Neutral Citation Number: [2023] EWHC 1164 (Admin)

Case No: CO/2805/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2023

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

The King
on the application of
MKA

Claimant

- and -

Secretary of State for Defence

Defendant

- -
- -

Mr Nikolaus Grubeck and **Ms Alexandra Littlewood** (instructed by **Leigh Day**) for the **Claimant**
Mr Edward Brown KC and **Mr Richard Evans** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 12 October 2022

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Approved Judgment

This judgment was handed down remotely at 3.00pm on 16 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. In this claim the Claimant MKA challenges a decision of 18 May 2022 of the Defence Afghan Relocation and Resettlement Panel ("the Panel") reaffirming an earlier decision of 21 July 2021 that the Claimant is ineligible for resettlement in the UK under the Afghan Relocations and Assistance Policy ("ARAP").

2. MKA is a national of Afghanistan who, between 2012 and 2020, worked as a technical engineer for internet, network and communication services used by the British military at Camp Qargha in Afghanistan. From 2014 he also worked as a technical engineer at the British Embassy. He provided his services exclusively at British camps and at the British Embassy, although he was employed by various Afghan networks and companies and not directly by the British. He says that the projects upon which he worked directly supported the British mission and refers in particular to the construction of an internet tower connecting networks of the British and the American Military in Afghanistan.

3. He says he was at a significantly increased risk of death and/or torture because of his work which was open and public in nature. Since the fall of Kabul in August 2021 he says he was threatened and intimidated by people he believes to be members or supporters of the Taliban. He fled to the United Arab Emirates in December of 2021 but his position there is not secure.

GENERAL BACKGROUND and POLICY

4. The background which gave rise to the ARAP is well known and not in dispute. It was described by Mrs Justice Lang in *R (on the application of S) v Secretary of State for Defence* [2022] WL 02106242 materially thus:

> "*5. Following the terrorist attacks against the United States of America ("USA") on 11 September 2001, the USA led a military intervention against Al Qaeda groups, and the Taliban government in Afghanistan. The UK took a significant part in the USA's initial intervention. Subsequently, the operation was supported by NATO and a joint international force, collectively called the International Security Assistance Force ("ISAF"), in which the UK played a leading political, diplomatic and military role.*
>
> *…*
>
> *7. On 29 February 2020, the USA and the Taliban signed the Doha Agreement (officially titled the "Agreement for Bringing Peace to Afghanistan") that provided for the withdrawal of all USA and allied military forces and civilian personnel from Afghanistan by 1 May 2021. The withdrawal was conditional upon the Taliban upholding the terms of the agreement that included not to allow Al Qaeda or any other extremist group to operate in the areas they controlled. The withdrawal of the USA was later deferred to 31 August 2021.*
>
> *8. In May 2021, the Taliban launched a major offensive against the Afghan Armed Forces, and then made rapid advances. By 15 August 2021, the Taliban had seized Kabul. USA and NATO troops retreated to Kabul airport from where they operated an emergency airlift for all NATO's civilian and military personnel, other foreign*

nationals, and at-risk Afghan nationals. The final British flight from Kabul took place on 28 August 2021. The last USA military planes left Afghanistan on 30 August 2021. Taliban soldiers then entered the airport and declared victory. The Taliban government has been in total control of Afghanistan since that date. The UK Embassy and other NATO Embassies have remained closed."

5. The ARAP was announced on 29 December 2020. It was launched on 1 April 2021 to provide for certain personnel who had worked with the UK in Afghanistan to offer relocation to eligible Afghan citizens employed by the UK government in Afghanistan in "*exposed, meaningful or enabling roles*" and assessed to be at serious risk as a result of their work.

6. In *S* Lang J described its introduction:

"*58. ARAP was introduced jointly by the Secretary of State for Defence ("SSD") and the SSHD with effect from 1 April 2021. Its stated purpose was to "offer relocation or other assistance to current and former Local Employed Staff ["LES"] in Afghanistan to reflect the changing situation in Afghanistan".*
59. ARAP replaced the Intimidation Policy which was introduced in 2010. The ex-gratia scheme, which provides redundancy payments, will continue alongside ARAP until November 2022, when it will close.
60. ARAP is routinely updated. ..."

7. The policy explained the position for those to whom the policy was directed, namely Locally Employed Staff ["LES"]:

"*The Relocation Offer creates the possibility for current and former LES to have the default option to relocate to the UK if they meet the eligibility criteria above. It is offered to LES whom the UK government considers to have put themselves in the most danger and contributed the most to the UK mission in Afghanistan. The Relocation Offer is based on recognition of service and an assessment of likely current and future risk to LES due to the nature of their work for the UK government in the evolving situation in Afghanistan.*"

8. ARAP is also reflected in Part 7 of the Immigration Rules which have been amended from time to time to reflect changes made in the underlying policy.

9. The policy at the material time, and that under which the Defendant decided his case, gave four categories of persons eligible for assistance of which Categories 1, 2 and 4, are relevant. It was referred to as the "*Afghan Relocations and Assistance Policy: further information on eligibility criteria and offer details*" and stated materially:

"***Category 1*** *The cohort eligible for urgent relocation comprises of those who are assessed to be at high and imminent risk of threat to life.*

Category 2 *The cohort eligible for relocation by default comprises of those who worked or work for HMG in exposed meaningful enabling roles.*

1. *Exposed meaningful enabling roles are roles that made a material difference to the delivery of the UK mission in Afghanistan, without which operations would*

have been adversely affected, and that exposed LES to public recognition in performance of their role, leaving them now at risk due to the changing situation in Afghanistan.

2. *Examples of such roles are patrol interpreters, cultural advisors, certain embassy corporate services, and development, political and counter-terrorism jobs, among others. This is not an exhaustive list, nor are all those who worked in such roles necessarily eligible by default.*

3. *Locally employed staff dismissed from employment are excluded from relocation by default, unless in exceptional circumstances on a case-by-case basis, without prejudicing their right to other forms of assistance under the scheme"*

…

Category 4 *The cohort eligible for assistance on a case-by-case basis are those who worked in meaningful enabling roles for HMG, in extraordinary and unconventional contexts, and whose responsible HMG unit builds a credible case for consideration under the scheme […]*"

10. The initial decision was made in a letter dated 13 July 2021; it stated the Claimant was not eligible under ARAP. It then set out "*with reference to the criteria*" the wording contained above under Category 2.1 to 2.3 above, then stated:

"*Based on the information that you provided and our records, you do not meet the criteria for the following reasons: because you were not directly employed by Her Majesty's Government and are not in the scope of the policy.*"

11. By this date in fact the policy did not extend *only* to those who were directly employed; that had changed in May 2021.

12. In any event, the Claimant made requests for reconsideration which were formalised in February 2022. The reconsideration decision was communicated by letter dated 18 May 2022, and stated to be by reference to the policy as at 21 July 2021. It gave as reasons for the refusal:

"*From the information you have provided, the Defence Afghan Relocation and Resettlement (DARR) Review Panel has upheld the decision that you do not meet the eligibility criteria for Categories 1, 2 or 4 of the ARAP. Review decisions are made in accordance with the policy in place at the time of the original eligibility decision which in this case was 21/07/2021.*

From the information you have provided you have been found ineligible for Category 1 of the ARAP because we have assessed you do not meet the following criteria:
You are at high risk and imminent risk of threat to life.

From the information you have provided you have been found ineligible for Category 2 of the ARAP because we have assessed you do not meet the following criteria:
You worked or work for HMG in an exposed meaningful enabling role that made a material difference to the delivery of the UK mission in Afghanistan, without which operations would have been adversely affected, and that exposed you to public recognition in performance of your role, leaving you now at risk due to the changing

situation in Afghanistan.

From the information you have provided you have been found ineligible for Category 4 of the ARAP because we have assessed you do not meet the following criteria:
You worked in a meaningful enabling role for HMG, in extraordinary and unconventional contexts."

13. In the words of the Defendant's deponent Katherine Carr, Deputy Director responsible for the relocation of Afghans in the UK since February 2022, a policy change had taken place affecting the criteria to be applied from May 2021. It is described in broad terms:

"*7. The policy has been altered over time to adjust to changing situation and feedback on its application: In May 2021, the ARAP was expanded to allow applications from individuals contracted to provide linguistic services to UK Armed Forces, and individuals who worked with or alongside a UK Government Department, including the Foreign Commonwealth and Development Office ("FCDO") in Afghanistan in exposed, meaningful, enabling roles that made a material difference to the delivery of the UK mission in Afghanistan; and without which operations would have been adversely affected.*

8. In October 2021, the Immigration Rules were changed to allow an application to be made from any country (including from the UK); to grant immediate settlement (indefinite leave to enter, or indefinite leave to remain if already in the UK) rather than five-years' limited leave; and to clarify a dependent child must be under 18 years.

9. In December 2021, the eligibility criteria to qualify under Category 4 special cases was [*sic*] *better defined under the Immigration Rules; a provision was added to allow dependants to be refused on grounds of suitability; and to enable non-Afghan dependants to apply.*

10. In March 2022, the requirements were adjusted to allow those employed by, or contracted to, a UK government department who were dismissed from their post for anything other than a minor reason, to be refused."

14. The criteria within the Rules (276BA1 and 276BB1) in Part 7 of the (out of date) IRs in place at the date of the decision in fact read:

"*276BA1. Limited leave to enter the United Kingdom for a period not exceeding 5 years, subject to a condition on study as set out in Part 15 of these Rules, will be granted to relevant Afghan citizens, unless the application falls for refusal under paragraph 276BC1*

…

276BB1. A relevant Afghan citizen is a person who:

(i) is in Afghanistan; and

(ii) is an Afghan citizen; and

(iii) is aged 18 years or over; and

…

(v) if applying on the basis of the Relocations and Assistance Scheme:

> ***a) is or was employed in Afghanistan directly*** *by the Ministry of Defence, the Foreign and Commonwealth Office, the Department for International Development or the Foreign, Commonwealth and Development Office for any period since 2001;* ***and***
> *b) submits an application on or after 1 April 2021;* ***and***
> *c) qualifies under one of the following categories:*
> *i) imminent risk to life;*
> *ii) eligible for relocation;*
> *iii) special cases; and*
> *d) if applying under (ii) above, is or was employed in an exposed, meaningful or enabling role that made a substantive, material difference to the delivery of the UK mission in Afghanistan and without which operations would have been adversely affected;*
> *e) and has been determined by the Secretary of State as being in need of relocation to the UK…*"
>
> [Emphasis added.]

15. As noted by the Claimant, the IRs were out of step with what is agreed to have been the correct policy interpretation at the material time. As he submits, they appeared to suggest at that time that direct employment was required under *each* of Categories 1, 2 and 4 (reflected in the list at Rule 276BB1(v)(a) set out at 14 above). MKA submits that, in truth at the time, direct employment was not a requirement under any category.

16. Lang J in *S* explained that the broadening to include non-direct employment and "*alongside*" was only reflected in a December 2021 version of the IRs. She said:

> "*64. Neither the April 2021 nor the September 2021 versions included provision for those who were not employed by the UK Government. Such provision was introduced for the first time in a version introduced on 14 December 2021. The material provision is as follows:*
>
> *276BB5. A person falls within this paragraph if the person meets conditions 1 and 2 and one or both of conditions 3 and 4. For the purposes of this paragraph:*
>
> *(i)* ***condition 1 is that at any time on or after 1 October 2001, the person:***
> *(a)* ***was directly employed in Afghanistan by a UK government*** *department****;***
> ***or***
> *(****b) provided goods or services in Afghanistan under contract*** *to a UK government department (whether as, or on behalf of, a party to the contract****);***
> ***or***
> *(c)* ***worked in Afghanistan alongside a UK government department, in partnership with or closely supporting*** *and assisting that department;*
> *(ii)* ***condition 2*** *is that the person, in the course of that employment or work or the provision of those services,* ***made a substantive and positive contribution towards the achievement*** *of:*
> *(a)* ***the UK government's military objectives*** *with respect to Afghanistan;* ***or***
> *(b) the UK government's* ***national security objectives*** *with respect to Afghanistan (and for these purposes, the UK government's national security*

objectives include counter-terrorism, counter-narcotics and anti-corruption objectives);
(iii) ***condition 3*** *is that* ***because of that employment****,* ***that work or those services****, the person:*
(a) is or was at an ***elevated risk of targeted attacks****;* ***and***
(b) ***is or was at high risk of death or serious injury****;*
(iv) condition 4 is that the person holds information the disclosure of which would give rise to or aggravate a specific threat to the UK government or its interests."
[Emphasis added]

17. The change to include contractors and those who worked with or alongside a relevant body in "*meaningful, enabling roles that made a material difference*" meant there was a change to (at least) Categories 2 and 4 which used that definition. The Defendant admits in this case that Categories 2 and 4 were affected by this clarification, but does not admit the same for Category 1.

18. MKA's application was expressed to be considered under the (post- May 2021 expanded) policy as at 31 July 2021. MKA thereafter corresponded with the Defendant and furnished further evidence in support of his claim. The Defendant undertook to consider his matter afresh but refused the application once more on 18 May 2022.

19. That refusal decision, was presented in tabular form. The gist of the refusal was expressed thus:

"*CAT 1: Panel all agreed to [sic] upheld (not eligible)*
CAT 2: Panel all agreed upheld (not eligible)
CAT 4: upheld (not eligible)"

20. In the penultimate column which is headed "Upheld/Overturned" the following was set out:

"*Does not meet Cat 1 as was not directly employed by HMG.*

Does not meet CAT 2 as was not directly employed by HMG or meets the examples of the roles that could be eligible in place at the time.

On Cat 4, the policy in place at the time was as follows:

The cohort eligible for assistance on a case-by-case basis of those who worked in meaningful enabling roles for HMG, in extraordinary and unconventional contexts, and who is responsible HMG unit for consideration under the scheme.

An exposed meaningful enabling role is defined as follows: [the definition at Category 2.1 above is then set out].

We should not reject purely on the basis there is no vetted unit who has provided information regarding the individual.

There is no evidence the individual meets this criteria [sic] which is quite a high bar. An Army Captain has said [MKA] was on call 24/7 for any service interruptions and often travel [sic] across Kabul in the early hours to conduct repairs and essential maintenance.

[MKA] claims the Taliban have been looking for those who built the Wi-Fi tower but there is no evidence provided regarding this."

21. The last column of the decision table contains the result as set out above. Thereafter appears:

"*Applicant was contracted with multiple companies doing IT/networking rules, but mainly focused on the Wi-Fi tower project with British forces.*

Evidence:

Recommendation letter was character evidence, didn't show material impact of work.

Document shows approval/contract to develop Wi-Fi tower was with US forces (no mention of British forces).

Threat:

Applicant said papers would link him to the Wi-Fi tower were only at certain locations (i.e. not easily available and wasn't exposed at the time).

Applicant and family travelled to and now residing in Dubai confirmed in February 2022."

BACKGROUND

Personal Background

22. The Claimant explained that he holds a Bachelor of Science degree from the University of Engineering and Technology in Peshawar, Pakistan. Camp Qargha was a UK run military camp accommodating multinational service personnel who provided support to the Afghan National Officer Academy. He served a number of employers in the role of technician, radio frequency engineer, information and communications technology engineer and senior network engineer. He was not directly employed by the British army but during all his time working there the Camp was controlled by them and for the majority of the time he worked under their supervision.

23. The nature of the work was providing telephone and on-site technical support. He was on call 24 hours a day, seven days a week. Sometimes, he had to cross the city in the middle of the night for repairs or maintenance. In 2012 an internet tower for coalition forces between the UK Camp Qargha and the American Camp Morehead was constructed providing fibre internet connectivity to the British camp, and internet to the American camp. It is the Claimant's case that the Taliban is in possession of documents that name him in connection with this project and that the Taliban had recently asked about the tower and its purpose. He was involved in other projects and explained that in the evenings he also worked at the British Embassy in Kabul part-time on internet and technical matters from 2016 to 2019. He says he was at risk and would have been seen by many members of the public during his years of working at Camp Qargha and at the British Embassy.

24. Mr Grubeck who appeared for MKA argues that the Panel's reasons suggest they disregarded and/or misunderstood significant parts of the relevant evidence produced to the Defendant on the Claimant's behalf.

The materials before the Panel

25. After the July 2021 refusal the Claimant submitted a number of requests for a review of that decision. He also submitted further information. By the time it came to make its decision among the materials before the Panel were the following:

(1) An email of 19 June (also before the first Panel) in which MKA describes himself as "(Supporting UK locally employed staff in Afghanistan)" in the title to his communication. He says the following:

"*I worked with British Army from 2013 on different Internet projects at New Kabul Compound, HKIA camp Tufan, and Camp Qargha, During my work, I experienced many threats in my life but still, I continued my work. I would like to mention in your email the current situation of my life. My life has been threatened in Afghanistan and couldn't continue to live there, especially after the withdrawal of NATO forces and British Forces. Previously, when the threat level would go high, I would feel safe in the camp but now as the camps are also winded up, I didn't have any other choice but to escape Afghanistan and come to the UAE. Currently, I am living in the UAE in worse conditions with no job and no financial means. My family lives aren't safe in Kabul. My wife along with her 3 kids are in hiding.*"

(2) These details and a reference letter from a Captain Craig were sent together with a number of appreciation certificates, a picture of him with Captain Craig and his professional certification and other personal details. A letter from Captain Craig (22 October 2020) which, with these other materials had been before the first decision-maker stated:

"*To whom it may concern*

[MKA] *has worked in Camp QAA as a Wi-Fi internet Service Provider throughout the time that I have been Quarter Master on Op TORAL 10. I have been in Camp Qargha (QAA) since May 2020 and I know that* [MKA] *has been here for several years prior.*

It is with great pleasure that recommend this very pleasant and helpful person to you.

l have worked with him in this very austere environment during very difficult times and he has always been there to support the soldiers within this base.

He is evidently a very exceptional and competent person who has conducted his business in a very fair and supportive way understanding the needs of his customers. He always provides them with value for money and is always willing to acquire items that the soldiers request.

To the best of my knowledge, [MKA] *presents no threat to the safety or security of the United Kingdom. It is my opinion that* [MKA] *would be successful in the United Kingdom and could be an asset to the UK economy and society as a whole.*

> [MKA] *has been a pleasure to have in Camp QAA and it is with regret that the camp has closed and we no longer require this service.*"

Captain Craig signed the letter as Quarter Master.

(3) "A memorandum for record" from the US Department of Defense dated 12 September 2020 providing formal authorisation to MKA in respect of a signal tower near Camp Commando. The document is signed by the officer commanding and the Camp Mayor. It records an arrangement between the American government and the individual and grants access to the American camps.

(4) An email of August 2021, after the refusal decision, addressed to the Defendant "Subject Local Staff-Afghanistan" from Captain Craig with his details and the details of four Afghans of whom one is MKA. He describes MKA as having:

> "*… provided much needed communications for UK service personnel for over eight years.*
>
> *and … X and Y are brothers whose safety I have concerns over. All are now in hiding due to threats on their lives.*
>
> *I have submitted emails and letters previously and had little or no response. Please provide any update to myself and the individuals or any info and or guidance that may help them?*"

(5) A further letter in August 2021 from Captain Craig written in response to a request from the Defendant confirming he does know MKA. It describes MKA's work, that he was on call 24/7 in line with the details given by MKA. Further,

> "*Since the closure of Camp Qargha I have feared for [MKA] and others as they were known by many to work for the coalition forces and now that the Taliban have taken control of Afghanistan I fear there will be repercussions for the connection they have to the UK.*"

(6) A letter dated 1 December 2021 from Leigh Day, solicitors to MKA, giving precise time and details of the employment of MKA and stating:

> "[MKA] *also worked part-time in the evenings, for VICE Group from 2014 until 2016 and Union Telecom from 2016 until 2019. In both of these roles, he would provide internet solutions and technical assistance in the guest houses of the British Embassy in Kabul (Alpha 1, 2, 3 and 12).*"

The letter made arguments against the adequacy of the initial decision and indicated that Captain Craig had sent numerous emails but as yet received no reply. It stated that the Claimant was desperate:

> "*He has recently been receiving a number of phone calls from people he believes to be members or associates of the Taliban, seeking information about his whereabouts. Accordingly, it is crucial that the reconsideration of his case is completed without delay.*"

(7) A Letter Before Action addressed to the Casework Team Afghan Relocations and Assistance Policy dated 16 December 2021 requiring a response by 23 December 2021 recording that the refusal letter had made no reference to other categories, notably other categories which are open to individuals who are *not* directly employed by HMG. It recounted the history of Captain Craig receiving a telephone call on 24 August 2021 but thereafter having had nothing from the ARAP team.

(8) Certificates of Appreciation from Captain Hopkin at Camp Qargha, a Certificate of Appreciation from Major Evans from there, camp entry cards, etc. For example, recommending MKA for his exemplary service and support saying:

"*Your hard work and commitment is of the highest value for the Coalition Forces and the people of Afghanistan.*

Your loyalty and professionalism are highly appreciated."

It was signed and dated 5 April 2019, another in similar vein signed and dated 16 June 2019.

(9) Following an indication that a review would be granted on 25 March 2022, a further response from MKA written to the Defendant on 28 March 2022 in which he sets out a detailed critique of the application of the Policy asking them to look particularly at Category 4. New information not yet considered included serious threats from the Taliban and/or their affiliates in October 2021 (after the point at which he had submitted his ARAP application). MKA was told local Taliban representatives were asking questions about the individual responsible for the construction of a tower connecting internet networks to the British and American camps, which was the project for which he was responsible. He believed the documents naming him were in the possession of the Taliban, copies were within the government ministries as well as at the base, highlighting the significance of his contribution to the UK's military and security objectives in Afghanistan and the elevated risk of targeted attacks. He again attached documentation.

26. New materials have since been provided to the Court in the form of statements from soldiers giving detailed accounts of his contribution and from the British Embassy guest houses manager (who was evacuated here under ARAP). All give context to the claim – but were not before the Panel on review.

THIS CHALLENGE

27. An agreed list of issues reads as follows:

> "***Ground 1***
> *1. Whether any or all of the following conclusions relating to the Claimant's eligibility under the Afghan Relocations and Assistance Policy ("**ARAP**") were irrational and/or vitiated by a failure to have regard to relevant evidence:*
>
> *a. the conclusion that Claimant's role was not "meaningful or enabling".*
> *b. the conclusion that the Claimant's role was not "exposed".*
> *c. the conclusion that the Claimant's HMG unit had not built a credible case for consideration under ARAP.*

d. the conclusion that the Claimant was not at high and imminent risk of threat to life.
e. the overall conclusion that the Claimant was not eligible for relocation to the UK under ARAP.

Ground 2
2. Whether the Defendant failed to follow its policy (ARAP), and/or misapplied that policy, including in any or all of the following respects:

a. by interpreting Category 1 as including a requirement of "direct employment";
b. by treating the examples listed in Category 2 as exhaustive;
c. by interpreting Category 4 as including a requirement that the Claimant had an "exposed" role;
d. by interpreting ARAP in a manner that frustrates the policy's purposes.

Ground 3
3. Whether the Defendant failed to comply with its Tameside duty of sufficient enquiry to take reasonable steps to acquaint itself with the relevant information to enable it to answer correctly the question of the Claimant's eligibility under ARAP, in particular in relation to:

a. the nature of the Claimant's role, and the extent to which it made a material difference to the UK mission in Afghanistan;
b. whether the Claimant's responsible HMG unit had built a credible case for consideration under ARAP;
c. the level of risk faced by the Claimant."

28. MKA's Wednesbury challenge was put primarily on the basis that the Panel did not consider material evidence that had been submitted to them. He points to the brevity of the decision and argues there is no reference to the particular circumstances of his case nor is there any reasoning explaining why in his case the criteria under the policy are not met. Further the reasoning suggested strongly they had misunderstood or mischaracterised some parts of the material. He challenges further the failure of the Panel to accept his evidence as coming within the criteria – and observes this is not the subject of detailed or any coherent reasoning.

29. The Claimant points to what he says are demonstrable misunderstandings of the evidence. The very short reasons suggest the Panel did not have proper regard to the evidence from MKA nor make efforts to obtain what was otherwise available to them given their access to information.

30. Under Ground 2 the essential challenge argued was the failure properly to apply the then policy which appears from the Panel's own reasoning in the review decision which relies, wrongly, on the absence of direct employment. Furthermore, the example occupations have been treated as a closed class – into which he did not fit, and they misapplied the description of the roles considered eligible for protection.

31. The Claimant makes specific complaint by way of Reply of the disregard of evidence of his role at the British Embassy. This responds to the Defendant's statement in the Statement of Grounds of Defence indicating that information concerning work at the British Embassy was not before the Review Panel (SGD, §7(vi)). The Claimant's work at the Embassy had

in fact been referred to in correspondence sent to the Defendant dated 1 and 16 December 2021 and, since centrally relevant to the Claimant's role and risks, he says should have been considered by the Panel on the reconsideration request. The Claimant says the Defendant must also have been aware who was working at the Embassy and in which roles and could not reasonably ignore that information when assessing his eligibility under ARAP. Although MKA did not know exactly what information the Defendant holds about his role at the Embassy the Defendant must have information concerning those employed there.

32. The Claimant relies upon the explanation of Saini J in *R v (Wells) v Parole Board* [2019] EWHC ACD 146 as to the interface of a rationality challenge with a reasons challenge. It involves asking the central question: can the conclusion reached be safely justified on the evidence before it – or the evidence that should have been before it, and his observation that an unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion. Reliance is also placed on Saini J's reminder that case context may require anxious scrutiny – and the present case was admitted to be one such.

33. Connected to Ground 1 is his contention under Ground 3 that the Defendant, who is necessarily in a position to obtain much more evidence than the Claimant, (unable to remove documentation from Afghanistan in the course of his flight out), has not informed itself by reference (in particular) to other individuals who are named in the materials that were initially before the Secretary of State and thereafter the Panel. The circumstances uniquely handicapped the Claimant from obtaining evidence to support his case, he says, whereas the Ministry of Defence was well able to contact the individuals named in the documentation in order properly to reach a decision on him. Enquiry could easily have been made of the Foreign and Commonwealth Office and such enquiry would have produced materials that supported the Claimant's case as to his involvement and as to the risks which he faced.

34. The Claimant prays in aid the circumstances, extreme in this case, amounting to the risk of death imposing a duty upon the Defendant to satisfy itself it has obtained material evidence. In circumstances of this extremity, says the Claimant, it is wrong to express a view that the evidence was insufficient without oneself having taken reasonable steps to ascertain whether evidence exists.

35. The explanation given by the Defendant in his Statement of Grounds of Defence refers to the Claimant's involvement as:

> "*mainly focused on a WIFI tower project with British forces*" and that "*at its highest*" the Claimant was "*a WIFI engineer…on call 24/7 for any service interruptions*".

36. This, MKA submits, does not accurately reflect the fact he worked for eight years at Camp Qargha, a British Camp, throughout under the supervision of the British Army, and worked for six years at the British Embassy. The Claimant worked on various projects and provided technical support to the camps and Embassy on a daily basis. The WiFi tower project was just one example of the Claimant's work and is specifically referred to because of the Taliban's particular interest in it and questions on it. It absolutely was not the "main focus" of his work.

37. As to the value of his role, it was reflected clearly on certificates of appreciation from the two British officers. His hard work and commitment were described as of "*highest value for the Coalition Forces…*". His supervisor, Captain Craig, highly praised his contribution for over eight years. These materials from Captain Craig are described in the decision as merely "*character evidence*". The Claimant says this ignores the fact that they speak to the value of the Claimant's role, not to his character.

38. All these matters say the Claimant point to errors in reaching the conclusion that his role was not "*meaningful or enabling*" under the policy. Further, the conclusion that the Claimant's role was not "*exposed*", the conclusion that the Claimant's HMG unit had not built a credible case for consideration under ARAP and the conclusion that the Claimant was not at high and imminent risk of threat to life are said to involve errors.

39. The essence of Mr Brown KC's submission on behalf of the Defendant is that there has been no error under any of the categories suggested by the Claimant. It is not the case that aspects of the Claimant's material were not considered: the decision states that all the material was considered. There is no reason to go behind that explanation. Furthermore, it is not accepted that the nature of the Claimant's role came within the policy at all. On the basis of the information available it is impossible to say that the rejection of MKA's case was Wednesbury unreasonable: the conclusions were rational on the evidence before the Panel.

40. He says further that the Panel is an expert panel with considerable specialist knowledge, and they performed an evaluative process in light of all the knowledge and material available to them. The scope of the duties implied by the Claimant's approach to decision-making would make the operation of the ARAP inoperable. The SSD contends that the context necessarily means the obligation to give reasons is much attenuated, and the reasons given were sufficient and defensible in substance.

41. Mr Brown KC submitted that it was not irrational to fail to include the Claimant in the class "*meaningful enabling role*" under Categories 2 or 4 of the Policy, and these were the relevant Categories. He did not accept that Category 1 applied other than to those who were directly employed. The Claimant did not come within the examples given of a meaningful enabling role. These were set out as patrol interpreters, cultural advisors and certain embassy corporate services, development, political and counter-terrorism jobs. He submitted that the evidence put his role as information and networking roles and mainly focussed on a Wi-Fi tower project, "*at its highest*" it was a role as communications engineer.

42. Further it could not be shown he had made a material difference to the delivery of the UK mission in Afghanistan. He set out in his skeleton argument, consistently with the reasons given in the decision itself, that it was open to the Defendant to conclude that because the evidence showed only that MKA was a communications engineer, at its highest, on call for service interruptions, there was insufficient evidence that he came within the definitions under Category 2 or Category 4 of ARAP. Such a conclusion was open to the Panel and could not be described as perverse.

43. The evidence was insufficient to suggest that his role made a material difference to delivery, nor did the evidence support a case that he would be recognised and at risk. The skeleton argument suggests (although the Grounds of Defence, had suggested the opposite) that material concerning the embassy role was before the Panel. The provision of internet and

technical assistance at the British Embassy guesthouse was not properly described as "*a type of embassy corporate service*", nor was it otherwise analogous to a "*meaningful enabling role*". In the same way the Defendant argued that MKA did not work in an exposed role, the Panel was not obliged to accept the views of Captain Craig. Mr Brown KC, (consistently with the review decision) characterised Captain Craig's material as "*character evidence*" albeit in his skeleton argument he described it as "*primarily*" character evidence.

44. Mr Brown, as stated, said that the Court should take at face value the statement "*all the evidence was considered*" – even though it did not articulate, indeed was not obliged to articulate, what evidence it was that it took into account. Furthermore, the reasons that were disclosed were internal reasons, by which I understood him to submit they might not capture entirely the thought process or reasoning of the Panel and were not produced with publication in mind.

45. He says the scheme is, in part, an immigration scheme and the applicant is obliged to produce the materials to support his case. The ARAP route operates alongside immigration policy, it is exceptional and specific, and necessarily involves value judgements by specialist panels whose knowledge is brought to bear alongside the submitted evidence. He agrees that a Panel will adopt an approach of anxious scrutiny given the nature of the decision, but there are general surrounding circumstances that are highly relevant. Further, the scheme has changed from time to time. After the deterioration of the position in Afghanistan he says the policy was liberalised. He accepts that the policy was interpreted more widely than was reflected in the wording. The amendment took place at a later time.

46. Mr Brown KC emphasised the expertise and experience of the Panel gave them a birds eye view of the whole scope of applicants and an awareness of the changing security situation at the time. It was a matter for them how they interpreted "*exposed and meaningful*" and "*enabling*" in which context was everything, and an evaluation was called for.

47. He noted that much of the detailed evidence here had been provided ex post facto.

CONSIDERATION

48. In my judgement the Defendant is correct to characterise the Panel as expert and their role as evaluative. The Court in these circumstances must afford respect to its judgement and its expertise in assessing the materials before it and recognise that collective experience and knowledge will be brought to bear. The Defendant is also correct that the unusual circumstances of the case and the task carried out by the Panel will condition the exercise of its duties, including any giving of reasons for decisions.

49. I have applied the analysis advanced by the Claimant as expressed in: *Wells v Parole Board (supra)*. Paragraph [34], "*[a]n unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion*" is of assistance, and I am clear that the Panel departed from an appropriate standard of public law decision-making. This decision cannot stand and must therefore be reconsidered. In the present case there is a disconnect between the materials produced on the Claimant's behalf to the decision-maker and the reasoning of the review decision. The reasons show material errors were made and the conclusion cannot be safely justified.

50. I accept as submitted by the Defendant that the obligations as to giving of reasons will be conditioned by context. The relevant features of the ARAP are not equivalent to hearing evidence, resulting in a judicial or quasi-judicial decision, it is a discretion-based scheme, and it is necessarily reasonably expedited. Judgements of fact and degree must be made and it may not be possible to give detailed reasons or any developed explanation about why as a matter of judgement a person falls to one side of a policy line rather than another.

51. However, the expedited process and the fact that the scheme was discretionary does not displace a duty of procedural fairness (see *R (Citizens UK) v SSHD* [2018] EWCA Civ 1812 at [86]). It is well established that the question as to whether there has been procedural unfairness is an objective question for the Court not just a review of the reasonableness of the decision maker's view of what fairness requires: see *R (Osborn) v Parole Board* [2014] AC 1115, per Lord Reed [65].

52. I recognise also that there is no universal obligation on public law decision-makers to give reasons for their decisions in all circumstances (*Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300; *R (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1312 at [19] and [21]; *R (Lee-Hirons) v Secretary of State for Justice* [2014] EWCA Civ 553). The context is relevant to determine the scope and the detail of the reasoning and what coherent reasoning would consist in, in a case such as this. The consequences for the Claimant are, on his case extreme, nonetheless this does not in my view require in the particular circumstances of the ARAP scheme, the detailed reasoning of an ordinary immigration decision in this context: nor did the Claimant, realistically, argue for such. It is agreed the duty to give reasons is attenuated. The pressure of time, the volume of applications, and the extreme situations pertaining to certain applicants will all contribute to short, sharp decisions; nonetheless coherent reasoning is in my judgement required even if in short form.

53. The characteristics of the scheme are, to an extent self-explanatory, but were at the relevant time, extremely broadly drawn. These elements are a guide to the nature of the evidence that will be of relevance to an application. I deduce the scheme has (at least) the following central elements (without intending any comprehensive description):

    a. Acknowledging that a visible connection to British forces creates risks to Afghan citizens – recognising those who were most at risk;
    b. such connection took place over a meaningful period of time; and
    c. the reason for connection is the rendering of important, militarily or diplomatically relevant etc assistance to the British presence in Afghanistan.

    These elements, do not suggest that the scheme intended to exclude those whose work offering was of a humbler or non-professional character, although the policy makes clear that it is intended to protect those most at risk. Accordingly, evidence of mission utility, reliance by the British Military over time and risk by reason of association are all of relevance to the picture.

54. The Category 2 description *might*, without more, apply to the role as described by the Claimant in the materials proffered to the Panel, accordingly reasons for rejecting it would be expected, even if extremely brief.

> "*Exposed meaningful enabling roles are roles that made a material difference to the delivery of the UK mission in Afghanistan, without which operations would have been adversely affected, and that exposed locally employed staff to public recognition in performance of their role, leaving them now at risk due to the changing situation in Afghanistan.*"

55. The new material was better evidence of a number of matters of importance under the policy including the central elements described above, particularly the recognition of service and the risk to the individual. It reinforced:

    a. the Claimant's connection with the British forces;
    b. the importance of the Claimant to UK forces generally by reference to his communications work both generally and with the Wi-Fi tower and also the important Embassy connection;
    c. the exposure of his work – his own evidence about risk and the natural deduction from his regular presence at the Embassy;
    d. the span of time 2012 to 2020 at camp Qargha;
    e. his personal relationship particularly with UK personnel which spoke not merely to his character but to his work and its value;
    f. awareness of the local Taliban of him and his work, phone calls and Captain Craig's concerns.

    However, the reasoning suggests the Panel failed to note its true impact – disabling themselves from fair decision-making.

56. The fundamental question here, where reasons have been disclosed is whether those reasons betray a material error. In judging whether a material error is disclosed I again am mindful of the unusual context and the particular pressures on a panel of this nature and, of course, as the Defendant argues, the particular expertise of this Panel. Nonetheless, I have however come to the conclusion that the evidence of the decision's reasoning does betray material errors.

57. Indeed, the reasoning provided by the Panel in the re-consideration leads me to conclude that there are several areas in the decision-making exercise of concern. They are:

    a. the understanding of the decision-makers of the scope and application of their own policy and the then currently applicable criteria;

    b. the treatment of the Claimant's evidence, particularly the new material gathered since the first decision and communicated to the Defendant before taking the decision under challenge;

    c. the likely omission of material parts of the Claimant's evidence from the Panel's consideration in particular that concerning the British Embassy which may have had a significant effect upon the final decision.

58. Turning to each of the areas of concern.

(a) Misunderstanding or misapplying the policy

59. In the present case the Claimant was told initially in July 2021 that he was ineligible because he was not directly employed. Whether or not that reasoning, given in July 2021, was sustainable or not, a reapplication was made in February 2022, and that decision under challenge in these proceedings, must be considered under its own terms. However, I am not sanguine that the Panel did not apply the old criteria when making the new decision, indeed I am persuaded they did.

60. The letter of 18 May 2022 gave no reasoning for the decision, except that the Claimant (as he might have naturally deduced) did not meet the criteria – which criteria were set out.

61. However, the contemporaneous record of decision-making, which is set out above, does contain some reasoning. It reflects the application of a policy by the Panel requiring direct employment in at least two out of the three relevant categories. This was an error under ARAP at the time. Under the column "Upheld/Overturned" under the heading "Recommended Decision" it is noted also that he does not meet Category 1 as he was not directly employed by HMG.

62. I am of the view that the Policy at Category 1 must have operated when amended in May 2021 so as not to require direct employment. This analysis is consistent with the essential change to the IR (effected in December 2021) which removes that requirement from all categories. It is also consistent with logic: this was the highest risk-based urgent relocation category for which the technicality of directly employed status was likely to be less, not more relevant: this class of person was at risk of death by reason of their association. Further, the policy contained in its relevant draft no wording differentiating it from the cohort whose relationship with HMG is characterised under Category 2, admitted to extend to a wider, non-directly employed category.

63. This is illustrated by the wording of the amended IRs which illustrate the change as a general broadening of all categories to include those "*alongside*". Furthermore, Ms Carr for the Defendant deposed in general terms to relaxation of the policy. This interpretation is not inconsistent with her statement.

64. With respect to Category 2 the decision stated he did not meet it "*as was not directly employed* ***or*** *meets the examples of the roles that could be eligible in place at the time*". The criterion regarding direct employment was not applicable (nor now argued to be) as stated but also, the policy explanation for Category 2 (see paragraph 7 above, and paragraph 2.2) makes plain that the examples of eligible roles given are not exhaustive. The Panel's reasoning however shows the decision-maker/s treated the Category 2.2 list as definitive. The "Panel Decision" column in respect of both of these categories was "*not eligible*".

65. With regard to Category 4 the "Recommended Decision" column set out the policy guidance indicating they were concerned with roles that made a material difference to the delivery of the UK mission in Afghanistan, without which operations would have been adversely affected, and that exposed LES to public recognition in performance of their role, leaving them now at risk due to the changing situation in Afghanistan. It indicated MKA should not be rejected purely because no vetted unit had provided information, then said "*there was no evidence the individual meets this criteria, which is quite a high bar*". It recalled that an Army Captain had said he was on call 24/7 for any service interruptions and that he claimed that the Taliban had been looking for those who built the Wi-Fi tower but there was no evidence provided regarding that. In fact MKA had given evidence of his own experience: it is difficult one might think to see how else it might be evidenced. The

Panel in fact had Captain Craig's individualised concerns and the updated position from MKA. It may be the intensity of threat caused doubt to the Panel, but that is not what it said – it said there was no evidence which was not the case. This issue connects to the next, at (b).

(b)Treatment of the evidence from the Claimant

66. The Panel Decision column entry which appeared after the "CAT 4" (not eligible) states the Claimant was "*mainly focused on a Wi-Fi-tower project with British forces*" although recognising IT/networking roles. The column continues with a heading "Evidence" stating that the recommendation letter was character evidence, and did not show the material impact of work. It states that the document shows the contract to develop the Wi-Fi tower was with US Forces and there is no mention of British forces. In my judgement the focus on the Wi-Fi tower, read with the statement that the evidence is merely character evidence and does not show the import of the Claimant's work betrays a failure properly to read or appreciate (one or the other) the available material.

67. This is a material error revealed by the reasoning. The Claimant worked alongside British military and under the supervision of British soldiers, the work described is clearly more intensive than being "*mainly focused on a Wi-Fi tower*" and it is wrong to suggest there was no British involvement, as the Panel's reasoning does: MKA's evidence showed the joint nature of the project. Likewise, the decision appears to confine consideration of risk to the Claimant, solely as to the availability or otherwise of documentation concerning the Wi-Fi tower. As is argued on the Claimant's behalf, necessarily given his travel to and from Camp Qargha, and to and from the British Embassy and his close association with both, he was likely to be at risk. The issue highlighted by the Claimant was a result of Taliban questions that were asked concerning the Wi-Fi tower with which he had a documented connection. In my judgement the catch all phrase concerning the "high bar" is inadequate to suggest this element was properly considered nor is it clear which part of the high bar tripped up MKA.

68. Even if it may be said, that in any event there were other reasons equally valid which might have been given, but were not, I am concerned in a decision of such moment that the Panel has not paid attention to relevant matters that they were required to consider. Reference to the note of contemporaneous reasons does not reassure. It is insufficient in these circumstances to say that a non-perverse refusal decision could result from examining these materials.

69. In particular, the new materials had been gathered in the course of August and September 2021 and from soldiers involved with the Claimant. The characterisation of information from the unit as "*received a letter of support from an Army Captain about his character*" suggests either an omission to look at the later evidence or betrays a material mischaracterisation of its import. The evidence of Captain Craig went not only to the personal reliability of the Claimant, but also to the value of his work and the reliance of the British Military at Camp Qargha upon him. It is true, there were certificates in, perhaps familiar, form attesting to his reliability and trustworthiness, however they also vouchsafed the truth of his assertions as to completing work of real value to HM forces and, given the description of his work, its importance to the Afghanistan campaign. Many contained wording expressing the value of his work. An example from 2018 stated:

> "*In recognition of your valued service and outstanding contribution to the General Command of Police Special Units (GCPSU Special Operations Advisory Group (S0AG) I9 February 2018.*"

70. The first letter from Captain Craig dated October 2020 written as Camp Qargha was closing, was certainly a letter written as a general reference, before the policy in question had evolved. Even that letter which might be thought of (merely) as a character reference included:

> "*I have worked with him in this very austere environment during very difficult times and he has always been there to support the soldiers within this base. He is evidently a very exceptional and competent person …*" etc.

71. The later material, written with regard to the policy by Captain Craig was written when he was asked if he had indeed worked with the Claimant. He said he had, and was happy to answer any further questions. It does not appear that any were asked. The passage is set out above – there is the important sentence in it: "*Since the closure of Camp Qargha I have feared for* [MKA] *and others as they were known by many to work for the coalition forces...*".

(c) Overlooking materials/ignorance of materials

72. The absence of any mention of the work at the British Embassy by the Panel is striking. This evidence indicated that the Claimant was involved in several capacities working for the mission in Afghanistan, and that he had an obvious and public connection with the British mission as well as the British forces. It is instructive that the Grounds of Defence states that this material concerning work over a number of years was not before the decision-makers. If that is so, that is a significant procedural error. I take the view it is very likely the Panel did not consider it – counsel's instructions to draft the Grounds are inconsistent with that and there was no explanation in evidence. This is a material error given the importance of consistent and long term involvement at the Embassy for the escalation of risk and the depth it gives to the Claimant's service to HMG.

73. Each of these issues mean that the decision must be reconsidered, and necessarily, on the basis of the materials that are now before the Defendant.

74. The Claimant put his case also on a *Tameside* basis. I accept, to a degree, there is an obligation to have reference to materials reasonably easily available to the Defendant. But in the current context the *Tameside* duty is not onerous: in the present case there was contact with Captain Craig, albeit he was prepared to offer more if asked. The real vice here, is not failing to ask him for more information, however, but rather misunderstanding the information he offered. With respect to the Embassy, the Defendant appears to have overlooked this material altogether, rather than disbelieved MKA or mischaracterised the evidence. I accept that a list of those employed at the Embassy (who necessarily would have required some security clearance) was likely available, but the real failure was overlooking the fact of the Embassy employment. I also do not accept that the Claimant's position abroad was irrelevant as suggested by the Claimant, however, given its uncertainty, it could never have been of very great significance.

75. I have considered the submission of the Defendant that the materials indicate that any negative decision could not be characterised as Wednesbury unreasonable, and that the

decision should in any event, stand. I have considered also the amendments to section 31 of the Senior Courts Act made by the Criminal Justice and Courts Act 2015, section 84, and what the result might have been, absent the errors. I, under these provisions, am obliged to refuse relief in a judicial review if it is highly likely the result for the Claimant would not have been substantially different.

76. I am unable to accept that this case comes within either approach. The approach advocated by Mr Brown KC is not appropriate because I have detected that the reasons justifying at this Panel's conclusion contain on their face material errors, suggesting misunderstanding and misdirection. I cannot be sure that the result would not have been substantially different given the nature of those errors. Furthermore, in my judgement it would be improperly entering the domain of the decision-maker, who is uniquely expert and informed as I have indicated, were I to draw conclusions about any new decision. It is appropriate for this particular specialist Panel to remain decision-makers and to make a new decision, as set out.

77. Furthermore, in this case I have held that the appropriate policy was misunderstood and misapplied: the content of the reasons again, revealing this error, from which it is plain the "*directly employed*" criterion was applied. In such circumstances it is very possible the Panel did not, in fact, consider properly the underlying factual material, believing as they appeared to, at least in respect of Category 1 and Category 2, that MKA was excluded by reason of not being directly employed. It would be inappropriate to deprive MKA of a decision made on the proper policy basis given the acute circumstances of this and the nature of the errors.

78. Accordingly,

    a. The Claimant succeeds on the challenge that the Defendant misapplied and/or misunderstood his policy by wrongly imposing conditions of direct employment at a time when that was no longer a policy requirement for the ARAP.

    b. The Claimant succeeds on the basis that the decision is not rationally defensible in that the reasons disclose material errors namely the mischaracterisation and/or ignoring of important material evidence as to the scope and importance of MKA's contribution and the risks he was running.

    c. The Claimant does not succeed on the *Tameside* duty as I am not persuaded that the duty is a material factor in this case. Such duty as does exit is, in any event, very attenuated given the circumstances, as the Defendant submitted. The Claimant's case is that the evidence of Captain Craig ought to have been sufficient on its face to be persuasive of the importance of the work and of the risk being as the Claimant claimed them to be. The failure as to the Embassy was in truth overlooking the available evidence, the failure to enquire further did not on this analysis mean the decision-maker was in breach of its duty in this present context.

79. The decision should be reconsidered by the Defendant in light of the policy properly construed and the material which is now available.