Case No: AC-2023-LON-003675

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

Neutral Citation Number: [2024] EWHC 3567 (Admin)

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 10 December 2024

BEFORE:

MR JUSTICE GARNHAM

BETWEEN:

MXR

Applicant

- and -

SECRETARY OF STATE FOR DEFENCE

Respondent

MS M KNORR appeared on behalf of the Applicant
MR R EVANS appeared on behalf of the Respondent
MR A UNDERWOOD KC appeared as Special Advocate

JUDGMENT

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Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

MR JUSTICE GARNHAM:

1. Pursuant to permission granted to him by Chamberlain J in his order dated 24 October 2024, the applicant, MXR, applies to amend his grounds for judicial review of a decision of the Secretary of State for Defence dated 23 September 2024. That was a decision that the applicant was ineligible for relocation pursuant to what is called the Afghan Relocation and Assistance Policy ("ARAP").

2. This is an ex tempore judgment given at the end of a day of argument, in which I heard from Ms Michelle Knorr for the claimant, Mr Richard Evans for the Secretary of State, and briefly, Mr Ashley Underwood KC as special advocate. I am grateful to all counsel for their clear and helpful submissions.

3. It is common ground that the test I have to apply in considering this application, is that which applies on an application for leave to apply for judicial review, namely, is the ground in issue properly arguable? That is the test I apply in what follows.

4. The background to this case is helpfully set out in the competing skeleton arguments and it is not necessary for me to repeat that detail here. The claimant seeks to advance three new grounds of challenge. Ground one is to the effect that the defendant's interpretation of appendix ARAP 13(3)(a) is wrong and inconsistent with the context and purpose of the ARAP scheme, which requires that an applicant be at elevated risk "in Afghanistan" on account of the eligible Afghan citizen's work with United Kingdom forces. Ground two is that the defendant has taken an incorrect approach in the claimant's review decision by only considering the facts at the time of the review, rather than at the time of the initial decision under review. Ground three is that the defendant has failed properly to exercise his discretion on the facts of the Claimant's case, in that the defendant had a discretion to find the applicant eligible where he had fled to safe third countries.

5. The ARAP is set out in an appendix to the Immigration Rules. Paragraph 13(3)(a) of that appendix relates to claims made by additional family members of eligible Afghan citizens. The eligible Afghan citizen here is a man known as QR, who was notified of his eligibility for relocation under ARAP on 17 March 2022. The claimant is an

additional family member of QR. He is in fact his brother. The claimant is currently in the United States, having been granted permission to enter that country on grounds not dissimilar from those on which he now relies in the present proceedings.

6. Paragraph 13(3)(a) provides as follows:

> "The additional family member must meet at least one of the following requirements"

(and I interpolate that only the first is relevant here):

> "(a) as a result of the eligible Afghan citizen's work for or with a UK Government department, the applicant must be at an elevated risk of targeted attacks, specific threats or intimidation; putting them at a high risk of death or serious injury ..."

7. The applicant says it is at least reasonably arguable that the Secretary of State was wrong to construe that paragraph as requiring that that elevated risk must be established in the applicant's current location rather than in Afghanistan. He argues that the ARAP rules are a special scheme focussed on risks arising in Afghanistan and designed to "honour the service of eligible Afghan citizens by providing support that properly reflects their work and the risks involved" by allowing "permanent relocation to the UK" for those eligible. The fact that the scheme is specific to Afghanistan, it is argued, strongly suggests that the present elevated risk is supposed to be in Afghanistan. It is said that the evolution of the relevant rule shows that when introduced in April 2021, eligible principal applicants (so in this case that is QR) and their eligible family members had to be "in Afghanistan". That requirement, however, was removed during the Taliban takeover in August 2021, expressly so that eligible Afghan citizens and their family members did not need to wait in Afghanistan in a situation of risk in order to remain eligible.

8. It is argued that the defendant's construction of paragraph 13(3)(a) imposes a requirement that there is an elevated targeted risk wherever the additional family member flees. Thus, it is said, on the defendant's construction, no additional family member (or "AFM") who was not still being targeted in the place to which they had fled because of their family member's work for the UK forces, could qualify, regardless

of the security of their status in that third country, or whether they were afforded protection. Moreover, it is argued, the ARAP specifies that those in the UK with limited leave or outstanding applications may be eligible under the policy. If the criteria required proof of targeted risk in the AFM's current location rather than in Afghanistan, no person with leave to remain in the UK could qualify.

9. Further, it is said that the ARAP refers to requirements that the family member be at elevated risk "beyond any existing risk levels present in the country". It is said that the country must properly be understood to be a reference to Afghanistan. Similarly, it is pointed out that the guidance applicable to earlier iterations of ARAP, make clear the relevant issue is risk in Afghanistan. The claimant further contends that his interpretation is consistent in part with the decision note in his own case, which addressed the evidence of the elevated risk to him in Afghanistan. Further it is said that that it is consistent with the purposes of the ARAP scheme to treat as eligible an individual such as the claimant, who had already suffered a serious direct attack by the Taliban, has been forced to flee his home, has lost everything and cannot return safely to his own country with his family, because they were all at enhanced risk, on account of QR's work with British forces. .

10. I reject that argument. In my judgment, the wording of the rule is perfectly clear and straightforward. As a result of his work in Afghanistan for the British forces, the applicant "must be" at an elevated risk. The use of the imperative "must" and the present tense "be", make it clear beyond argument that the requirement relates to the applicant's present status, not some earlier status.

11. The proper approach to the construction of an immigration rule was set out by the Supreme Court in *Mahad v Entry Clearance Officer* [2009] UKSC 16. Immigration rules are to be construed sensibly, according to their natural and ordinary meaning. The expression "the applicant must be at a relevant risk" can only sensibly be interpreted as meaning that he must at present be at such risk. Lord Brown in *Mahad*, went on to explain that reference to Government policy was not a legitimate aid to construction when the words used are clear. References to previous iterations of the relevant rules and previous guidance also do not assist.

12. Furthermore, I accept Mr Evans's submission that, properly construed, the rule does not necessarily require a family member still to be targeted if they are in a third country. The assessment of risk can properly include an assessment of whether there is a risk of deportation from a third country to Afghanistan. Here, however, the applicant is now in the US and there is no evidence of any risk of deportation or removal from the United States to Afghanistan. As to the numerous other points advanced by Ms Knorr, I accept Mr Evans's submissions in reply. My essential conclusion is that the words of the rule mean what they say and the alternative is not properly arguable.

13. By ground two, the applicant seeks to argue that the Secretary of State erred in considering the application for a review on the basis of the facts at the time of the review, rather than at the time when the applicant was in Afghanistan. Again, I see no arguable claim there. Ms Knorr submits that the Secretary of State should have conducted the review on the facts as they were, not at the time of the review, but as they were at the time when the application was made. In my judgment, that would be an entirely artificial approach. There is nothing in the rules themselves or any applicable guidance to support such an approach. It would, in my view, simply be unreal for the Secretary of State to disregard the fact that the applicant is now in a safe country, free of any threat to his safety, in determining an application which has as at least one of its main objectives securing an applicant's safety. In my view, the whole thrust of the ARAP scheme is directed towards AFMs who are at elevated risks as a result of the principal's work with the United Kingdom. I accept Mr Evans's submission that to require the decision maker to undertake a review ignoring the applicant's current circumstances would be absurd.

14. As to the third ground, Ms Knorr says that, regardless of the outcome of grounds one and two, in the claimant's particular circumstances, it is arguable that the claimant should be accepted as eligible, despite his having fled to a safe third country, and that the defendant has acted unlawfully in failing to consider the exercise of discretion in his case and/or in failing to take relevant matters into account in considering the exercise of that discretion and/or in failing to exercise discretion in the claimant's favour, because on his facts there is only one way that decision could reasonably be exercised.

15. In my judgment that argument, too, is without merit. ARAP is an ex-gratia scheme, available to those who meet its particular requirements. The applicant does not meet those requirements. The request for the exercise of discretion is based on precisely the same, or very much the same, submissions as I have just rejected in deciding that he does not come within the scheme. In *R (S and AZ) v Secretary of State for the Home Department and Secretary of State for Defence* [2022] EWCA Civ 1092, Underhill LJ said the following at paragraphs 25 to 26:

> "25. This basis for the Judge's decision essentially accepted the Claimants' position that their submission of ARAP application forms constituted the use of a "form most closely matching their circumstances" in accordance with the Guidance. I should say at the start that I do not believe that the ARAP application form was such a form. In my view it is clear that the reference in the Guidance is to one of the online VAFs to which hyperlinks are (at one remove) provided: see para. 13 above. The ARAP form is not one of those forms: indeed it is not a VAF at all – see para. 17 (1) above. On this basis, as Ms Giovannetti submitted, the paragraph in version 2 of the Guidance simply makes more explicit what was already the effect of version 1.
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> 26. That is in my view formally a complete answer to the Claimants' case on this point, but I should say that I do not regard it as a purely formal matter. The entire ARAP relocation procedure is *sui generis* and is quite inapt for the determination of the issues raised by a LOTR application. The assessment performed by MoD staff following receipt of an ARAP form is directed solely to the applicant's eligibility under ARAP itself. They could not determine the issues which are the basis of the LOTR application. Thus the use of the ARAP procedure as a gateway to the issue of an ARAP VAF would achieve nothing except complication and confusion. Once the form was submitted the Secretary of State would still have to determine the substance of the application (which the ARAP VAF does not address at all, because in a true ARAP case the eligibility decision has already been made)." (Original emphasis)

16. Similar analysis applies here and this ground is not properly arguable. It was, and is, open to the applicant to apply for leave outside the rules but that is not what he has done here when he applied under ARAP.

17. All that I have just set out in respect of the issue of discretion turns on arguments I heard in open, and without reference to any closed material. However, in the short,

closed session I conducted at the end of the open hearing, a point was raised based on some closed material. Up until then, the Secretary of State had eschewed reliance on any closed material. Because the point was raised by the Secretary of State in closed, I sought and obtained the special advocate's submissions on the point. In the light of those submissions and the Secretary of State's submissions in response, I am satisfied that no other individual was the beneficiary of the exercise of the sort of discretion contended for by the claimant, nor of any other matter that might assist the claimant's case.

18. For those reasons, this application for leave to amend the claim form is refused.

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Lower Ground, 46 Chancery Lane, London WC2A 1JE
Email: civil@epiqglobal.co.uk