



Neutral Citation Number: [2022] EWHC 1937 (Admin)

Case No: CO/1215/2022

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22<sup>nd</sup> July 2022

Before :

**MR JUSTICE EYRE**

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Between :

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**Claimant**

- and -

THE SECRETARY OF STATE FOR THE HOME  
DEPARTMENT (1)

**Defendants**

THE SECRETARY OF STATE FOR THE  
FOREIGN, COMMONWEALTH AND  
DEVELOPMENT OFFICE (2)

THE SECRETARY OF STATE FOR DEFENCE (3)

- and -

N1 (1)

N2 (2)

N3 (3)

N4 (4)

N5 (5)

N6 (6)

**Interested  
Parties**

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**Irena Sabic and Emma Fitzsimons** (instructed by **Wilson Solicitors LLP**) for the **Claimant**  
**Edward Brown QC** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 12<sup>th</sup> July 2022  
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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EYRE

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be **10:00** on **22 July 2022**

## MR JUSTICE EYRE :

### Introduction.

1. The Claimant is an Afghan national. Before the defeat of the Afghan government by the Taliban in August 2021 he had worked in the broadcast media. He had worked for the BBC and bodies associated with it, amongst others, and had provided content which was used by the BBC. The Interested Parties are his wife and five daughters. The Claimant and his family are currently in hiding in Afghanistan and it is not in dispute that they are at risk from the Taliban.
2. The Claimant sought leave to enter the United Kingdom under the Afghan Relocation and Assistance Policy (“ARAP”) and in the alternative he sought leave to enter outside the Immigration Rules (“LOTR”). The Second Defendant decided that the Claimant did not fall within the scope of the ARAP. The First Defendant takes the view that the ARAP application form and the correspondence from the Claimant’s solicitors did not constitute an application for LOTR and as a consequence has not considered the purported application.
3. The Claimant sought judicial review of the refusal of his application under the ARAP; of the First Defendant’s refusal to consider the grant of LOTR; and of the upholding of the ARAP refusal on review. Permission was given by Choudhury J.
4. On 9<sup>th</sup> June 2022 Lang J handed down judgment in the cases of *R (S) v Secretary of State for Foreign, Commonwealth and Development Affairs & others* and *R (AZ) v Secretary of State for the Home Department & others* [2022] EWHC 1402 (Admin) (“*S & AZ*”). I will consider Lang J’s judgment more fully below but in short she found that the claimants in those cases (both of whom were Afghan judges) were outside the scope of the ARAP but that the applications under that policy and the accompanying correspondence were to be seen as applications for LOTR and to be considered as such. As a consequence of that decision the Claimant accepts that he does not fall within the scope of the ARAP. However, he says that there is no material distinction between his claim to be considered for LOTR and those with which Lang J was concerned. He says that Lang J’s approach is to be followed with the consequence that the First Defendant’s refusal to treat his submissions as an application for LOTR should be quashed and the First Defendant directed to consider those matters as such an application.
5. The Defendants are appealing the decision in *S & AZ* and do not accept that it is correct<sup>1</sup>. However, before me Mr Brown QC accepted that if that case could not be distinguished I would be obliged to follow Lang J’s approach.
6. In those circumstances the principal issue was whether the circumstances of this case could be distinguished from those of *S & AZ*. If the cases are not distinguishable the First Defendant’s refusal to treat the material advanced as an application for LOTR falls to be quashed. There were two subsidiary questions. The first was whether I should make an assessment of whether a refusal of LOTR would be unlawful or irrational by virtue of an unreasonable inconsistency between any such refusal and the approach taken to those given leave to enter in the circumstances of Operation Pitting as I will describe below. The second was whether the Claimant was entitled to redress in respect

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<sup>1</sup> Since the hearing before me it has been established that the appeal is to be heard on 28<sup>th</sup> July 2022.

of the Second Defendant's failure to see the Claimant's case as being one for action outside the ambit of the ARAP.

**The Factual Background: Events in Afghanistan and Operation Pitting.**

7. The background of the relevant events in Afghanistan was explained in some detail by Lang J in *S & AZ* where she also explained and rehearsed the terms of the relevant policies. The history as explained there is not contentious and in those circumstances the barest of summaries will suffice to provide the context of the matters I am to consider.
8. Concerns about the potential risks posed by a Taliban seizure of power to those who had worked for HM Government in its operations in Afghanistan led to the adoption of the ARAP. The policy was "primarily aimed at local staff and other personnel employed directly by the UK Government" (per Lang J at [106]) but it was later expanded to cover some of those who had worked alongside an HM Government department.
9. In August 2021 the UK government announced the Afghan Citizens Resettlement Scheme ("the ACRS") to resettle in the United Kingdom up to 20,000 Afghan citizens at risk from the Taliban. Although announced in August 2021 the ACRS was opened in January 2022.
10. In August 2021 in the light of the Taliban advances in Afghanistan the UK government undertook Operation Pitting. This was the mission in Kabul to evacuate some of those at risk from that advance. The initial intention had been to evacuate two groups of persons: British nationals and their families and Afghan citizens who had been given leave to enter under the ARAP. The processing of those who were to be allowed on the flights took place at the Baron Hotel. In the course of Operation Pitting it was found that there was, at least on occasion, spare capacity on the evacuation flights. As a result others in particular identified categories and who had managed to reach the Baron Hotel were called forward for evacuation through that spare capacity with a view to being given LOTR when processed either at a staging post in Dubai or on arrival in the United Kingdom. That leave was known as Pitting LOTR being a reference to the leave given to those called forward for evacuation in those circumstances. Those persons were given leave to enter outside the Rules.

**The Nature of LOTR and the First Defendant's Approach to Applications for such Leave.**

11. Again, and in the light of the explanation provided by Lang J at [72] – [76], I need only give the briefest of summaries. By reason of section 3 of the Immigration Act 1971 the First Defendant has the power to grant LOTR. The First Defendant has published guidance on the principles which will be applied when considering whether to grant LOTR and as to the process to be followed when applying for such leave. There are a number of routes by which persons may apply for the grant of visas or leave to enter under the Immigration Rules with online application forms relating to the different routes available. The guidance provides that those seeking LOTR from overseas "must apply on the application form for the route which most closely matches their circumstances...". The visa application forms require answers to be given to a number of questions relating to the route in question. In addition an application will not be regarded as complete and will not be considered until those applying have provided their biometrics at a Visa Application Centre (this is subject to provision for the First

Defendant to waive or defer that requirement but at the time of the Claimant's applications there was no reference to this on the online application forms).

### **The Claimant's Personal Position.**

12. In light of the conclusions I have reached the Claimant's personal circumstances can be summarised in the briefest of terms. I have already noted that through his work for the broadcast media he provided content which was used by the BBC. He contends that it is because of this that he and his family are at risk from the Taliban. There is no dispute that he and his family are at such risk though it is not necessarily accepted that this is because of or predominantly because of his engagement with the BBC. As the Taliban took over Kabul the Claimant and his family attempted to reach Kabul airport or the Baron Hotel but were unable to do so because of bomb attacks. They have left their home and are in hiding in Afghanistan.

### **The Claimant's Applications and the Defendants' Decisions.**

13. On 21<sup>st</sup> September 2021 the Claimant applied for leave to enter under the ARAP. On 19<sup>th</sup> October 2021 solicitors acting for the Claimant wrote to the Second Defendant attaching supporting material in respect of the Claimant and his family members and seeking "relocation to the UK under the ARAP scheme". On 11<sup>th</sup> November 2021 those solicitors sent a letter before action to all the Defendants. In this the Claimant's solicitors repeated the contention that the Claimant satisfied the requirements of ARAP but contended that even if those criteria were not satisfied the First Defendant should grant LOTR "on compelling compassionate grounds".
14. It does not appear that the letter of 11<sup>th</sup> November 2021 was before the Second Defendant's decision maker when on 15<sup>th</sup> November 2021 there was an assessment of whether the Claimant satisfied the ARAP criteria. By that decision the Second Defendant declined to sponsor the Claimant's application under the ARAP. She did so on the footing that the Claimant was not within the scope of the policy. That was because she was not satisfied that the Claimant had been either an employee of HM Government or worked alongside units of the government; because she was not satisfied that he worked in a role which made a material contribution to the government's mission in Afghanistan or that UK operations there would have been adversely affected without his work; and because, in the light of that analysis, she was not satisfied that the threat posed to the Claimant was a consequence of working with or alongside the United Kingdom.
15. On 26<sup>th</sup> November 2021 the Government Legal Department replied to the 11<sup>th</sup> November 2021 letter. A copy of the decision of 15<sup>th</sup> November 2021 was enclosed and the stance that the Claimant fell outside the scope of the ARAP reaffirmed. In respect of LOTR the letter referred to the requirements that an application for such leave be made on the application form for the route most clearly matching the applicant's circumstances and that the applicant's biometrics had to be provided before the application would be considered. It was in the light of those matters that the First Defendant did not accept that an application for LOTR had been made.
16. The decision that the Claimant did not satisfy the ARAP criteria was reviewed on 24<sup>th</sup> March 2022 but the conclusion that he did not do so was maintained.

### **The Judicial Review Claim.**

17. In the Claim Form the Claimant identified the following decisions as under challenge. First, the decision of 15<sup>th</sup> November 2021 to refuse his application for leave under the ARAP. Second, the decisions contained in the letter of 26<sup>th</sup> November 2021 which were said to be decisions relating to the ACRS and to an application “made outside the Immigration Rules pursuant to the First Defendant’s residual statutory discretion under the Immigration Act 1971”. Third, the upholding of the ARAP refusal on 24<sup>th</sup> March 2022.
18. Similarly at [1] the Statement of Facts and Grounds said that the Claimant was challenging the decision of 15<sup>th</sup> November 2021 and the review decision of 24<sup>th</sup> March 2022 refusing his application for leave under the ARAP and “outside of the Immigration Rules, pursuant to the First Defendant’s residual statutory discretion...”.
19. The Statement of Facts and Grounds contained four grounds. Ground 1 contended that the decision that the Claimant did not meet the ARAP criteria was unlawful. In the light of the decision in *S & AZ* that ground is no longer pursued.
20. Ground 2 alleged unlawful and unreasonable inconsistency in the treatment of similarly situated individuals. In short the contention was that the Claimant was in an equivalent position to those who had been granted Pitting LOTR and that the failure to treat him in the same way by granting leave to enter was unlawful and/or unreasonable.
21. Ground 3 challenged the First Defendant’s position that an application for LOTR had not been made contending that the ARAP application and the subsequent correspondence should have been treated as an application for LOTR and a decision made on the grant of LOTR in response to the application.
22. Finally, ground 4 alleged an unlawful failure to exercise discretion in favour of the Claimant. It will be necessary to consider the terms in which this ground was expressed more fully below.
23. The relief sought was the quashing of the decisions of 15<sup>th</sup> November 2021 and a mandatory order that the Defendants reconsider the applications as soon as reasonably practicable.

### **The Decision of Lang J in *S & AZ***

24. The claimants in these two cases were Afghan judges. They had applied for leave under the ARAP alternatively for LOTR. The Secretary of State for Foreign, Commonwealth, and Development Affairs had refused the ARAP application. The Secretary of State for the Home Department had said that no application for LOTR had been made because the ARAP application and the correspondence from those acting for the claimants had not been an application made using the online application form for the visa route most closely related to the claimants’ circumstances. In that regard it was said that leave under the ARAP was not a route to leave under the Immigration Rules and so could not be the route most closely related to the claimants’ circumstances.
25. The claimants had argued that the refusal to treat the ARAP application and the references in the correspondence to LOTR as an application for such leave was unlawfully irrational and unfair. They said that leave under the ARAP was to be seen as leave under the Rules. Moreover, they contended that their treatment was unfairly and unlawfully inconsistent with the approach which had been taken to other Afghan

judges who had been able to reach Kabul airport or the Baron Hotel and had then been called forward under Operation Pitting and given Pitting LOTR.

26. Lang J set out in some detail the background of the relevant circumstances in Afghanistan; the ARAP; Operation Pitting; the grant of Pitting LOTR; and the operation of LOTR in general. She considered in detail the role of Afghan judges; the public statements which had been made in respect of them by HM Government; and the similarities and differences between the roles and circumstances of the claimants before her and other judges who had been given leave under the ARAP or granted Pitting LOTR.
27. As a result of that analysis Lang J concluded that S and AZ were not within the scope of the ARAP. She also found that the distinctions between them and the judges given leave under the ARAP were such that it was not unlawfully or irrationally inconsistent for the claimants before her to be refused such leave while other Afghan judges had been granted leave. However, she did find that there was no valid distinction between the circumstances of S and AZ and those of other judges who had been given Pitting LOTR. She concluded that “the sole reason” why the judges given Pitting LOTR had been selected “was because they had contacts in the UK who were able to lobby the FCDO on their behalf” (see at [124]). At [125] Lang J found that both S and AZ “could have been eligible under Pitting LOTR criteria if their names had been put forward”.
28. At [126] Lang J noted that the Pitting LOTR criteria were no longer in operation. Nonetheless she said that “factors such as [S and AZ’s] role in promoting the rule of law and the risks to their safety arising from their work as judges” would still be relevant in any assessment of an application by them for LOTR. In addition the factors listed at [124] and [125], namely eligibility for Pitting LOTR and the absence of any valid distinction between the claimants and the judges given such leave, would also be relevant considerations. It is to be noted that although she set out in strong terms her conclusions as to the inconsistency between the treatment of S and AZ and that of the judges granted Pitting LOTR Lang J did not say that S and AZ were necessarily to be given LOTR. Rather she identified matters which would be relevant in consideration of their applications for LOTR.
29. Lang J then turned to consider the contention that S and AZ had not actually made an application for LOTR. She rejected that argument. Lang J concluded that the ARAP was to be seen as an immigration policy and that the online visa application routes did “not remotely match the Claimants’ circumstances” (see [131]). It was unlawfully irrational and disproportionate for Secretary of State for the Home Department to refuse to treat the applications which had been advanced as applications for LOTR. One significant factor was that it was not possible for S and AZ honestly to complete the online application forms which asked questions by reference to criteria which simply were not relevant to their circumstances. Similarly it was not rational in the particular circumstances appertaining in Afghanistan to require the provision of biometrics before the application would be considered.
30. Although Lang J found many of the claimants’ allegations in respect of the difference between their treatment and that of the judges granted Pitting LOTR to be well-founded she made no order for judicial review in that regard. That was because in light of the unlawful refusals to consider the applications for LOTR there were no substantive

decisions to be quashed. However, the decisions refusing to consider the material submitted as being an application for LOTR were quashed.

31. The ratio of the decision is, therefore, that where leave through the ARAP is the route most closely matching an applicant's circumstances (albeit that the applicant is outside the scope of that policy) then an application under the ARAP combined with correspondence invoking Secretary of State for the Home Department's power to give LOTR is to be treated as an application for LOTR and considered as such.
32. The Defendants have been granted permission to appeal Lang J's decision. However, it is relevant to note the reasons which Andrews LJ gave when granting permission. Andrews LJ said that on the face of matters Lang J had given "cogent and compelling reasons" for the conclusion that the failure to treat the applications in that case as applications for LOTR was unlawful. Andrews LJ described herself as being "very dubious" as to whether a real prospect of success had been shown by the appellants. She explained that she had not reached a concluded position on that issue because she was satisfied that the desirability of the Court of Appeal giving a definitive ruling on the lawfulness of the refusal to treat the applications as being applications for LOTR was a compelling reason for granting permission. Andrews LJ referred to the fact that other cases addressing the same issue were before this court at first instance but expressed the view that there was "nothing to prevent" them being heard while *S & AZ* made its way to the Court of Appeal. In the light of those comments the Defendants before me sensibly abandoned their application that the current proceedings be stayed pending the outcome of the appeal. `

## **Ground 2.**

33. By ground 2 the Claimant contended that he was in an equivalent position to others who had been given Pitting LOTR such that the refusal to grant him LOTR was unlawfully inconsistent.
34. Until the hearing before me the Claimant had been seeking to adjourn consideration of this ground. That was because he was seeking further information from the Defendants as to the circumstances of those engaged in the media who had been given Pitting LOTR. However, by the time of the hearing the Defendants had provided such information as they had and the Claimant no longer sought an adjournment.
35. A number of those given Pitting LOTR were journalists or others working in the media including some who had worked for or with the BBC. However, the Defendants were not in a position to provide any fuller information as to the nature of their activities.
36. The Claimant accepted that there was no decision refusing him LOTR which was capable of being quashed (as opposed to the decision not to consider his application). I was nonetheless asked to consider the equivalence which the Claimant said there was between his position and that of those media workers given Pitting LOTR and make a reasoned assessment of that equivalence. It was said that this would mirror the course taken by Lang J in *S and AZ* and was appropriate because of a reference made in the skeleton argument of Mr Brown QC and Miss Masood for the Defendants. It was said there that because Operation Pitting had now ended the criteria used to determine the grant of Pitting LOTR had no legal relevance to the grant of LOTR.



37. The approach which the Claimant urged on me would not be appropriate for a number of reasons and I decline to engage in the assessment sought.
38. The first point is that the First Defendant is the relevant decision maker and she has not yet considered the application for LOTR let alone made a decision in respect of it. As will be seen I have concluded that ground 3 is established and that the First Defendant acted unlawfully in failing to consider the application. That does not, however, warrant the court in directing in advance how the application should be considered in the sense of the matters to be taken into account. In any event Mr Brown accepted on behalf of the First Defendant that all matters advanced by the Claimant would be considered. The reference to the legal irrelevance of the criteria used to determine the grant of Pitting LOTR was, he explained, simply a statement that those criteria could not as a matter of law govern the grant of LOTR after the end of Operation Pitting. Expressed in those terms that is an unexceptionable statement of the legal position and does not prevent consideration of the argument that the asserted equivalence between the Claimant and those granted Pitting LOTR is a relevant factor.
39. Next, it is of note that the exercise which Lang J undertook was to identify relevant considerations. However, as I have already noted she did not indicate the weight to be given to those considerations let alone purport to determine the conclusion which would follow.
40. Finally, even if the course proposed were in principle appropriate I am not in a position to undertake the exercise sought by the Claimant. Lang J had before her detailed information not just as to the circumstances of S and AZ but also as to the circumstances of at least some of the judges who had been given Pitting LOTR. She was able to assess the extent to which there was or was not equivalence between them. The material before me is far sketchier. I do have material as to the Claimant's activities but the information about the journalists and media workers who were given Pitting LOTR is only in the most general of terms and gives no detail about their roles or activities. The Claimant accepts that the information now available is the most that the Defendants can provide and Miss Sabic sought to persuade me to "do my best" to assess equivalence between those persons and the Claimant. The exercise which I was being invited to undertake would be one of speculation rather than of an assessment based on limited material. It would not be appropriate to engage in such an exercise.
41. It follows that ground 2 forms no basis for the grant of relief and that I decline to engage in an assessment of the equivalence or otherwise between the position of the Claimant and of those given Pitting LOTR.

### **Ground 3.**

42. The First Defendant had taken the position that no application for LOTR had been made and so the stage had not yet been reached when a decision as to the grant or refusal of LOTR was required. The application for leave under the ARAP scheme and the accompanying correspondence were said not to amount to an application for LOTR because the Claimant had not used an application form from the First Defendant's online visa application system. The Claimant contended that this was an unlawful and irrational approach. In response the First Defendant said that she was entitled to specify a process for applicants to follow and that it was both lawful and reasonable to require the application to be made using the online system.

43. At first sight this dispute is four-square within the scope of the decision in *S & AZ* where Lang J held that the refusal to treat an application for leave under the ARAP and a request in correspondence for LOTR as an application for LOTR was unlawful.
44. In the absence of a material distinction between the present case and the circumstances of *S & AZ* I am to follow Lang J's approach unless I am convinced that it is wrong (see *Police Authority for Huddersfield v Watson* [1947] 1 KB 842, 848 and *R (ex p Tal) v Greater Manchester Coroner* [1985] 1 QB 67, 81). The Defendants do not accept that Lang J's decision was correct (indeed as shown by their appeal they say that it is wrong and should be reversed). However, Mr Brown accepted that I could not be convinced that it was wrong. That concession was clearly correct in the light of Andrews LJ's comments on the force of Lang J's reasoning (to say nothing of the sundry instances cited by the Claimant of permission to bring judicial review proceedings having been given on the same or similar grounds).
45. The question then becomes one of whether there is any material distinction between the circumstances of this case and those with which Lang J was concerned. Mr Brown advanced two grounds of distinction neither of which can be sustained.
46. The first purported distinction was to say that an application under the ARAP scheme was not the route to entry which most closely matched the Claimant's circumstances. The Claimant has a brother-in-law living in the United Kingdom. The First Defendant says that the Claimant has not explained why he did not seek LOTR by making an application under either the family reunion or family migration routes to leave. In the absence of such explanation those are said to be the routes most closely matching the Claimant's circumstances. It is of note that this was not the reason given for concluding that the Claimant had not made an application for LOTR. That does not prevent the Defendants from raising the argument now but it does give an indication as to its force.
47. In her oral submissions and by reference to the witness statement of Miss Cooley Miss Sabic explained why an application using those routes would fail. In short the family reunion route provides for leave to be given to the family members of persons who have been given asylum in the United Kingdom and is intended to allow the reunion of the families of such persons. However, the Claimant's brother-in-law is present in the United Kingdom as a British citizen and not a refugee and reunion with him would not be the reunion of the family of the recipient of asylum. The Claimant falls outside the other family migration routes because the relationship between brothers-in-law would not enable leave under those routes, at least in the absence of dependency which does not exist here.
48. However, the fact that an application for leave under a different route from that of the ARAP would fail under the Rules is not of itself the answer to the Defendants' argument. That is because *ex hypothesi* the application would fail under the Rules (otherwise there would be no need for LOTR). The question is which route under the Rules most closely matches the Claimant's circumstances and the basis on which LOTR is said to be merited. It is nonetheless relevant to consider the nature of those routes to see how closely the Claimant's circumstances and contentions match those required to obtain leave under the Rules through those routes. It can immediately be seen that both the Claimant's circumstances and his contentions are very far from those which would need to apply for leave to be obtained through the family-based routes. By contrast his circumstances and arguments are closely akin to those of persons obtaining leave by

virtue of the ARAP. The Claimant asserts he and his family are at risk of harm from the Taliban (and that is not contested). He says, moreover, that the risk has arisen, at least in part, because of his engagement with a British entity and in circumstances where his activities with that entity furthered objectives which at the very lowest HM Government regarded as desirable. If, as Lang J found, the ARAP is to be regarded as an immigration policy and leave given under the ARAP seen as leave under the Rules then that is patently the route which most closely matches the Claimant's case. The Claimant is not seeking leave because of a desire to be reunited with his brother-in-law but because he is in fear of the Taliban with that fear deriving from the Taliban's antipathy towards his activities working with a British entity in Afghanistan.

49. The second distinction was said to be that the application for LOTR did not accompany the ARAP application form. However, Mr Brown accepted that it appears from [41] of Lang J's judgment that AZ's request for LOTR was sent separately and at a different time from his application under the ARAP albeit only by one day. So on the facts there was not a contemporaneity of the ARAP and LOTR applications in *S & AZ*. However, even if the timings of the applications made by the Claimant were to be seen as different from those made by the claimants in those cases that would not be a material distinction. Both there and in this case the First Defendant was being asked to treat the ARAP application and the correspondence as an application for LOTR. Both there and here she refused to do so by reason of the view she took of the nature of the ARAP application. Whether the application for LOTR was made at the same time as the ARAP application was submitted or subsequently is not material.
50. Accordingly, there is no material distinction between the circumstances here and those considered by Lang J. Following the approach enunciated in *S & AZ* the First Defendant's refusal to treat the Claimant as having made an application for LOTR is to be quashed and to the extent that it is necessary the First Defendant directed to consider those matters and application for LOTR.

#### **Ground 4.**

51. The preamble to the ARAP application form included a paragraph saying:

“If you are not eligible under ARAP and still wish to relocate to the UK, you may be able to raise a case with the Foreign, Commonwealth and Development Office (FCDO)”.
52. It is to be noted that no separate case was submitted to the Second Defendant. The application of 21<sup>st</sup> September 2021 and the solicitors' letter of 19<sup>th</sup> October 2021 asserted that the Claimant was eligible under the ARAP. The letter of 11<sup>th</sup> November 2021 was not before the Second Defendant's decision maker at the time of the decision of 15<sup>th</sup> November 2021. In any event that letter repeated the assertion that the Claimant was within the scope of the ARAP and alternatively sought LOTR from the First Defendant.
53. I have already noted at [17], [18], and [23] the decisions which the Claim Form said were being challenged; the terms of [1] of the Statement of Facts and Grounds; and the relief which was sought in the claim form.
54. As set out in the Statement of Facts and Grounds at [101] – [103] ground 4 was said to be:

“101. Further to the illegality in the LOTR decision, the Defendants act unlawfully in failing to exercise discretion *now* in favour of the Claimant, given his proximity to both the ARAP and ACRS policies.

102. All of the circumstances here include:

- I. An Afghan national from an ethnic minority background, who has worked with and for the BBC, on work that was funded by HMG, and ultimately supported and contributed to the UK’s political/military aims in the context of challenging Taliban norms in Afghanistan, including democracy, the rule of law, women’s rights;
- II. That the Claimant and his family sought to escape at the time of Operation Pitting;
- III. The fact that he is accepted as being at real risk from the Taliban now;
- IV. That his wife and five daughters are all dependant on his application, are also at risk and are in hiding;
- V. That his eldest daughter is at particular risk from the Taliban of forced marriage, and the Claimant and his wife credibly fear the Taliban’s takeover means there is no form of state protection available to them.

103. Bearing in mind the policy intention of both ARAP and ACRS, the Claimant’s circumstances straddle one or both of the policies, and the accepted evidence of the continued risk are heavy factors that weight in favour of the SSHD’s exercise of discretion in this particular case.”

55. Expressed in those terms ground 4 related to the First Defendant’s decision as to LOTR and amounted to a contention that not only was the failure to treat the material submitted as an application for LOTR unlawful but that the failure to exercise the First Defendant’s discretion in favour of the Claimant was unlawful. Although the only relief expressly sought was the quashing of the refusal to consider the application and a direction that the application be treated as being for LOTR and be considered on that footing ground 4 appeared to be asserting that a lawful exercise of the discretion would inevitably result in the grant of LOTR.
56. Seen in those terms the ground was untenable. The First Defendant is the relevant decision maker. She has not made any decision as to the grant or refusal of LOTR to the Claimant. That is because she has not considered the application. The effect of my conclusion as to ground 3 is that she will now have to consider the application. Although the Claimant’s arguments have considerable force it is not self-evident that the only rational conclusion is necessarily that the Claimant should receive LOTR. The rationality or otherwise of the decision as to LOTR will have to be considered once it has been made.
57. In their skeleton argument Miss Sabic and Miss Fitzsimons mounted a different line of argument. At [93] and [94] they said:

“93. The Claimant maintains that it is evident that even outside of the parameters of the ARAP policy, the FCDO has a discretion to determine whether an applicant should be

relocated to the UK. That is evident from the ARAP form itself, which the Claimant completed, which recognises:

*“If you are not eligible under ARAP and still wish to relocate to the UK, you may be able to raise a case with Foreign, Commonwealth and Development Office (FCDO)”* [SB/H131, emphases added]

94. There has been no exercise of that discretion by the FCDO in the ARAP decision or the review decision. There has only been the determination of the Claimant’s case by reference to the ARAP rules and policy. “

58. In her oral submissions Miss Sabic accepted that the Second Defendant has no power to grant LOTR and so no power to determine whether the Claimant should be relocated to the United Kingdom. However, in a further development of the Claimant’s case, she contended that the Second Defendant had a discretion to sponsor an application for LOTR and that she had unlawfully failed to consider the use of that discretion.
59. It is to be noted that in the decision of 15<sup>th</sup> November 2021 the Second Defendant did decline to sponsor the Claimant’s application for leave. That was, however, in the context of considering whether the Claimant was within the scope of the ARAP and the sponsorship being referred to was of a person as being within the scope of that scheme. Assuming in the Claimant’s favour that the Second Defendant does have a discretion to sponsor or support an application for LOTR then a decision not to exercise that discretion or a refusal to sponsor having considered the matter would in principle be amenable to judicial review. There are, however, two obstacles to the grant of any relief based on ground 4 in its latest iteration. The first is that the Second Defendant has made no relevant decision. As I have explained the Claimant did not purport to raise a case with the Second Defendant other than by way of contending that he was within the scope of the ARAP. The suggestion that the Claimant should receive relief outside the Rules was made only in the context of seeking LOTR from the First Defendant. In those circumstances it is not surprising that there was no decision by the Second Defendant. The second is that this line of attack relates to a decision or a failure to act wholly different from those which were said to be under challenge in the claim form and the Statement of Facts and Grounds. It is not open to the Claimant at this stage to mount this attack in the absence of a formal amendment being sought and permitted.
60. In those circumstances ground 4 provides no basis for the grant of relief.

### **Conclusion.**

61. It follows that I have concluded that this case is not distinguishable from *S & AZ*. In those circumstances the claim succeeds by reference to ground 3 and the refusal to consider the material advanced as an application for LOTR is to be quashed. I will invite submissions as to the extent to which it is necessary for me to direct consideration of that application.