the defendants' summary grounds in an earlier claim brought by the first claimant (CO/2403/2022 ('the first claim'), the defendants said that during August 2021 "*the Claimant was considered for relocation under Operation Pitting LOTR and received approval from the Home Office, but he was not called forward*" as the situation in Afghanistan changed before the call forward process could be completed.

25. On 23 August 2021, at 1.31pm, the Head of Serious & Organised Crime Overseas Engagement ('SOCOE') at the Home Office sent an email to the private secretary to the Home Secretary urgently requesting the re-categorisation of the additional cohorts of individuals who worked for and with the National Crime Agency ('NCA') as ARAP (Category 4) rather than LOTR. This re-categorisation was described as "*critical at this juncture because the LOTR status of these individuals is now (due to flight pressure) placing their prioritisation for flights below those with ARAP status*". The Home Secretary's agreement to this was confirmed at 5.40pm the same day.

26. On 23 August 2021, at 6.24pm, Nick Pashley responded to Mr Willis's request for security checks to be undertaken in respect of, among others, the first claimant his wife and three daughters, "*checks done – no matches, except a possible for [redacted]. Report gone for review*". At 8.13pm the same day Mr Willis asked him to "*please confirm asap whether is clear to go? This is a very urgent request*". There is no response to that email in evidence. But at 8.35pm Louise sent the first claimant WhatsApp messages telling him:

> "You will get an email
> Not sure when
> To tell you to go to the airport"

27. On 24 August 2021, at 3.02pm, Louise sent the first claimant a further WhatsApp message asking, "*Do you have email?*" It is apparent that this resulted in a miscommunication. Louise intended to ask whether he had received an email from the Home Office but the first claimant understood her to be asking for his email address. The first claimant responded, "*yah sure*" and then in a further message provided his email address. Responding to his "*yah sure*" Louise said, "*yes so you go to Baron hotel*", in response to which the first claimant asked, "*Which time*". Having spotted the misunderstanding on receipt of his email address, Louise asked, "*From home office*" and followed it up with messages saying, "*Hold on*", "*Did you get an emai[l]*". The first claimant confirmed he had not received an email and Louise said she would "*see what's happening*".

28. On 25 August 2021, at 11.03pm, Louise asked the first claimant "Do you have the email yet?" He replied, "No", and she informed him "They are starting to come to others we have supported so wanted to check".

29. On 26 August 2021, a suicide bomber exploded a bomb at the airport in Kabul. The same day, at 7.20pm, Louise sent the first claimant a WhatsApp message:

> "I don't know when your email will come but we are dealing with a difficult situation with the airport and the military are

> organising the emails, they don't want to send all the emails out as it would be too busy at the airport and dangerous. You are probably aware of the airport and I hope you are safe and your family and friends."

30. The first claimant sent a number of further WhatsApp messages to Louise seeking an update on his application but she was unable to provide any further information and no longer responded after 3 September 2021.

Decision that the first claimant was eligible to relocate under ARAP

31. On 22 April 2022 the first claimant's solicitors sent a pre-action protocol letter requesting the defendants take a decision on the first claimant's ARAP application. Following further correspondence that resulted in a letter from the DARR team to the first claimant dated 17 May 2022 informing him:

> "Having assessed your case, you are eligible for relocation to the United Kingdom (UK), providing you pass further checks (see below at paragraph 8), under the ARAP policy as a current or former Locally Employed Staff (LES) who was directly employed by Her Majesty's Government (HMG) and worked in an exposed, meaningful enabling role that made a material difference to the delivery of the UK mission in Afghanistan, or you are deemed eligible under category 4 with a HMG sponsor, and are now at risk."

32. The letter did not specify which eligibility category the first claimant was assessed as coming within. However, it is evident that the applicable category was 4: the panel notes of 6 and 14 July 2022 state he was "Cat 4", the defendants' summary grounds in the first claim stated he was in ARAP category 4, and the first claimant was not directly employed by HMG (or contracted to provide linguistic services). The letter of 17 May informed the claimant that, subject to satisfying the requirements of the Immigration Rules, and following them, he would be able to apply for his spouse and any dependant children under the age of 18 to accompany him to the UK. In response, the first claimant provided the required documents on 19 May 2022.

Application for ARAP LOTR for the second, third, fourth and fifth claimants

33. Following further correspondence, on 21 June 2022, the first claimant submitted an application for LOTR to relocate the second to fifth claimants. In the application the first claimant wrote that although he has a big family, he had listed only four of his children as "*they live with me and I am their only supporter*". He said his two daughters and the fourth claimant are students. Having described his role, the first applicant wrote:

> "I have justified a lot of cases regarding narcotics, drug mafias, and affairs alike and most of these mafias are Taliban. They were imprisoned by me and by collapse of previous government they were released from prisons. They have searched for me and my family members several times even they came to my house several times asking for me and my family members who are

> living with me now, fortunately, we were not at home. Me and my listed family members are living in hide.
>
> Secondly my son [the fourth claimant] worked as [words omitted for anonymity purposes]… Because of his civil activities, he was attacked by Talibans several times. If he remains in Afghanistan, not only because of my duty with previous government of Afghanistan but also because of his activities, he will definitely be killed by Talibans and other criminals alike.
>
> Moreover, my other son [the third claimant] worked [words omitted for anonymity purposes] because of his duty he is living under a critical situation here in Afghanistan as well.".
>
> …
>
> I cannot trust on any other folks and relatives of mine in Afghanistan in case if I leave my sons and daughters here in Afghanistan."

Initial notification of the first security incident

34. At 2.10pm on a day in late June 2022, the claimants' solicitor informed the defendants by email about what Mr Tim Owen KC referred to as 'the first security incident':

> "We have been informed this morning by our client's family that he and his son [the fourth claimant] have been arrested by the Taliban and are currently detained by them. [The first claimant]'s son [the third claimant] was also taken but has since been released. Both of these sons are included on [the first claimant]'s application form for LOTR." (Original emphasis.)

35. Attached to the email was a "*copy of the letter received by our client this morning from the Taliban*", relating to the arrest of the first claimant and a photograph "*showing [the fourth claimant] being taken away by the Taliban*". The claimants' solicitor asked for the LOTR application to be processed with "*extreme urgency*".

36. The following day, at 9.39am, the claimants' solicitor sent the defendants a translation of the Taliban letter "*regarding the arrest of [the first claimant] and his two sons*". The email stated:

> "We have been informed overnight by [the first claimant]'s daughter that [the fourth claimant] has now been released by the Taliban. He was tortured [words omitted for anonymity purposes] and is in a bad mental and physical condition. We attach the photos we have been sent. [The first claimant] is still being held by the Taliban.".

The claimants' solicitors stated that an emergency response was clearly required to determine the LOTR application, provide security advice to the family and make an immediate plan for assistance in relocating outside Afghanistan.

37. At 5pm the same day, the claimants' solicitor wrote:

> "We have been informed by his family that [the first claimant] has been released. It appears he has been threatened but is not physically harmed. There is a letter of guarantee that he has had to give regarding future attendances."

Commencement of the first claim

38. On 1 July 2022, the MOD responded to the claimants' solicitor's emails regarding the first security incident that they would not prioritise cases exclusively on the basis they have legal representation or are well connected.

39. On 5 July 2022, the first claimant filed and served on the defendants, in the first claim, an application for urgent consideration, a claim form, a statement of facts and grounds, and a witness statement made by the first claimant. The first claimant sought permission to challenge (i) the defendants' failure to implement, within a reasonable time, the offer of relocation (or other interim support) made to him on 17 May 2022; and (ii) the delay in determining the application for LOTR for the second to fifth claimants.

40. In his statement dated 5 July 2022 in the first claim, the first claimant stated:

> "In my role as a judge … I convicted and sentenced many criminals, including dangerous drug producers and dealers. … The nexus of Taliban personnel and the narcotics trade is well known. Many of the sentenced criminals have since been released by the Taliban, placing me and my family at significant risk. Even before the Taliban takeover my family and I were provided with security protection by the Afghanistan government and the British Embassy in the form of bodyguards and a bullet proof car. My children were accompanied to school by bodyguards."

41. The first claimant also provided an explanation regarding children who were not the subject of the application.

42. The first claimant described the first security incident:

> "18. On [a date in late June 2022] at around midday at around midday, <u>two Taliban came to my house with an arrest warrant for me</u>. [He exhibited this document and its English translation.] <u>I was not at the house as I have been in hiding since the Taliban took over and have been moving from place to place. My son [the fourth claimant] was at home, however, and was taken by these Taliban</u> to the … Office of Taliban Intelligence, which is a large office for the whole Kabul area.
>
> 19. [The fourth claimant] was interrogated and badly tortured so that he would divulge my location. [Words omitted for anonymity purposes] [He exhibited photographs of the fourth claimant's injuries and other relevant information]. Words

omitted for anonymity purposes] [The fourth claimant was asked many questions about my background, [words omitted for anonymity purposes], whether I have any American or British contacts. He was put under a lot of pressure to answer these questions and was also bombarded with abuse and humiliation. The Taliban threated to take him to Bagram and imprison him for many years, so that no-one would know where he was and no-one would be able to help him. [The fourth claimant] was released on bail (see paragraph 23) [the following day].

20. Taliban arrested me and my son [the third claimant] [on a date in late June 2022]. [The third claimant] had been staying with me where I was hiding, so that he could go out to get groceries for me. He is not as well recognised in the area as I am. [The third claimant] was held by the Taliban for around three or four hours. He was interrogated about my work and my contacts. The Taliban intelligence wanted to know from him, for example, who I am in touch with and who visits me.

21. I was held for around 24 hours and released early in the afternoon of [the following day]. The Taliban wanted me to tell them about the cases I worked on. They wanted to know which cases the US and UK gave me to decide. I told them that I was not given instructions by the US or UK. I was doing my job. I decided thousands of cases and I do not remember the details of each one. The Taliban were abusive, they shouted at me, but they did not kick me. They said that I support the British and the Americans, [details omitted for anonymity purposes], that I belonged to the previous government. They told me that unless I tell them the details of every case when I previously put someone in prison, they will harm me and my family. They threatened to put me in prison forever. They made threats against [the third and fourth claimants] and my other family. They told me I should not leave Afghanistan as they will require me for further investigations.

22. I am afraid that in the future my family members and I will be arrested again, interrogated and tortured, and either killed or put in prison indefinitely. If it is not the Taliban officials that do this, then we will be harmed by the criminals I previously convicted.

23. Some of the people in my village agreed to put up bail for me and my two sons. I gave these names when I was arrested and the Taliban then took me back to the village to find these people. The villagers are guarantors for me and my sons. …" (Emphasis added.)

The Threat Assessment

43. On 4 July 2022, a threat assessment was completed by the MOD's DARR Intimidation Advisor in Part 2 of the application form submitted by the first claimant ('the Threat Assessment'). As that was the day before the claim was filed, the DARR Intimidation Advisor would have had access to the emails (and attachments) regarding the first security incident, but not the first claimant's evidence about it.

44. In the Threat Assessment, the DARR Intimidation Advisor noted where the first claimant had served and that his application had been "*supported by NCA via MinSub*". A copy of that Ministerial Submission is not in evidence but it can be surmised that the threat towards the first claimant would have been identified in similar terms to the description given by the DARR Intimidation Advisor. The Threat Assessment stated:

> "**Threat towards the principal based on his role**:
>
> HIGH – Almost Certain/Highly Likely (80 to 95%) to be subject to reprisal by Taliban/Criminals.
>
> The role of the principal would have clearly placed him in a high-profile and exposed position, making him clearly identifiable to elements of the Taliban and criminal groups. It is highly likely that he would have had face to face dealings with both groups within his daily duties. In addition, following the collapse of the Afghan Govt and release of prisoners from Afghan prisoners, it is likely that these groups would be looking for retribution for their "suffering" at his hands.
>
> …
>
> **Threat toward family members based on the role of the principal:**
>
> Whilst it cannot be completely corroborated that the family are suffering at the hands of the Taliban due to the role of the principal, it is considered Likely/Highly Likely that this would be the case. As the family members live with the principal and considering the Taliban interest in targeting him, it would be likely that family members would be subjected to threat and intimidation as the Taliban make efforts to trace the principal.
>
> HIGH – Almost Certain/Highly Likely (80 to 95%) to be subject to reprisals by Taliban/Criminals
>
> **Threat toward family members based on their roles:**
>
> The principal states that his two sons both have connections with civil/human rights groups and within GIROA. It is also stated that both sons have been detained by the Taliban recently, with one suffering torture. It is unclear as to whether this has occurred due to the role of the principal, or the sons' role. However, the detention and use of torture would seem to indicate that the Taliban considered the sons as high value targets. The evidence

> of the principal is uncorroborated by independent sources, but it would be considered a realistic possibility given the roles of both sons.
>
> MED – Likely/Realistic Possibility (40-75%) to be subject to Taliban reprisal." (Emphasis in the original, save underlining added.)

Panel meeting on 6 July 2022

45. On 6 July 2022, the ARAP LOTR panel ('the Panel') met to consider the third and fourth claimants' application for LOTR. On that occasion, four panel members were present: the ARAP Relocation Deputy Director, an NCA Representative, the Relocation Casework Assistant Head and the LOTR Review Project Lead. An adviser, observer and a secretary were also present. The minutes of the Panel meeting on 6 July note that the Threat Assessment provided by the MOD had been shared with the Panel.

46. The minutes of the Panel meeting on 6 July 2022 note that the recommendation they had received on the question whether to "Rule In/Rule Out" the application was:

> "Rule In: threat assessment suggests potential heightened threat to adult children due to principal's role."

47. In the column headed "Panel Decision Rule In/Rule Out" the minutes record (omitting the redacted initials of the participants):

> "- today we will only consider the sons for two reasons: firstly, the alleged detention and torture of the sons means that we have prioritised assessment of the threat based on the evidence provided and are therefore in a position to make a decision on the case of the sons; secondly, we are awaiting advice as to the status of the daughters given that they were originally noted on HMG documentation in relation to PITTING and we therefore need to ensure they do not hold any status already before making a LOTR AFM decision.
>
> – noted that this is currently a live legal case
>
> – yes, therefore we've had offline discussions internally and with other Depts to establish timeline and interactions with the principal. The principal is MinSub approved Cat 4 ARAP with NCA as the sponsor, hence NCA panel member for SME input
>
> – threat assessment has been provided by [redacted], which NCA will provide their take on in this panel as the SMEs
>
> – consider the threat to be lower than MOD assessment, Medium at most. Notably there is disparity between the two brothers (only one arrested) which suggests the arrest is likely in relation to individual activity and not principal's work/role

– note the application which states activities of two sons in question, likely this would increase threat to them as individuals

– note the points made by [redacted] about threat to sons and agree to decide threat element based on this view as NCA are best placed to assess

– to clarify, if [redacted] is content we will note the NCA comments for the record as effectively downgrading the agreed threat assessment

All – agree

…

– form states two sons will remain and seems to say they are not in danger as not well known and not living with principal

– original request at PITTING was for 3 daughters only, so presumably there is another daughter, possibly married also remaining in country but cannot confirm

– ref consistency in decision-making, previous cases where other adult children or other family member remain this diminishes the strength of both threat and dependency rationale

…

– based on the input from NCA, and in accordance with decision-making for other cases it seems that we are leaning towards a rule out

– primary factor to consider here for decision-making is threat to sons and NCA have confirmed they don't assess it to be above the threshold specifically in relation to the principal's role with HMG on the basis of available evidence and information

– agree

– rule out

– rule out endorsed

– action to [redacted] to draft letter and ensure threat assessment updated accordingly with NCA input

RULE OUT"

(Emphasis added.)

48. The "action" of updating the Threat Assessment, referred to at the end of the minutes, was duly taken. A note has been added in italics below the DARR Intimidation Advisor's threat assessment:

> "*Home Office representative comments – Re the question on sponsoring [first claimant] sons I believe the rules state the AFM must be at heighten [sic] threat due to the role of the Principal. We assess that [the fourth claimant] is more likely to be at risk in his own right. We do agree that the risk against him may be heighten [sic] due to the role of the Principal but we have assessed that this risk should be equal to the risk towards [the third claimant] (who we believe was not arrested along with the Principal and [the fourth claimant])*." (Emphasis added.)

Leading Counsel for the defendants, Mr Edward Brown KC, has confirmed that although this comment is described as emanating from the Home Office representative, it was from the NCA representative.

49. In response to the question whether the papers from the permission bundle in the first claim, in particular the first claimant's witness statement (see paragraph 40 to 42 above), "*were before the panel on 6/14 July 2022*", the defendants stated in their summary grounds in this claim that it was "*considered by the Panel on 14 July 2022*". In other words, the Panel did not consider the statement made by the first claimant in the first claim when making their decision to downgrade the Threat Assessment and to refuse LOTR in respect of the third and fourth claimants on 6 July 2022.

Panel meeting on 14 July 2022

50. The Panel reconvened to consider the application for LOTR in respect of the second and fifth claimants on 14 July 2022. The column indicating the recommendation they had received states:

> "Rule out: Threat considered in panel for brothers and not deemed above threshold. Daughters are adult and will have family support remaining in country."

51. In the column headed "Panel Decision Rule In/Rule Out" the minutes for the 14 July 2022 record (omitting the redacted initials of the participants):

> "- this panel is for the remaining AFM on the LOTR AFM application, the two daughters. Advice has been taken from HO legal and policy to determine that the daughters do not have ARAP or LOTR PITTING status and therefore a decision needs to be made on them for ARAP LOTR AFM. This decision will be communicated in a combined decision letter including the decisions on the sons
>
> …
>
> – invite the NCA to provide thoughts on these individuals on the application

> – NCA would ideally endorse the daughters simply because they originally intended to endorse them for PITTING LOTR, otherwise there is no specific rationale for doing so other than potentially for dependency, as the dependency of females differ from than [sic] of males. Understand that this does not necessarily reflect the current decision-making process or approach post-PITTING
>
> – we need to make a decision consistent with other similar cases unless circumstances and evidence directs us to do otherwise – NCA don't consider that there is any threat or specific dependency evidence that would support a rule in?
>
> – no, reaffirm the only rationale is to meet original intend [sic] but defer to MOD on the adherence to Rules, policy and guidance so that the decision is consistent with similar cases
>
> – understood, note that the previous 'decision' falls away post-PITTING and we have to make a new AFM decision in light of Cat 4 ARAP status and the standard process to consider AFM that aren't included automatically under ARAP
>
> …
>
> – is the threat to the daughters considered to be the same as to the sons, or less?
>
> – yes, likely less as neither were arrested
>
> …
>
> – yes, adult children usually only ruled in in exceptional circumstances, single adult females are occasionally ruled in but normally in absence of other adult family members remaining in Afghanistan. There are several male relatives known to be remaining, possibly more that we are not aware of.
>
> – inclined to rule out in the circumstances
>
> All – agree
>
> RULE OUT"
>
> (Emphasis added.)

15 July decision

52. The ARAP Unit notified the first claimant of the decision to refuse the application for LOTR for the second to fifth claimants in a letter dated 15 July 2022 ('the 15 July decision'). The letter gave the reasons for refusal in the following terms:

> "The reason for refusal of [the fourth and third claimants] is because it was the panel's view that there was insufficient evidence to demonstrate exceptional and compelling risks to their safety, security or vulnerabilities to warrant LOTR. In considering the case for [the fourth and third claimants], the panel concluded that the evidence provided in respect of the alleged detention and torture of [the fourth claimant] did not show a clear link between the threat to [the fourth and third claimants] and your links to HMG. Specifically it was assessed that the threat to [the fourth claimant] is increased due to his own role, which you stated was as a civil society activist, rather than as a direct result of your role and links to HMG. Furthermore, both [the fourth and third claimants] were said to have been arrested and it was reported that following arrest [the third claimant] was released without torture. The panel assessed that the threat posed to the sons as a result of your work could not be corroborated, due to the fact that [the fourth and third claimants] were treated differently following arrest. You have also stated that you have other family members remaining in Afghanistan. We conclude the risk to [the fourth and third claimants] is not necessarily specific to the work you undertook, or that there is an exceptional level of dependence on you such that they would not be able, even with your support, to obtain the required level of care or protection required in Afghanistan. I am sorry that this is not the outcome that you were hoping for.
>
> With regards to [the second and fifth claimants], it was also the panel's view that there was insufficient evidence to demonstrate exceptional and compelling risks to their safety, security or vulnerabilities to warrant LOTR. Specifically, the panel did not assess an exceptional level of dependence on you such that they would not be able, even with your support, to obtain the required level of care or protection required in Afghanistan. As above, you have also stated that you have other family members remaining in Afghanistan. On threat, the panel noted that neither [the second nor fifth claimant] were arrested by the Taliban. In contrast, the panel considers the fact that you have stated that your sons were arrested, demonstrates a potentially lower threat to your daughters. Further, the specific link between your role and the risk posed to [the second and fifth claimants] could not be corroborated.
>
> …"

Application for review of the 15 July decision

53. On 27 July 2022, the claimants applied to the defendants for review of the 15 July decision. In support of this application they submitted witness statements from the second, third, fourth and fifth claimants, and a country expert report from Tim Foxley MBE. They also relied on the Home Office's Country Policy and Information Note ('CPIN') on *Afghanistan: Fear of the Taliban* (version 3.0, April 2022). The third and

fourth claimants addressed the first security incident in their statements. The third claimant said:

> "When I was arrested by the Taliban at the end of June 2022 it was after [the fourth claimant] had been tortured to reveal where our father was staying. At that time I was with my father. The Taliban put me and my father in separate rooms at the intelligence office.
>
> They asked me what my work was. [Words omitted for anonymity purposes]. The Taliban intelligence has different departments, this one was all about my father. But there are other networks, the Haqqani network is the one that will know about my work.
>
> After that, they tried to beat me and they put a lot of pressure on me to tell them about my father. They wanted to know how my father was connected to the Americans and the British and about the work he had done with them. They wanted to find out about any legal documents that would show the work my father had done and his connections.
>
> I do not know about these things, but they threatened that they will torture me if I don't give them the information they want. They told me that I have to give them enough information. They released me on bail after a few hours but told me that I must go back there whenever they want me. They said that they would be able to find me anywhere in Afghanistan." (Emphasis added.)

54. The fourth claimant gave the following evidence regarding the first security incident:

> "When I was arrested by the Taliban and detained at the …intelligence office, it was because of my father. I was tortured so that I would tell them about him and where he was. [Details omitted for anonymity purposes] This happened during the interrogation, when they were asking questions about my father and where he was. I did not have information about my father's connections to the US and the British, but I was not able to resist the torture and I had to tell them where he was. The Taliban went and arrested my father and my brother [the third claimant] and brought them to the … intelligence office.
>
> After the Taliban had found and arrested my father, they continued to ask me a lot of questions about him, about his activities and what he had been doing with the British and the Americans. They wanted to know about his connections to foreign authorities. They told me that if I did not give enough information about my father and his work that they would send me to Parwan jail at Bagram and that they would do something to me that they have never done to any other human. They told me that they had the right to assassinate me, to hang me because

> my father worked for and took money from the foreigners. After they found my father they continued to beat me. They got angry because I did not have enough information about my father.
>
> They did not know about my work … until they saw some pictures on my phone. Then they did ask a few questions about me, my biography and about my social media. I didn't tell them most of it, just about my Facebook account although I told them I had forgotten my password. Most of their questions were about my father.
>
> They released me on bail after nearly 24 hours. They said they could rearrest me any time they wanted. They told me that they would find me anywhere I went in Afghanistan…." (Emphasis added.)

Determination of the first claim

55. An order for expedition was made by Lang J in the first claim on 6 July 2022. The defendants filed an acknowledgment of service and summary grounds on 13 July 2022. On 28 July 2022 Hill J directed an oral hearing take place to determine permission.

56. On 4 August 2022, the Government Legal Department ('GLD') informed the Court and the claimants that although the MOD did not have a LOTR review process (unlike the FCDO which had established such a process for those it had sponsored), the MOD were in the process of establishing one and, in the interim, applicants were permitted to submit further evidence for consideration. If substantive evidence that had not been available to the decision-maker at the time of the original eligibility decision was provided, a case would be put back before the panel. GLD stated that "*the material submitted on 27 July 2022 is currently being considered*".

57. On the morning of 5 August 2022, the first claimant was informed that he and his wife would be evacuated from Afghanistan in the next two days. The oral hearing of the application for permission and interim relief in the first claim took place the same morning. In the circumstances, much of the relief that was sought having been overtaken by events, Sweeting J refused permission.

Pre-action protocol letter in this claim

58. On 5 August 2022, the claimants' solicitors sent a pre-action protocol letter giving notice of their intention to challenge the refusal of LOTR to the second to fifth claimants. They requested the defendants make and communicate a decision, following consideration of the materials submitted on 27 July 2022, within 7 days.

Relocation of the first claimant and his wife

59. The first claimant and his wife evacuated from Afghanistan overnight on a date in early August 2022.

12 August 2022 decision

60. On 12 August 2022, the DARR Directorate wrote to the first claimant that the "Review Team" had reviewed the decision of 15 July to refuse LOTR to the second, third, fourth and fifth claimants ('12 August decision'). Both the reviews/reconsiderations undertaken in this case were *ad hoc*. Although the defendants have stated their intention to establish a formal review process, currently there is not one.

61. The 12 August letter stated:

> "From the additional information you have provided, the Defence Afghan Relocation and Resettlement Team has upheld the decision that your above-named family members do not qualify for leave outside of the rules under ARAP."

62. No minutes of any Panel meeting at which the 12 August decision was taken have been disclosed. In the summary grounds, in response to the claimants' question "*whether the review request, supporting materials (witness statements and expert report) and submissions of 27 July and 05 August 2022 were before the panel that made the 12 August 2022 decision*", the defendants responded:

> "This material was not considered by the Panel which made the 12 August 2022 as it had not been received."

(Those materials had, of course, been received by the defendants but not, it appears, by the Panel.)

63. The 12 August decision responds to representations made by the claimants' solicitors. First, the claimants' solicitors had suggested that there was an obvious risk, given that the first claimant was bailed by the Taliban, and had breached that bail by leaving Afghanistan, that the risk to the second to fifth claimants would increase as a result of his departure. The Review Team responded:

> "We conclude the risk to [the second, third, fourth and fifth claimants] is <u>not necessarily specific to the work you undertook</u>, or that there is an exceptional level of dependence on you such they would not be able, even with your support, to obtain the required level of care or protection required in Afghanistan." (Emphasis added.)

64. Second, the claimants' solicitors suggested that as "*the risks being evaluated relate to Taliban intelligence and activities against collaborators with the democratic regime, and their likely actions in relation to a person of interest already identified and bailed by them*", none of which were "*matters in which the NCA has obvious expertise*". The MOD's Threat Assessment (and that of Mr Foxley) should have been preferred. The Review Team responded:

> "The decision makers use a range of expertise and sources to make decisions. Under the ARAP Scheme, you were assessed at risk as you worked in an exposed, meaningful enabling role that made a material difference to the delivery of the UK mission in Afghanistan, or you were deemed eligible under category 4 with a HMG sponsor. The refusal of [the fourth and third claimants]

> is because it is the view [sic] that there is insufficient evidence to demonstrate exceptional and compelling risks to their safety, security or vulnerabilities to warrant LOTR under ARAP." (Emphasis added.)

65. Thirdly, the claimants' solicitors suggested, by reference to the minutes of 14 July, that the desire to maintain consistency was an irrelevant consideration when it came to the assessment of risk, which is necessarily fact specific. The Review Team responded:

> "Each case is considered on its merits. The risks are considered in light of the circumstances of each case. When considering your application for leave outside the rules, the specific circumstances of your family have been considered alongside other information which informs the decision on the case."

66. The 12 August letter continues:

> "The Review Team have also considered the following:
>
> '*The assessment regarding the two male applicants is based on a mistake of fact: that only one son was detained. This is incorrect. The threat assessment also was in error in this regard (the Home Office comment at the end).*'
>
> This reference refers to the email from Deighton Pierce Glynn [in late June 2022], which states '*We have been informed this morning by our client's family that he and his son [the fourth claimant] have been arrested by the Taliban and are currently detained by them. [The third claimant] was also taken but has since been released*'. The threat assessment was undertaken with due regard to this information and other information available in this case.
>
> The Review Team have considered your representations:
>
> '*The assessment of the threat regarding the daughters then relies upon that of the sons (minutes, p.5), which is flawed for the reasons noted above. Further, the Secretary of State's decision to grant LOTR to the daughters is highly relevant, not necessarily to risk assessment, but to whether the panel should make good that grant.*'
>
> Each case is considered on its merits and the assessment in this case results in upholding the original refusal. There is insufficient evidence to demonstrate exceptional and compelling risks to their safety, security or vulnerabilities to warrant LOTR under ARAP." (Emphasis added.)

67. The 12 August letter continued:

> "The Review Team have considered the following representations:
>
> '*There is no evidence that the panel had before them the papers from CO/2403/2022 including the Witness Statement of the Claimant. The panel should have this material as well as the review submissions and supporting materials (witness statements and expert report) and this letter.*'
>
> Upon reviewing the case, it is evident that this information was available at the time the original decision was made, therefore this does not add anything new into the original decision-making process." (Emphasis added)

This is a remarkable assertion given that (i) the first claimant's witness statement was only before the Panel on 14 July, not on 6 July when the key decision to downgrade the threat assessment was made (see paragraph 49 above); and (ii) the 'review submissions and supporting materials' had not been written prior to the 15 July decision, so plainly had not been before the Panel on 6 or 14 July, and nor were they considered by the Review Team (see paragraph 62 above).

68. The 12 August letter concluded that "*the DARR Review Team has upheld the original refusal decision made on 15/07/2022*".

69. In respect of the process that resulted in the 12 August letter, the defendants submit:

> "This was incorrectly referred to as a 'Review' and referred to the officials conducting the reconsideration as a 'Review Team' in the letter communicating the decision."

Further pre-action protocol letter in this claim

70. The claimants' sent a further pre-action protocol letter on 13 August 2022 indicating their continued intention to challenge the 15 July decision (as upheld by the 12 August decision).

The second security incident

71. On a date in mid-August the claimants' solicitor sent GLD an "urgent factual update":

> "The reason for the increased urgency is that we have just been informed by our client's son that the Taliban came to the family's house this morning (Afghan time) and searched it, looking for him and his siblings. We have not been able to take full instructions yet, for obvious reason, but we have been informed that the Taliban officials asked [details omitted for anonymity purposes] where [the first claimant]'s children were, and when he said he did not know, the officials warned him that the children face severe punishment because their father has absconded. [details omitted for anonymity purposes] took some pictures surreptitiously, which are attached herewith."

72. This 'second security incident' is addressed in a witness statement provided in these proceedings by the fourth claimant on 16 August 2022. The fourth claimant states:

> "My three siblings and I are no longer staying in our family home because it was not safe to stay there after our parents were evacuated. The Taliban could have come to find us there when they find out about my father leaving. [Details omitted for anonymity purposes].
>
> On the morning (Afghanistan time) of [a date in mid-August 2022] [details omitted for anonymity purposes] contacted me….to say that the Taliban had just been at our family home and had left around 10 minutes ago. He said that seven Taliban had attacked the house to search for me, my brother and my sisters. They were at the house for around 30 minutes and they wrecked the house in the search. They were from the same intelligence office that detained me, my brother and my father [in late June 2022].
>
> I believe that the villagers who guaranteed my father's bail …went voluntarily to the Taliban to report that my father has left Afghanistan. I believe this because if they had not reported it, they would have been in default. I think they will not have wanted to get in trouble themselves.
>
> The Taliban [details omitted for anonymity purposes] will keep looking for me and my brother sisters because our father ran away from sharia law. They told [details omitted for anonymity purposes] that when they find us, they will severely punish us. This usually means imprisonment or torture. The Taliban did not leave a letter or note but they brought the letter of guarantee with them [exhibited to the first claimant's statement in the first claim]."

Commencement of this claim

73. This claim was filed and served on 17 August 2022. On 19 August, Freedman J abridged time for the acknowledgment of service to be filed to 24 August. On 24 August, the defendants indicated that they were reviewing the decisions of 15 July and 12 August. On 26 August, the parties filed a consent order seeking to vary the terms of Freedman J's order to allow for the defendants to conduct a further review by 30 August (with directions in respect of pleadings and evidence thereafter). On 2 September, on an application by the defendants, Tipples J amended the terms of the consent order to allow for the review decision to be made on 7 September.

7 September decision

74. The claimants were notified of the third of the three decisions which are challenged in the claim by a letter dated 7 September 2022 from the DARR Directorate ('the 7 September decision').

75. The letter states:

> "The additional evidence provided in relation to the ARAP Leave Outside the Rules Additional Family Members (LOTR AFM) application has now been assessed by the ARAP LOTR AFM team. Although a formal review process is not yet live, the total evidence provided to date for this case, as well as the record of decision-making thus far, was taken into account when considering the additional information. This activity was undertaken by officials involved in the original case preparation and panel, and supplemented by additional officials within the relevant area of work. The conclusion of this assessment of information pertaining to this case is that the refusal is upheld because there is insufficient evidence to demonstrate exceptional and compelling risks to their safety, security or vulnerabilities to warrant LOTR under ARAP."

76. The 7 September decision then proceeded to address the same points as had been addressed in the 12 August letter. The response to the first point (see paragraph 63 above) was in the same terms save for very minor and inconsequential amendments. The response to the second point (see paragraph 64 above) was:

> "The decision makers use a range of expertise and sources to make decisions. Under the ARAP Scheme, you were assessed at risk as you worked in an exposed, meaningful enabling role that made a material difference to the delivery of the UK mission in Afghanistan, or you were deemed eligible under category 4 with a HMG sponsor (in this case the NCA). The role of the NCA in the Panel was to provide an expert overview of the role you undertook for HMG and provide a view on the potential risks to your family members as a result of this role. The refusal of [the fourth and third claimants] is because it is the Panel's view that there is insufficient evidence to demonstrate exceptional and compelling risks to their safety, security or vulnerabilities, as a result of your work with HMG, to warrant LOTR under ARAP." (The underlining indicates the amendments made compared to the response given in the 12 August decision.)

77. The response to the third point (see paragraph 65 above) the 7 September decision states;

> "Risk thresholds are considered in light of the circumstances of each case. When considering your application for ARAP LOTR AFM, the specific circumstances of your family have been considered alongside other information which informs the decision on the case. Each case is considered on its merits.
>
> On the matter of specific protection measures afforded to you and your family that you noted in CO/2403/2022, we note that many officials working for the Government of Afghanistan were afforded protection measures routinely and some cohorts of

> individuals working with HMG were offered stipend payments which included allowances for personal security measures. You have not specifically mentioned any reasons why you consider that you required enhanced personal security over and above that of a comparable role, nor why any such rationale would extend to your family members." (Emphasis added.)

In response to a request for disclosure of the "*other information*" referred to in the review decision which informed the decision, in the summary grounds the defendants stated that this "*includes any information provided by the Defendants and the Claimants*".

78. The 7 September decision continued:

> "In assessing the documents and the claims therein [i.e. in the documents provided by the claimants], we make the following points:
>
> - There is disparity between the original application, documents provided in relation to a request to expedite the case, and further evidence provided subsequently. For example, the 3rd claimant said that he was interrogated about your location, and that the Taliban were unaware of his own activities until they went through his phone in his witness statement (… dated 27/07/22). However, in your original ARAP-LOTR application you placed emphasis on the activities of your sons in their own right as rationale for the alleged threat against them, rather than as a direct result of your role and work with HMG, including that the third claimant [sic] had in fact previously been attacked by the Taliban because of his own civil activities. This account of the third claimant [sic] being detained for the primary purpose of locating yourself was only put forward after the original decision had been issued on 15 July 2022. These conflicting accounts of the Taliban's knowledge of the third clamant [sic] undermines the credibility of the evidence presented.
>
> - It is difficult to corroborate the details and events provided in the witness statements, including verifying that the individuals you refer to as Taliban in your evidence are operatives acting in the capacity of representing Taliban interest. We therefore take a variety of information into account in order to balance the evidence provided with our understanding of the circumstances in country and our understanding of the risk posed to other individuals within similar cohorts to you.

- The Foxley report (…dated 20 July 2022) provided does not add any specific detail that supports the claim of increased threat to family in your specific case in relation to your work with HMG, nor does it make any points that are specific to your circumstances.

We have considered the suggestion that the threat to your family would increase as a result of your relocation to the UK without them. Noting that you have other family members in Afghanistan to whom you do not assess there to be a heightened risk because they are not co-located and are living separate lives, we do not agree with this assessment of increased risk, rather we consider this to support our assessment that your relocation would decrease any potential threat. Furthermore, we assisted you and your wife in relocating from Afghanistan on 15 August 2022 and have had no additional evidence provided that substantively corroborates this assessment of increased threat."

79. In response to the claimants' contention that the assessment regarding the third and fourth claimants was based on a mistake of fact that only one son had been arrested, the 7 September decision states, in identical terms to the 12 August decision save for the final sentence:

> "This reference refers to the email from Deighton Pierce Glynn [in late June 2022], which states 'We have been informed this morning by our client's family that he and his son [the fourth claimant] have been arrested by the Taliban and are currently detained by them. [The third claimant] was also taken but has since been released'. Our final assessment of this case was undertaken with due regard to this information and all other information available in this case. (Emphasis added.)

80. In relation to the second and fifth claimants, the first paragraph of the response was in precisely the same terms as the 12 August letter (see paragraph 66 above), but the letter adds:

> "On the matter of the disclosed Ministerial Submission regarding PITTING Leave Outside the Rules (PITTING LOTR) status, the inclusion of individuals and their family members on lists associated with Ministerial Submissions during Op PITTING does not itself constitute allocation of PITTING LOTR status, nor does it equate to being authorised for evacuation. The accepted threshold for HMG commitment to evacuating persons and granting them PITTING LOTR status is an official 'Called Forward' instruction issued by the relevant officials which, according to our records and the information you provided, you did not receive. Therefore you and your family members unfortunately do not qualify for this status and accordingly are not eligible via ACRS Pathway 1 through holding said status."

81. The 7 September decision concluded that the original refusal decision of 15 July in respect of the second, third, fourth and fifth claimants was upheld. The first claimant was informed that

> "Once the formal review process for ARAP LOTR AFM is live, you will be able to request one review of your case. This review will be conducted by a separate review team and take into account all evidence provided on the case."

82. The defendants' summary grounds confirmed that the review request, supporting materials and submissions of 27 July and 5 August, and the permission bundle, including the fourth claimant's witness statement dated 16 August, "*were before the maker of [the] 7 September 2022 decision*".

Post-decision evidence

83. On 29 September 2022, the claimants applied to adduce further evidence, consisting of:

    i) a witness statement made by their former neighbour ('XY'), who is living in the claimants' family home, and who gives evidence about the first and second security incidents, as well as about a third security incident on 11 September 2022 (and photographs to support his account of the third security incident);

    ii) a further witness statement from the first claimant addressing the contention that the risk to the other claimants is not linked to his role and the allegation that the terms of the original application undermined the credibility of subsequent evidence given by the claimants; and

    iii) a further witness statement from the fourth claimant addressing the contention that the risk to him arises from his own role.

84. On 7 October 2022 Lane J granted the claimants permission to adduce these statements, in circumstances where they address an issue (credibility) that was not raised until the review decision of 7 September, while noting that it would be for the court to decide what, if any, weight to give to the contents of the statements.

F. Ground 1: Irrationality

Legal principles

85. There is no dispute as to the applicable principles. It is not for the court to stand in the shoes of the decision-maker and substitute its own view. A decision may be held to be "*irrational*" where the decision is outside the range of reasonable decisions open to the decision-maker. Or a decision may fail the test of rationality because the reasoning process is flawed so as to rob the decision of logic. The "*common law no longer insists on a single, uniform standard of rationality review based on the virtually unattainable test stated in the Wednesbury case* [1948] 1 KB 223"; the Supreme Court has "*endorsed a flexible approach to principles of judicial review, particularly where important rights are at stake*": *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, Lord Carnwath JSC at [60], Lord Mance JSC at [98], and Lord Sumption JSC at [109]-[110].

86. In *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] 1 AC 514, Lord Bridge observed at 531F-G:

> "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

87. It is common ground that in this case, which concerns the risk that the second to fifth claimants will lose their lives, or be subjected to torture or other serious harm, if they are not able to join their parents in the UK, the court is required to scrutinise keenly the application of the policy to them and the reasons given for the challenged decisions.

Discussion and analysis

88. The claimants challenge the 15 July, 12 August and 7 September decisions. I agree with Mr Brown (and the point was not disputed) that nothing turns on whether they are regarded as three decisions or a single decision that has been reviewed twice. None of the decisions have been withdrawn and all three fall to be considered together.

89. As Mr Brown emphasised, the decisions were made in respect of applications for leave to be granted *outside* the Immigration Rules. The first claimant's adult children do not qualify for relocation under the Immigration Rules. A decision by the Home Secretary to exercise her discretion to grant leave outside the Immigration Rules, on the basis of a free-of-charge application, is by its nature exceptional. The AFM Guidance is designed to promote consistency of decision-making.

90. It is readily apparent on the face of the AFM Guidance that there are two alternative bases on which applications for LOTR may be granted to additional family members of an eligible ARAP principal, namely, "security concerns" or "additional vulnerabilities". The claimants rely on both bases, but they have focused overwhelmingly on the concerns for their safety and security.

91. Insofar as they allege that the decision not to grant LOTR to the second to fifth claimants on the basis of their "vulnerabilities" is irrational, I reject the claim. I can state my reasons in respect of this aspect of the claim briefly:

    i) With respect to "*additional vulnerabilities*", the AFM Guidance makes clear that LOTR will only be granted to an ARAP additional family member where the applicant demonstrates "*an exceptional level of family dependence*" due to the additional family member's "*specific vulnerabilities*", and that the additional family member would be unable to obtain the required level of care and protection in Afghanistan. This basis of obtaining LOTR will only apply where the applicant demonstrates "*the most exceptional and unusual circumstances*".

    ii) The second to fifth claimants are all unmarried. Those who had jobs prior to the Taliban takeover have lost them, and the others were full-time students. All of them were living at home with their parents and are financially dependent on them. Their evidence is that they will not be able to support themselves, it would be culturally impermissible for them to be supported by their married sisters,

and their brothers are unemployed, subsistence farmers who are struggling to provide for their own families. While this evidence does demonstrate that they are dependent on the first claimant, it is clearly not irrational for the Panel to consider that the evidence does not show that any of these four healthy, able-bodied, educated young adults have "*an exceptional level of dependence*" on their father. In this context, consistency of decision-making is a virtue, and it was manifestly open to the Panel – having regard to the range of cases which they see – to determine that given the level of dependency they had demonstrated, and the continuing presence in Afghanistan of several of their adult siblings, their circumstances had not been shown to be "*most exceptional*" or "*unusual*".

iii) The evidence regarding the approval of the second and fifth claimants for evacuation in August 2021 does not undermine the rationality of the decision. That decision was taken at high speed, in extraordinarily challenging circumstances, and it did not entail any assessment of whether the second and fifth claimants could demonstrate specific vulnerabilities such as to meet the criteria identified in the AFM Guidance under the heading "other vulnerabilities".

iv) The Panel assessed the application in respect of the second and fifth claimants on the basis that they did not qualify for ACRS Pathway 1 status. This first ground of review falls to be determined on the premise that was correct. On that premise, the Panel cannot be faulted for applying the AFM Guidance to the evidence of their circumstances.

92. I turn then to the primary basis on which this ground is pursued, that is, under the head of "*security concerns*". The claimants contend that the decisions added an exceptionality requirement to the policy which is not present in the AFM Guidance (see paragraphs 14-15 above). This is evident from the references in all three decisions to there being insufficient evidence to demonstrate "*exceptional and compelling*" risks to their safety (see paragraphs 52, 64, 66, 75 and 76 above). The claimants submit that a threshold test requiring that the risk is both exceptional *and* compelling is necessarily more demanding than a test requiring demonstration of a compelling risk.

93. The defendants contend that given the requirement of genuine, verifiable, compelling reasons relating to the additional family member's safety and security, by its very nature the risk must necessarily be exceptional. The defendants emphasise the statement in the AFM Guidance that these cases "*will be exceptional to the relevant Afghan citizen and their immediate family member cases which are considered under the Immigration Rules*" (see paragraph 12 above) and contend that the reference to a requirement to demonstrate "*the most exceptional and unusual circumstances*" (see paragraph 16 above) governs the AFM Guidance as a whole.

94. In my judgment, the AFM Guidance makes clear that the question whether to grant LOTR to an additional family member by reason of security concerns falls to be judged by reference to whether there is a genuine, verifiable and compelling risk to the safety and security of to that person related to the work undertaken by the principal. The contention that the requirement to demonstrate the "*most exceptional and unusual circumstances*" governs the AFM Guidance as a whole is plainly wrong. Those words appear under the heading "*Other vulnerabilities*" and clearly only apply where the basis

of the application is the additional family member's exceptional level of dependency by reason of their specific vulnerability. However, there is nothing on the face of the decisions to indicate that the decision-makers wrongly applied that standard.

95. Where the basis of the application is the risk to the safety and security of the family member, the test described in the policy is not one of "*exceptionality*". However, given that this is guidance in relation to the grant of leave outside the Immigration Rules, and the level of risk that is likely to be regarded as sufficiently compelling to grant leave may well mean, in practice, that cases which satisfy the test will be uncommon, I am not persuaded that the statements that there was insufficient evidence of an *exceptional* risk show the decisions were irrational.

96. Nonetheless, in my judgment, the claimants have succeeded in showing that the reasoning process was so seriously flawed as to render the decisions illogical and irrational.

97. First, the risk to the second, third, fourth and fifth claimants, based on the first claimant's role, was assessed by the MOD's DARR Intimidation Advisor. The Intimidation Advisor assessed that, by reason of the first claimant's role, the other claimants were at the same high level of risk as their father. That is, they were "*Almost Certain/Highly Likely (80 to 95%) to be subject to reprisal by Taliban/Criminals*". Such a level of risk could not rationally be regarded as other than compelling.

98. However, as Mr Owen readily accepted, the Threat Assessment is not determinative. If it were, the Intimidation Advisor would be the decision-maker and the Threat Assessment would be the decision. That is not the position. On the other hand, as Mr Brown acknowledged, the Threat Assessment is highly probative. Acting rationally, the Panel could only reject the Threat Assessment if they had cogent reasons for doing so.

99. The minutes of the meeting on 6 July show that the Panel decided to downgrade the level of assessed risk to the additional family members from 'High' to 'Medium at most'. The sole reason given for doing so was that the NCA representative considered that the fact that only one of the two brothers had been arrested in the first security incident suggested that the arrest was likely to have been a consequence of the arrested brother's own activity and not a consequence of the first claimant's work. The italicised comment added at the end of the Threat Assessment (see paragraph 48 above) confirms that the NCA representative's reason for downgrading the Threat Assessment was a belief that the third claimant was not arrested along with the first claimant and the fourth claimant. The minutes show that the other members of the Panel agreed to accept the NCA representative's view that the Threat Assessment should be downgraded, and then proceeded to determine the application in respect of all four additional family members by reference to that downgraded level of risk.

100. The decision to downgrade the Threat Assessment was based on a serious error. The evidence before the Panel on 6 July was that both sons and the father had been arrested and detained by the Taliban. That was made clear from the outset in the contemporaneous email in late June, as the Intimidation Advisor understood. It is true that a Panel member referred at the outset of the meeting on 6 July to the detention of the "sons" (plural), and when the Panel's reasons were given in the letter of 15 July the letter-writer recognised that the evidence was that both the third and fourth claimants had been arrested. But this does not assist the defendants. The essential basis for the

Panel's decision (with respect to security) was the NCA's downgraded assessment of the threat which was fundamentally flawed.

101. Although the original decision has been reviewed twice, at no stage has there been any acknowledgment that the departure from the Threat Assessment was founded on a mistake of fact. In circumstances where the Panel has not recognised its mistake, withdrawn the original decision, and begun the decision-making process again, having regard to the Threat Assessment (without the erroneous comment of the NCA representative), the decision is irrational.

102. Mr Brown submits that the decisions were made by specialist decision-making panels. The inherent safety and security risks affecting large sections of Afghan society are well known and understood by the panel members. Bearing in mind the vantage point they have of considering a range of cases, the court should accord due respect to the expertise of the Panel. I accept that the Panel is a specialist decision-making body and it can reasonably be inferred that its members are able to bring to bear knowledge drawn from the range of cases that come before them. Nonetheless, it is significant that there is no evidence as to the knowledge and expertise of the members, and in particular of the NCA representative, in relation to assessing risks to life and limb emanating from the Taliban and criminal groups. Nor is there any evidence as to how their level of expertise in this field compares with the expertise of the MOD's DARR Intimidation Advisor to whom the task of compiling the Threat Assessment was given.

103. I do not accept the defendants' contention that there were good reasons why the Panel departed from the Threat Assessment. None of the three letters face up to the fact that the Panel chose to downgrade the Threat Assessment based on comments from the NCA representative or seek to explain that decision. The only explanation appears in the minutes of 6 July, read together with the comment added to the threat assessment after that meeting. It shows, as I have said, that the reasoning was seriously flawed. The flawed approach to the Threat Assessment undermines the rationality of the decision in respect of all four additional family members.

104. Secondly, insofar as the decision that the risk to the safety and security of the second to fifth claimants as a consequence of the first claimant's role, is based on the evidence that during the first security incident the Taliban tortured the fourth claimant and held him for longer than the third claimant, who was not physically harmed – rather than the false premise that only one son was arrested - it is in any event irrational. The reliance on a 'disparity' between the treatment of the brothers (i) ignores the differing circumstances in which they were arrested; and (ii) ignores the evidence about the questioning of the third and fourth claimants and/or rejects it or gives it little weight based on thoroughly bad credibility points.

105. As to (i), the evidence is that the fourth claimant was arrested at the family home in late June when the Taliban came looking for the first claimant. At that point, the Taliban were unable to arrest the first or third claimant because they were in hiding elsewhere. The third claimant was arrested later the same day, *with* his father, after the fourth claimant had been physically abused in order to force him to divulge his father's location. The Taliban did not need to pressure the third claimant to disclose his father's location because they were arrested together. Fortunately, the first claimant – to whom the high risk based on his role is not in dispute - was also physically unharmed during the first security incident.

106. As to (ii), in his statement of 5 July, the first claimant stated that the fourth claimant "*was interrogated and badly tortured so that he would divulge my location*" and the third claimant "*was interrogated about my work and my contacts*" (see paragraph 42 above). This evidence was not taken into account before the Threat Assessment was downgraded (see paragraph 49 above). And it was effectively discounted in the 7 September decision when the defendants alleged – manifestly wrongly – that the account of the fourth claimant (wrongly referred to as the third claimant) "*being detained for the primary purpose of locating yourself was only put forward after the original decision had been issued on 15 July 2022*".

107. Mr Brown wisely did not seek to support the attack on the claimants' credibility that was revealed in the 7 September decision (see paragraph 78 above). The two points taken were thoroughly bad. One I have addressed in the paragraph above. The other credibility point was that in the application the first claimant had emphasised the activities of his sons in their own right as the rationale for the threat to them, "*rather than as a direct result of your role and work with HMG*" (emphasis added). In fact, in the application form, the first claimant first referred to the threat to family members based on his own role, then identified that his sons were "*not only*" at risk because of his role but they were also at risk due to their own activities (see paragraph 33 above). The decisions take the illogical approach of assuming that if the third and fourth claimants are at risk because of their own activities, this reduces the degree to which they are at risk based on the first claimant's role.

108. Moreover, in assessing credibility in this case, the factual starting point is that the defendants have assessed that the first claimant falls within ARAP category 4. Having regard to the criteria, and the fact that his application was based on the threat to his safety, it can be readily inferred (not least in circumstances where the ministerial submission supporting his application has not been disclosed) that the DARR team determined that the first claimant worked alongside the NCA, in partnership with or closely supporting and assisting that agency; in doing so he made a substantive and positive contribution to the achievement of the UK government's military or national security objectives with respect to Afghanistan; and he was (while he remained in Afghanistan) at an elevated risk of targeted attacks or at high risk of death or serious injury.

109. In respect of the first claimant, the Threat Assessment concluded that, based on his role, he was "*Almost Certain/Highly Likely (80 to 95%) to be subject to reprisal by Taliban/Criminals*". Notably, the risk to him based on his "*high profile and exposed position*" was assessed as emanating from the Taliban and criminal groups. There is nothing in the reasoning of the Panel, as shown in the minutes and the three decision letters, to suggest that this was other than an accurate assessment of the risk to the first claimant. Based on his role, he was at high risk of death or serious injury at the hands of the Taliban and criminal groups.

110. Of course, the assessed threat to the first claimant does not itself show that any members of his family were at similar risk based on his role. But the assessed threat to him is the context in which the evidence regarding the risk to the other claimants fell to be determined. In addition, the credibility of their evidence is supported by the view of the DARR Intimidation Advisor as to the likelihood that the risk of reprisals would extend to the second to fifth claimants, as well as by the Country Practice Information Note.

111. Mr Brown submits that the issue was not, in truth, one of credibility in circumstances where there is inevitably no direct evidence from the Taliban as to why they did what they did, and the claimants can only express their opinion as to the Taliban's reasons. It was the Panel's responsibility to evaluate the material and reach their own conclusions as to the likely reasons for those arrests. I accept that it was for the Panel to evaluate all the evidence, but the most pertinent evidence as to why the Taliban arrested the fourth claimant, and then the first and third claimants, is their evidence about their arrests and interrogations by the Taliban. They were not merely expressing opinions as to why they were arrested; they were giving evidence regarding the questions they were asked. The rationality of the evaluation is undermined in circumstances where key evidence was effectively dismissed or given little weight based on absurd credibility points.

112. Thirdly, there is no sign that any consideration was given to the evidence regarding the second security incident when the 7 September decision was made. The 7 September decision asserted that there was no additional evidence to corroborate the claimants' contention that the threat increased following the first claimant's departure from Afghanistan (and breach of bail imposed by the Taliban) without reference to the evidence of this incident following his departure.

113. I do not consider it necessary to address all the many criticisms of the reasoning process raised by the claimants. In my judgment, the serious flaws in the reasoning process that I have identified suffice to show that the decisions were irrational and fall to be quashed.

114. I have not placed any weight on the post-decision evidence, including the evidence regarding the third security incident. I accept the defendants' submission that the focus should be on whether the decisions were properly made based on the material that was available to the decision-maker, and without regard to information subsequently provided to them: see *Kenyon v Secretary of State for Housing* [2021] Env LR 8, Coulson LJ at [28].

G. Ground 2: Procedural unfairness

115. It is apparent that the first claimant's statement in the first claim was not before the Panel on 6 July when the decision to downgrade the Threat Assessment was made. And it is conceded that the extensive materials that the claimants submitted in support of the application for review of the 15 July decision were not put before the Panel on 12 August. The claimants contend that it appears likely that the panel did not have all the relevant material before them when taking the 7 September decision either. The claimants contend this is procedurally unfair.

116. In the summary grounds of defence, which are supported by a statement of truth, the defendants have confirmed that all the materials provided by the claimants were before the decision-maker (see paragraph 82 above). In those circumstances, I reject the contention that the decision was procedurally unfair. Insofar as the claimants criticise the failure to engage with some of the materials that they submitted, that is a matter I have considered in the context of ground 1.

H. Ground 3: Failure to correctly apply the ACRS Pathway 1 policy

117. The ACRS Pathway 1 policy applies to those "*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*" (see paragraph 18 above). In *R (KA) v Secretary of State for the Home Department* [2022] EWHC 2473 (Admin) Julian Knowles J accepted the defendants' contention that "*the expression 'called forward', when read in context, must be construed to mean 'received a call forward notification following security and eligibility checks'*". In this case, the claimants acknowledge that they were not called forward. But they contend, by reference to the facts as outlined in paragraphs 21 to 30 above, that the second and fifth claimants were "*specifically authorised for evacuation*" and therefore they are eligible.

118. First, in their statement of facts and grounds, the claimants sought to disconnect the words "*or specifically authorised for evacuation*" from the requirement that eligible people were notified. They rely on the evidence that they were, in fact, specifically authorised for evacuation.

119. In my judgment, this way of putting the claimants' case misconstrues the ACRS policy. The defendants contend, and the claimants accept, that in establishing the ACRS Pathway 1, they were seeking to honour specific commitments that were made to some people at the time of Operation Pitting. It is only those who were *notified* that they had been called forward or *notified* that they had been specifically authorised for evacuation (but in the event not evacuated during Operation Pitting) to whom a *commitment* was made that falls to be honoured in accordance with the ACRS policy. Reading the ACRS policy in context, with an understanding that Pathway 1 is there to ensure commitments will be honoured, it is clear that the requirement of notification by the UK government governs both the concept of being called forward and specific authorisation for evacuation.

120. Secondly, in their oral and written submissions, the claimants contend that the first claimant was effectively notified, bearing in mind the chaotic circumstances at the time, that he and his family were approved for evacuation in August 2021 through his communications with the Chief of Staff at the British Embassy in Kabul and her secretary. Although it is evident that the first claimant was on the cusp of being notified that he, his wife and three daughters (including the second and fifth claimants) were authorised for evacuation, before events prevented that occurring, I do not consider that the communications show the first claimant in fact received any notification of such authorisation in August 2021. He would have been aware from his communications with Louise that the Embassy had supported his application, but as he did not receive the anticipated email, he had no means of knowing whether his application – in particular in respect of the second and fifth claimants - had been authorised and all security checks completed.

121. Thirdly, the claimants contend that the policy does not require notification at a specified time, and so the notification they received during the first claim that they were approved for evacuation by the Home Secretary, together with disclosure of the emails regarding security checks, sufficed to notify them that the second and fifth claimants were specifically authorised for evacuation. I do not accept this contention. The terms in which eligibility is described by reference to what had happened before individuals were unable to board flights during Operation Pitting, as well as the aim of honouring commitments that were made at that time, clearly shows that eligibility is predicated on notification while that operation was happening.

122. Fourthly, the claimants contend that they *should have been* informed that the first claimant, his wife and three daughters were approved by the Home Secretary for relocation under Operation Pitting LOTR at the time or shortly thereafter when the ACRS policy was announced. It is not arguable that the defendants acted unlawfully in not notifying the first claimant in August 2021, in the context of the exceptional challenge of the evacuation following the Taliban takeover of Afghanistan. And once Operation Pitting ended, approval for evacuation in that operation fell away.

123. Although I was persuaded that this ground of claim is arguable, in light of the combination of the Home Secretary's approval of the second and fifth claimants for evacuation in Operation Pitting, and the evidence of communications between the first claimant and the Embassy, ultimately I have come to the clear view that the defendants made no error in determining that the second and fifth claimants were not eligible pursuant to ACRS Pathway 1.

124. The claimants understanding was that the renewed application for permission was to be dealt with on a 'rolled up' basis. The defendants submitted that if I were to grant permission, I should give them an opportunity to file detailed grounds and evidence. However, the only evidence they identified that they would have wished to adduce concerned the fact that the purpose of the ACRS Pathway 1 was to honour commitments made to some people during Operation Pitting which were unable to be fulfilled at that time, a point which was accepted by Mr Owen. Ordinarily, if a renewed application on one or more grounds is heard at the substantive hearing of the grounds on which permission has been granted, that will be on the understanding that it will be determined on a 'rolled up' basis. It would not have been consistent with the overriding objective to adjourn the determination of this ground to a further substantive hearing, and it was obviously unnecessary to give the defendants an opportunity to adduce further evidence given that I have dismissed this ground.

I. Ground 4: Legitimate expectation

125. The second and fifth claimants contend that they have a legitimate expectation that their status as persons eligible under ACRS Pathway 1 would be recognised. As the second and fifth claimants had no such status, for the reasons I have given in respect of ground 3, this ground must also fail.

126. Moreover, it is not arguable that the second and fifth claimants had such a legitimate expectation. For a legitimate expectation to arise, an undertaking must be given which is clear, unambiguous and devoid of relevant qualification: see *In re McQuillan* [2022] AC 1063, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Sales and Lord Leggatt JJSC (with whom the other three members of the court agreed), at [221]. The second and fifth claimants were not called forward, and at no stage were they, or the first claimant, informed in clear terms that their evacuation had been authorised, with all security checks satisfactorily completed. Accordingly, I reject the renewed application for permission in respect of this ground.

J. Conclusion

127. For the reasons I have given, the claimants have succeeded on ground 1 and it follows that the decisions of 15 July, 12 August and 7 September 2022 should be quashed. I grant the renewed application for permission on ground 3, refuse the renewed

application for permission on ground 4, and dismiss the claim on grounds 2, 3 and 4. I will hear the parties on the precise terms of the order that should follow this judgment.