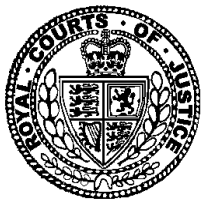

Neutral Citation Number: [2022] EWHC 2156 (Admin)

Case No: CO/4090/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/2022

Before:

MRS JUSTICE HILL DBE

- -

Between:

THE QUEEN **On the application of** **JZ**	**Claimant**
- and –	
(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **(2) THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS** **(3) THE SECRETARY OF STATE FOR DEFENCE**	**Defendant**

- -

- -

Sonali Naik QC, Irena Sabic and Emma Fitzsimons (instructed by **Wilsons Solicitors LLP**) for the **Claimant**
Edward Brown QC and Hafsah Masood (instructed by the **Government Legal Service**) for the **Defendants**

Hearing dates: 8 June, 9 June and 25 July 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 2.00pm on Friday 12 August 2022

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MRS JUSTICE HILL DBE

MRS JUSTICE HILL DBE:

Introduction

1. The Claimant ("JZ") is a judge in Afghanistan. He seeks judicial review of the Defendants' decision dated 18 October 2021, maintained on 24 November 2021, refusing his application under the Afghan Relocations and Assistance Policy ("ARAP").

2. JZ has also applied for Leave to Remain Outside the Rules ("LOTR"). In light of events since the claim was issued, he is challenging the LOTR decisions in separate proceedings.

3. On 1 April 2022 Lieven J granted the Claimant permission to amend his claim in certain respects and allowed his application for interim relief: *R (JZ) v Secretary of State for the Home Department & Ors* [2022] EWHC 771 (Admin) ("*JZ No. 1*").

4. On 9 June 2022 Lang J handed down a comprehensive judgment in another case involving ARAP and LOTR applications by two Afghan judges: *R (S) v Secretary of State for Foreign and Commonwealth and Development Affairs and Ors* and *R (AZ) v Secretary of State for the Home Department and Ors* [2022] EWHC 1402 (Admin) ("*S and AZ*"). An appeal against certain aspects of her judgment was dismissed by the Court of Appeal on 29 July 2022: [2022] EWCA Civ 1092.

5. On 1 July 2022 I granted the Claimant's application for an order that the Defendants provide certain further information under CPR Part 18: *R (JZ) v Secretary of State for the Home Department & Ors* [2022] EWHC 1708 (Admin) ("*JZ No. 2*").

6. This is my judgment on the merits of the Claimant's claim, taking into account the information provided by the Defendants pursuant to the Part 18 order and the further submissions made by the parties on it. I also address an application made by the Claimant on 22 July 2022 to admit a fifth witness statement from his brother, SQ.

The factual background

The context, ARAP and "Pitting LOTR"

7. Lang J provided a detailed account of the history of the UK mission in Afghanistan leading to the events of August 2021, the various public statements concerning Afghan judges, the UK's role in promoting the rule of law and supporting women's rights in Afghanistan, the risk of harm from the Taliban and the court system in Afghanistan in *S and AZ* at [5]-[35].

8. ARAP was introduced with effect from 1 April 2021. It replaced the "Intimidation Policy" which was introduced in 2010. Its stated purpose was to "offer relocation or other assistance to current and former Local Employed Staff ["LES"] in Afghanistan to reflect the changing situation in Afghanistan". The categories of those eligible to apply under ARAP are routinely updated. As at 15 September 2021 the ARAP policy provided for the following categories of eligibility

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

The previous, 1 April 2021, version had referred to "those who worked in meaningful enabling roles <u>for</u> HMG": *S and AZ* at [58]-[61].

9. ARAP was introduced into the Immigration Rules ("IR") from 1 April 2021. However, it was not until 14 December 2021 that provision was made in the IR for

those who were not employed by the UK Government. The material provision is as follows:

> "276BB5. A person falls within this paragraph if the person meets conditions 1 and 2 and one or both of conditions 3 and 4. For the purposes of this paragraph:
>
> (i) condition 1 is that at any time on or after 1 October 2001, the person:
>
> (a) was directly employed in Afghanistan by a UK government department; or
>
> (b) provided goods or services in Afghanistan under contract to a UK government department (whether as, or on behalf of, a party to the contract); or
>
> (c) worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department.
>
> (ii) condition 2 is that the person, in the course of that employment or work or the provision of those services, made a substantive and positive contribution towards the achievement of:
>
> (a) the UK government's military objectives with respect to Afghanistan; or
>
> (b) the UK government's national security objectives with respect to Afghanistan (and for these purposes, the UK government's national security objectives include
> counterterrorism, counter-narcotics and anti-corruption objectives);
>
> (iii) condition 3 is that because of that employment, that work or those services, the person:
>
> (a) is or was at an elevated risk of targeted attacks; and
>
> (b) is or was at high risk of death or serious injury.
>
> (iv) condition 4 is that the person holds information the disclosure of which would give rise to or aggravate a specific threat to the UK government or its interests": *S and AZ* at [63]-[64].

10. Operation Pitting was the name given to the UK Government's mission to evacuate British nationals, and others at risk from the Taliban, from Afghanistan during August 2021. It operated from 13-28 August 2021. Individuals were "called forward" to board evacuation flights and later granted LOTR. This scheme became known informally as "Pitting LOTR". Several Afghan judges were within this group. The selection criteria for Pitting LOTR were (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; and (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; or (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. The Contribution criterion had to be met in all cases and then either the Vulnerability criterion or the Sensitivity criterion: *S and AK* at [5]-[11] and [15]-[17].

11. After the end of Operation Pitting, the Home Office published its "Afghanistan Resettlement and Immigration Policy Statement" dated 13 September 2021. This explained the establishment of the Afghan Citizens Resettlement Scheme ("ACRS") which opened on 6 January 2022: *S and AK* at [65]-[71].

12. On 16 February 2022 the wording of ARAP Category 4 was revised to read follows:

> "The cohort eligible for assistance on a case-by-case basis are those who:
>
> on or after 1 October 2001 were directly employed in Afghanistan by an HMG department; provided goods or services in Afghanistan under contract to an HMG department; or worked in Afghanistan alongside an HMG department, in partnership with or closely supporting that department; and
>
> in the course of that employment or work or provision of services they contributed to the UK's military objectives or national security objectives (which includes counterterrorism, counternarcotics and anti-corruption objectives) with respect to Afghanistan; and
>
> because of that employment or work or provision of services, the person is or was at an elevated risk of targeted attacks and is or was at a high risk of death or serious injury; or
>
> hold information the disclosure of which would give rise to or aggravate a specific threat to HMG or its interests.
>
> Checks will be made with the HMG department or unit by whom the applicant was employed, contracted to or worked alongside, in partnership with or closely supported or assisted": *S and AZ* at [62].

JZ's judicial career, the threats made to him and the Defendants' decisions about him

13. From 20 July 2008 to 30 May 2011 JZ was a Primary Court (first instance) judge, was assigned to the "Public Security" bench hearing terrorism cases. He sat at the Justice Centre in Parwan ("JCIP") at Bagram Air Force Base and at Pol-e-Charkhi prison in Kabul. Most of the cases involved insurgents and Taliban fighters who had been arrested by the International Security Assistance Force ("ISAF"). From May 2011 he sat as an Appeal Court judge in Kabul. He was still in that post in August 2021 and technically remains so.

14. JZ and his family are currently in hiding, separately, in Afghanistan. JZ's evidence is that most of the Taliban fighters sentenced by him have been released from prison, have re-joined the Taliban and actively fight for them. He is being actively sought by

the Taliban and has received threats, including death threats, since August 2014. Some of the death threats have said that he and his children will meet the same fate as that of his cousin, Judge Rafieddin. He was assassinated by the Taliban on 22 January 2020, while a sitting judge in the Appeal Court in Nangarhar. Several statements provided by SQ indicate that the threats against JZ and his family continue. The Defendants do not dispute that his life is at risk due to his judicial service.

15. On 14 August 2021 JZ applied under ARAP. In support of his ARAP application he provided a witness statement dated 13 August 2021 with supporting documentation about his judicial position and the threats he had received. He also relied on a letter dated 13 August 2021 from Colonel Thomas English, a retired US army officer who had been assigned the mission of overseeing the investigation and prosecution of detainees captured on the battlefield in Afghanistan, including those captured by the UK. As Director of the Legal Operations Directorate, he had been directly responsible for supervising all personnel including JZ. Colonel English explained in his letter that the serious death threats made to JZ and other judges meant that he had requested the assistance of the US Marshall's Service to provide security. He concluded his letter by saying "the Afghan Judges made it possible to fulfil our rule of law mission".

16. JZ initially understood that he had been called forward during Operation Pitting, albeit not evacuated. Lieven J set out the various communications between JZ, SQ and their contacts with those linked to Operation Pitting between 25 and 30 August 2021 in *JZ No. 1* at [4]-[9].

17. However, the Defendants' evidence in this claim showed that this was not the case. At 11.30 pm on 25 August 2021 JZ's name was included on a list of six "High profile cases not successfully processed". At 5.27 am on 26 August 2021, Philip Hall who was leading the team within the Foreign and Commonwealth and Development Office ("FCDO") implementing ARAP, emailed Sharon Wardle (a "Silver" leader in the Afghanistan Crisis Centre at the material time) indicating that the applications on the list "look[ed] very credible" and asking her to convene an panel when further information was received. In fact, by this point the travel advice had changed due to the rapidly deteriorating security situation. Realising this, and that no further call forward instructions would be issued, Ms Wardle did not convene a further panel. Accordingly, JZ's case, like that of several others, was not considered by a panel for a call forward instruction and he remained in Afghanistan during Operation Pitting.

18. By a decision dated 18 October 2021, sent under cover of a pre-action protocol response dated 20 October 2021, JZ's application under ARAP was rejected. The decision-letter was from the FCDO Head of Counterterrorism, Afghanistan Task Force for ARAP Category 4 Applications. It began as follows:

> "In addition to [considering the evidence submitted by JZ], I have applied my own knowledge developed through heading the Counter Terrorism Team at the British Embassy in Kabul (BE Kabul) since January 2021 to its closure in August 2021. I consulted with my team who worked with me there and who on my behalf undertook enquiries with Afghan judges relocated to the UK under Operation PITTING. These confirm that [JZ] was a judge, who most recently sat in the Traffic Courts in Kabul.
>
> My knowledge of the application of military and civilian law in justice operations at Bagram Air Base is limited. I note that in June

> 2010, the Justice Centre in Parwan became an Afghan controlled and operated court that benefitted from mentoring and training by coalition forces. Prior to June 2010 (during the applicant's employment) cases were prosecuted under the US Law of Armed Conflict and it was a US military establishment."

19. The letter stated that the following test was applied:

> "individuals who (1) had worked in a role that made a material contribution to HMG's mission in Afghanistan, and (2) without whose work the UK's operations would have been adversely affected, and (3) who were now at risk because of their work given the changing situation in Afghanistan."

This reflected the definition of "exposed meaningful enabling roles" set out under Category 2 of the ARAP policy.

20. The decision continued:

> "2. On the evidence provided to me, I have concluded that the applicant was indeed a judge within Afghanistan and sat as a judge at the Justice Centre in Parwan (referred to in the evidence bundle as Bagram Air Force Base) and at Pol-e-Charki prison. I note the threats the applicant claims are against him. I am personally aware of threats made against other members of the Afghan Justice System that considered issues of Afghanistan's national security.
>
> 3. I note that the US Marshals Service provided support and training whilst [JZ] worked at the Justice Centre in Parwan demonstrating the high threat he faced in 2008-11. [JZ's] own statement (para 15, page 11 of the evidence bundle) references that some of those he convicted would have been released by now. In addition, I am aware that many other prisoners have now been released either as a consequence of the US Taliban peace deal (referred to in the statement) or the thousands of detainees let out of prison by the Taliban following the collapse of the Afghan Government.
>
> 4. The translated threat document (pages 25 to 27 of the evidence bundle) does make reference to [JZ] having "imprisoned many of our members/personnel", whilst this might well be a consequence of his time at the Justice Centre in Parwan, there is no mention of his involvement with international forces or foreign governments.
>
> 5. In light of these considerations, whilst I accept that [JZ] is at risk, **I am not satisfied that the threat to [JZ] is heightened as a consequence of engagement with the United Kingdom.**
>
> My decision not to sponsor this application are further based on the following factors:
>
> 6. I have no evidence to lead me to believe that [JZ] was an employee of Her Majesty's Government, nor does it refer to work

> alongside or in cooperation with HMG units. The Justice Centre in Parwan was not a UK or HMG led intervention and from June 2010 was indeed an Afghan institution – albeit one that benefitted from extensive donor support.
>
> 7. Based on the evidence reviewed, it does not appear to me that [JZ] made a material contribution to HMG's mission in Afghanistan. The UK's capacity building effort around justice and the rule of law over the last nine years was focussed in Kabul – that was also the focus of HMG's counter terrorism mission in Afghanistan. As [JZ] does not claim to have worked in the anti-terrorism courts within Kabul he did not make a material contribution to HMG's mission there. Based on my limited knowledge of military operations in Afghanistan and the limited detail about [JZ's] involvement with HMG provided in the evidence bundle, I cannot come to an alternative view.
>
> 8. In view of the above, it is not apparent that the UK's operations would have been adversely affected without [JZ's] work. As stated in paragraph 7, the UK's counter-terrorism mission was focussed in Kabul. As [JZ] did not work there, his contribution to the UK's counter terrorism mission was minimal. Mr English's letter of support highlights [JZ's] role in hearing cases to determine if detainees should continue to be detained under Afghan law and how this facilitated the exit of ISAF. However, from my position in determining whether the FCDO Counter-Terrorism team within the Afghanistan Task Force should sponsor [JZ] the case does not provide clear evidence on how [JZ's] work supported UK counter-terrorism operations" [emphasis through bold text above in original].

21. On 12 November 2021 JZ's solicitors responded to the ARAP decision, challenging the Defendants' interpretation of the policy. It was argued that the decision-maker had erred in (i) applying a high threshold of "heightened risk" which was not provided for in the policy; (ii) requiring that the risk be on account of the applicant's work with the UK; (iii) misinterpreting HMG's mission in Afghanistan too narrowly, by equating it to UK counter-terrorism operations; and (iv) focussing exclusively on the location of the UK's operations.

22. JZ's solicitors provided further evidence in the form of (i) a report from Tim Foxley MBE, a political and miliary analyst with expertise on Afghanistan dated 10 November 2021; (ii) a further witness statement from JZ dated 25 October 2021; and (iii) a witness statement from his brother, 'SQ', dated 9 October 2021. JZ's 25 October 2021 statement took issue with the suggestion that he had worked in the Traffic Court. He also explained that "Being a Public Security Court Judge, I participated in many seminars organised / sponsored by the UK government as part of their counter terrorism mission in Afghanistan and those organised by other ISAF Member States".

23. On 16 November 2021 JZ's solicitors provided a further witness statement from Colonel English. This described the JCIP as "an…ISAF…led, controlled and operated anti-terrorism court". Colonel English said that he believed JZ had convicted over 100 insurgents captured by the UK forces and other members of ISAF. He expressed the view that "JCIP made a material contribution to the UK's and other ISAF's member

states mission in Afghanistan. Insurgents…were brought to justice. Afghan judges, including [JZ], made this possible and put their lives, and the lives of their families, at serious risk by convicting those insurgents".

24. By letter from the Government Legal Department ("GLD") dated 24 November 2021 the Defendants indicated that the ARAP decision was upheld. The key parts of the letter are as follows:

> "As is made clear in the ARAP Decision at [paras] 5-6, the decision-maker was not satisfied that your client had worked *alongside* HMG and was not satisfied that any risk he now faces has increased *as a consequence* of engagement with the UK. Properly understood, the ARAP Decision makes no finding that the risk to your client is insufficiently grave as you suggest…
>
> …the ARAP Decision-maker was not satisfied that your client had worked alongside HMG and was not satisfied that any risk he now faces had increased as a consequence of engagement with the UK. You suggest that this was a misapplication of the policy, and that all that is required is that "*this risk be on account of 'their work'. There is no limit as to who the work was for*". We disagree…The "work" referred to is the work in a meaningful enabling role alongside HMG. This is clear both as a matter of language and in the light of the purpose of the policy which is, as stated in the published ARAP guidance, "*based on recognition of service and an assessment of likely current and future risk to [locally employed staff] due to the nature of their work for the UK government in the evolving situation in Afghanistan*" …
>
> Mr Foxley's report identifies certain instances where HMG's capacity-building efforts did involve working with Afghan judges and others in the justice sector. But [JZ] does not claim to have been involved in any of these projects (and Mr Foxley's report confirms that – as stated in the ARAP Decision – the Parwan Justice Centre was not a UK-led intervention).
>
> Your letter adopts a much broader and more abstract conception of HMG's mission…it suggests that "*the Afghan judiciary contributed in two clear ways to the UK mission. First, by achieving the specific UK goals within Afghanistan, but also by protecting mainland UK from terrorist offences*" …Our clients do not accept that simply being part of the Afghan judiciary is the kind of contribution to HMG's mission contemplated by the policy. It was no doubt desirable form [sic] the UK's point of view for Afghanistan to have a functioning judiciary (and indeed court staff, prosecutors, police, army and a multitude of other Afghan institutions) but the ARAP policy cannot plausibly be understood as referring to a "material contribution to HMG's mission in Afghanistan" at that level of abstraction. Nor can that criterion be considered in isolation from the requirements of works alongside HMG" [emphasis in the original].

25. The letter noted that JZ had not identified any HMG unit that he had worked alongside, but given the way his application had been presented, his case had been

considered by the Head of Counterterrorism, Afghanistan Task Force. It had previously been explained that this was the HMG unit responsible for sponsoring Counter-Terrorism judges.

26. The letter explained that JZ's case had now also been considered by the Ministry of Defence ("MOD"). Enquiries had been made with the MOD units involved in counter-terrorism work in Afghanistan, but they were not aware of JZ. MOD had "… considered the information provided and was not satisfied that JZ had a meaningful enabling role that supported MOD activities in Afghanistan, and it is not apparent that UK operations would have been adversely affected without his work". On that basis MOD had also decided not to sponsor JZ under ARAP category 4.

27. The Defendants' view was that the new material provided by JZ's solicitors did not justify a reconsideration of the ARAP decision. The question of whether he had been a judge in the Traffic Court was immaterial. The new information about him participating in seminars organised and sponsored by the UK government did not alter the decision not to sponsor his application.

28. The 18 October 2021 and 24 November 2021 decisions are challenged in this claim.

29. On 30 November 2021 this claim was issued.

30. On 28 April 2022 JZ's solicitors sought a reconsideration of the ARAP decision. The further evidence provided included an additional statement from JZ dated 7 March 2022. This provided further details of his judicial service. It reiterated that he had "participated in many seminars organised / sponsored by the UK government as part of their counter terrorism mission in Afghanistan and those organised by other [ISAF] member states".

31. A letter from Lord Carlile and Lord Anderson, former Independent Reviewers of Terrorism Legislation, dated 15 April 2022, was also submitted. Their letter said "our own experience of counter-terrorism work both in the UK and abroad causes us firmly to question both those propositions [that JZ had not made a material contribution to HMG's mission in Afghanistan and that it is not apparent that the UK's operations would have been adversely affected without JZ's work] which appear to be based on holy artificial separations between the purposes of the US and UK missions in Afghanistan, and between Counter-Terrorism in Kabul and elsewhere". Lord Carlile and Lord Anderson said they regarded it as "incontestable" that the trial, conviction and sentencing of insurgents captured on the battlefield by UK forces made a material contribution to the UK's mission in Afghanistan and that the UK's operations would have been adversely affected without that work.

32. On 9 May 2022 further evidence of the risk to JZ was provided, in the form of an updating statement from SQ, describing particular threats that had been made on 7 and 9 May 2022. JZ also relied on a witness statement from General Sir John McColl KSB CBE DSO, former Deputy Supreme Commander of NATO Forces in Afghanistan, dated 7 May 2022. He emphasised the importance of a functioning judicial system in all areas, but in particular in the area of counterterrorism. He expressed the view that the JCIP was a "mission critical hub" for dealing with some of the most extreme insurgents who came across the whole of Afghanistan. The US and the UK were the largest military contributors to JCIP in terms of the insurgents they captured. A significant number of the UK detainees were processed through the JCIP. He considered that there was a "clear and direct link" between the work of JZ at

the JCIP and the UK's military contribution. He therefore fundamentally disagreed with the claim that JZ did not work in a role that made a material contribution to HMG's mission in Afghanistan.

33. The panel met on 17, 20 and 26 May 2022 to reconsider JZ's ARAP application. By a decision dated 26 May 2022 the refusal under ARAP was maintained. The material parts of the decision letter are as follows:

> "Ground 1 [that the decision was not made in accordance with policy] has been resolved through JW's judicial review proceedings.
>
> In relation to ground 2 [new evidence that was not available when the decision was made] the panel acknowledged the work undertaken by JZ and had careful regard to the views of Lords Anderson and Carlile, Gen McColl and Colonel English. The panel recognised the important contribution certain judges in Afghanistan made to counter-terrorism efforts. The panel approached the issue carefully and having regard to all of the circumstances and evidence. The panel however decided that a general contribution to such efforts is not sufficient to qualify under ARAP in the absence of a clear and direct link to HMG and its mission. The additional evidence did not justify a different decision. Taking into account all the additional evidence, the panel noted that the JCIP was not supported by the UK, and that while the additional evidence demonstrated JZ's role in tackling counterterrorism in Afghanistan, it was not possible to conclude that JZ worked alongside HMG in a role that made a material contribution to HMG's mission in Afghanistan.
>
> Given these elements of the eligibility criteria were not satisfied, it was not relevant for the panel to consider whether JZ was now at risk because of their work".

34. The 26 May 2022 decision is not subject to challenge in this claim. Although it was suggested at the outset of the hearing before me that the claim would be amended to include it, this has not occurred. The Defendants had indicated that they would oppose such a course as the same would amount to "rolling judicial review" of the sort that has been deprecated: *R (Dolan and Ors) v Secretary of State for Health and Social Care and Anor* [2021] EWCA Civ 1605; [2021] 1 WLR 2326 at [118].

Evidence about other judges

(i) Judges relocated under ARAP

35. There is no statement or principle that the status of being an Afghan judge is sufficient to establish eligibility under ARAP. Afghan judges may be eligible under ARAP, but whether they are in fact eligible depends on a case-specific evaluation of the individual facts: *S and AZ* at [103].

36. The pre-action protocol response in this case dated 20 October 2021 explained that:

> "[t]hose approved under…category [4] (on a case-by-case basis) have included a number of Afghan judges who were publicly known to have co-operated with the UK or had been involved in highly

> sensitive cases of particular UK interest (including national security) and were at significant risk as a result".

37. As at 4 February 2022 13 members of the Afghan judiciary had been relocated to the UK under ARAP. The lives of all 13 were regarded as being at risk. They were sponsored by either the FCDO or MoD.

38. At least 12 of the 13 worked directly alongside HMG and made a material contribution to the UK's national security objectives in Afghanistan.

39. 11 of this group had been approved under ARAP in summer 2021, due to their role in the Primary or Appeal level of the **Anti-Terrorism Court in Kabul** between 2020 and 2021. The UK Government provided logistical and operational support for this court: *S and AZ* [101].

40. The Part 18 response indicated that the UK's support to counter-terrorism courts was limited to Kabul and decisions on eligibility made based on the applicants' work there, with those courts the UK supported. Their cases had been primarily assessed by FCDO, with input from other HMG units. Further, these judges were considered to have "worked alongside" HMG for the following reasons:

> "From 2015 onwards, HMG developed a partnership with some judges serving in the Anti-Terrorism Court in Kabul. All 11 judges that were resettled due to their role in presiding over terrorism trials were involved in this partnership, although the full circumstances of this partnership may not have been known to the judges involved. They were invited to attend a series of events run by HMG (colloquia to discuss matters of continuous professional development and debate interpretation on points of law and some of the technical aspects of considering different forms of evidence in complex trials), and, at times, HMG officials attended hearings they presided over, where the cases were of interest to the UK".

41. **Judge W** was in this group. He had provided a witness statement which was relied on by the Claimants in *S and AZ*. His identity was well-known. He did not work directly or indirectly for the UK Government or military. He and his fellow judges were invited to the British Embassy and elsewhere to attend events and training seminars, and they met British officials on those occasions: *S and AZ* [101].

42. A second witness statement from Judge W was provided at the outset of the hearing before me. Alexander Pinfield, who had been Deputy Ambassador to Afghanistan from 5 April 2021 to 26 August 2021 and the line manager of the Head of the Counter-Terrorism Team in the British Embassy in Kabul, provided a statement in response to the second statement from Judge W. He explained that from the UK Government's perspective, it was incorrect to say that Judge W did not have links to the Government as he had asserted: for example, he had met the Head of the Counter-Terrorism Team in Kabul several times between February and April 2021 and was one of the judges dealing with terrorism issues in Kabul with whom the Government had developed substantial links, through the Counter-Terrorism Team in particular.

43. The twelfth of the ARAP judges had served on the Appeal Court of the **Counter Narcotics Justice Centre ("CNJC")**. The CNJC evolved from the Criminal Justice

Task Force which was established in 2005 with the support of HMG to investigate and prosecute those involved in serious drug related offences within Afghanistan. Investigators, prosecutors and judges within the CNJC were mentored by the National Crime Agency. The CNJC Appeal Court was located in, and limited to, Kabul. This judge was sponsored for resettlement under ARAP category 4.

44. In relation to the thirteenth judge, the GLD accepted that it had not seen evidence that the judge had worked directly alongside HMG. However, the judge had worked at a court which received support from the UK Government, namely the Primary Court in the Serious Corruption Crime division, in the **Anti-Corruption Justice Centre ("ACJC")**. The UK had been instrumental in the creation of the ACJC in 2011, and offered seminars, provided mentoring and established a courtroom for their public hearings. The UK also led international support for the development of an Office of Asset Recovery to support the ACJC in confiscating illegally held and obtained assets, including from corruption. The Part 18 response continued:

> "The judge was assessed to be at risk, including in relation to her work at the ACJC. She was in hiding with judges who were approved for ARAP Category 4. When these judges were called forward for their flights under ARAP this left her exposed and alone. Given her exceptional circumstances, the gendered dynamic of her case and the particular risks faced by women in this context, it was exceptionally decided that she should be included alongside the Category 4 judges that had been called forward. It is important to emphasise that the decision was made under the exceptional pressures of the evacuation detailed in Philip Hall's evidence".

45. A letter from the GLD dated 4 February 2022 referred to one further judge (not in fact relocated to the UK at that date) who was approved under ARAP Category 4 where they had not seen evidence that they worked directly alongside HMG.

46. Since the GLD letter of 4 February 2022, a small number of other judges have been granted resettlement to the UK under ARAP Category 4. All of those who were approved for ARAP by FCDO's Counter Terrorism team had served in the Anti-Terrorism Court in Kabul from 2015 onwards.

47. In his second witness statement, Judge W set out his understanding that all the judges working at the Primary and Appeal Anti-Terrorism Courts (7 at Primary Court level and 13 at Appeal Court level) and the administrative staff were given leave under ARAP, apart from one who he understood to be in Pakistan, waiting for a visa to the UK.

(ii) Judges relocated under Operation Pitting

48. At least 11 judges, one head of a court of appeal and one prosecutor were evacuated to the UK under Operation Pitting. All the judges were female. The eleven judges first came to FCDO's attention on the evening of 20 August 2021 when their names were emailed by an MP to Lord Ahmad, whose private office shared this list with FCDO officials. The UK Afghanistan Women Judges Association ("UKAWJA") had lobbied the FCDO on behalf of these judges. Under the auspices of the IAWJ, the UKAWJA had set up an online mentoring scheme for female judges in Afghanistan, which is how they came to know about the Afghan judges: *S and AZ* at [118]-[126].

49. This group included Judges X, Y, A, B and C. The Claimants in *S and AZ* adduced evidence from these judges, as did JZ in this claim. Lang J summarised their details as follows:

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

    ii) **Judge Y** worked in the Primary Court in Kabul, hearing family and civil law cases. She did not have any direct or indirect contact with the UK Government. She received a threatening telephone call from the Taliban, after Kabul fell. She and her family were unable to enter Kabul airport in time to be evacuated under Operation Pitting. The IBA helped them to flee to Greece, from where they obtained visas to enter the UK on 21 October 2021.

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

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

    v) **Judge C** worked in the Military Criminal Division of the Primary Court at Parwan, and she also heard family and civil cases. She did not have any direct or indirect contact with the UK Government. She had previously been threatened by the Taliban and feared for her safety after the Taliban took power. She and her brother went to the Baron Hotel and were evacuated from Kabul airport on a UK military plane to Dubai, and then on to Birmingham: *S and AZ* [122]-[123].

The Claimant's grounds and the issues

50. Ground 1 originally sought to challenge the interpretation of the ARAP policy in JZ's case. It was argued that working in a "meaningful enabling role alongside HMG" within the ARAP policy as described at [8] above should be interpreted as including those who had made a direct or indirect contribution to the HMG's mission in Afghanistan, which was consistent with the mission of the Afghan Government, the US military and other International Security Assistance Force ("ISAF") partners.

51. JZ was refused permission to argue this ground by Lane J on the papers on 9 December 2021, by Kerr J after an oral renewal hearing on 15 December 2021 and by Lewis LJ in the Court of Appeal on 1 March 2022.

52. By the time of the hearing before Lieven J on 24 March 2022, Ground 1 had been re-framed, to allege a material inconsistency between the decisions in respect of the JZ and those concerning other judges whose circumstances are not materially different. In light of the grant of permission in several other cases raising this argument, the Defendants did not resist the grant of permission on this ground: *JZ No. 1* at [21].

53. Kerr J granted the Claimant permission to challenge the Defendants' refusal to consider or determine his request for LOTR in the absence of an application form under his Ground 2. The SSHD later agreed to treat the Claimant as if he had made an application for LOTR. JZ had understood that he had been called forward during Operation Pitting. Lieven J granted him permission to substitute the original ground 2 with one which argued that the Defendants had made a material error of fact in failing to treat him as someone who had been called forward: *JZ (No. 1)* at [4]-[9] and [22]-[23].

54. After the interim relief hearing, JZ accepted the Defendants' evidence set out at [17] above showing that he had not in fact been called forward. He revised the way in which Ground 2 was put, to argue that his case should be treated *as if* he had been called forward during Operation Pitting given his proximity to the group of people who were actually called forward. His proximity to the call forward group was said to be a highly relevant factor in the exercise of the Defendants' residual discretion under ARAP or LOTR.

55. Lieven J refused the Claimant permission to argue his Grounds 3 and 4: *JZ (No. 1)*: [24]-[23].

56. She granted him permission to argue under his Ground 5 that the Defendants had acted irrationally in refusing to consider the application for LOTR without him having submitted biometric data. She ordered interim relief, requiring the First Defendant to take an 'in principle' decision on his LOTR application: *JZ (No. 1)* at [34]-[53]. On 6 April 2022 JZ's application for LOTR was refused. On 25 April 2022 this decision was maintained by the Entry Clearance Manager. The LOTR decisions are now being challenged through separate proceedings.

57. It was therefore accepted that only Grounds 1 and 2 remained live in this claim. The issues in the claim were identified by JZ's counsel as:

    (1) Is the Claimant in a materially similar position as to eligibility under ARAP to those who were relocated under ARAP, most notably Judge W?

    (2) Have the Defendants provided a cogent and lawful reason for the acknowledged differential treatment between the Claimant and the similarly situated comparators?

    (3) Were the Defendants' systems and processes for ARAP and/or Pitting LOTR incoherent or otherwise procedurally unlawful in the way they were expressed or operated?

    (4) What is the relevance of the Claimant's proximity to being called forward during Operation Pitting for a lawful decision on ARAP/LOTR?

The legal principles

58. The legal principles were set out by Lang J in *S and AZ* at [77]-[83]. They are agreed between the parties and can be summarised insofar as they relate to the issues that remain in this claim as follows.

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

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

60. The "principle of equality" simply means that "distinctions between different groups or individuals must be drawn on a rational basis. It is thus no more than an example of the application of *Wednesbury* rationality": *R (Patel) v Secretary of State for the Home Department* [2012] EWHC 2100 (Admin) at [114], Mr John Howell QC (sitting as a Deputy High Court Judge).

61. Inconsistency, unequal treatment, unfairness or arbitrariness in public decision-making are contrary to good administration and may lead to a conclusion that a decision is irrational. However, such flaws are not to be treated as free-standing grounds for judicial review. The Supreme Court clarified the position in *R (Gallaher Group Ltd) v Competitions and Markets Authority* [2018] UKSC 25, [2019] AC 96 per Lord Carnwath, as follows:

> "[24] Whatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law. Consistency, as Lord Bingham said in the passage relied on by the appellant (para 19 above), is a "generally desirable" objective, but not an absolute rule.
>
> [26] …in domestic administrative law issues of consistency may arise, but generally as aspects of rationality, under Lord Diplock's familiar tripartite categorisation…
>
> [31] Fairness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law. Addition of the word "conspicuous" does not obviously improve the precision of the concept. Legal rights and remedies are not usually defined by reference to the visibility of the misconduct….

> [41] …procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson's words at para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

62. Where there are divergent decisions in materially the same situations, the Court is required to "consider with the greatest care how such a result can be justified as a matter of law": *R v Department of Health, ex p Misra* [1996] 1 FLR 128 at 133; see also *R (Gurung) v Ministry of Defence* [2002] EWHC 2463.

Lang J's decision in *S and AZ*

63. The first of the two issues in *S and AZ* was defined as follows: "Was any difference in treatment between the Claimants, and the comparator judges irrational or otherwise unlawful? The comparator judges were relocated to the UK, during and after Operation Pitting, under [ARAP] or under a grant of [LOTR]": *S and AZ* at [2 i)]. It was therefore the same inconsistency argument as has been advanced here under Ground 1 in respect of the ARAP cohort.

64. Before addressing the inconsistency issue, Lang J made the following observation about the context of the ARAP policy:

> "…it is important to bear in mind that it is primarily aimed at local staff and other personnel employed directly by the UK Government, as expressly stated on the face of the policy. It replaced other policies which were also directed at locally employed staff. It originated as a means of showing commitment to those who worked for and supported the UK Government, and reflects responsibilities owed by the UK to individuals in Afghanistan as a result. Category 4 also acknowledges the importance of work carried out by Afghan individuals alongside the UK Government, rather than as a Government employee…an Afghan judge may be eligible for ARAP, under the terms of the scheme, but…the status of being an Afghan judge is not of itself sufficient to establish eligibility. Eligibility will depend on a case-specific evaluation of the individual facts to see whether the criteria are met: *S and AZ* at [106]-[107].

65. She made the following finding in respect of Judge W:

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

> roles were public and high profile, and they were at risk from the Taliban: *S and AZ* at [108].

66. Lang J then observed:

> "…whilst Kabul was the centre of the UK's counter-terrorism mission in Afghanistan, the evidence indicates that British engagement with the justice system, and anti-terrorist measures, were not limited to Kabul… In my view, decision-makers should not assume that Afghan judges deciding anti-terrorist, anti-narcotics, and security cases were not contributing to the UK mission merely because they were working in the provinces, rather than Kabul. Each case deserves careful examination on its own facts": *S and AZ* at [110].

67. Lang J noted that S had sat as a Primary Court judge in the Juvenile Court of Kabul City. Over the course of her career, she had investigated criminal and national security cases involving the Taliban and Daesh/ISKP. She and her family had been the targets of Taliban violence as a result of her judicial work. However:

> "[S] has not worked with the UK Government in any capacity, or had any connection with UK Government officials, and so it was not possible to identify an HMG sponsoring unit for her. She did not receive training or support from the UK Government. Based on the evidence reviewed, the decision maker concluded that it did not appear that she worked in a role that made a material contribution to HMG's mission in Afghanistan, or that UK operations would have been adversely affected without her work. It was accepted that S was at risk, but the decision-maker was not satisfied that the threat to S was heightened as a consequence of working with or alongside the UK: *S and AZ* at [49]-[51] and [116].

68. AZ had sat as a Primary Court judge throughout his career, mainly hearing criminal cases. He had sat in the Public Security court in Jalalabad (Afghanistan's third largest city). More recently he had worked in the Springhar district in Nangarhar. He had made over 40 decisions in counter-terrorism cases, mostly against Taliban and ISK members. He has passed lengthy prison sentences for terrorism offences on members of the Taliban who have now been released from prison and hold positions of power and influence. He had been warned by the Supreme Court that he was on a Taliban list of planned killings and had been given a gun and two armed bodyguards. Since the Taliban gained power, he has received direct threats to his safety and been unable to work. He is in hiding in Afghanistan. However, per Lang J:

> "AZ was a judge in a Primary Court of first instance, who worked in provincial areas, without any connection to the UK Government's Counter-Terrorism mission in Kabul. The Defendants concluded, in the decision-maker's assessment of 5 November 2021, and the covering letter of 17 November 2021, that AZ had not demonstrated any link to a UK Government Sponsoring Unit, as required by the policy. His case was considered by the FCDO Head of Counter-Terrorism Afghanistan Task Force which would be the unit responsible for sponsoring Counter-Terrorism judges under Category 4 of ARAP, and so would be able to identify them. AZ had not been involved in cases of special UK interest. AZ had not received training

> or other support from the UK Government. Based on the evidence reviewed, it did not appear that he made a material contribution to the UK Government's mission in Afghanistan, and it was not apparent that UK operations would have been adversely affected without his work. Thus, the Defendants concluded that the accepted threat to AZ from the Taliban was not a consequence of working with or alongside the UK Government: *S and AZ* at [36]-[40] and [112]-[114].

69. Lang J concluded that the Defendants' decisions in respect of both S and AZ could not be characterised as irrational applications of the ARAP policy on grounds of inconsistency because there were distinguishing factors between them and the judges of the Anti-Terrorism Court in Kabul, which explained and justified the decision to grant leave to them, under the terms of the ARAP policy, but to refuse it to S and AZ: *S and AZ* at [115] and [117].

70. In respect of the LOTR issues, Lang J concluded that many of the Claimants' allegations were well-founded. She found that:

> "…. there was no rational distinction between the comparator judges and the Claimants which could justify a grant of Pitting LOTR to the comparator judges but not to the Claimants. They were all judges who were implementing the rule of law in Afghanistan, consistently with the UK's mission, but none of them had any direct or indirect connection with the UK Government. Their membership of the IAWJ and their participation in the mentoring scheme, neither of which are UK Government schemes, could not rationally justify the grant of LOTR to them, but refuse it to the Claimants. In any event, S was also a member of the IAWJ and its affiliated association, the AWJA. They were all at risk from the Taliban because of their occupation. As female judges they were at greater risk than AZ. On the other hand, AZ's anti-terrorist work had made him a Taliban target to a much greater extent than some of the comparator judges, particularly those sitting in civil jurisdictions. The sole reason why the comparator judges were selected was because they had contacts in the UK who were able to lobby the FCDO on their behalf. This illustrates the inconsistency and arbitrariness of Operation Pitting, and the extent to which lobbying, and connections influenced the selections made, instead of the application of fair and objective criteria.
>
> …. both S and AZ could have been eligible under Pitting LOTR criteria, if their names had been put forward. In their work as judges, hearing counterterrorism and national security cases, they contributed to the UK Government's objectives in Afghanistan to promote the rule of law, and to combat terrorism (albeit not working for or alongside the UK Government, so as to meet the ARAP criteria). In doing so, they placed themselves and their families at considerable personal risk. That risk has heightened since the Taliban seized power. They and their families are in hiding, but realistically they will be found by the Taliban at some point. There is verified evidence that other judges have been summarily executed by the Taliban.
>
> However, the Pitting LOTR criteria are no longer in operation as they were only introduced for the purposes of Operation Pitting, which has

> now concluded. The Claimants' applications had to be considered in accordance with LOTR policy as at the date of the decisions made in their cases in October and November 2021 respectively. However, I consider that factors such as their role in promoting the rule of law, and the risks to their safety arising from their work as judges, will still be relevant in any assessment of their cases. In my view, the factors set out at paragraphs 124 and 125 above are also relevant considerations to take into account in the Claimants' favour, in any substantive consideration of their applications for LOTR": *S and AZ* at [124]-[126].

71. However as there were no substantive decisions on LOTR for S and AZ which were capable of being quashed, Lang J made no order for judicial review: *S and AZ* at [104].

SQ's fifth witness statement

72. By way of an application notice dated 22 July 2022 JZ seeks to rely on a fifth statement from SQ. This statement indicates that (i) JZ met a number of HMG officials during events which he attended from 2005-2021; (ii) he was invited to and attended a series of events organised by the CJTF and the Counter Terrorism Team at the British Embassy in Kabul; (iii) he made presentations at some of the HMG events on topics related to terrorism; (iv) at times, HMG officials attended hearings he presided over from 2008-2011 at the Anti-Terrorism court in Kabul; and (v) in 2021, he had a formal request to transfer back to that court, albeit that this was not concluded before Kabul fell to the Taliban.

73. Ms Naik QC argued that the statement should be admitted in the interests of justice because it included plainly important factual material that went directly to the alleged inconsistency of treatment issue. She submitted that the significance of this evidence had only become apparent once the Defendant's Part 18 replies made clear that at least in respect of the 11 counter-terror judges based in the Kabul courts, the Defendants had interpreted "worked alongside" HMG as including "partnership" with the UK via events, professional development, colloquia and attendance at hearings by HMG officials. The statement from SQ had been provided very promptly after receipt of the Defendant's Part 18 at 4.48 pm replies on 20 July 2022.

74. The Defendants opposed the admission of the evidence. The court's role was to decide whether the ARAP decisions made in JZ's case were correctly made, based on the material before the decision-maker, which did not include the contents of SQ's fifth statement. It was therefore not material to the issues before the court. The Defendants did not agree with the gist of the statement and needed the opportunity to respond to it, which would necessitate a further adjournment and the litigation becoming never-ending.

75. I do not consider that it would be appropriate to admit SQ's fifth witness statement. JZ had provided evidence about participating in seminars organised / sponsored by the UK government ahead of the 24 November 2021 decision (and again in advance of the 26 May 2022 reconsideration): see [22] and [30] above. However, the further details of his contact with HMG provided in SQ's fifth statement were not before those who made the 18 October 2021 and 24 November 2021 decisions. I agree with the Defendants that the focus in these proceedings has to be on whether those

decisions were properly made, based on the material then available. I also take into account the fact that the contents of the statement are not agreed by the Defendants.

76. As the 24 November 2021 and 26 May 2022 decisions illustrate, reconsiderations of ARAP decisions are possible within that scheme when further evidence is obtained. It may be that because this claim, including the Part 18 process, has shed greater light on how the Defendants' decision-making under ARAP has operated, JZ will seek a further reconsideration of the ARAP decision on the basis of the additional information in SQ's fifth statement. However, conducting such a "rolling" merits-based reconsideration, based on post-decision evidence, is not the role of this court.

Ground 1

The Claimant's submissions

77. The Claimant's overarching submission under Ground 1 was that the ARAP decisions in his case were flawed to the level of irrationality due to inconsistent decision-making across the ARAP scheme. He has been treated inconsistently with other judges in a materially similar position to him under ARAP and the Defendants have provided no cogent and lawful reason for the difference in treatment.

78. The courts will and have intervened where a distinction between materially similar persons is an irrational one: see, for example, *A v SSHD* [2005] 2 AC 68 (derogation from the European Convention of Human Rights in respect of non-UK national terror suspects only, and not UK nationals, not adequately explained) and *Middlebrook Mushrooms* (inadequately reasoned exclusion of mushroom pickers from the definition of 'Manual Harvest Workers' for the purposes of differing minimum wage rates) (both cited in *Gallaher*: *S and AZ* at [80]); see also *R (Gurung) v Ministry of Defence* [2002] EWHC 2463 (a successful challenge on rationality grounds by Nepalese nationals and survivors of Japanese concentration camps, having served in the Gurkha brigade, to their exclusion from the ex gratia compensation scheme).

79. The facts of his case are, on any reasonable assessment, materially similar to 11 of the 13 judges who were considered eligible for sponsorship under ARAP by the FCDO. He had sat in the Anti-Terrorism Court in Kabul and there was evidence of him attending seminars organised / sponsored by the UK government.

80. The Defendants' assertion of a 2015 partnership with the 11 judges, made in Mr Pinfield's statement and in the Part 18 response, needs to be approached with caution as it constituted *ex post facto* reasoning: "*in principle, where reasons are called for, they should be recorded and given at the time of the decision (or at prompt request), and not articulated later in defending a legal challenge*": Fordham, Judicial Review Handbook, 7th Edition, paragraph 62.4.

81. In any event this assertion is a "marginal variation" on the facts and is not a sufficiently cogent and principled distinction to justify the differential treatment of JZ compared to the other judges, for the following reasons.

82. *First*, the ARAP policy documents and IR make clear that ARAP has no temporal limit but reflects the fact that the UK mission in Afghanistan lasted from 2001 to 2021. JZ's work as an anti-terrorism judge from 2008 to 2011 was during the height of international involvement and the UK assistance to Afghan institutions to prepare for international withdrawal: the Defendants' evidence was to the effect that from 2006

until 2014 UK forces were part of NATO's response to the 9/11 attacks on the United States, with the UK playing a leading role in ISAF; and from 2015 onwards UK forces were part of a non-combat NATO mission, Resolute Support, focused on training, advising and assisting Afghan forces. It is neither credible nor consistent with the purpose of ARAP to suggest that JZ's work did not make a meaningful contribution to the UK mission due to the timing of his service. Support for this proposition is drawn from the evidence of Colonel English, Lords Anderson and Carlile and General McColl. Further, the period at which JZ was serving at the Anti-Terrorism Court in Kabul did not coincide with a reduced period of risk, as is illustrated by the fact that JZ received threats in 2014.

83. *Second*, as to the question of "partnership" with HMG, JZ satisfied all the hallmarks for inclusion described in the Defendant's Part 18 response. The Defendants' contemporaneous evidence showing his inclusion in a list of "high profile" individuals during Operation Pitting also illustrates the Defendant's view at that point of JZ's contribution to the UK mission and nexus to the UK.

84. *Third*, the decision letter in JZ's case did not confine judicial co-operation with the UK's mission to post-2015 service. The decision had wrongly proceeded on the basis that JZ had not worked in Kabul and drew a distinction between ISAF and UK counter-terrorism operations which was difficult to reconcile with the Defendants' evidence that the UK had played a leading role in ISAF.

85. The Claimant also submitted that the Defendants' policies and processes were incoherent and procedurally unlawful in the way they were expressed or operated. The identified Pitting LOTR criteria largely overlapped with the ARAP criteria. There was no cogent reason for discontinuing the Pitting criteria as opposed to the process to give effect to them. They were in fact continued in substance in the 14 December 2021 IRs.

86. The expedited process and the fact that the scheme adapted was entirely discretionary does not displace the duty of procedural fairness or coherence of the scheme: *R (Citizens UK) v SSHD* [2018] EWCA Civ 1812 at [86]. Whether there has been procedural unfairness is an objective question for the court to decide, rather than merely reviewing the reasonableness of the decision maker's judgment of what fairness required: *R (Osborn) v Parole Board* [2014] AC 1115, per Lord Reed at [65].

The Defendants' submissions

87. The Defendants resisted Ground 1 on the basis that equality of treatment is not a free-standing ground for judicial review, as *Gallaher* and *R (Pathan) v* SSHD [2018] EWCA 2103; [2018] 4 WLR 161 and [2020] UKSC 41; [2020] 1 WLR 4506 made clear. Generally, the court on a judicial review claim will not be concerned with the merits of the decisions in individual cases, but rather with whether they were made lawfully.

88. In so far as the Claimant alleges irrationality, this case is different to cases such as *A*, *Middlebrook Mushrooms* and *Gurung*, as in those case a policy or scheme excluded entire groups. By contrast, each ARAP and LOTR application is decided on its own facts. The fact of different outcomes in different cases, by individuals presenting different facts and, is not irrational. That decision makers can reach different views on the same facts was recently emphasised, albeit in another context, in *HA (Iraq) v SSHD* [2022] UKSC 22 at [96] thus: "…findings made by a tribunal in one case have

no authoritative status in a different case….the tribunal has to make its own evaluation of the particular facts before it, it is often difficult to be sure that the facts of two cases are in truth substantially similar, and the assessment of undue harshness if an evaluative exercise on which tribunals may reasonably differ".

89. As to ARAP, the decision maker in the Claimant's case carefully assessed his ARAP application and supporting evidence and produced a reasoned decision dated 18 October 2021 which concluded that he was not eligible under ARAP category 4. The ARAP policy was correctly applied, and the Claimant has been refused permission to argue otherwise.

90. These principles would be sufficient to dispose of Ground 1. However, to the extent that the court becomes concerned with inconsistency of treatment, the facts of the 13 ARAP cases addressed in the Part 18 response are materially different to those in JZ's case. As the response makes clear, all judges who were approved for ARAP by FCDO's Counter-Terrorism team served in the Anti-Terrorism Court in Kabul from 2015 onwards. The Claimant did not. Further, as explained in Mr Pinfield's evidence and the Part 18 response, from 2015 onwards, HMG developed a partnership with some judges serving in the Anti-Terrorism Court in Kabul, as described at [40] above. This did not apply to the Claimant.

91. As to Pitting LOTR, the executive was entitled to decide who to evacuate during Operation Pitting. While there are some similarities in the criteria used in the ARAP scheme and those used under Operation Pitting LOTR, it is unrealistic to compare the application of nominally similar criteria during an emergency evacuation with the situation as it pertained after the evacuation ended.

92. It was entirely lawful for the Defendants to discontinue their approach once the evacuation had ended, while taking into account any commitment that had been made, not least because the policy in question had been adopted as a short-term emergency measure. The Secretary of State is entitled to review, change or revoke a policy whenever she considers it to be in the public interest to do so: *R (Munir) v SSHD* [2012] UKSC 32; [2012] 1 WLR 2912 at [19]

93. The Claimant does not have permission to argue that the Defendant's ARAP systems and processes are lacking in logic and coherence. In any event, the court has no function in appraising systems and processes in generality and 'coherence' short of irrationality is not a justiciable ground of judicial review.

Analysis

94. It is common ground that inconsistent treatment between materially similar circumstances only constitutes a public law error as a species of irrationality.

95. The Defendants are correct to assert that the allegation of inconsistency here is different to that in *A, Middlebrook Mushrooms* and *Gurung* because in those cases, policies or schemes excluded entire groups in a way that was said to be irrational. Here, the Defendants have established criteria for both ARAP and Pitting LOTR which are not, in themselves, said to be irrational. Both sets of criteria focus on the applicant's connection to the UK and are thus a logical extension of a system which originally focussed on those directly employed by HMG.

96. Inconsistency as a species of irrationality can nevertheless exist in relation to individual cases, as the facts of cases such as *Hussain* and *Gallaher* illustrate. However, the existence of the discretionary decision-making by separate decision makers within both the ARAP and Pitting LOTR schemes is likely to make it more difficult to show such irrationality, because as set out at in *HA (Iraq)*, different decision makers can reach different decisions on similar facts and still act lawfully.

97. It is therefore appropriate to undertake the exercise advocated for by the Claimant, namely, to review the evidence in order to identify whether there has been inconsistency as a species of irrationality in how the respective criteria have been applied in practice: per *Misra* and the approach taken by Lang J in *S and AZ* summarised at [63]-[69] above.

(i) Alleged inconsistency with the ARAP cohort

98. It is now clear that being a judge who has presided over terrorism cases in Afghanistan is not, in itself, sufficient to bring a judge within ARAP Category 4. As noted at [69] above, Lang J concluded that lawful decisions had been made that neither S or AZ were eligible for ARAP, and they had both previously tried cases involving alleged terrorists.

99. Rather, the focus is whether the judge in question has a sufficient link with HMG in accordance with the extant wording of the ARAP policy. As of September 2021 ARAP, Category 4 applied to those who had "worked in meaningful enabling roles alongside HMG, in extraordinary and unconventional contexts" and who received the appropriate support from an HMG unit: [8] above.

100. The evidence now available in relation to those judges who have satisfied ARAP Category set out at [35]-[47] above suggests a broadly consistent pattern to the extent that all had worked at courts which HMG had directly supported and worked closely with, either the Anti-Terrorism Court in Kabul after 2015, the CNJC or the ACJC. This fact had no doubt assisted those judges in meeting the "worked alongside" HMG criterion (save in respect of the ACJC judge where it was accepted that there was no such evidence).

101. JZ had tried terrorism cases in two Primary Courts while a judge assigned to the Public Security bench.

102. First, he had worked at the JCIP at Bagram air base. JZ's 25 October 2021 statement suggests that this was "located within Kabul". It was led, controlled and operated by ISAF (of which the UK was a partner) at that time. It was then run by the Afghanistan government, albeit with extensive donor support. Although JZ's work at JCIP had featured heavily in the first iteration of Ground 1, it became less of a focus given the refusal of permission in relation to that ground and the evidence about the judges from the Anti-Terrorism Court in Kabul.

103. Second, he had tried terrorism cases at a court which sat at Pol-e-Charki prison, Kabul from 2008-2011. This was the main way in which JZ argued he was in a directly comparable position to the judges in the Anti-Terrorism Court in Kabul who had succeeded under ARAP.

104. Judge W's evidence was that he and JZ had both worked in the Primary Anti-Terrorism Court in Kabul. JZ's evidence is slightly different: according to his 25

October 2021 statement, the specific Anti-Terrorism Courts were not introduced until 2012, but they took over the terrorism cases that had previously been heard by the Public Security courts such as the one at Pol-e-Charki prison, Kabul, where he sat.

105. The Defendants took no point over this distinction. The case proceeded before me on the understanding that the cases JZ was hearing prior to 2011 were similar if not identical to those heard by Judge W and others in the Primary Anti-Terrorism Court in Kabul and thus, he was effectively considered to have been a judge of the latter.

106. However, a key difference between JZ and the judges of the Anti-Terrorism Court in Kabul in the successful ARAP cohort relied on by the Defendants is the time of JZ's service.

107. JZ's work in hearing terrorism cases at Pol-e-Charki prison ended in 2011. In contrast, Judge W had served at the Anti-Terrorism Court in Kabul from 2015 until he was evacuated in August 2021. Further, the Part 18 response showed that all of the judges from the Anti-Terrorism Court in Kabul who had succeeded under ARAP served in that role after 2015. All of the 11 judges who had been successful under ARAP by 4 February 2022 were serving at the Anti-Terrorism Court in Kabul in 2020-2021.

108. In challenging the rationality of the Defendants' reliance on the dates of JZ's service as a justification for his different treatment, Ms Naik QC understandably highlighted that ARAP has no time limit, that from 2008-2011 the UK mission was active in Afghanistan and that JZ experienced threats as long ago as 2014 as a result of his service from 2008-2011.

109. However, these factors do not bear directly on the central question for the ARAP decision-makers, namely whether there was sufficient evidence of JZ having "worked alongside" HMG at the material time.

110. Rather, the dates of JZ's service on anti-terrorism cases help explain why the decision-makers considered he did not meet the "worked alongside" criterion, unlike his comparator judges, because HMG only became involved in supporting the Anti-Terrorism Court in Kabul and building partnerships with the judges there after 2015.

111. The extract of the 20 October 2021 letter quoted at [36] above, read together with the Part 18 response summarised at [40] above, suggests that evidence of partnership, or perhaps the "worked alongside" criterion more generally, was made out by factors such as (i) the extent to which a judge was publicly known to have co-operated with the UK; (ii) whether the judge had been involved in highly sensitive cases of particular UK interest; (iii) whether HMG representatives had attended their hearings; and (iv) whether they had been involved in colloquia of the sort described at [40] above. These were not discrete requirements, but the sort of factors that enabled the "worked alongside" criterion to be satisfied.

112. As the 18 October 2021 decision letter makes clear, decision-making under ARAP involves an assessment of the evidence provided by the applicant and the Defendants' own enquiries.

113. In JZ's case he had provided evidence during the ARAP decision making process of attending seminars organised / sponsored by the UK government. These may well have been similar to the colloquia referred to above. However, based on the material

before them the ARAP decision makers did not consider that sufficient evidence had been provided of the other type of factors referred to at [111] above, nor did their own enquiries apparently generate the content now advanced by JZ in SQ's fifth witness statement which was not before them.

114. The absence of this evidence before the decision makers in JZ's case also helps explain why it was considered he did not meet the "worked alongside" criterion, while other judges did.

115. I recognise that the "2015 partnership" evidence has been provided late in the chronology of this claim, but I do not consider that it undermines the analysis above. Reasons for the decision in JZ's case were given contemporaneously. These made clear that it was the lack of evidence of work alongside HMG which was the reason why his application had not succeeded. The 2015 partnership evidence essentially provides further detail about how decisions were reached in other cases.

116. It is a slightly unusual feature of the case that the Defendants accept that the judges granted ARAP may not have appreciated that they were considered to be in partnership with the Defendants. There is plainly an element of subjectivity in the Defendants' assessment of whether the "partnership" existed. However, this is perhaps no more than a further aspect of the evaluative exercise of whether the "worked alongside" criterion was satisfied. This does not in itself show that the scheme was operated in an irrational way.

117. The evidence showing JZ's inclusion in a list of "high profile" individuals during Operation Pitting does not, of itself, show that he should have been found to have met the "worked alongside" criterion through evidence of partnership or by other means.

118. The Claimant relies on the fact that the 18 October 2021 letter erroneously states that he "does not claim to have worked in the anti-terrorism courts within Kabul" when he had. While this was not pleaded as a material error of fact, it was said that this was further evidence of the unprincipled and inconsistent application of ARAP. Although this was not a point advanced by the Defendants, when the key phrase is read in the context of the decision letter, it may not in fact have been an error. I say this because the phrase referring to JZ not having served in Kabul features in a passage concerning "the last nine years" (see [20] above) (therefore from 2012-2021). It was correct that the Claimant had not claimed to have worked in the anti-terrorism courts in Kabul in that time.

119. The Claimant argues that the treatment of the "outliers" (the two judges within the ARAP cohort where it was accepted that GLD had not seen evidence that they had "worked alongside" HMG: see [44]-[45] above) is further evidence of an inconsistently applied policy. In my view it is not: one of these judges had worked in a court supported by HMG, consistently with other judges in the ARAP cohort, and there were exceptional reasons which justified the ARAP grant to that judge: see [44] above. This decision, and the decision in respect of the other such judge, was apparently an exercise of the residual discretion under ARAP which the Claimant accepted existed. Its exercise in a small number of cases, even within a small cohort, does not show that the overall scheme was incoherent or inconsistent.

120. For these reasons I consider that there were distinguishing factors between JZ and the judges of the Anti-Terrorism Court in Kabul who served after 2015, which explained and justified the decision to grant leave to them, under the terms of the ARAP policy,

but to refuse it to him. There was no other inconsistency as a species of rationality between JZ and the other judges who succeeded under ARAP.

(ii) Alleged general incoherence and unfairness

121. The ARAP scheme operates to published criteria, which change over time. The fact that the policy was not always reflected in the IR does not itself indicate a lack of coherence. The ARAP decision template indicates the test that has been applied which makes the position clear.

122. Each case is assessed by a specialist panel, who address the question of whether the applicant's case meets the criteria then in operation. They do so based on their assessment of the evidence provided by the applicant and their own enquiries within the potential sponsoring unit.

123. There is no rule, for example, that to qualify under ARAP someone has to be a particular type of judge, have served at a particular time or in a particular location, or been involved in certain sorts of events related to HMG. What matters is that the Panel is satisfied that the applicant meets the applicable wording of Category 4. Therefore, while as Lang J observed a sole focus on judges serving in Kabul may have been problematic ([66] above), this is not how the scheme operates: each case is assessed on its own facts. Service in Kabul was only one of the reasons why certain judges in the ARAP cohort succeeded in their applications.

124. There has been some substantive overlap between ARAP and Pitting LOTR in terms of the similarity in the criteria. There was also some temporal overlap given that ARAP existed before and after Pitting. However, this does not render the overall operation of the ARAP system incoherent. It perhaps simply illustrates different ways of meeting the same policy need to provide support to certain members of Afghan society through a longer-term process (ARAP) and an emergency, temporary measure (Pitting LOTR).

125. Therefore, even if the issue over whether permission to take these points was resolved in the Claimant's favour, I do not consider that the available evidence shows that there has been incoherence / unfairness to the level of irrationality in the ways alleged in respect of the interaction between ARAP and Pitting LOTR.

126. In my view Lang J's findings in respect of the inconsistency and arbitrariness of Operation Pitting do not assist JZ in challenging the ARAP decisions in his case.

Ground 2

127. The Claimant argued that his case should be treated as if he had been called forward during Operation Pitting given his proximity to the group of people who were actually called forward. It was submitted that his proximity to the call forward group is a factor that is highly relevant to the exercise of the Defendants' residual discretion under ARAP or LOTR.

128. The Defendants resisted Ground 2, again submitting that the Claimant did not have permission to argue it in this way. In any event the ARAP decision which is challenged was rationally reached and there is no challenge to the LOTR decisions before the court.

129. Ground 2 was never advanced by the Claimant on a free-standing basis, ie. that the failure to consider the Claimant as if he had been called forward itself rendered the ARAP decisions unlawful. Rather, the relevance of Ground 2 was primarily that, if the court granted relief, this was said to be a factor which the court should direct future ARAP or LOTR decision makers to take into account.

130. My conclusion on Ground 1 will not lead to a mandatory order requiring the Defendants to reconsider the ARAP decision. The LOTR decisions are no longer challenged in these proceedings and so whether or not to require those decisions to be re-made is a matter for others. To that extent Ground 2 has fallen away.

131. In any event I note that the witness statement of Mr Hall in this claim, referring to the evidence that the Claimant was considered as a possible call forward case, was placed before the ARAP decision-maker who conducted the most recent reconsideration and was specifically referred to in the 26 May 2022 decision.

132. Mr Hall's evidence was no doubt submitted by the Claimant because the description of him as "high profile" and the sympathy with which his case was treated was said to be relevant to question of whether he had worked in a meaningful enabling role alongside HMG, and to whether the relevant HMG unit would sponsor his application.

133. To that extent, the evidence was potentially relevant, alongside all the other evidence provided to the decision-maker. However, whether the 26 May 2022 decision was vitiated by the approach taken to this evidence or for any other reason is not a matter before me.

134. In those circumstances there is no basis for me to uphold the Claimant's claim on Ground 2 even if the issue over permission was resolved.

Conclusion

135. For all these reasons the claim is dismissed.