Neutral Citation Number: [2023] EWHC 1795 (Admin)

Case No: CO/71/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2023

Before

MR JUSTICE SWIFT

- -

Between

LND1 and others — **Claimants**

- and –

(1) Secretary of State for the Home Department
(2) Secretary of State for Defence — **Defendants**

–and –

Secretary of State for the Foreign, Commonwealth and Development Affairs — **Interested party**

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- -

Ramby de Mello and Edward Nicholson (instructed by **Luke Bridger Law Ltd**) for the **Claimants**
Sian Reeves (instructed by **Government Legal Department**) for the **Defendants**
Secretary of State for the Foreign, Commonwealth and Development Affairs did not appear and was not represented

Hearing dates: 29 and 30 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 14/07/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWIFT

A. Introduction

1. The First Claimant is an Afghan national who, between 2008 and August 2021, held judicial and other related positions in Afghanistan. In November 2021 he applied on his own behalf and on behalf of his wife and children (who are the Second to Sixth Claimants) under the Afghan Relocations Assistance Policy ("the ARAP scheme") for relocation to the United Kingdom. The ARAP scheme is a successor to arrangements originally devised by the Ministry of Defence, and now contained in the Immigration Rules (in the "ARAP Appendix" to those Rules). The scheme falls into two parts. The first part is an eligibility requirement. An applicant must apply to the Ministry of Defence for a decision on eligibility. Eligibility is determined by reference to the criteria at paragraphs ARAP 3.1 – 3.7 in the ARAP Appendix. If an applicant is determined to be eligible for relocation, the Home Secretary, applying the provisions in Part 9 of the Immigration Rules, then determines whether to grant the applicant entry clearance to the United Kingdom: see ARAP 2.1 and 6.1 – 6.2.

2. By a decision letter dated 9 December 2022 the First Claimant's application was refused on the ground he did not meet the eligibility requirement. The Claimants challenge that decision on a number of grounds. First, they contend that the conclusion that the First Claimant did not meet the eligibility requirement was "wrong and irrational"; second that, when taking the decision, the Secretary of State for Defence acted unlawfully by placing an "excessive evidential burden" on the First Claimant; third, that no adequate reasons were given for the decision; and fourth that the eligibility decision should have been taken by the Home Secretary, not the Secretary of State for Defence.

(1) The ARAP eligibility requirements

3. The ARAP scheme provides that "eligible Afghan citizens" are Afghan citizens, aged 18 or over, who made an application on or after 1 April 2021, and who either (a) meet the requirements of ARAP 3.4 (high and imminent threat to life); or (b) the requirements of ARAP 3.5 (former employees eligible for relocation); or (c) the requirements of ARAP 3.6 (special cases). The special cases provision is the one that is relevant for present purposes. It comprises four conditions and is as follows:

> "ARAP 3.6 A person meets the eligibility requirement if conditions 1 and 2 and 1 or both of conditions 3 and 4 applies:
>
> (a) Condition 1 is that at any time on or after 1 October 2001, the person:
>
> (i) was directly employed in Afghanistan by a UK Government department; or
>
> (ii) 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

> (iii) worked in Afghanistan alongside a UK Government department, in partnership with or closely supporting and assisting that department.
>
> (b) Condition 2 is that the person, in the course of the employment or work or the provision of those services under Condition 1, made a substantive and positive contribution towards one or more of the following:
>
> (i) the UK Government's military objectives with respect Afghanistan; or
>
> (ii) the UK Government's national security objectives with respect to Afghanistan (and for these purposes, the UK Government's national security objectives include counter-terrorism, counter-narcotics and anti-corruption objectives).
>
> (c) Condition 3 is that because of the person's employment or work or those services under Condition 1, the person:
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> (i) is or was at an elevated risk of targeted attacks; and
>
> (ii) is or was at serious risk of death or serious injury.
>
> (d) Condition 4 is that the person holds information, the disclosure of which would give rise to or aggravate a specific threat to a UK Government department or its interests."

(2) The decision on eligibility

4. The decision letter of 9 December 2022 was in a standard form. The letter started by stating the First Claimant was not eligible for relocation to the United Kingdom. Then, the letter stated, formulaically, that he did not meet the terms of various parts of (what are now) ARAP 3.4 – 3.6. For present purposes the material part of the letter is paragraphs 5 – 6 which stated as follows:

> "5. From the information you have provided you are not eligible under Category 4 of the ARAP scheme because you do not meet the following criteria:
>
> - *You were directly employed in Afghanistan by the UK Government, or provided goods or services under contract to the UK Government, or worked in Afghanistan alongside a UK Government Department, in partnership with or closely supporting it;*
>
> 6. You therefore do not meet the necessary criteria for Category 4 of ARAP scheme."

These paragraphs addressed only Condition 1 in ARAP 3.6. Conditions 2, 3 and 4, were not considered.

5. On the same day a lawyer in the Government Legal Department's Defence, Security and General Public Law team sent an email to the Claimants' solicitors referring to eligibility decisions taken on the First Claimant's application and one other application. So far as concerned the First Claimant the email stated as follows:

> "6. Whilst the applicant has set out their judicial role(s) they were not able to demonstrate that they worked alongside, in partnership or closely supporting and assisting a UK Government Department. Analysis of records and other assessments did not show the applicant was affiliated or known to a UK Government Department.
>
> 7. The applicant's asserted counter terrorism work pre-dates the FCDO's partnership with the Kabul counter-terrorism courts in 2015. The FCDO does not have records of having worked alongside the applicant at those courts. There is no evidence that the applicant's asserted work on the penal code was conducted in partnership with or alongside, or closely supporting the FCDO.
>
> 8. The applicant states that his role was as Director General of Investigation and Research at the Supreme Court (2016 – 2021) and that he was actively involved in the work of the Counter Narcotics Justice Centre (CNJC) 2019 – 2021 although the NCA did work closely with the CNJC, in the event that the applicant carried out this role, he was not directly employed by or contracted to the NCA. Neither was he said to have worked alongside in partnership with or closely supported and assisted the NCA in delivering its counter-narcotics mission in Afghanistan. The UK did provide general funding to the Counter Narcotics Justice Centre (as we also did with Kabul Counter Terrorism Courts) but that does not equate to a CAT 4 eligibility for individuals who worked there. In both instances there was a strong relationship built with key individuals.
>
> 9. Providing a brief at the British Embassy Kabul does not indicate the applicant worked alongside, in partnership or closely supported and assisted HMG.
>
> 10. In conclusion, there was insufficient evidence in the applicant's submission to indicate they had worked alongside, in partnership or closely supported and assisted the MOD, FCDO, NCA or any other UK Department or Unit."

This document ("the 9 December email"), like the pro-forma decision letter, only considered ARAP 3.6, Condition 1.

6. In the course of this litigation the Secretary of State for Defence has filed further evidence concerning the decisions and the decision-making process, in particular: (a) a witness statement dated 24 February 2022 by Philip Higginson the Deputy Director at the Ministry of Defence responsible for the teams who make eligibility decisions on ARAP applications; (b) two chains of emails from November 2021 which evidence the decision on the First Claimant's application; (c) a response to a Part 18 request dated 16 March 2023; and (d) a response dated 30 March 2023 to a request for disclosure.

B. Decision

(1) Ground 1. The eligibility decision was "wrong and irrational".

7. Ground 1 raises two issues. The first is the approach to be taken when applying ARAP 3.6, Condition 1. The second issue is whether the conclusion of fact that the First Claimant did not meet the requirements of Condition 1 was a conclusion lawfully open to the Secretary of State for Defence.

8. Condition 1 of ARAP 3.6 is addressed by both the pro-forma decision letter and the 9 December email. On the facts of this case there could be no question either that the First Claimant was employed by a United Kingdom government department, or that he had been contracted to supply goods or services to a government department. Plainly, he had done neither. In this case, for the purposes of Condition 1, the question was whether he had "worked … alongside a UK government department in partnership with or closely supporting or assisting …" such a department. In his judgment in *R(CX1 and others) v Secretary of State for Defence* [2023] EWHC 284 (Admin) at paragraph 85, Lane J construed an identical provision in an earlier version of the ARAP scheme as requiring an applicant to have worked alongside a United Kingdom government department either (a) in partnership with it, or (b) closely supporting and assisting it. I am not convinced that breaking down these requirements (now in ARAP 3.6(a)(iii)) in this way assists the understanding of the provision any better than an approach that takes all the words in the sub-paragraph and seeks to make sense of them, in the round.

9. In her submissions for the Secretary of State for Defence, Miss Reeves contended that Condition 1 requires a "real and substantial" connection with the work of a United Kingdom government department and that the word "alongside" means there has to be a "close relationship" and a "high degree of connection". I am not convinced that these or any other glosses on the words used are likely to be helpful. The words used in ARAP 3.6 are all ordinary words chosen by the Secretary of State. They should be applied in accordance with their ordinary meaning having regard to the context in which the words are used.

10. The more important questions are whether the Secretary of State for Defence correctly approached the application of Condition 1and was entitled to conclude that the First Claimant's working history in judicial and related positions between 2008 – 2021, was insufficient to bring him within Condition 1.

11. As to what is the proper approach to and meaning of the provision, context is important. The context is provided by the two preceding paragraphs in the Condition, each of which rests on some form of established contractual connection between the applicant and the United Kingdom government department. Set against those provisions, the notion of "working alongside" is intended to capture a further category of applicant

whose connection with a United Kingdom government department is measured by some form of qualitative yardstick. That being so, considering the rubric in its totality seems better likely to capture all members of the intended category than an approach that rests on breaking it down into one or more constituent parts.

12. The First Claimant's evidence is that from 2008 until August 2021 he held several judicial and related posts. Between 2008 and 2009 he was a member of the Primary (i.e., the first instance) Court for Crimes Against Internal and External Security in Kabul. He refers to this as "the Terrorism Court" and there is no dispute that that label properly describes the work that court did. The First Claimant's role as a judge of that court was to investigate criminal cases, many of which concerned members of the Taliban, to try those cases, and sentence those found guilty. Between 2010 and 2012 he was the chairman of the court. His evidence is that during that time, he worked on more than 700 cases involving Taliban combatants.

13. From 2013 to 2016 the First Claimant was a member of the General Directorate of Investigation and Legal Studies of the Afghanistan Supreme Court. The Directorate developed the legislation and rules governing the Afghanistan Anti-Corruption Justice Centre ("the ACJC"), which was established in 2016. From 2016 to 2021 the First Claimant was the Director General of the Directorate of Investigation and Legal Studies. In this position he was responsible for interpretation of the law applicable to the ACJC and the law applicable to the Counter-Narcotics Justice Centre ("the CNJC") which had been established in 2005 to investigate and prosecute drug related offences. The First Claimant further says that between 2019 and 2021 he was "actively involved" in the work of the CNJC. None of this evidence was disputed. In his witness statement in response to the claim, Mr Higginson says that the First Claimant's evidence was "not disbelieved".

14. The Secretary of State for Defence's evidence on how the decision was made is to the effect that the merits of the First Claimant's application were the subject of comment first by the Foreign, Commonwealth and Development Office and then by the National Crime Agency. The Ministry of Defence is the first port of call for eligibility decisions, and the decisions are made in the name of the Secretary of State for Defence. That reflects the practical position that of all the United Kingdom government departments involved in Afghanistan, the role of the Ministry of Defence was the most significant. Yet since the ARAP scheme applies to support and assistance provided to the work of any United Kingdom government department involved in Afghanistan, it is inevitable that the Ministry of Defence will in some instances need to seek the views of other government departments or agencies.

15. So far as concerned the First Claimant's application this led first to that application being referred to the Foreign and Commonwealth and Development Office. In an email of 26 October 2022, the Foreign Commonwealth and Development Office was asked "whether this is someone the FCDO may be willing to sponsor for Cat 4?". "Cat 4" was a reference to Condition 1 in ARAP 3.6. The response, dated 3 November 2022, which considered both the First Claimant's application and one other application, included the following:

> "I've taken a good look through the material on both applications. In summary, I do not believe they are cases that should be properly referred to the FCDO – I think they are more

> appropriately considered by NCA … Neither applicant demonstrates in the material provided that they engaged with (other than in a quite cursory way), built any kind of partnership, or provided close support or assistance to the FCDO (or predecessor departments). They assert that they are entitled to ARAP as a result of their wider contribution to the rule of law, and specifically that their work in, or in support of, counter-terrorism and counter narcotics courts was broadly in line with UK and coalition objectives in Afghanistan …
>
> In respect of their work at counter-terrorism courts, we know that the FCO's partnership with the Kabul counter-terrorism courts began in 2015 and that we are aware of the judges we supported through that partnership. The work of both applicants at those courts pre-dates 2015 – hence they are not able to describe any kind of partnership with the FCO. As both applicants state that they tried detainees captured by coalition forces the MOD might wish to consider any relationship they had with the applicants, though noting that none appears evident in the supporting documentation.
>
> Their work on work on counter-narcotics appears to post-date the FCO passing HMG leadership of counter narcotics issues to the NCA (2011/2) … [The First Claimant] asserts that his role as director general of investigation and search at the supreme court (2016 to 2021) supported the work of the UK part-funded Counter Narcotics Justice Centre. In any event, any claim to eligibility because of that counter narcotics work should properly be considered by the NCA."

16. The First Claimant's case was then referred to the NCA. Two responses followed. The first was on 7 November 2022 from Simone Alleyne, the NCA's Operations Manager for the Middle East and Asia Region. This included the following:

> "I have reviewed the documents on both applications for [another applicant] and [the First Claimant] and the NCA will not support these applicants for ARAP Cat 4. We can find no trace of these individuals working alongside or in partnership with the NCA in Afghanistan therefore we are unable to support that they would have made a substantive and positive contribution towards the achievements of the UK's government national security objectives with respect to Afghanistan. Neither applicant has provided any evidence to support they engaged with the NCA – we appreciate that the [First Claimant] has provided a photo of [a CNJC] judge but this is not sufficient to prove he built a partnership or a closely supported the NCA.
>
> …

> [The First Claimant] states that his role was as Director General of Investigation and Research at the Supreme Court (2016 to 2021) and he supported the work of the UK part-funded Counter Narcotics Justice Centre; this applicant does not appear on our payment schedule and therefore we have no record of his affiliated to the NCA in this role."

17. A second response was provided on 3 December 2022 by Andrew Tickner who the First Claimant described as having been an advisor to the CNJC.

> "I have absolutely no knowledge of working with him while deployed. I never had any direct dealings with judges from the Supreme Court, I am not aware of any involvement NCA had directly with the Supreme Court.
>
> The NCA had limited direct involvement with the ACJC, we had significant concerns related to the corruption amongst staff, especially prosecutors, that took place at ACJC.
>
> I can say that I believe that my name and email address has been circulated on social media amongst Afghans seeking a ARAP and as such I have had a large number of contacts from Afghans claiming to have worked at CNJC or supporting the NCA to which I have no knowledge of.
>
> I'd suggest that … the ex-chief prosecutor at CNJC would have a better knowledge of any Supreme Court Judges involvement at CNJC."

18. The 9 December email reflects the information in these responses. Notwithstanding the element of cynicism in Mr Tickner's response, it is important to note once again, that the Secretary of State for Defence accepts that the information provided by the First Claimant about the work he did between 2008 and 2021, was true.

19. Drawing this together, it is apparent that the question of whether the First Claimant had worked in partnership with or closely supporting or assisting a government department was considered in terms of whether the First Claimant had held office at the Terrorism Court at a time when the Foreign Commonwealth and Development Office considered itself to have been "in partnership" with that court (i.e., from 2015), or whether his name was known to anyone at the Foreign Commonwealth and Development Office or the National Crime Agency, or whether he had been in receipt of any form of payment (see the reference to the National Crime Agency's "payment schedule").

20. I do not consider this is a correct approach to the application of this part of Condition 1 in ARAP 3.6. The overall effect of the responses from the Foreign Commonwealth and Development Office and the National Crime Agency involved consideration of Condition 1 in isolation from Condition 2. ARAP 3.6 contains four conditions. An applicant must satisfy Conditions 1 and 2 and either Condition 3 or Condition 4. There

is a clear distinction between Conditions 1 and 2 on the one hand, and on the other hand, Conditions 3 and 4. Put generally, the latter concern risk arising by reason of the work the applicant has undertaken, either risk to himself or risk to United Kingdom interests. Conditions 1 and 2 must be considered together, in particular when the applicant was not in either of the first two categories within Condition 1, i.e., was not employed and did not work under contract, but was (or claims to have been) in the third, partnership, close support and assistance, category. Conditions 1 and 2 are, obviously, interdependent. Condition 2 is the more important because it identifies the substantive activity that the applicant must have undertaken to meet the eligibility requirement. By contrast, Condition 1 operates as a filter by requiring that activity to have been performed either in consequence of a contractual obligation (the first and second categories) or in consequence of some other sufficiently close connection (the third category). Since the third category is not defined by reference to an objective criterion, I do not think it possible to apply it without, as part of a single exercise, also considering the nature and extent of the applicant's contribution to the relevant military or national security objectives. Put shortly, the position of such an applicant must be considered in the round; whether an applicant has "worked … alongside a UK government department" cannot be reduced simply to whether he worked somewhere while it received specific support from a UK government department (with the consequence in this instance that the First Claimant's work as a judge at the Kabul Terrorism Court between 2008 and 2012 did not count, whereas doing the same work at the same court after 2015 would have counted), or whether his name can be remembered by one or more United Kingdom civil servants who worked in Afghanistan, or whether he received some form of payment from a United Kingdom government department. An approach that focusses only on matters that are in some respects peripheral, risks missing the wood for the trees. In this case the decision-maker ought also to have taken account of the substance of the work the First Claimant undertook, the nature of the institutions in which he worked, the nature of the connection between those institutions and the relevant United Kingdom government departments, and the contribution made by the work of those institutions to the United Kingdom's military and national security objectives in Afghanistan during the period the First Claimant worked in them.

21. That was not the approach taken in this case, and for that reason the Secretary of State for Defence failed properly to consider the First Claimant's application in accordance with his policy. That being so, the next issue is whether the application of Conditions 1 and 2 ought to be remitted to the Secretary of State for Defence for further consideration or whether that is unnecessary so far as concerns compliance with those Conditions because, given the First Claimant's circumstances it is clear on any proper application of this part of the scheme there would only be one legally permissible outcome.

22. It is in the nature of the application of provisions such as Conditions 1 and 2 that instances where there will be only one permissible outcome will be rare. However, I am satisfied that this is such a case. The First Claimant's case, accepted by the Secretary of State for Defence, includes evidence that he worked as a judge at the Kabul Terrorism Court between 2008 and 2012, and that between 2013 and 2016 he worked in the Directorate at the Afghanistan Supreme Court responsible for establishing the rules and procedures of the Anti-Corruption and Justice Centre. Even disregarding the further work First Claimant undertook thereafter until 2021, these matters evidence an extended period of work in leading roles, in leading Afghan institutions, the work of

which was obviously central to the United Kingdom's national security objectives in Afghanistan as described in Condition 2. During the hearing submissions were made on the significance that might properly attach to one part of the First Claimant's evidence, that in 2012 he (with others) attended the British Embassy in Kabul to provide a briefing on the work of the Kabul Terrorism Court. I accept the Secretary of State for Defence's submission that little significance may attach to this event for its own sake. However, what happened on that occasion is indicative of a rather obvious point, that the work of the judges of that court directly affected and supported the United Kingdom's natural security objectives in Afghanistan. The other matters referred to in the emails, set out in paragraphs 16 – 18 above, and in the 9 December email do not, rationally, diminish the strength of the First Claimant's application. The fact that the Foreign Commonwealth and Development Office regarded itself as "in partnership" with the Kabul Terrorism Court from 2015 and from that time "supported" some of the judges at that court, but not before, seems somewhat arbitrary since there is no suggestion that the court's work after 2015 differed in any way from its work between 2008 and 2012. The same can be said for the point made in Miss Alleyne's email that the First Claimant did not appear on the National Crime Agency's "payment schedule". While it could be said that had the First Claimant continued to work as a judge at the Kabul Terrorism Court after 2015, or had been on the National Crime Agency's payment schedule his application would have been all the stronger for those matters, I do not consider that on a proper approach to Conditions 1 and 2 it would be rationally be open to the Secretary of State for Defence to conclude that the First Claimant did not meet Conditions 1 and 2 for those reasons alone. Ground 1 of the Claimants' challenge therefore succeeds. In these circumstances I can address the further grounds of challenge more briefly.

<u>*(2) Ground 2. The Secretary of State for Defence imposed an "excessive evidential burden" on the First Claimant.*</u>

23. The submission here is directed to the suggestion in the emails above, at paragraphs 16 – 18, that the information provided by the First Claimant was wanting. The point made by the First Claimant is that without access to information such as the court records of the Kabul Terrorism Court and of the relevant Supreme Court Directive which, for obvious reasons, have not been available to him since August 2021, it is unreasonable either to expect further information to be provided or to criticise the merits of his ARAP application because such detail has not been included.

24. In substance this complaint is an aspect of Ground 1 of the Claimants' case. If the correct approach to the application of Conditions 1 and 2 in ARAP 3.6 is as I have described when dealing with Ground 1 of the Claimants' case, this part of the claim becomes redundant. For that reason, I need say no more about it.

<u>*(3) Ground 3. Failure to give reasons.*</u>

25. The submissions in support of this ground focused on two matters. The first was whether the reasons given in the 9 December email had sufficiently addressed the evidence of the work the First Claimant undertook between 2018 and 2021, including the contents of a letter dated 30 August 2021 from Ms Monica Martinez-Fernandez, the

Chief of the Rule of Law Unit at the United Nations Assistance Mission in Afghanistan. Given my reasoning on Ground 1, on the proper approach required to the application of Conditions 1 and 2 in ARAP 3.6, this ground of challenge tends to merge into Ground 1. These more general matters were not addressed in the 9 December email because of the way in which Condition 1 was addressed, in isolation from Condition 2.

26. The second matter was the sufficiency of the pro-forma letter. The Secretary of State for Defence did not dispute that an adverse eligibility decision needed to be sufficiently reasoned. However, his submission was that given the number of eligibility applications made under the ARAP scheme (some 131,000 since the scheme opened in April 2021), it was in practice impossible to provide decision letters that directly addressed the reasons relied on in support of each application. Part of the practical difficulty was the need to translate decisions into local languages (Dari Persian and Pashto). Thus, went the submission, the pro-forma letters were sufficient, even though what is said in them comes to no more than telling each applicant that his application has been considered against the ARAP conditions but did not meet them. It was further submitted that the pro-forma letter informed applicants they could request a review of the decision and that reasons given in the event of a review would also count to discharge any obligation to give reasons.

27. The general position in this regard was considered by Lane J in his judgment in *CX 1* which concerned the use of the same pro-forma letters. His conclusion, on the facts of that case, was as follows:

> "65. … Since the duty to give reasons arises from the duty of fairness at common law, what fairness demands will inevitably be fact and context-specific.
>
> …
>
> 67. Over 128,000 applications for ARAP have been received since the scheme opened in April 2021. This greatly exceeds the number of individuals estimated as even potentially eligible for it. That estimate was 16,500, prior to Operation Pitting, comprising both principals and dependants. Ms Pester says that, were the first defendant required to provide bespoke decision letters that includes detailed reasoning for every single case, this would inhibit how quickly eligibility decisions can be made. It would also divert resource from supporting the relocation of eligible applicants, besides having high costs.
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> …
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> 69. Ms Pester says that ARAP caseworkers prepare decision letters by adapting template documents. If a person is determined to be ineligible, standardised wording is employed to identify the eligibility criteria to which the applicant is subject, specifying which criteria have been met, and which have not, on the first defendant's assessment of the evidence provided by the applicant. For category 4 applicants, there are three different variations of decision letter that unsuccessful individuals may

> receive, depending on which category 4 criteria the applicant has or has not met.
>
> 70. A further issue concerns the translation of the decisions. The template decision letters are translated by humans, as opposed to computer software, in order to allow for greater accuracy. The first defendant considers that human translation is important to ensure that it is fair and accessible to ARAP applicants. If every applicant deemed ineligible for ARAP received a bespoke and detailed decision letter, this would have to be translated on an individual basis. That would either rapidly overwhelm the first defendant's translation capacity, adding delay to the issuing of decisions, or else significantly increased translation costs (as well as the time taken to translate).
>
> 71. Overall, as Ms Pester says, the use of template letters allows applicants to understand the basis of the first defendant's eligibility decision, whilst supporting the provision of a fair, accessible and consistent service, which is, in all the circumstances, proportionate.
>
> 72. Taken as a whole, Ms Pester's evidence firmly demonstrates, in my view, that the first defendant's approach to the giving of reasons in decision letters concerning eligibility under ARAP is compatible with the common law duty of fairness."

28. The issue before Lane J does not directly arise in the present case because of the 9 December email. Whatever view is taken of the sufficiency of the pro-forma letters in general terms, in this case the pro-forma letter was supplemented by the 9 December email and, save to the extent I have explained at paragraph 25, when these two documents are read together sufficient reasons were provided.

29. Had the position been different, and if in this case the pro-forma letter had comprised the only reasons given for the eligibility decision, I would not have followed Lane J's conclusion in *CX 1*. As he said, the requirements of fairness are shaped by context. In this case, I accept that the context includes the fact that from August 2021 the Secretary of State for Defence faced a very large number of eligibility applications under the ARAP scheme, many more than he could have reasonably expected to have received. I accept the problem presented by the need to translate decision letters into relevant languages. I also accept that in the assessment of what is required to meet the obligation to act fairly, due weight will attach to the consideration that the obligation should not be framed to place an intolerable or unrealistic burden on a decision-maker.

30. However, when considering the content of the obligation to act fairly so far as it concerns an obligation to provide reasons, the most important matters of context are the decision being taken and the criteria applied to take the decision. Under the ARAP scheme, the eligibility criteria are such that each decision is an assessment of information that an applicant has provided about himself: of matters such as the work

he undertook, the circumstance under which the work was performed, and the consequences in terms of personal safety for the applicant of having performed that work. Decisions that turn on the assessment of matters of this sort, of an applicant's personal circumstances set against criteria that are incapable of mechanical application, ordinarily attract an obligation to give reasons so a disappointed applicant can understand why the case he has put forward has not been sufficient to meet the criteria set for a successful application. In that sort of context, reasons are an essential element of the obligation to act fairly; they allow the applicant to be satisfied his application has been considered on its merits, and to decide whether any further avenue may be open – in this instance the opportunity to decide whether a review of the decision should be pursued. All this weighs heavily in favour of the conclusion that reasons should be provided. The reasons given do not need to be elaborate or lengthy, but I see significant force in the contention that in this case they do need to go further than the statements contained in the pro-forma letter, which come to no more than that the application has been weighed in the balance but has been found wanting, statements that provide nothing by way of explanation for the conclusion reached. Moreover, in the present context there is no question but that before the pro-forma letters were sent out each application was considered on its own merits. Therefore, it is only the burden of translating the reasons for the decisions that weighs against a conclusion that more specific reasons than those in the pro-forma letter should be provided. Had it been necessary for me to decide the matter, I would have concluded that reasons beyond the bare statements in the pro-forma letter should have been given. Those reasons could have been brief, but they should have provided the sense of the reason why the matters relied on in support of the application had not met the one or more of the eligibility requirements.

(4) The eligibility decision should have been made by Home Secretary, not the Secretary of State for Defence.

31. The Claimants' submission is that because the eligibility requirement is contained in the Immigration Rules, the decision on whether the requirement is met must be taken by the Home Secretary. I do not consider there is any substance in this point. The Claimants rely on the decision on the House of Lords in *R(BAPIO Action Limited) v Secretary of State for the Home Department* [2008] 1 AC 1003. However, that decision is no more than authority for the proposition that a measure that falls within the scope of sections 1 and 3 of the Immigration Act 1971 needs to have been made by the procedure provided in section 3(2) of the 1971 Act, even if it is a measure applied by a Secretary of State other than the Home Secretary. In that case the measure took the form of guidance issued by the Secretary of State for Health. There can be no suggestion that the rules for the eligibility requirement in the ARAP scheme falls foul of the rule in *BAPIO*; the eligibility rules are stated in the ARAP Appendix to the Immigration Rules.

32. The Claimants' next submission is to the effect that even though the eligibility rules were made as part of the Immigration Rules in accordance with the requirements of section 3(2) of the Immigration Act 1971, they are *ultra vires* because they require a decision on the part of a Secretary of State other than the Home Secretary and for that reason fall outside the power at section 3(2) of the 1971 Act. I do not accept that

submission either. The requirement in section 3(2) of the Immigration Act 1971, so far as material for present purposes, is that the Home Secretary:

> "… shall from time to time … lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter …"

There is nothing in that provision that prevents the Home Secretary adopting a policy of considering applications for leave to enter the United Kingdom made by a class of persons identified by another Secretary of State who has himself applied criteria contained within the Immigration Rules to identify who are the members of that class.

33. The Claimants' third submission, based on *Carltona Limited v Commissioner of Works* [1943] 2 All ER 560, also goes nowhere. The principle in *Carltona* recognises that duties imposed on Secretaries of State may be exercised by departmental officials who act under the minister's authority. This is not a principle of delegation but rather a common law principle that, save where statute otherwise requires, decisions taken by departmental officials are, in law, decisions of the relevant minster. There is no aspect of the *Carltona* principle that prohibits one Secretary of State from framing a rule to the effect that she will consider the exercise of her statutory powers in respect of a class of persons identified by reference to a prior decision taken by another Secretary of State. A rule framed in that way does not engage the *Carltona* principle at all.

34. The Claimant's final submission on this ground is that even if neither section 3(2) of the Immigration Act 1971 nor the *Carltona* principle prevented the Home Secretary from relying on an eligibility decision made by the Secretary of State for Defence, the position was different in so far as any eligibility decision was made by the Secretary of State for Defence in reliance on information provided by another government department or agency – in this case the Foreign Commonwealth and Development Office or the National Crime Agency. The Claimant's submission that such circumstances produce a different outcome must rest on some notion of impermissible sub-delegation. That is incorrect. First and as already explained, the *Carltona* principle has no application to the operation of the eligibility rules within the ARAP Appendix. Second, the *Carltona* principle is not a principle about delegation at all. Thirdly and on the assumption that both the first and second points are wrong, the fact that when considering the First Claimant's application the Secretary of State for Defence relied on information provided by the Foreign Commonwealth and Development Office and the National Crime Agency does not render the eligibility decision any the less a decision made by the Secretary of State for Defence.

C. Conclusion and disposal

35. The Claimants' claim for judicial review succeeds on Ground 1 but fails on all other grounds. The consequence of my conclusion on Ground 1 is that the First Claimant meets Conditions 1 and 2 within ARAP 3.6. It will now be for the Secretary of State

for Defence to consider whether either Condition 3 or Condition 4 is met. If his decision is that either of those Conditions is met then, subject to any point arising under ARAP 3.7, the Claimants' applications for entry clearance will fall to be determined by the Home Secretary in accordance with the remaining provisions in the ARAP Appendix to the Immigration Rules.