Neutral Citation Number: [2023] EWHC 284 (Admin)

Case No: CO/2866/2022, CO/3458/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2023

Before :

MR JUSTICE LANE

- -

Between :

THE KING
on the application of

(1) CX1
(2) CX2, CX3, CX4, CX5, CX6, CX7, CX8 **Claimants**

- and –

(1) SECRETARY OF STATE FOR DEFENCE
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendants**

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Mr A. Straw KC, Ms C. Meredith, Mr D. Greene (instructed by **Leigh Day Solicitors**) for the **Claimants**
Mr D. Blundell KC, Mr N. Chapman, Ms N. Jackson (instructed by **Government Legal Department**) for the **Defendants**

Hearing date: 15 December 2022
(Further material and submissions filed on 16 December 2022)

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Judgment Approved by the court for handing down.

Mr Justice Lane :

1. This is a "rolled-up" application for judicial review. The claimants are Afghan nationals who previously worked for the BBC and other news agencies in Afghanistan. The claimants say that they and their families became at high risk of being killed or otherwise harmed by the Taliban, as a result of the claimants' work as journalists. Some of the claimants have, as a result, left Afghanistan, whilst others remain in hiding in that country.

A. AFGHAN RELOCATIONS AND ASSISTANCE POLICY ("ARAP")

2. Each of the claimants made applications to be relocated to the United Kingdom, along with their families, under the first defendant's Afghan Relocations and Assistance Policy ("ARAP"). Those applications were refused by the first defendant on 14 June 2022 (CX1), 11 August 2022, (CX5), 12 August 2022 (CX2-4) and 16 August 2022 (CX6-8). The claimants also sought to invoke the second defendant's residual discretion under the Immigration Acts to grant leave to enter or remain, outside the Immigration Rules (version 2.0) (9 March 2022).

3. According to the witness statement of Ms Hannah Seakins, who currently works in the Home Office but who formerly worked for the Ministry of Defence, the ARAP scheme was announced on 29 December 2020 and launched on 1 April 2021. Originally, ARAP related to certain Afghan locally-employed staff and other personnel who had worked for a Department of HMG, together with certain of their family members. ARAP replaced the so-called "intimidation" policy, which had been in place since 2010, and an *ex gratia* scheme, which had been in place since 2013. ARAP provided financial packages, training and the possibility of relocation to the United Kingdom. It offered relocation to eligible Afghan citizens employed by the United Kingdom in Afghanistan in what Ms Seakins describes as "exposed, meaningful or enabling roles", who were assessed to be at serious risk as a result of their work.

4. ARAP is not principally an immigration policy. Although relocation to this country is available in certain cases, Ms Seakins states that this is only part of the overall structure. ARAP originated as a means of showing commitment and paying a debt of gratitude to those who worked for HMG and supported the UK armed forces' mission in Afghanistan.

5. There are 4 categories for assistance under ARAP, against which all ARAP applications are assessed. Relocation to the United Kingdom is offered to those falling within categories 1 and 2, or who fall within category 4 and in respect of whom it is decided that relocation should be offered on a case-by-case basis.

6. As at 4 June 2021, category 4 was limited to "those who work in meaningful enabling roles for HMG". On 26 August 2021, this was altered to "those who have been employed by HMG, in meaningful enabling roles".

7. The version of ARAP which was in force at the date of the challenged decisions was that of 27 April 2022. This defined category 4 as follows:-

> "Category 4

> The cohort eligible for assistance on a case-by-case basis of those who:
>
> - on or after 1 October 2001 were directly employed in Afghanistan by an HMG department; provided goods or services in Afghanistan under contract to an HMG department; or worked in Afghanistan alongside an HMG department, in partnership with or closely supporting that department; and
>
> - in the course of that employment or work or provision of services they contributed to the UK's military objectives or national security objectives (which includes counter-terrorism, counter-narcotics 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."

B. THE IMMIGRATION RULES

8. At the relevant time, the terms of the policy governing relocation were given effect by paragraphs 276BA1to 276BC1 of the Immigration Rules. Categories 1 to 3 are, by, respectively, paragraphs 276BB to 276BB4 of the Rules. Category 4 was given effect by paragraph 276BB5. This provides as follows:-

> "276BB5. A person falls within this paragraph if the person meets conditions 1 and 2 and one or both of conditions 3 and 4. For the purposes of this paragraph:
>
> (i) condition 1 is that at any time on or after 1 October 2001, the person:
>
> (a) was directly employed in Afghanistan by a UK government department; or
>
> (b) provided goods or services in Afghanistan under contract to a UK government department (whether as, or on behalf of a party to the contract); or
>
> (c) worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department;

> (ii) condition 2 is that the person, in the course of that employment or work or the provision of those services, made a substantive and positive contribution towards the achievement of:
>
> (a) the UK government's military objectives with respect to Afghanistan; or
>
> (b) the UK government's national security objectives with respect to Afghanistan (and for these purposes, the UK government's national security objectives include counter-terrorism, counter-narcotics and anti-corruption objectives);
>
> (iii) condition 3 is that because or 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."

C. LEAVE OUTSIDE THE RULES ("LOTR")

9. The power of the second defendant to grant leave outside the Rules ("LOTR") arises from section 3 of the Immigration Act 1971. The second defendant's guidance, at the date of the impugned decisions, provides as follows:-

> "Applying overseas for LOTR
>
> Applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry clearance on their chosen route. Any dependants of the main applicant seeking a grant of LOTR at the same time must be included on the form and pay the relevant fees and charges. An ARAP form cannot be used to apply for LOTR (see Afghanistan Relocations and Assistance Policy (ARAP))."

10. As was the case with the present claimants, a person who is unsuccessful in their ARAP application is told that they may, instead, apply for LOTR. The words "application form" in the passage from the Guidance set out above contains a hyperlink to another web page. This provides a number of different types of visa routes. In R (S and AZ) v Secretary of State for the Home Department and Secretary of State for Defence [2022] EWCA Civ 1092, Underhill LJ, in a judgment with which Lewis and Elisabeth Laing LLJ agreed, said:-

> "11. Applications for a visa must typically be made online. The gov.uk website has a page entitled "Applying for a visa to come to the UK". It identifies the most typical visa "routes", referred to by the Judge as "the online visa routes": these include, for example, visitor visas, student visas, various kinds of work visa and family visas. Under each there are hyperlinks which take a potential applicant to a page where they can find the necessary online application form: I will call these "the online VAFs". The online VAFs have an obvious family resemblance as regards lay-out, basic personal information required and various boilerplate provisions, but they of course differ, according to the route chosen, in the particular questions which the applicant is required to answer. Each has an expandable free-text box where the applicant can enter "additional information".

11. In S & AZ, Underhill LJ held that an application for LOTR could not be made using the ARAP application form: "The entire ARAP relocation procedure is *sui generis* and is quite inapt for the determination of the issues raised by an LOTR application" (paragraph 26).

D. THE DECISIONS

12. The decisions in respect of the present claimants are in a "template" form. In each case, the decision begins as follows:-

> "1. Thank you for your application for relocation to the United Kingdom under the Afghan relocation and assistance policy (ARAP). We have assessed your application against the ARAP criteria and deemed you are not eligible for relocation to the United Kingdom under this scheme. The reasons for this decision are set out below."

13. Following paragraph 1, and each subsequent paragraph, there is a translation in the Pashto language.

14. Paragraph 2 states that the applicant was found ineligible for category 1 of ARAP because they were not employed in Afghanistan by a UK government department. Paragraph 3 states that the applicant had been found ineligible for category 2 because they were assessed as not having been directly employed in Afghanistan by a UK government department or as not having provided linguistic services to or for the benefit for members of the UK's armed forces in Afghanistan.

15. Paragraph 5 reads:-

> " 5. Your eligibility against category 4 of the ARAP has also been assessed. This involves making checks with relevant HMG department or unit(s). From the information provided you do not meet the following criteria:".

16. In the case of CX1, the criteria were as follows:-

> " • 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".

17. Accordingly, paragraph 6 told the applicant that "You therefore do not meet the necessary criteria for category 4 of the ARAP".

18. Paragraph 7 told the applicant that they had a right to seek a review of the decision if the applicant believed the decision was not made in accordance with the policy and/or the applicant could supply additional evidence to support their case that was not available when the decision was made. Information was then given on how to submit a request for review.

19. After other paragraphs giving information about alternative routes to come to the United Kingdom, paragraph 13 stated that the second defendant has power to grant leave outside the Immigration Rules. A link was given to the relevant guidance, which I have already described.

20. In the case of CX2 to CX8, paragraph 5 of the decision contained the statement that, besides not being directly employed by etc or working alongside the UK government department, in partnership with or closely supporting it, the applicant had not met the following additional criteria:-

> "• in the course of that employment or work or provision of services you contributed to the UK's military objectives or national security objectives (which includes counterterrorism, counter-narcotics, and anti-corruption objectives) with respect to Afghanistan."

E. THE GROUNDS OF CHALLENGE AND DISCLOSURE

21. As originally formulated, the claimants' grounds of challenge were essentially as follows:-

> **Ground 1:** The first defendant's decisions that the claimants did not meet the ARAP category 4 criteria were unlawful because the first defendant failed to give any or adequate reasons for the decisions.
>
> **Ground 2**: The second defendant's policy Leave outside the Immigration Rules, (LOTR) is unlawful because it requires a person in the position of the claimants to apply for LOTR on an application form which they cannot be reasonably expected to use, without any justification. This is said to be unreasonable and unfair.
>
> **Ground 3:** The second defendant, accordingly, unlawfully refused to consider the claimants' applications for leave under her residual discretion conferred by section 3 of the Immigration

> Act 1971 because her refusal was made pursuant to an unlawful policy."

22. On 11 November 2022, the defendants filed and served a witness statement of Ms Michelle Pester. She is a Deputy Director in the Ministry of Defence, responsible for the relocation of Afghans to the United Kingdom. Until late August 2022, Ms Pester was also responsible for the teams making ARAP eligibility decisions, and for the separate team responsible for carrying out reviews of those decisions.

23. Beginning at paragraph 10 of her statement, Ms Pester describes the decision-making in respect of ARAP in the case of each of the claimants. The key category was considered to be category 4, so far as CX1 was concerned. As Ms Pester says:-

> "13. Firstly and primarily, CX1 provided no evidence that they worked alongside, in partnership with, or closely supporting a Government Department. The BBC is not part of His Majesty's Government (HMG). It is independent of the government in all matters, including operationally, financially and editorially. For this reason, CX1 did not satisfy the first condition for eligibility under ARAP category 4 and the Defence Afghan Relocation and Resettlement (DARR) casework team did not refer CX1's case to any sponsoring unit or Government Department, because no relevant unit or department was identified in CX1's application.
>
> 14. There was also not sufficient evidence provided to meet condition 2, which is that the applicant made a substantive and positive contribution towards the achievement of (a) the UK government's military objectives with respect to Afghanistan; or (b) the UK government's national security objectives with respect to Afghanistan (and for these purposes, the UK government's national security objectives include counter-terrorism, counter-narcotics and anti-corruption objectives).
>
> 15. The DARR case worker conducting CX1's eligibility assessment did not proceed to consider the third and fourth conditions in more detail, as it is a pre-requisite for ARAP eligibility under category 4 to meet conditions 1 and 2".

24. The same paragraphs occur in Ms Pester's description of the decisions in the cases of CX2 to 8.

25. The claimants point out that this court should be cautious in its approach to reasons that are provided only after proceedings have been issued: R v Westminster City Council ex-party Ermakov (1996) 28 HLR 819. If, however, the court decides to take account of Ms Pester's witness statement as explaining the decision-making in their cases, the claimants submit that her statement shows that the first defendant erred in law. In short, the fact that an applicant for ARAP was employed by a body that is independent of HMG does not prevent that applicant from being eligible under category 4. Further, it is unnecessary for an applicant to identify a sponsoring unit or government department in their application.

26. At the hearing, Mr Straw KC applied for permission to amend the claimants' grounds, so as to introduce, as part of Ground 1, the contention that the first defendant erred in law because she misunderstood the ARAP policy. For the defendants, Mr Blundell KC did not oppose this application, arising as it did from service of the witness statement. In all the circumstances, I considered that it was appropriate to grant the application.

27. On 6 December 2022, the defendants filed and served a second witness statement of Ms Pester. In this, she discloses material, which Ms Pester accepts should have been filed and served earlier in these proceedings, pursuant to the defendants' duty of candour. The failure arose from what Ms Pester describes as mistakes, for which she offers an unreserved apology.

28. The material in question comprises caseworker notes in respect of CX1 and CX2-8; and a Standard Operating Procedure ("SOP").

29. The caseworker notes concerning the decision in respect of CX1 were found on the first defendant's DACS (database and caseworking) system, on or around 23 November 2022. The notes read as follows:-

> "CX-1- This applicant has made 3 x applications, first of these on 30 Aug 21. I have changed the application date on this last application to reflect the earliest date. The applicant is supported by legal counsel statements are in both Pfiles (sic). I have read the emails and applied to policy, this applicant did not work for HMG. Therefore, is ineligible for ARAP. As the legal action includes the FCDO they may decide he is eligible for ACRS. E-mail sent to applicant 14 June 2022."

30. Ms Pester says the e-mail states in respect of CX1 that "he was [not] employed by HMG and therefore is ineligible for ARAP and I have sent the unsuccessful letter". The word "not" was obviously intended to be inserted by the caseworker. Ms Pester observes that these notes and the e-mail are inconsistent with the first defendant's position in the current litigation, in that they refer only to employment by HMG as a condition for eligibility for ARAP category 4. Ms Pester suggests that, even if the caseworker did apply the wrong test, CX1 would in any event not satisfy the full test under ARAP category 4. The reasons for this were said to be explained in Ms Pester's first witness statement.

31. On 15 November 2022, it was discovered that internal case-working notes relating to CX2-8 existed. These were prepared prior to the ARAP refusal decisions in each case. On 1 December 2022, the first defendant also discovered case notes on the DACS system pertaining to CX2-8. Ms Pester says that as these were non-standard documents, they were accidentally overlooked during the normal procedures for considering documents, which would be routinely shared with counsel.

32. The caseworker notes make reference to the expert report of Mr Tim Foxley, who was commissioned by the claimants in support of their case that they fall within ARAP category 4. The caseworker particularly noted Mr Foxley's belief that the BBC's efforts "very likely reduced the scope of armed resistance to the international forces and the Afghan government by educating and explaining key issues such as the intentions of the international community, democratic processes and the importance of human and

women's rights". The caseworker considered that "This does not support the requirements under CAT4".

33. Towards the end of each set of the case notes which were disclosed with Ms Pester's second witness statement, there is the following:-

> "Further to the Statement of Facts and Grounds, para 61 [or, in one case, 60] States: The Claimants worked in meaningful enabling roles for the BBC, which is a public corporation of the Department for Digital, Culture, Media and Sport. The BBC is a quasi-autonomous corporation authorised by royal charter, making it operationally independent of the government. The BBC is required by its charter to be free from both political and commercial influence and answers only to its viewers and listeners. Therefore, an assertion that working for the BBC qualifies the applicant as being employed by HMG is refuted.
>
> My recommendation is that the applicant is found unsuccessful for CAT 1, CAT 2 and CAT 4 as ineligible".

34. The reference in the above-quoted passage to the Statement of Facts and Grounds appears to be a reference to an earlier claim for judicial review (CO/1728/2022), which was brought by the claimants to challenge the delay in determining their applications. Paragraph 60 of the Statement of Facts and Grounds in that judicial review said:-

> "*60. The Claimants worked in meaningful enabling roles for the BBC, which is a public corporation of the Department for Digital, Culture, Media and Sport. The Taliban consider the BBC to be a part of the UK government, and journalists who worked for it to be British agents, who should be killed (see above). The Taliban's perception is important for the question of eligibility, because the ARAP policy objective is to provide protection for those at risk as a result of their work alongside the UK. Several of the claimants worked in other roles for or alongside the UK government."*

35. Examples were then given. These included CX1 working on a UK Foreign, Commonwealth and Development Office project, travelling with British troops to Helmand and the front line; CX2 travelling to Helmand to embed with NATO forces; CX3 having a lengthy history of reporting in support of the British mission and democracy in Afghanistan; CX4 working for the BBC, focusing on the British and NATO objectives in Afghanistan, with highly critical reporting of the Taliban; CX5 supporting the UK mission, including the Afghanistan Peace Council; CX6 working on many media programmes aimed at giving a voice to the Afghan people; CX7 travelling into the field and working for the Independent Directorate for Local Government, training media professionals on how to use the media to promote counter terrorism; and CX8 reporting for the BBC from the front line, as well as participating in journalism and media training courses.

36. The caseworker notes on the DACS system in respect of CX2-8 have, against the date of the ARAP eligibility decision, the following:-

> "Rejected - The applicant worked for the BBC and did not meet the criteria for CAT's 1, 2 or 4."

37. Whilst, on their face, the caseworker notes in respect of CX2-8 might be regarded as equivocal, as regards the significance attributed by the caseworker to the fact of having worked for the BBC, when viewed together with the same caseworker's admittedly erroneous assumption that, because the BBC was not a part of the HMG, CX1 could not meet the category 4 criteria, it is at least likely that the same erroneous reasoning played a part in the rejection of the ARAP applications of CX2-8.

38. The final piece of material disclosed with Ms Pester's second witness statement is the Afghanistan Relocations Assistance and Policy (ARAP) Category four (Cat4) Caseworking Standard Operating Procedures ("SOP"). This is marked "Official Sensitive" and is, thus, an unpublished document.

39. Paragraph 1 of the SOP makes the point that category 4 (special cases) applicants are processed on a case-by-case basis. Paragraph 2 then sets out paragraph 276BB5 of the Immigration Rules.

40. Paragraph 3 says that the "following guidance can be used to help departments consider cases". After stating that the most commonly potential category 4 cases will be members of an HMG partnered unit, sub-paragraph (a) of paragraph 3 continues:-

> "While not directly employed by HMG, for individuals to be eligible under Cat4, they will likely have worked closely alongside HMG units (either indirectly or in partnership) and made a positive and substantive contribution to HMG's national security or military objectives (including counter-terrorism, counter narcotics and anti-corruption) and must now face a significant risk to life as a result of that role and contribution".

41. Sub-paragraph (b) explains that category 4 cases are subject first to agreement by senior officials from the Home Office, Ministry of Defence and Foreign, Commonwealth and Development Office. Once agreed on an applicant's eligibility, the sponsoring department should then submit to the relevant Minister for approval.

42. Sub-paragraph (c) provides that the evidence that an individual made a material contribution and is at risk as a result must be gathered and presented to demonstrate a credible case by the "sponsoring unit" within HMG. That sponsoring unit will be the unit or department that the individual worked alongside or partnered with. Owing to the sensitivity of the information in these cases and the "high threshold for relocation under category 4", this is said to be likely to require the sponsoring unit or agency to work with the lead ARAP policy officials in their Department.

43. Paragraph 4 reads as follows:-

> "4. The criteria against which the case will be considered are set out in the Immigration Rules. Departments may wish to consider the following guidance questions to help apply the eligibility criteria set out in the Immigration Rules:

> (a) Has evidence been provided that the individual worked closely alongside, in partnership or indirectly with the UK government?
>
> (b) Has evidence been provided that, working in the role described in (a) above, the individual made a material positive and substantive contribution to HMG's national security (including counter-terrorism, counter narcotics and anti-corruption) or military objectives? For example, has the individual worked in an HMG partner unit directly supporting /contributing to HMG CT objectives? These individuals may have been directly employed by the government of Afghanistan, but most will have received additional pay or other remuneration from HMG for their contribution to UK objectives.
>
> (c) Has evidence been provided that this individual's role has placed them at significant risk to life?
>
> (d) Or, has the individual worked in a particularly sensitive role which has granted them an understanding of HMG operational activity (notably Training Tactics and Procedures) which could, if exploited by an adversary, pose a risk to HMG?"

44. Paragraph 5 sets out considerations for the assessment of evidence. It also states that "Each case must be assessed on its merits against the eligibility criteria as set out in the Immigration Rules".

45. Paragraph 9 says that the vast majority of cases under category 4 will be made directly by the HMG sponsoring units to the departmental ARAP team. The next two paragraphs read as follows:-

> "10. However, if the individual does not have the contact details of the unit with which they worked, then individuals may set out the nature of their relationship with HMG, and contribution made to the UK's mission in Afghanistan, by means of a standard online application via the ARAP website. If further detail is needed to support the case, or for clarification it can be requested from the applicant.
>
> 11. On receipt of an application by an individual who was not directly employed by HMG but does have clear links to HMG, the MOD ARAP team will note the nature of the claimed relationship and will refer the information provided to the most relevant HMG unit. Should there be no identifiable link to a named or described HMG department or partner unit then it is likely that the applicant is ineligible for relocation or assistance under Cat 4".

46. In the light of the defendants' disclosure of the SOP, the claimants applied for permission to amend their grounds of claim to introduce a new Ground 4. This contends

that the SOP, and its application to the claimants, was unlawful because the SOP is an unpublished policy.

47. In the circumstances, Mr Blundell understandably did not object to the application to add Ground 4. I granted the application.

F. AFGHAN JOURNALISTS

48. In the light of the expansion of Ground 1, the parties drew the court's attention to the position of Afghan journalists, both before and after the international evacuation in August 2021 and the Taliban's re-establishment of control over that country.

49. The evacuation of British nationals and their families, together with ARAP beneficiaries and their eligible family members, is known as Operation Pitting. During that Operation, according to Ms Seakins' witness statement, it became clear that there was a desire to assist others at risk, who did not fall into those categories. Accordingly, an extra-statutory scheme was adopted, whereby evacuated persons would be granted leave outside the Rules on arrival in the United Kingdom. This scheme became known as "Operation Pitting LOTR".

50. On 16 August 2021, during the evacuation, a submission was provided by officials to the Secretary of State for the Home Department entitled "Potential urgent relocation of additional cohorts from Afghanistan that do not qualify under the Afghan relocation and assistance policy (ARAP)". The submission said that these cohorts were "nonetheless considered at risk because of their ties to the UK". The 16 August 2021 submission identified the cohorts in question. One such cohort, which did not qualify under ARAP, was that of journalists. Another cohort was "Chevening students".

51. So far as journalists were concerned, paragraph 11 of the submission said:-

> "11. The Foreign Secretary had previously suggested that Afghan journalists who had worked with British news agencies could qualify for the ARAP, but they do not for the same reasons as set out above for Chevening students [essentially, a lower likely level of threat]. The FCDO has already engaged with a consortium representing this group and suggested that they, as employers, may be able to sponsor these individuals under the Skilled Worker Route, but the consortium has suggested that there may not be suitable jobs available in the UK."

52. On 18 August 2021, the decision was made that there was sufficient capacity on the evacuation flights from Kabul to enable officials to look beyond the consular and ARAP cohorts and include people in the LOTR cohort. Ms Seakins says that the 18 August submission concerning this decision "explicitly named journalists as LOTR cohort because they did not fall under the ARAP".

53. Paragraph 7 of the 18 August submission reads as follows:-

> "7. **Journalists working in Afghanistan had been part of a free press contributing vital insight into developments on the ground as well as welcome challenge to the government of**

> **Afghanistan and HMG.** Many will have participated in or cooperated with HMG media freedom campaigns and have been activists against the Taliban and in favour of a free liberal society. Embassy staff relied on quality reporting from within Afghanistan from trusted sources to supplement their work and corroborate often patchy intelligence from personal contacts." (original emphasis)

54. Paragraph 8 contains the following:-

> "8. **Many journalists, independent or belonging to larger organisations, were close contacts of the British embassy and so will likely be identified as 'collaborators'- even those tangentially associated with the international community through cooperating with embassies are likely to be targeted by Taliban foot-soldiers, even if instructions are given by the leadership not to harm them…".** (original emphasis)

55. In paragraph 9 of the submission, it was observed that a consortium of British media organisations had written to the Prime Minister on 4 August 2021, asking for help with visas for some of their local Afghan journalists. Separately, the BBC had also written regarding 170 of their local Afghan staff, some of whom they would like to re-employ in the UK.

56. The section of the submission dealing with journalists ended as follows:-

> **"10. Based on the representations received these journalists would total 232 individuals, or around 1,160 including family members.** The Foreign Secretary has previously given public assurances that this group would be protected and so the FCDO are keen for them to be included, on the basis that they have served HMG interests by promoting a free press and distributing information globally, and that their association with British [news] agencies puts them at risk.
>
> **Do you agree to include journalists, as per the Foreign Secretary's commitment? Alternatively, would you like to press the FCDO to identify particularly high risk individuals or groups within this cohort?"** (original emphasis)

57. According to Ms Seakins, during Operation Pitting some cases were considered under category 4 of ARAP that might not have been considered eligible prior to that Operation. It was therefore felt necessary, following the end of Operation Pitting, to define ARAP eligibility more clearly, and what was meant by a "meaningful enabling role", such as to make an individual eligible under category 4, despite having been not being directly employed by HMG. This clarification was necessary in order to balance the obligation of showing a debt of gratitude towards those who worked to advance the UK mission in Afghanistan with commitments made by Ministers, the wider pressure from the public, and limits on support and accommodation.

58. Accordingly, in September 2021, after the evacuation had ended, Ministerial agreement was sought to clarify category 4, so as to provide for those who were not directly employed by HMG but who had worked alongside, indirectly or in partnership with HMG, in a meaningful, exposed role; and who had made a material positive contribution to HMG's national security. Discussions between the MOD, FCDO and Home Office led to further clarity on category 4 by explicitly stating that sponsoring departments or units must be able to demonstrate evidence of positive influence on security or defence outcomes for HMG. There must be "a high degree of risk to life with an elevated threat of targeting of the group in question", owing to the specific nature of its role in association with HMG. Alternatively, there would need to be a specific threat to HMG from data disclosure where sensitive information was held by an individual. The Immigration Rules were updated in December 2021 to reflect that clarification.

59. Ms Seakins' statement contains the following:-

> "23. There is no statement or principle that the status of being an Afghan journalist is sufficient to establish eligibility under the ARAP. Afghan journalists are not eligible under the ARAP by virtue of that occupation alone, unless there are case-specific facts which mean the eligibility criteria of 276BB1(v) were, or latterly 276BB5 are, met."

60. Returning to events during Operation Pitting, the defendants state that the BBC identified named members of their existing local staff for evacuation from Afghanistan under Operation Pitting LOTR, pursuant to the submissions of 16 and 18 August 2021. The BBC did not identify any of the claimants. A number of BBC journalists who were evacuated under Operation Pitting LOTR have made statements in support of the claimants, seemingly to support an argument that the claimants should be entitled to relocation under ARAP. The defendants say that this does not follow. Selection for evacuation under Operation Pitting LOTR does not equate to eligibility under ARAP. Thus, the fact that the BBC journalists who have provided statements were evacuated under Operation Pitting LOTR says nothing about the eligibility of the claimants under ARAP. The journalists in question were still employed by the BBC at the time of the evacuation.

G. DISCUSSION

Ground 1

61. I shall deal first with what it is now convenient to describe as Ground 1(a); namely, the alleged failure of the first defendant to give the claimants legally adequate reasons for the negative ARAP decisions conveyed to them on 14 June and 11, 12 and 16 August 2022. Mr Straw invokes the judgment of Hickinbottom LJ (with whom McCombe and King L JJ agreed) in R (Help Refugees Ltd) v Secretary of State for the Home Department (Centre for Advice on International Rights in Europe intervening) [2018] 4 WLR 168. The judgment in Help Refugees followed that of Singh LJ in R (Citizens UK) v Secretary of State for the Home Department [2018] 4 WLR 123.

62. Help Refugees Ltd concerned the duty of the second defendant under section 67 of the Immigration Act 2016 to make arrangements to relocate to the United Kingdom and

support a specified number of unaccompanied asylum-seeking children from other countries in Europe. Of 1,800 children rejected for relocation, 388 were told that they had been rejected on the grounds of age, while the remainder were told only that they had not met the criteria.

63. The Court of Appeal held that, on the basis of the reasons given, for at least the majority of unaccompanied asylum-seeking children who had been rejected, there was no real prospect of them being able to challenge the decision. Accordingly, the procedure set up by the second defendant was in breach of the common law duty of fairness and thus unlawful. As a result, the reasons given for rejecting a child assessed against the criteria were patently inadequate. Hickinbottom LJ said:-

> "122. The general principles concerning the duty of fairness at common law – in particular when that duty requires reasons to be given and, where it does, the adequacy of reasons given – were considered by Singh LJ in Citizens UK at [68] and following. It is unnecessary for me to repeat them. So far as this appeal is concerned, the following propositions are relevant and uncontroversial.
>
> i) The common law will readily imply requirements of procedural fairness into a statutory framework even where the legislation itself is silent.
>
> ii) When procedural fairness is in question, the court's function is "not merely to review the reasonableness of the decision-maker's judgment of what fairness required" (R (Osborn) v Parole Board [2013] UKSC 61; [2014] AC 1115 at [65] per Lord Reed JSC), but to consider objectively whether there has been procedural unfairness.
>
> iii) The rule of law requires effective access to justice. Therefore, generally, unless (e.g.) excluded by Parliament, there must be a proper opportunity to challenge an administrative decision in the court system. As a consequence, unless rendered impractical by operational requirements, sufficient reasons must be given for an administrative decision to allow a realistic prospect of such a challenge. Where the reasons given do not enable such a challenge, they will be legally inadequate."

64. Mr Straw argues that, by direct comparison with Citizens UK and Help Refugees Ltd, a decision, such as that given to the present claimants, which merely gives as its reasons the fact that certain criteria are not met, without explaining why, must be unlawful; at least, when it is not apparent to the recipient why they have been rejected as ineligible.

65. I reject that submission. I agree with Mr Blundell that the *caveat* in paragraph 122(iii) of Hickinbottom LJ's judgment is important. 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.

66. The facts and context of decision-making in ARAP cases are extremely important. They are to be found in the first witness statement of Ms Pester.

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.

68. Given that a significant number of individuals making applications under ARAP are likely to be high risk of harm from the Taliban (if still in Afghanistan), the need to process their applications quickly is plainly of great importance. This must directly inform the court's view of what fairness requires.

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.

73. In so finding, I recognise that the court will usually be slow to find that "operational requirements", in the sense described in paragraph 122(iii) of Hickinbottom LJ 's judgment in Help Refugees Ltd, permit the decision maker to avoid legal challenges on the basis that the recipients of adverse decisions will simply not be in a position to know whether there is a legal basis to challenge those decisions. Such cases are likely to be rare.

74. It is relevant that, given the court is not operating by reference to any "bright line" criteria, what is meant by "a realistic prospect" of mounting a legal challenge is itself a question of fact and degree, to be determined according to the nature of the operational requirements under which the decision-making is taking place. In other words, the greater the operational requirements, the more likely it is that the reasons will be legally sufficient; even if the reasons might not pass muster in a context where there is not the same urgency to make and convey the decision.

75. With this in mind, it is striking that, in the present cases, the claimants were able, in their original statement of facts and grounds, to mount a challenge to the reasonableness of the first defendant's decisions. As articulated in paragraph 63 of those grounds, as filed by CX1, the claimant contended that the decision that CX1 did not work alongside a UK government department, closely supporting it, was unreasonable and/or otherwise unlawful because, *inter alia*, there was cogent evidence that CX1 worked alongside and closely supported the UK government in Afghanistan and that the first defendant and had given no reasons for rejecting that evidence. A corresponding case was put in paragraph 54 of the statement of facts and grounds relating to CX2-8.

76. Ground 1(a) accordingly fails.

77. I turn to Ground 1(b). This concerns the part of Ms Pester's first witness statement, in which she says that, firstly and primarily, the claimants provided no evidence that they worked alongside, in partnership with, or closely supporting a government department; and that the BBC is not part of His Majesty's Government. I have already referred to this part of her statement (paragraph 23 above).

78. Mr Straw argues, first, that Ms Pester's reasons cannot be deployed to make good the deficiencies in reasoning in the June and August 2022 decisions. I have, however, found there are no such legal deficiencies. If, however, as the claimants submit, the June and August 22 reasons (whilst legally sufficient as reasons) can now be seen to have been based upon a misinterpretation of the wording of the ARAP policy, then the decisions are vitiated, albeit on a different basis. A material failure to understand a policy renders the decision unlawful: Gransden & Co v Secretary of State for the Environment (1987) 54 P & CR 86.

79. The claimants argue that, if the first defendant had recognised that a person is not necessarily excluded merely because they work for an independent organisation, such as the BBC, there is at least a real prospect that they would have been found eligible under category 4, albeit that whether they would ultimately have succeeded in relocating to the United Kingdom pursuant to ARAP would have depended upon the first defendant's analysis of their individual circumstances, in order to determine not only if their contribution in the course of that work met the relevant requirements but also that there was the requisite degree of consequential risk.

80. It is common ground between the parties that the interpretation of a policy is an objective question for the court, whose task is to decide what a reasonable, literate person's understanding of the policy would be. This involves an examination of the words of the policy, taking the policy as a whole and in the context of its purpose: R (KA) v Secretary of State for the Home Department [2022] EWHC 2473 (Admin); R (O) v Secretary of State for the Home Department) [2016] 1 WLR 1717.

81. I have set out at some length the way in which the defendants attempted to address the position of Afghan journalists, both before and (more particularly) during the currency of Operation Pitting. The defendants point to the fact that, at those times, ARAP did not cover such journalists. They also highlight the fact that, as explained in Ms Seakins' witness statement, there is no statement or principle that the status of being an Afghan journalist in of itself is sufficient to establish eligibility under the version of ARAP that was in force at the time of the impugned decisions.

82. For their part, the claimants point, in particular, to the 18 August 2021 submission and what is there said about the contribution made by journalists working in Afghanistan to the overall aims of HMG, including the provision of information used by HMG in intelligence-gathering. The 18 August submission also highlights the risks faced by such journalists from the Taliban.

83. Overall, I agree with the claimants that the first defendant can derive nothing of material assistance from the position of Afghan journalists *vis a vis* ARAP up to and during Operation Pitting. The ARAP policy wording has undergone several changes since that time. The essential question remains whether the relevant wording of category 4 at the date of the decisions is such as to make it possible for the claimants to be treated as eligible for relocation under ARAP.

84. Mr Blundell advanced a textual analysis of category 4, with the aim of showing that journalists, in particular, those working for the independent BBC, would not in reality be able to satisfy the relevant criteria. Mr Straw objected to this analysis, seeking to reserve the right to respond to it in writing, following the hearing. I do not accept Mr Straw's stance. Interpreting the wording of ARAP is inherent in Ground 1(b) and the defendant was correct to come to the hearing with its case on this issue.

85. I am in no doubt that Mr Blundell is correct in his submission that (taking the iteration of the policy in paragraph 276BB5 of the Immigration Rules) , in order to satisfy sub-paragraph (c) of condition 1, the person concerned must have worked in Afghanistan alongside a UK government department <u>either</u> (i) in partnership with it; or (ii) closely supporting and assisting it. As a general matter, independent journalists may find it difficult to satisfy this aspect of condition 1.

86. There was debate concerning what is meant by having "worked... alongside…". At one extreme, merely having been physically alongside, say, a UK military unit as a result of sharing a ride with that unit to the front line, is very likely to be insufficient. On the other hand, a pattern of travelling and living (or being embedded) with British military units may be different, as may significant activities which were closely aligned with the "democracy-building" activities of an HMG department. In every case, it will, of course, still be necessary to meet the other requirements of category 4.

87. Condition 2 of category 4 requires the person, in the course of their work etc, to have made a substantive and positive contribution towards the achievement of the UK government's military objectives or the UK government's national security objectives. Mr Blundell questioned whether, conceptually, Afghan journalists could satisfy condition 2. Again, I accept that, as a general matter, they are likely to find it difficult to do so. However, the provision of intelligence, such as was highlighted in the 18 August 2021 submission, is clearly a way in which condition 2 could be satisfied, subject to this having the necessary substantive and positive qualities. More broadly,

national security objectives (which are not exhaustively defined in terms of counterterrorism etc) could properly include significant contributions to the building of democratic, open and transparent systems, as well as informing the Afghan population of such things as the corruption of the Taliban. All of this could be done by an independent journalist, working for the BBC.

88. I do not consider any of this to be controversial. On the contrary, it chimes precisely with what Ms Seakins says at paragraph 23 of her witness statement. She accepts that there may be "case-specific facts", whereby an Afghan journalist can establish eligibility under ARAP.

89. With this in mind, I can turn to the claimants' criticisms of Ms Pester's first witness statement.

90. I can deal with the first criticism briefly. The claimants argue that one reason why their applications were unsuccessful in terms of eligibility was that the first defendant misinterpreted category 4 as requiring the claimants to identify a relevant UK government department. There is nothing in this aspect of the challenge. It essentially relies upon the unwarranted inference that the phrase (e.g. in paragraph 13 of the witness statement) "no relevant unit or department was identified in CX1's application" means the first defendant required CX1 to specify which department was being relied upon in the application. It would plainly be unreasonable for the first defendant to expect an applicant, in all cases, to name the relevant department. Provided that the applicant describes in sufficient detail who or what they were working "alongside", the first defendant can and should establish the identity of the UK government department concerned. I can see nothing in the decisions, Ms Pester's statement or the caseworker notes, which suggests that any more than this was expected of the claimants.

91. The second criticism is, as I have indicated, that the applications were held to be ineligible because the claimants had worked for the BBC and that organisation is not part of HMG.

92. Here, the claimants are on much stronger ground. At paragraph 13 of her first witness statement, Ms Pester is categoric that "for this reason" – namely, that the BBC is not part of HMG but, rather, independent in all matters – CX1 did not satisfy the first condition for eligibility. The same rationale is employed in paragraphs 20, 27, 34, 41, 48, 55 and 62 in respect of CX2-8. Condition 1, however, is satisfied not only if the applicant was directly employed by a UK government department but also in other circumstances, which include working in Afghanistan alongside, in partnership with or closely supporting such a department. The articulated rationale appears to be that, since the BBC is independent of HMG a person working for the BBC can never, in that capacity, be said to be working alongside etc a UK government department. For the reasons I have earlier given, that is wrong.

93. The caseworker notes reinforce my conclusion that the operative reason for deciding that the claimants were not eligible under ARAP was because they had worked for the BBC; and the BBC is independent of government. I refer to what I have said above concerning these notes. Although Ms Pester's second witness statement seeks to distance the first defendant from the caseworker's e-mail about CX1 that "he was [not] employed by HMG and therefore is ineligible for ARAP and I have sent the unsuccessful letter", the caseworker notes make it evident that no consideration was

given to whether, as someone working for the BBC, CX1 (and the other applicants) could nevertheless have worked alongside a UK government department, in the way described in the submission of 18 August 2021 and as I have described above.

94. I have already mentioned the fact that, in respect of an earlier judicial review challenge, the claimants had advanced the submission that working for the BBC was the equivalent of working for a UK government department and that the reference in category 4 to such a department should be given a broad interpretation, so as to encompass working for the BBC. That stance on the part of the claimants was carried over into the current proceedings, as the pre-action protocol correspondence makes plain.

95. Against that background, I find it is clear that the caseworker was addressing this (manifestly misconceived) submission, in saying what they did about the BBC in the case notes. This is not, however, an answer to the challenge in respect of Ground 1(b). On the contrary, the caseworker erred in confining their decisions to the issue of whether working for the BBC amounted to working for HMG, at the expense of considering whether, on the particular factual matrices of CX1-8, a journalist working for the BBC or any other news organisation could be said to have worked alongside an HMG department, in partnership with or closely supporting that department. Although Ms Pester appears to accept that refusing the applications on the narrow basis adopted by the caseworker was wrong, I find she exhibits the same broader error, in not appreciating that a person in the position of the claimants could satisfy category 4.

96. No doubt anticipating the difficulty all this posed to the first defendant's case, Mr Blundell submitted I should hold that any error in this regard was immaterial. He invited me to find, under section 31(3C) (or section 31(2A)) of the Senior Courts Act 1981, that the outcome for the claimants would not have been substantially different if the relevant conduct complained of had not occurred. Mr Blundell said that it was highly likely - indeed, very clear - that the outcome would have been the same. Drawing attention to the rigorous requirements of sub-paragraph (c) of condition 1 and condition 2, Mr Blundell submitted that, notwithstanding Mr Foxley's report highlighting the various ways in which the claimants could be said to have advanced the United Kingdom's interests in Afghanistan, none of them could be said to have worked alongside a relevant department in partnership with or closely supporting it. Whether the Taliban perceive there to be, in practice, no difference between the BBC and HMG was, Mr Blundell said, irrelevant.

97. I do not consider that section 31(2A) can be invoked in the present case. Having regard to what I have found to be the proper interpretation of category 4, and notwithstanding the challenges the claimants may face in making good their cases under that category, there is a more than fanciful prospect of a different outcome, so far as eligibility is concerned. I refer to what I have recorded at paragraph 35 above concerning the individual activities of the claimants. The defendants' position at the hearing was not to engage with the relative strength or otherwise of the claimants' individual histories. In the circumstances, it would be wrong for this court to attempt to undertake such an exercise, even if had the means of doing so.

98. Whilst I accept that the Taliban's perception of the relationship between the BBC and HMG cannot alter the ordinary meaning of the words contained in sub-paragraph (c) of condition 1, that perception is clearly relevant so far as condition 3 is concerned.

Condition 3 requires there to be or have been an elevated risk of targeted attacks, death or serious injury "because of …that work…".

99. Ground 1(b) accordingly succeeds.

Ground 2

100. The claimants contend that the second defendant's LOTR policy is unlawful because it requires persons in their position to apply for LOTR on a form that they cannot reasonably be expected to use. The case is put forward on two bases: first, that the LOTR policy frustrates the second defendant's statutory discretion to grant leave under section 3 of the 1971 Act; and second, that the LOTR policy is unlawful because ordinary applicants in the same circumstances as the claimants cannot reasonably be expected to use online VAFs.

101. Ms Alcock is a Chartered Legal Executive with Leigh Day solicitors. She has filed a witness statement dated 25 November 2022, concerning the process whereby an ARAP applicant must submit an online VAF, in order to satisfy the second defendant's LOTR policy. Essentially, Ms Alcock's evidence is that, in order to be able to submit such an online application, using the form designed for a visitor or a worker, an applicant for LOTR must submit false information (for example, concerning a non-existent sponsor). It is not possible to complete the application by writing "n/a" or similar.

102. Furthermore, an applicant is, in certain circumstances, required to tick a box to confirm that they accept certain conditions, such as not having access to free medical treatment. In the case of the claimants and their family members, this is wholly inappropriate.

103. Section 26 of the 1971 Act makes it a criminal offence for a person to give a statement or make a representation in the immigration context which they know to be false or do not believe to be true. Each of the application forms requires the applicant to complete a declaration, confirming that to the best of their knowledge and belief, the information contained in the form is correct. The declaration includes the statement that the applicant understands that if false information is given, the application can be refused and the applicant may be prosecuted, as well as being banned from the United Kingdom.

104. Ms Alcock notes that the second defendant requires the use of an online VAF in order that the application can be dealt with under the Home Office's automatic system for dealing with applications, involving an assigned reference number and access (amongst other things) to the procedure for the provision of biometrics. Ms Alcock observes that the claimants are likely to obtain a biometrics waiver, because they are unable to provide biometrics in Afghanistan (in the cases of those who are still in that country).

105. Although the witness statement of Ms Sally Weston filed on behalf of the second defendant in connection with the "forms" issue, appeared to suggest that "n/a" could be inserted by an Afghan LOTR applicant, in order to avoid giving false information, the consensus of the parties at the hearing was that, at least in respect of some of the forms mentioned by Ms Alcock, this would not enable the applicant to complete and submit the online VAF.

106. Ms Weston is Head of the Simplification and Systems Unit in the Migration and Borders Group in the Home Office. Paragraph 9 of Ms Weston's statement says the

"application form provides an opportunity for information about exceptional circumstances and/or compassionate compelling grounds to be provided in free text fields". Once submitted, the application would go directly to an appropriately trained decision-maker to consider.

107. I asked for further information regarding the free text fields or boxes. On 16 December 2022, I received a note from the defendants on this issue, closely followed by a written response on behalf of the claimants.

108. The second defendant confirmed that all out-of-country online VAFs contain a question asking applicants if there is anything else which they want to tell the decision-maker about their applications. That question is accompanied by a free-text box which allows applicants to respond with whatever they wish to say, within a 500-character limit. The second defendant says that an applicant is able to use this box in order to inform the second defendant that they have answered questions elsewhere on the application form incorrectly; and to explain why. If an applicant wishes to say more, applicants or their representatives can refer in the free-text box to representations or submissions that can be provided separately.

109. The defendants' note acknowledges that, depending on how an applicant answers questions on the VAF and their resulting pathway through the form, it may be that their progress is blocked before they are presented with a free-text box, unless the requisite information (including what will in practice in the claimants' cases necessarily be false information) is provided. However, for an applicant to progress to the point that they are able to submit an application, they will have had the opportunity to give a free-text response. An example is given in respect of the VAF form for a worker visa. This requires the input of a valid sponsor certificate number. If this is not inserted, the applicant will not progress to the free-text box and will not be able to accept the declarations and submit the form.

110. In their written response, the claimants submit that the online VAFs available for applicants in their situation are unreasonable or unfair, notwithstanding the existence of free-text boxes at the end of the forms. This is because, in order to complete the online VAF, an applicant would have to give false information, and then press "save and continue", before the applicant eventually reaches the free-text box. Although, at that point, the applicant might state that they have given false information, identifying what that is, and explaining the reason that they gave the false information, they are not able to remove the false information which they have given. As previously noted, the applicant must then click a box accepting that if false information is given, certain consequences, including prosecution, may follow.

111. The claimants say that, even though an applicant may explain the position in the free-text box and hope that this explanation is accepted, there is no guarantee that it will be. As a result, applicants are likely to fear that there is a risk they will be banned from entry or prosecuted.

112. Before me, there was debate concerning the appropriate standard of review in respect of Ground 2. The second defendant contends that the choice of the form of applications and the underlying operational decisions concerning departmental processing of applications seeking LOTR are areas in which, for reasons of institutional competence and democratic legitimacy, the court should be extremely slow to interfere.

113. Mr Blundell drew attention to R (SC and others) v Secretary of State for Work and Pensions and others [2022] AC 223. This concerned the two-child limit contained in section 9 of the Tax Credits Act 2002. The claimants sought a declaration that the two-child limit was incompatible with their rights under the ECHR Articles 8, 12 and 14. The Supreme Court, dismissing the claimants' appeal, held that where an impugned measure reflected the choice of the legislature or the executive in a matter of social or economic policy, a low intensity of review was generally appropriate, other things being equal. As a result, the courts would generally accept the judgment of the legislature or the executive as to whether a difference in treatment was appropriate in that field unless it was manifestly unreasonable.

114. The claimants, for their part, relied on R (Johnson and others) v Secretary of State for Work and Pensions [2020] PTSR 1872. Johnson concerned the identification of income for the purposes of the Universal Credit Regulations 2013. The system used did not accommodate the fact that people who are usually paid their salary on a particular day of each month, such as its last day, will in fact be paid on a different day if their usual payment date falls on a weekend or bank holiday. The Court of Appeal held that, in assessing the lawfulness of the "non-banking day salary shift problem", the court had to consider the disadvantages of leaving the problem unsolved, as against the disadvantages of adopting a solution to the problem, along with whether the chosen solution would be consistent or otherwise with the nature of the Universal Credit regime. The court had thereby to determine whether no reasonable Secretary of State would have struck the balance in a way that the Secretary of State had done. Applying that approach, the court held that no reasonable Secretary of State would have struck the balance in the way it had been.

115. Although the judgment of the Supreme Court in SC refers to the executive, I agree with Mr Straw that Ground 2 of the present claim is not really comparable to the challenge brought in respect of the two-child benefits policy. I prefer to follow the broad approach of the Court of Appeal in Johnson. That said, the challenge contained in Ground 2 is still a rationality challenge, which necessarily involves a high threshold for the claimants to surmount.

116. The first aspect of the challenge in Ground 2 is, as I have said, that requiring claimants to apply for LOTR on a form which is not designed for that purpose frustrates the second defendant's statutory discretion to grant leave under section 3 of the 1971 Act. This essentially amounts to a submission that the LOTR policy is *ultra vires*. The second defendant argues that this aspect of the challenge is bound to fail, following the judgment of Singh LJ in R (Al-Enein) v Secretary of State for the Home Department [2020] 1 WLR 1349.

117. Al-Enein concerned a challenge to the Secretary of State's policy that an application for naturalisation would normally be refused if the applicant had failed to comply with immigration requirements in the ten years preceding the application. The claimant's submission that the policy was *ultra vires* the British Nationality Act 1981 was rejected by the Court of Appeal. The Secretary of State had a discretion, rather than an obligation, to grant the application. There was no reason in law why the Secretary of State could not impose an additional or extended requirement relating to breach of immigration laws, as properly being a matter which was relevant to the more general question of whether an applicant was of "good character" for the purposes of the 1981 Act.

118. Although Al-Enein is of some assistance to the second defendant, it seems to me that the two bases of Ground 2 are, in fact, closely interrelated. If requiring LOTR applicants in the position of the claimants to use an online form which is not bespoke (and which requires false information to be inputted) unreasonably deters individuals from seeking the second defendant's exercise of discretion under section 3, then the second defendant has in effect fettered her discretion under that section, in the case of those applicants.

119. Accordingly, the central question in Ground 2 is whether the second defendant is unreasonably requiring applicants in the circumstances of the claimants to use online VAFs.

120. I do not agree with the defendants that this issue was settled by the Court of Appeal in S and AZ. It is quite apparent from paragraph 31 of the judgment of Underhill LJ that that Court declined to make a finding on whether the use of such forms was irrational. It is therefore open to the claimants to advance the present challenge.

121. The starting point for a Johnson-type analysis must be that, as Ms Weston's witness statement indicates, the grant of LOTR is to be used "sparingly". The LOTR guidance explains that compelling compassionate factors making LOTR appropriate are "broadly speaking, exceptional circumstances, which mean that a refusal of entry clearance would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, refugee convention or obligations (sic)".

122. The LOTR guidance is of a general nature. It is not in any sense confined to those with relevant connections to HMG, who are seeking to leave Afghanistan. This needs to be borne in mind in deciding whether the court should, in effect, compel the second defendant to design and issue a bespoke application form for the claimants and others in their position. On any view, the production of such a form would require time, effort and expense (albeit that no-one has suggested what precisely might be involved).

123. What, then, are the disadvantages of the second defendant's present stance in respect of the use of online VAFs? I refer to Ms Alcock's evidence. I find myself in respectful agreement with Underhill LJ who, at paragraph 30 of S & AZ, said it was "it hard to believe that there is any risk of applicants being prejudiced in their applications, still less of their being rendered liable to prosecution, in circumstances where they are only doing what the Guidance tells them to do and where the Secretary of State has … formally confirmed what the GLD has said on her behalf".

124. Although the claimants are legally represented, they question whether unrepresented would-be applicants for LOTR who are in Afghanistan, or who have fled that country, will understand that, despite having to make the declarations I have described, there will, in fact, be no risk of them suffering any adverse consequences as a result of providing false information; whether this be prosecution, being refused entry to the United Kingdom or some other sanction. The fact is, however, that any such potential applicants will necessarily have read the second defendant's guidance, which tells them to use a form that will necessarily in some respects be unsuited to the application they wish to make.

125. I consider that the existence of the free-text boxes in the VAF forms further significantly diminishes the claimants' concerns. These boxes enable applicants to explain what of

the preceding proffered information is inaccurate, having been generated solely for the purpose of enabling the application form to be completed and electronically submitted. That includes purporting to accept conditions with which the applicant does not intend to comply.

126. The declarations at the end encompass the totality of what the applicant has said in the form, including in the free-text box. In these circumstances it is, I consider, entirely unrealistic to conclude that anyone would be deterred from submitting an LOTR application in the circumstances with which we are concerned. Those circumstances include the fact that (even though they may not be eligible under ARAP) a person seeking relocation to the United Kingdom on the basis of having a connection with HMG in Afghanistan, and who may be living there in daily fear of harm from the Taliban, is highly unlikely to be deterred by the concerns expressed by Ms Alcock. I should also say that, in the light of the availability of the free-text boxes, I am not persuaded that a legal professional in the United Kingdom would consider themselves prevented from assisting a client to make an LOTR application.

127. Like Underhill LJ in paragraph 30 of S & AZ, I acknowledge that the position is, from the point of view of the claimants and others like them, distinctly sub-optimal. The claimants have not, however, come near to showing that the second defendant's approach is unreasonable, to the point of being unlawful.

128. Ground 2 accordingly fails.

Ground 3

129. The parties are agreed that the fate of Ground 3 depends upon Ground 2. Had Ground 2 been made out, the second defendant's refusal to consider the representations made by and on behalf of the claimants as an application for LOTR in accordance with the guidance would also be unlawful. The corollary is, of course, that in the light of my conclusions on Ground 2, Ground 3 accordingly fails.

Ground 4

130. As I have already mentioned, Ground 4 arises out Ms Pester's second witness statement. In this, she exhibited the SOP.

131. The claimants contend that the unpublished SOP imposes a materially different threshold from that in the published ARAP policy. In paragraph 3(a) of the SOP, the claimants highlight the statement that, for an individual to be eligible under category 4, "they will likely have worked **closely** alongside HMG units" (my emphasis). Also in paragraph 3(a), the claimants highlight the statement that the individual concerned "must **now** face a **significant risk to life** as a result of that role and contribution". Finally, paragraph 3(c) says that there is a "**high** threshold for relocation under category 4" (my emphases).

132. The claimants contend that these highlighted passages are materially different from the published category 4 of ARAP. As a result, the decisions, taken by reference to the SOP, are unlawful, given the fact that the SOP is unpublished: R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245.

133. I agree with Mr Blundell that none of these criticisms of the SOP brings it within scope of the Lumba principle. Properly read as a whole, the SOP imposes no materially different threshold to that in the published ARAP policy.

134. Importantly, paragraph 2 of the SOP sets out the entirety of paragraph 276BB5 of the Immigration Rules. Paragraph 3 then begins with the statement that the "following guidance can be used to help departments consider cases". It is axiomatic that this consideration is to be undertaken by reference to paragraph 276BB5. The purpose of the SOP is no more than to assist caseworkers in that task.

135. With that in mind, I turn to the passages upon which the claimants rely. The word "closely" in paragraph 3(a) does no more than reflect the wording of sub-paragraph (c) of condition 1, that the individual must have worked alongside a UK government department in partnership with or closely supporting and assisting that department. So far as concerns the words "now face a significant risk to life" in paragraph 3(a), which the claimants contrast with condition 3 of category 4 (which describes a present or past elevated risk of targeted attacks or a present or past high risk of death or serious injury), the claimants' criticism dissolves once it is observed that the sentence in which the impugned phrase occurs is describing those who are "likely" to have worked alongside HMG units and who now face a significant risk to life as a result of that role and contribution. Paragraph 3(a) does not purport to circumscribe the scope of category 4; it merely describes a paradigm instance of those likely to be eligible under that category.

136. The reference in paragraph 3(c) to the "high threshold for relocation under category 4" does no more than describe the effect of that category, which is, indeed, to set a high threshold for eligibility.

H. CONCLUSIONS

137. I grant permission to bring judicial review in respect of Grounds 1(a) and (b), 2, 3 and 4. The claimants succeed on Ground 1(b), to the extent described. The claimants fail on Grounds 1(a), 2, 3 and 4.