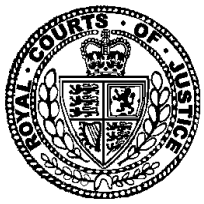

Neutral Citation Number: [2024] EWHC 410 (Admin)

Case No: AC-2023-LON-002091

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE KING ON THE APPLICATION OF MP1	**Claimant**
- and -	
SECRETARY OF STATE FOR DEFENCE	**Defendant**
-and-	
MP2-MP5	**Interested Parties**

- -
- -

Duran Seddon KC and Ali Bandegani (instructed by **Wilson Solicitors LLP**) for the **Claimant**
Edward Brown KC and Luke Tattersall (instructed by **GLD**) for the **Defendant**
The Interested Parties did not appear and were not represented

Hearing date: **16 November 2023**

- -

Approved Judgment

This judgment was handed down remotely at 14:00 on 4 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Julian Knowles:

Introduction

1. The Claimant, MP1, is a lawyer and former Afghan judge. The Interested Parties are his wife and children. They are all Afghan nationals. An order has been made preventing their identification. The reasons for that will become obvious. I have endeavoured in this judgment to give sufficient detail to allow it to be comprehensible, whilst at the same time protecting the Claimant and his family's anonymity. I am satisfied on all of the evidence, some of which I will describe, that they are at real risk from the Taliban in Afghanistan.

2. The Claimant challenges the Defendant's decision dated 4 May 2023, taken by the Defence Afghan Relocation and Resettlement Review Panel (hereafter 'the Second Review Panel'), that he and his family are not eligible for relocation to the UK under the Afghan Relocations and Assistance Policy (ARAP).

3. The Claimant's application was first refused on 30 March 2022. This decision was then reviewed twice, leading to the final decision on 4 May 2023 – hence the *Second* Review Panel.

4. Had the Claimant been found to qualify under the ARAP then he and his family would have been entitled to apply for entry clearance to the UK under the Immigration Rules (the Rules).

5. The principal issues arising on this claim are whether the Second Review Panel in the following respects:

    a. Ground 1: that it failed (a) to consider relevant evidence before it; and (b) to provide sufficient reasons for its decision in the light of the evidence; and so (c) rendered a decision that was unreasonable and irrational.

    b. Ground 2: that it mis-construed and applied an unlawfully narrow approach to the ARAP.

6. In this judgment: 'CB' is Core Bundle'; 'SB' is Supplementary Bundle; 'SFG' is the Claimant's 'Statement of Facts and Grounds; 'SGD' is the Defendant's Summary Grounds of Defence; and 'DGD' is his Detailed Grounds of Defence.

The Afghan Relocations and Assistance Policy (ARAP)

7. The background to the ARAP was set out by Hill J in *R (JZ) v Secretary of State for the Home Department* [2022] EWHC 2156 (Admin), [7]-[9].

8. ARAP was launched on 1 April 2021 and remains in force. It has been revised several times. The version I am concerned with is that which was in force on 30 March 2022, when the initial decision was taken to refuse the Claimant's application. It is and was contained in Appendix ARAP to the Rules.

9. When the Taliban regained power in Afghanistan in August 2021, the UK Government (HMG) evacuated British nationals and certain groups of Afghans, and brought them to the UK under Operation Pitting. During that operation, there was an identified need to assist others at risk, and an additional cohort of Afghans were granted leave to remain outside the Rules (LOTR).

10. The Introduction to the ARAP states:

> "*Introduction*
>
> *Background*
>
> In recognition of the commitment and bravery shown by local staff who supported the UK in Afghanistan, the UK government introduced 2 schemes: the 'Intimidation Policy' introduced in 2010 and the ex-gratia scheme (EGS) introduced in 2013. These policies were designed to support those who worked with or alongside British Forces in Afghanistan, often in dangerous and challenging situations, offering relocation to those at risk as a result of their work.
>
> The intimidation policy closed in 2021, and the EGS closes on 30 November 2022, at which point the Afghan Relocations and Assistance Policy (ARAP) will be the sole route to relocation in the UK for Afghans who worked with or with the UK government in Afghanistan.
>
> The ARAP scheme was implemented on 1 April 2021 under the Immigration Rules …
>
> *Policy intention*
>
> The policy intention is to:
>
> • honour the service of eligible Afghan citizens by providing support that properly reflects their work and the risks involved
>
> • ensure that eligible Afghan citizens, their partner, dependent children and eligible additional family members, who relocate to the UK, can do so permanently to build their lives and their future in the UK."

11. An application by an Afghan under the ARAP goes to the Ministry of Defence (MoD). An eligibility decision is made by the Defence Afghan Relocations and Resettlement team (DARR), following a referral to the relevant UK government department where that is necessary. Other government departments can be consulted where necessary as part of the process to

determine whether they would be willing to support or 'sponsor' the application.

12. Those who are assessed to be ineligible under the ARAP have the right to seek a review of their decision if one or both of the following conditions are met: (a) they believe the decision was not made in accordance with the ARAP; (b) they can supply new evidence to support their case that was not available when the decision was made. Applicants have, in general, one right of review of the initial decision.

13. The applicable version of ARAP in the Rules (ie, the version in force on the date of the initial decision rejecting the Claimant's application, 30 March 2022) identified four categories of persons (or cohorts) eligible for assistance. Those in Categories 1, 2 and 4 were eligible for relocation. Those in Category 3 were eligible for other support, and that category is not relevant to this claim.

14. The persons in Categories 1, 2 and 4 were defined in [276BB3], [276BB4] and [276BB5] of the Rules respectively as follows.

15. Category 1:

> "(i) the person was at any time on or after 1 October 2001 directly employed in Afghanistan by a UK government department; and
>
> (ii) because of that employment, there is a high and imminent risk of a threat to the person's life."

16. Category 2:

> "(i) 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 linguistic services to or for the benefit of members of the UK armed forces in Afghanistan under contract to UK government department (whether as, or on behalf of, a party to the contract); and
>
> (ii) the nature of the role in which the person was employed was such that the UK's operations in Afghanistan would have been materially less efficient or materially less successful if a role or roles of that nature had not been performed; and
>
> (iii) the nature of the role exposed the person to being publicly recognised as having performed that role; and

(iv) as a result of that public recognition, the person's safety is at risk."

17. The Claimant has never claimed to be within Categories 1 or 2.

18. Category 4 is the one relevant in his case. It provides (or provided at the relevant time) (my emphasis):

> "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"

19. Although he first applied under ARAP when it was in a different form, the Claimant ultimately sought assistance by way of re-location for him and his family pursuant to Category 4.

20. In broad terms, he relied on his service in Afghanistan as a criminal defence lawyer working for an NGO from 2008, and then as a judge in Helmand Province from 2015 until 2021. As a judge he presided over a range of cases including terrorism and narcotics cases.

Procedural history

21. On 22 August 2021, during Operation Pitting, the Claimant emailed the UK authorities seeking urgent assistance. He received an automated response asking him to submit an ARAP form, which he did that day. He did not receive a reply, and was not evacuated.

22. On 1 and 23 November 2021 respectively, the Claimant (who was now represented) submitted a further ARAP form. He made detailed representations and supplied a significant quantity of supporting evidence, asserting that he qualified under the ARAP policy as it then was. (From my reading of that early version of the ARAP, it was a requirement that the applicant had been directly employed by HMG, and so the Claimant might not have qualified, as he had never been so employed).

23. He also applied under the Afghan Citizens Resettlement Scheme (ACRS), a scheme for resettling Afghans who assisted the UK's efforts in Afghanistan and stood up for values such as democracy, women's rights, freedom of speech, and the rule of law. He also applied for LOTR. Later, further evidence was submitted.

24. In the meantime, the ARAP was amended so that it read as set out above. Among other things, it removed the requirement for direct employment.

25. On 30 March 2022, the DARR refused the Claimant's ARAP application. The decision was a *pro forma* document and did not contain any individualised assessment of his representations or evidence.

26. Firstly, it recited the criteria for Categories 1 and 2 and said that the Claimant had not met them, eg, by being employed by a UK Government department in Afghanistan. Then, in relation to Category 4, the form stated simply, 'from the information provided you do not meet the following criteria …' and then recited the wording of condition 1:

> "5. Your eligibility against Category 4 of the ARAP has also been assessed. This involves making checks with relevant HMG Department(s) or unit(s). From the information provided you do not meet the following criteria:
>
> …
>
> You were directly employed in Afghanistan by the UK government, or provided goods or services under contract

> to the UK government, or worked in Afghanistan alongside a UK government department, in partnership with or closely supporting it."

27. There was no consideration of the remaining conditions in Category 4.

28. The Claimant sought a review of this decision. It was common ground that such a review is a full merits review.

29. On 6 October 2022, a Review Panel upheld the decision. The material part of the Review decision merely stated, 'from the information you have provided you have been found ineligible for Category 4 of the ARAP because we have assessed that you do not meet the following criteria', and then recited the wording of condition 1. Again, there was no consideration of the remaining conditions. The Review decision also said the Claimant was not in Category 1 or 2, even though these had not been relied upon.

30. The letter also said:

> "As a result of the panel upholding the original decision, this concludes your one right of review.
>
> There will be no further reviews of this application based on the evidence you have provided to date. Only in exceptional circumstances with compelling new evidence being provided may your case be reassessed."

31. The Claimant then began the pre-action judicial review protocol. He argued that the Review Panel's decision was unlawful by reason of: inadequate reasons; irrationality; failure to consider evidence; and fairness.

32. On 6 March 2023, Ritchie J granted permission on all grounds. Among other things, he said:

> "Protecting the UK and US armed forces in the fight against the Taliban is arguably 'working alongside' the\ UK Government in my judgment."

33. On 29 March 2023, the Defendant withdrew the Review decision, and the claim was settled with costs. As part of the terms of settlement, the Defendant undertook to carry out a fresh review.

34. The Second Review was then carried out.

The decision under challenge in these proceedings (the Second Review Decision)

35. On 4 May 2023, the Second Review Panel again upheld the DARR decision of 30 March 2022. Once again, it was a *pro forma* letter which did not engage with the Claimant's case in any substantive fashion.

36. The operative parts of the Second Review Decision were as follows:

"From the information you have provided you have been found not eligible for Category 1 of the ARAP because we have assessed you do not meet the following criteria:

…

You were directly employed in Afghanistan by a UK government department.

…

From the information you have provided you have been found not eligible for Category 2 of the ARAP because we have assessed you do not meet the following criteria:

…

You were directly employed in Afghanistan by a UK government department or provided linguistic services to or for the benefit of members of the UK's armed forces in Afghanistan under contract to a UK government department.

…

From the information you have provided you have been found not eligible for Category 4 of the ARAP because we have assessed you do not meet the following criteria:

…

On or after 1 October 2001 you were directly employed in Afghanistan by a UK government department; provided goods or services in Afghanistan under contract to a UK government department; or worked in Afghanistan alongside a UK government department, in partnership with or closely supporting that department.

…

Subsequently, we regret to inform you that the DARR Review Panel has upheld the not eligible decision made on 30/03/2022.

…

As a result of the panel upholding the original decision, this concludes your one right of review.

> There will be no further reviews of this application based on the evidence you have provided to date. Only in exceptional circumstances with compelling new evidence being provided may your case be reassessed."

37. It should be noted, therefore, that the Second Review Decision *only* referred to the Claimant not satisfying condition 1 in Category 4. That will become relevant for reasons I will explain later.

38. The Claimant again commenced the pre-action judicial review protocol.

39. In response to his letter before claim, on 2 June 2023 the Defendant disclosed notes relating to the Second Review Panel's consideration of his case. These were in two parts, as follows.

40. The first part were a caseworker's notes on the Claimant's file, which concluded with an 'advisory assessment' which was said to be not binding on the Panel. This recommended that his application be refused on the ground that condition 1 in Category 4 was not satisfied.

41. The caseworker then went on to conclude in very brief and perfunctory terms (*obiter* fashion) their conclusion that if it had been necessary to consider conditions 2-4 in Category 4, they would have concluded that the Claimant did not satisfy them either.

42. The second part of the notes was headed 'Panel Decision Notes'. These related to the Panel meeting at which it reached its decision. They were compiled by a caseworker, who acted as secretary to the Panel during its meeting**.** They are not a verbatim record of the meeting, and are comparatively brief. They were compiled by the caseworker after the meeting from his or her own contemporaneous notes, and their memory of what was said.

43. I will return to the Panel Decision Notes later in this judgment.

44. On 7 July 2023, the Claimant issued a second judicial review claim. Expedition and anonymity were ordered.

45. On 17 July 2023, the Defendant filed an Acknowledgement of Service and Summary Grounds of Defence, to which the Claimant replied on 20 July 2023.

46. On 21 July 2023, Johnson J granted permission.

47. On 29 August 2023, the Defendant filed his DGD and a witness statement from Clementine Kalunga, an Assistant Head of DARR Reviews in the MoD, who acted as the Second Review Panel's Chairperson. At the time of her statement she had worked for the MoD for a total of seven months. Again, I will return to her statement later.

The evidence relied on by the Claimant

48. Evidence about HMG's work and objectives in Afghanistan from 2001 was adduced by the Claimant before the Second Review Panel. In particular, there was a lengthy expert

report from Tim Foxley MBE dated 2 June 2022. He described his experience in [1] as follows:

> "I have been requested by Wilson Solicitors LLP to provide an expert report in relation to the case of [MP1]. I worked for the British Ministry of Defence (MOD) from 1987 to 2014, including as an intelligence analyst from 1992 to 2012. I have been studying Afghanistan since 2001. In 2005, I was awarded the MBE for my analytical work on Afghanistan while at the MOD. I have some experience of government crisis work while at the MOD, related to the Balkans, Kosovo and Afghanistan. I served two operational tours of duty in Bosnia in the 1990s and two in Afghanistan in 2006 and 2011. I currently run my own political/military research and analysis consultancy based in Sweden, focusing on Afghanistan. I am a Research Fellow with the European Foundation for South Asian Studies (EFSAS). I have been providing expert opinion on an individual basis for legal firms representing Afghan asylum-seekers for over ten years."

49. Annex A to his report stated:

> "I have been researching and analysing the political and military situation facing Afghanistan, the surrounding region and insurgency/terrorism themes since 2001: within the UK MOD from 2001 – 2012 and with the Stockholm International Peace Research Institute from 2006 - 2010. I have undertaken several field trips and operational tours to Afghanistan since 2002. In 2006 and 2011 I was based in Kabul for several months as an analyst within the ISAF headquarters in Kabul, where I regularly briefed senior political and military officials, including the British Ambassador and the commander of ISAF."

50. Given Mr Foxley's lengthy service with the MoD and his obvious expertise, Ms Kalunga's scepticism about him was surprising ('… Mr Foxley was discussed in terms of his self-regard as an 'expert''; witness statement, [54]). The quotation marks around the word 'expert' are Ms Kalunga's. For the avoidance of doubt, Mr Foxley was and is extremely well-qualified to give expert evidence and I approach his evidence on that basis and accept it in full.

51. The Claimant also relied on evidence in the form of a report, *Building the Rule of Law in Helmand*, by Naina Patel, Director of Training and Education, Bingham Centre for the Rule of Law, and a practising barrister, who was the Senior Justice Advisor to the UK-led Helmand Provincial Reconstruction Team (HPRT, or PRT).

52. The HPRT worked to deliver a provincial stabilisation and development plan that had been agreed between the Government of Afghanistan and international partners

following the invasion of Afghanistan by US-led forces in October 2001. Again, I accept Ms Patel's expertise and the evidence in her Report without question.

53. There was also evidence from the Claimant in the form of witness statements and supporting material.

54. None of the Claimant's evidence was challenged or contradicted by the Defendant in the Review process.

55. I can summarise the Claimant's evidence as follows (which has been adapted from the Claimant's Skeleton Argument).

Core objectives of HMG's mission in Afghanistan

56. The core purpose of the British mission between 2001 and 2021 was bringing security and stability to Afghanistan by combatting the Taliban and assisting in the 'construction of a capable and self-sustaining Afghan government system' (Foxley, [61]).

57. A 'crucial element' of this process was 'to re-build the Afghan justice sector' (Foxley, [61]). Mr Foxley said at [62] of his statement:

> "A credible, functioning Afghan judiciary was crucial to stabilising the security situation in Afghanistan and the region. The success of the Afghan judiciary contributed directly to the UK mission in Afghanistan."

National security objectives: counter-terrorism

58. In her Report at [24] under the heading 'The Counterinsurgency Context' Ms Patel said:

> "Working on the rule of law in Afghanistan, challenging already, becomes all the more challenging when attempted in the midst of a counterinsurgency. The ultimate objective of NATO's International Security Assistance Force (ISAF) was to prevent Afghanistan from being used as a base by international terrorists. For HPRT, this meant eliminating the Taliban, and with them, their system of governance, justice and security. The HPRT's method was based on demonstrating that the Afghan state can deliver higher quality, fairer, more efficient and more accessible state services than the Taliban. Justice was a key battleground, as it was in this area that the reputation of the state had historically been weak and that of the Taliban strong. Taliban justice may be severe, but it was also seen by many to be swift and effective - perhaps by reason of its severity."

Counter-narcotics and anti-corruption

59. Helmand had a 'weak economy characterised by extensive opium cultivation and little else' – about 60% of the world's supply is from Helmand (Patel, [25]). Warlords and corrupt government officials benefitted from the narcotics trade (Foxley, [37]).

Judicial corruption

60. Judicial credibility as a result of corruption/lack of independence (eg, caused by interference from local executive authorities and telephone justice) challenged the establishment of the rule of law specifically in Lashkar Gah (Lashkar – the capital of Helmand). Absence of qualified, trained judges would have undermined progress. The HPRT put an emphasis on anti-corruption work (Patel, [23], [40]-[41]; Foxley, [16], [23-25], [37].)

61. Mr Foxley said at [37]-[39] of his witness statement in response to a question posed by the Claimant's solicitors:

> "*In your opinion and experience, would the absence of national Afghan judges/other members of the justice system (such as our Client) and their work presiding over the full spectrum of cases in domestic courts and specialist justice centres in particular those cases relating to public/national security and terrorism, have adversely affected the UK's operations in Afghanistan? If so, how?*
>
> 37. The work of Afghan judges – particularly those who worked on terrorism, counter-narcotics and security matters – was difficult and very dangerous because the Taliban and other insurgent groups were hostile to the prosecution of their fighters and also opposed to the justice system being established. Other groups, such as warlords and corrupt government officials, were also benefiting from the narcotics trade and other criminal activities. Judges were targeted by the Taliban for assassination, as your client relates from his own experience. At the time, the Afghan justice system was still very flawed and there was much corruption. The absence of qualified, trained judges would have entirely undermined rule of law.
>
> 38. Without a functioning justice system able to address an insurgency and violent criminals, Afghanistan's security situation would have deteriorated further and quicker. Confidence in governance would have evaporated. Local groups – Taliban, Islamic State and warlords – would have filled the justice 'vacuum'. International forces would not have been capable of running a justice system without the credible involvement of a legitimate Afghan government and would have increasingly been viewed as an occupying force if they had tried. The UK's presence in Afghanistan would have

> been untenable and the mission – stabilising Afghanistan and rebuilding the government structures - would have failed. The risk to the UK mainland from terrorism, narco-trafficking and illegal migration would have increased.
>
> 39. As I have noted earlier and reiterate here, the work of the Afghan justice system was acknowledged by the British government as vital to protecting the UK's mission and operations in Afghanistan and the security of mainland UK (my highlights are in bold for emphasis):
>
> > 'Since 2001, the UK has provided significant support to the people of Afghanistan; **this has in turn helped to protect the UK … The Afghan government has the capability to lawfully investigate and prosecute terrorism, organised crime and corruption**. These gains have been achieved through a decade of multinational investment and are designed to operate alongside wider initiatives to address economic reform, poverty and agriculture. **A loss of these capabilities would be irreversible and undermine any UK or international efforts to strengthen the Afghan state**.'"

62. The success of the Afghan judiciary 'mitigated the risks of terrorism, narco-trafficking and illegal migration in mainland Britain' (Foxley, [62]).

The objectives and work of HMG in Afghanistan

63. The five 'pillars' for stabilisation and state-building developed by the international community in 2001 after the defeat of the Taliban were: (a) security/military reform; (b) police reform; (c) judicial reform; (d) disarmament; (e) counter-narcotics (a UK focus). Italy's focus was judicial reform, but its approach failed and others, including the UK, stepped in (Foxley, 17- 18).

64. The rule of law was among the priorities for HMG and was vital to protecting the UK's mission and operations in Afghanistan. The support provided from 2001 has 'in turn helped to protect the UK … the Afghan government has the capability lawfully to investigate and prosecute terrorism, organised crime and corruption. These gains have been achieved through a decade of multinational investment … A loss of these capabilities would be irreversible and undermine any UK or international efforts to strengthen the Afghan state … The UK has worked with the Afghan authorities to strengthen institutions for governance, rule of law and human rights' (Foxley, [29-31], [39]), including citing the UK Government report to HL Select Committee, March 2021).

65. According to the then Foreign Secretary in 2013 (William Hague MP), the HPRT was a UK-led, multi-national effort working with the International Security Assistance Force

(a multinational military mission in Afghanistan from 2001 to 2014 established by UN Security Council Resolution 1386 to help (Foxley, [42]):

> "…the Afghan Government establish improved governance and development across Helmand … HMG funded programmes have improved governance and economic conditions … the PRT has been working with Afghan and international partners to transition our work on\ rule of law, governance and development to Afghan control."

Justice as part of HMG's objectives and the work of the HPRT

66. Through decades of internal armed conflict occupation and insurgency, Afghanistan's justice system had been 'largely destroyed', ie, as to infrastructure, documents, and loss of personnel (Foxley, [16]).

67. Ms Patel's paper examined the exceptional challenges of establishing the rule of law in Afghanistan and particularly Helmand given the existence of three systems of law, namely: (a) the state system; (b) the customary system; and (c) the Taliban system, with the latter based on a particular interpretation of Sharia Law which is founded on ancient religious texts, which include punishments that conflict with international law (Patel, [8]-[21]). Other challenges were counterinsurgency, at the centre of which was Helmand (Patel, [25]), and the extremely low literacy and education levels (Patel, [26]).

The system of justice is central to Taliban ideology, influence and control

68. The Taliban were hostile to the prosecution of their fighters and opposed to the justice system being established (Foxley, [37]). From 2001-2021, the Taliban operated its legal system as a 'shadow' justice system in competition with the state system (Patel, [21]; Foxley, [25]). According to the Home Office Country Policy and Information Note *Afghanistan: Fear of the Taliban* (October 2021), [4.6.4], punishments enforced by the Taliban parallel system included 'execution, mutilation and stoning to death'. Without a functioning justice system able to address an insurgency and violent criminals, Afghanistan's security system would have deteriorated further and quicker; confidence in governance would have evaporated and the Taliban would have filled the justice 'vacuum' (Foxley, [38]).

The HPRT's methods and work

69. This was based on demonstrating that the Afghan state could deliver higher quality, fairer, more efficient and more accessible state services than had the Taliban (Patel, [24]).

70. Delivery of these services 'needed to win the battle for hearts and minds' and required 'significant investment in civilian expertise' of which *inter alia* legal specialists were 'crucial'. The HPRT, protected within 'the walls of the UK-led Main Operating Base in Lashkar', including specialists in security, justice and counter-narcotics, was a

response to the absence, in an active conflict, of the typical spread of international agencies and NGOs that would normally develop this expertise (Patel, [27], [36]).

71. The justice advisors in the HPRT rule of law team, led by Ms Patel, 'sought to strengthen both the statutory and community-based systems of justice as well as the links between them, with the endgame of edging the Taliban system of justice out of the picture' (Patel, [29]) (emphasis added); albeit in June 2010, the state system was 'sparse' in Helmand (Patel, [30]).

72. The aspects of the system which were 'deemed essential to a successful transition' included 'the ability of the criminal justice system to process crimes against the state (clearly critical to the security of the Afghan nation)' and 'the ability of the civil justice system to resolve disputes over land' (Patel, [32]).

73. The HPRT engaged in a range of interventions including: funding and encouraging criminal defence; lobbying for the deployment of more judges and defence lawyers to Helmand; providing legal training; trial observation and monitoring; helping to publicise the legal system; addressing infrastructure needs: a new Appeal Court was built in Lashkar (subsequently attacked by the Taliban); and designing justice infrastructure for certain Districts (Patel, [33[-[35], [49], [57], [60]).

74. The security situation meant that Ms Patel's team could not leave the UK base without protection and then only for 'short bursts'. New judges and prosecutors were delivered to new Districts by British or US military helicopters (Patel, [36]-[37]).

75. Further, the FCO states that it 'funded Helmand's only 'publicly funded' lawyers to provide criminal defence representation' (Foxley, [35]).

76. Despite all these challenges, 'significant progress' was made (Patel, [38]).

77. Mr Foxley stated at [61]:

> "The British mission in Afghanistan between 2001 and 2021 varied according to a range of security challenges but at its core was designed to bring security and stability to Afghanistan by combating the Taliban and assisting with the construction of a capable and self-sustaining Afghan government system. A crucial element of this process was to rebuild the Afghan justice sector. The UK was strongly involved in reforming the Afghan judiciary, with advice, mentoring, construction and funding of its own projects but also in support of other nation's projects."

Which UK Departments were involved ?

78. From 2001-2021, the main HMG departments (among others) involved, with a 'lot of overlap and inter-departmental collaboration', were: the Ministry of Defence, which was engaged on counter-terrorism; the FCO and DFID (which merged in 2020), which were engaged on developmental aspects including 'governance, rule of law, justice, democracy, women's rights, aid and reconstruction' (Foxley, [33]).

79. Several HMG departments were 'closely involved' with the HPRT including the MoD, the FCO, Department for International Development (DFID) and the Stabilisation Unit. The HPRT was headed by senior HMG civilian officials from those departments (Foxley, [42]).

Risk to judges and legal professionals

80. Severe concerns about the risks faced by those serving as judges under the pre-August 2021 administration (and others) have been raised by a number of bodies and organisations. Mr Foxley dealt with some of the evidence at [4], [13], [26], [45], [46], [50], [54], [63] and [64]. He said that the Claimant is at risk from the Taliban and non-Taliban persons whom he has convicted or imprisoned and that he and his wife potentially fit a number of vulnerability categories, Mr Foxley also said that 'many' legal professionals have been assassinated.

81. Among others who have expressed similar concerns about former Afghan judges are Baroness Hale; the Bar Council; the Law Society; the International Bar Association; various national and international associations of judges; the Home Office; the UNHCR; Amnesty International; and Human Rights Watch.

82. The detail and references are set out in the Claimant's Skeleton Argument at [75]-[77]. That former Afghan judges are now at considerable risk cannot seriously be doubted. In *R (S) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2022] EWHC 1402 (Admin), [27]-32], in which Mr Foxley also gave expert evidence, Lang J said:

> "27. There is credible evidence of the continued threat posed by the Taliban towards those perceived as associated with the previous government and its institutions, including judges. The Taliban also perceive women in the public sphere, such as female judges, as transgressing Taliban cultural and religious mores.
>
> 28. This threat was identified by the United Nations High Commissioner for Refugees ("UNCHR") in August 2021 ("Position on Return to Afghanistan") and confirmed in the detailed 'Country Policy and Information Note Afghanistan: Fear of the Taliban' published by the Home Office in October 2021 (see paragraphs 2.4.7, 2.4.8, 5.1.1, 5.2.4, 5.2.5) and April 2022 (see paragraphs 2.4.4, 2.4.9, 2.5.1, 5.7.4, 6.5.3, and section 6.9).
>
> 29. The April 2022 Note states, at paragraph 6.5.3:
>
> > 'Former female Afghan lawyers and judges claim that ex-prisoners, freed by the Taliban, have been searching for them to take revenge for their convictions and imprisonment. The women have been unable to return to work following the Taliban

takeover and now live in fear of reprisals from both the Taliban and convicted criminals, some saying they received death threats on a daily basis.'

30. In a section on lawyers, judges and human rights defenders, the April 2022 Note reports as follows:

"6.9.2 In its 'Afghanistan: Country Focus', dated January 2022 and based on a range of sources covering events between 15 August and 8 December 2021, the European Asylum Support Office (EASO) noted:

'IAJ [International Association of Judges] and IAWJ [International Association of Women Judges] published a joint statement in which judges were stated to be in "very grave danger", and stressed that revenge killings might occur, and that judges had been subjected to house-searches, threatening messages and physical harassment, and had their bank accounts suspended. Also, family, friends and neighbours were said to have been pressed to reveal judges' whereabouts. A similar account was published by Business Insider quoting a former judge, who claimed that "Taliban fighters went into his house looking for him and searched the homes of his families, friends, and colleagues." Another former judge in hiding told Business Insider that some Taliban fighters were pursuing 'personal vendettas' against judges, and could not be controlled by the Taliban leadership'."

6.9.3 On 25 December 2021, Sky News reported:

'More than 100 female Afghan judges and their families have been rescued by a team of pro-bono lawyers in the UK following the Taliban takeover. 'The women held senior roles in the Afghanistan judiciary and were vital in upholding the equal rights of women and girls. They were judges and prosecutors in the courts of domestic violence, rape cases, forced and child marriages and in cases involving the trafficking of women.'

6.9.4 The same source noted that Baroness Helena Kennedy, an expert in human rights law who arranged the rescue, said 'The women who were

> contacting me were terrified for their lives, they were hiding with their families, with their children in basements. They had moved out of their houses and gone to stay with relatives and they were getting these threats on their phones, and through relatives they would be receiving threats…'."

31. The 100 or so female Afghan judges referred to above were evacuated from Afghanistan to Greece, from where they were assisted to re-settle in countries including the UK, the USA, Germany, Iceland, Ireland, and Australia. The Defendants estimated that a small number came to the UK, and they were all or mainly among the group who had been identified during Operation Pitting, but had not been successfully evacuated.

32. Mr Foxley summarises, at paragraph 69 of his witness statement, the potential risk of Afghan judges being targeted by the Taliban where one or more of the following factors are present:

> "a. co-operated with HMG [Her Majesty's Government];
>
> b. was involved in highly sensitive cases of particular UK interest (including national security, terrorist, corruption, narcotics, criminal cases);
>
> c. presided over trials of members of the Taliban/ISIL/Al Qaeda/Haqqani network, or combatants from those organisations;
>
> d. sentenced members of those organisations to terms of imprisonment/decided whether detention should continue under Afghan law;
>
> e. presided over the trial of combatants captured by ISAF forces including the UK on the battlefield (inc. nationals of countries such as Pakistan, Uzbekistan);
>
> f. heard/ resolved cases criminal cases involving: public security; corruption; drug trafficking; and violence against women;
>
> g. attended programmes/seminars etc delivered or sponsored by ISAF/HMG;
>
> h. was appointed to a judicial position/roles within an institution/court/justice centre that received donor

> funding and other technical support from ISAF/HMG."

Mr Foxley's conclusions

83. These were as follows:

a. the Claimant 'contributed directly' to the UK mission. Mr Foxley said at [62] of his statement:

> "A credible, functioning Afghan judiciary was crucial to stabilising the security situation in Afghanistan and the region. The success of the Afghan judiciary contributed directly to the UK mission in Afghanistan and it mitigated the risks of terrorism, narco-trafficking and illegal migration in mainland Britain. I believe that your client contributed directly to the UK mission in Afghanistan and, therefore, to the defence of the UK. It seems very plausible that your client worked in support of a range of UK departments during his time in Helmand. His activities in Helmand would certainly have contributed to the UK mission in that province."

b. 'I believe [the Claimant's] work closely supported and assisted UK government activities in stabilising Afghanistan and helping to secure rule of law across the country' and that he 'worked alongside or in support of a range of UK departments during his time in Helmand and supported efforts to achieve the UK mission [there]' (Foxley, [34], [36]).

c. Members of the justice system, like the Claimant, who presided over trials and sentencing of members of the Taliban made a material contribution to HMG's mission in Afghanistan because imprisoning Taliban fighters, other insurgents and other criminals 'would have represented a significant and positive contribution to the UK's national security objectives. Establishing a functioning judiciary and rule of law in Afghanistan was an essential component of the UK's mission in Afghanistan – a key part of the UK's exit strategy' (Foxley, [29]).

d. The mission of the NGO for which the Claimant worked was entirely consistent with UK goals in Afghanistan; its work as an international NGO defending human rights would not have found favour with the Taliban at the time the Claimant worked for it (Foxley, [41]).

Evidence about the Claimant's personal role that was before the Second Review Panel

84. As I indicated at the outset, in this section I have tried to give sufficient details about the Claimant's personal role, but without doing so in a way which might allow for his jigsaw identification. There is very considerable detail set out in the evidence, which I accept, as I said earlier.

Defence lawyer

85. From 2008-2012, the Claimant was a criminal defence lawyer for a well-known international NGO (the NGO) in Kabul and elsewhere. The NGO is named in the evidence but I will not name it. He was promoted to senior positions which involved, in part, supervising other lawyers. He also appeared in over 400 cases. He worked across several different provinces. The evidence shows that he served 'professionally, honestly and accurately' and 'with distinction.' He was supported by the HPRT.

Work as a judge

86. The structure of the formal state system of courts from 2001 until 2021 was as follows (Foxley, [20]-[22]; Patel, [12]): (a) Supreme Court: nine members appointed by the President for 10-year terms; (b) Appeal Courts - based in each Province with discrete sections covering: general criminal; public security; civil; personnel affairs; public rights; and commercial; (c) Primary courts - based in Provincial capitals; (d) Primary courts - based in District centres (the Provinces are divided into Districts).

87. In the mid-2010s the Claimant undertook judicial training and became a judge in or around 2015. He passed his training with 'high distinction'.

88. He then worked as a judge until 2021. He worked in Helmand Province. During that service he held a number of positions in different courts before becoming the chief judge in a Primary court and then an appeal court judge.

89. The Claimant held a number of different judicial positions during his career which he fully set out in the evidence. He says, and I accept, that a number of those with whom he worked were Taliban informers, who now hold senior positions in the Taliban Government.

90. Across his various roles he dealt with crimes such as murder; violence against women and children; and theft. He also dealt with cases involving public security; terrorism; kidnapping; drug smuggling; corruption; and foreign crimes. The perpetrators were often the Taliban and Daesh (formerly known as Isis).

91. The Claimant was the only permanent judge in the province in question (although he was able to call for assistance when necessary) and his role carried considerable security risks. Many judges refused to serve because of the dangers.

92. The Claimant sentenced and imprisoned Taliban members who subsequently obtained high positions in the present Taliban regime. He also signed arrest warrants and search warrants against the Taliban which were actioned by the police. He was involved in cases where the perpetrators were arrested during joint raids conducted by international forces and Afghan authorities. The intelligence about these perpetrators would be provided by the international forces and the cases would come before the Claimant. The Claimant also had the task of confirming whether the raids had been conducted according to law.

93. The Claimant gives an example of a perpetrator whom he ended up convicting who was originally arrested following international cooperation.

94. In 2020 there was an attempt on the Claimant's life, for which the Taliban took responsibility. After that, he and his family were subject to a number of security measures in order to protect them. There is a considerable amount of documentary evidence about this in papers, however I will not set out any further details given that I accept the Claimant's evidence entirely.

95. There is also evidence in the papers about MP2, the Claimant's wife, who worked as a schoolteacher until 2021 when she was forced to give up work by the Taliban. She also worked for an organisation promoting democracy and human rights which was funded by the US until she was forced to give up that role due to threats to her safety.

Taliban take-over of Afghanistan and the Claimant's military airlift out of Helmand

96. In May 2021, coalition forces began drawing down and the Taliban rapidly advanced through the country, culminating in the seizure of Kabul on 15 August 2021.

97. Lashkar was surrounded by the Taliban (it fell on 13 August 2021) and the Claimant was air-lifted out of the region by military aircraft. His wife and children had already gone into hiding before the airlift.

98. Following the Taliban takeover, many judges and lawyers were forced into hiding.

99. Following these events, the Claimant and his family have lived in hiding in various places and fear being detected and turned over to the Taliban. They are aware the Taliban have visited family members seeking their whereabouts.

The notes relating to the Second Review Panel's consideration of the Claimant's case

100. The notes of the meeting were as follows (emphasis as in original):

> "The panel were introduced to Serial 01 of Panel 13.
>
> The Applicant cited the following reasons for review and these were considered against the evidence provided:
>
> 1. I do not agree my case has been properly considered in accordance with the policy.
>
> 2. I have new information that has not yet been considered.
>
> The chair confirmed that the caseworker assessment was not binding on the panel, and the panel needed to draw an independent conclusion.
>
> Category 1 - The Applicant did not meet this category as they have not provided any further evidence of being assessed as being at a high and imminent risk of threat to life. There was no evidence of any subsequent threats since the alleged shooting incident in 2020. The Applicant

has not provided evidence of being directly employed by HMG and does not meet either criteria for this Category.

Category 2 – The Applicant did not meet this category as they have not alleged or provided evidence of being directly employed by HMG or Contracted to provide Linguistic Services. No further evidence was provided to meet these criteria.

The Applicant therefore did not meet the CAT 1 and CAT 2 criteria.

Discussion was subsequently set around the Applicant's CAT 4 eligibility.

The possibility of a referral to FCDO [Foreign, Commonwealth and Development Office] was proposed in respect of the Applicant's role with PRT but it was considered that this connection with PRT might predate FCDO involvement and, as such, it would be an unnecessary challenge for FCDO to try and identify the Applicant prior to its involvement and record keeping. It was further considered that the FCDOs subsequent involvement in the PRT project was very limited and again, there would be the question of what to request of FCDO in respect of the Applicant. It was concluded that there would be little or no value in a FCDO referral and it was therefore reasonable not to refer in this instance. A quote from the applicant, read out, stated that the Applicant was supported by the PRT (rather than the Applicant lending supporting to the PRT).

The Buckland report was cited and its possible relevance to this case; consensus of opinion was that the Buckland quote pertained to ACRS eligibility and not ARAP eligibility.

Category 4 - The Applicant is required to meet conditions 1 & 2 and one or both of conditions 3 and 4 as set out in ARAP 3.6 of the Immigration Rules Appendix Afghan Relocation and Assistance Policy (ARAP).

(a) The panel assessed that the Applicant did not meet this condition due to them not being directly employed in Afghanistan by a UK Government department.

(b) The panel assessed that the Applicant did not provide goods or services in Afghanistan under contract to a UK government department. There is no evidence to support any contract of employment, or any services provided to

the Afghan judiciary by the Applicant on behalf of HMG and no other sponsoring unit or relevant department was identified.

(c) The panel assessed that the Applicant did not provide any further evidence of working in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department.

While assessing the information held on file for the Applicant, including several media posts and various immigration/relocation policy references submitted by the Applicant and their representatives, the panel were unable to determine a substantive link to any UK government department.

The panel considered the assertions made by the Applicant and his representatives that he was supported by the Helmand Provincial Reconstruction Team (PRT) in his role as Defence Lawyer and that his work as Judge will have been carried out alongside and/or in partnership with and/or closely supporting and assisting UK Government departments as part of the UK's counter-terrorism mission in Afghanistan. But it was noted that the Applicant did not go beyond these assertions to expressly detail the nature of that support, provide details of any relevant cases dealt with or individuals/officials from the PRT with whom he worked in partnership with or was closely supported and assisted by. The panel also noted that the evidence supplied by the Applicant did not include details of the specific terrorist crimes he presided over in his role as Judge, or details of how he specifically contributed to the UK's counter-terrorism mission in Afghanistan.

The panel further discussed the point made by the Applicant with regard to him being supported by the PRT and concluded that the Applicant being supported by a UK Government department is not necessarily the same as the Applicant working in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department, which is a requirement of Condition 1(c) of the criteria for Category 4.

The panel therefore assessed that the there is no evidence in relation to any direct links to any government department or evidence to substantiate whether any such government departments were for the UK or for other countries, save PRT which was previously discussed and rejected due to a lack of corroborating evidence. There

> was no further evidence in respect of any specific terrorist crimes dealt with or any specific details of how the applicant contributed to the UK's counter-terrorism mission in Afghanistan (in his position of Judge or any other of the judiciary roles mentioned).
>
> The applicant's alleged links with the Helmand PRT lacked any supporting evidence.
>
> While the Applicant claims a PRT link, they have not provided any further evidence to support a link to the PRT as being substantive enough to support CAT 4 Condition 1.
>
> The Applicant was therefore assessed as not meeting Condition 1 (a,b,c). As the Applicant did not meet Condition 1, the remaining conditions were not assessed and therefore the criteria for CAT 4 was not met.
>
> In conclusion, the panel agreed that there was no additional material or substantive evidence to support this ARAP application and a decision was made.
>
> Decision: Upheld – unanimous"

101. The Second Review Panel's conclusion was therefore materially identical to that of the case worker (see above). Like the caseworker, the Panel went on to consider (*obiter*) the other conditions in Category 4 in a brief and perfunctory way, and said the Claimant would not have satisfied them if they had had to consider them.

102. Ms Kalunga said expressly that the Panel's Decision Notes constitute the reasons for its decision: witness statement, [41]; 'The Review Panel Notes record the decision.'

Submissions

The Claimant's case

103. On behalf of the Claimant, Mr Seddon KC submitted as follows.

Ground 1A: failure to consider relevant evidence

104. The Second Review Panel failed to consider relevant evidence, in particular, the Foxley report (Mr Seddon also referred to other evidence, but said the Foxley report was key). The Second Review Decision itself made no reference to it at all.

105. The Defendant's position is not materially advanced by Ms Kalunga's statement. This should be treated with caution because it was given only after the commencement of the claim when there is a natural tendency to bolster a decision under challenge – it is not admissible insofar as it seeks to provide new reasons or contradict those previously given (see further below) (*Inclusion Housing Community Interest*

Company v Regulator of Social Housing [2020] EWHC 346 (Admin), [78]. Further, it will normally be impossible to assess the reasoning process of individual members (here, there were six): such a decision making process should be clear in the recorded decisions: *R (Young) v Oxford City Council* [2002] EWCA Civ 990, [20].

Ground 1B: failure to provide sufficient reasons in light of the evidence

106. The bare recitation of the criteria in the ARAP was plainly insufficient to discharge the duty to provide reasons in a case such as this. The reasons given by Swift J in *R* (*LND1) v Secretary of State for the Home Department* [2023] EWHC 1795, [29]-[30], should be preferred to those of Lane J in *R (CX1) v Secretary of State for Defence* [2023] EWHC 284 (Admin), [65]-[76], on this point. Foxley and Patel gave clear evidence (above) about the alignment between the Claimant's work with HMG's mission. The Defendant did not challenge any of the Claimant's evidence. What was missing from the Panel's decision was engagement with the process of reasoning whereby those two matters were, on the evidence, aligned.

Ground 1C: unreasonable/irrational Decision by the Panel

107. Further and additionally, Mr Seddon submitted that the Panel erred in that, having regard to the case set out, its failure to consider the evidence and to provide reasons disclose a decision that was unreasonable and irrational.

Ground 2: The Panel misconstrued the ARAP and/or applied an unlawfully narrow approach to it

108. The 'working alongside' criteria did not require that the Claimant be employed by HMG, or that he directly interacted with members of HMG. Engagement in 'significant activities which were closely aligned' with the objectives of HMG (eg, 'democracy building') ought to have qualified him: *CX1*, [86]-[87]; [95]. It is the substance of the work undertaken, the nature of the institutions, and the contribution made to the military and national security objectives that are relevant.

109. The Panel failed to adopt the above approach. It directed itself instead to a search for a 'substantive link' or a 'direct link' to an UK Government Department (albeit the Claimant was in fact paid by the UK funded HPRT). Instead, it said that the Claimant did not 'expressly detail the nature of support' he provided, or give details of the cases or 'individuals/officials' from the HPRT he worked with, or give evidence of the specific 'terrorist crimes' he presided over; that he was supported 'by' the HPRT and not the other way around; and that there was 'no evidence of any direct links to any government department'. This approach is erroneous as being in conflict with to the construction and approach adopted in *LND1* and *CX1*. (Mr Brown KC told me that permission to appeal has been granted in *LND1*, and expedition ordered, however there is no decision at the time of writing this judgment. No-one suggested I should postpone this judgment pending the outcome of that appeal.)

110. The Panel also erred in failing to consider conditions 1 and 2 together (*per LND1*): it rejected the Claimant 'as not meeting Condition 1(a, b, c). As the [Claimant] did not meet Condition 1, the remaining conditions were not assessed'. This required permission to amend the SFG, which I granted.

111. Mr Seddon said that, to the extent that it was relevant, Ms Kalunga's approach compounded these errors.

112. In short, Mr Seddon said the Panel's approach was 'replete with error'.

The Defendant's case

113. On behalf of the Defendant, Mr Brown KC submitted as follows.

114. He made some preliminary points about the ARAP, pointing to the fact that it had been especially created under prerogative powers but was now part of the Rules. He said the Defendant had a broad discretion in setting the criteria and in applying the criteria. When challenged by me, he retreated and accepted that applying the criteria did not involve exercising a discretion, in the way that term is generally understood. The Panel's task was an evaluative one. He referred to his client's 'institutional know-how' and said the Review Panel was 'specialist'. That said, he accepted that Review Panels 'did get things wrong', although this one had not. He also said there had been 128,000 applications under the ARAP and thus that there had to be a fair and proportionate system.

115. In relation to Ground 1A, Ms Kalunga said in her witness statement at [52] and [62] that the Panel considered all of the evidence which the Claimant alleges was not taken into account, including the Foxley report, and there is no reason to go behind that evidence. She was the Chair of the Panel.

116. In relation to Ground 1B, there was no obligation on the Defendant to provide detailed reasons. It was only necessary to provide reasons which allowed the Claimant to know what had been decided and why. The Claimant was well acquainted with the facts of his own case and thus there was no need to provide detailed reasons. Matters of weight were for the Panel's assessment. Judicial review on the ground that the decision-maker failed to grapple with the issues should only be granted where there is evidence of a failure to consider relevant material, and that is not the case here. Ground 1B was linked to Ground 2 and both were the different sides of the same coin.

117. The Decision in the present case made clear: (a) the outcome, ie. that the Claimant was not eligible for relocation under the ARAP policy; and (b) the reason why, namely that the Claimant did not satisfy the relevant conditions under Category 4 of the ARAP policy. Mr Brown relied on *CX1*, upholding the use of *pro forma* documents in ARAP applications.

118. In relation to Ground 1C, Mr Brown accepted that this ground was symbiotic with Grounds 1A and B above, namely that a failure to consider the evidence and/or failure to give sufficient reasons is irrational.

119. Mr Brown said that there was no failure to consider the evidence, as attested to by Ms Kalunga, and that the reasons were sufficient to enable the Claimant to understand the outcome of the decision and the basis upon which that his application was rejected. There were therefore no grounds to claim that the Defendant acted irrationally.

120. In relation to Ground 2, conditions 1 and 2 had to be read separately. They were separate conditions (although there might be factual material relevant to both). Neither working as a defence lawyer nor a judge qualified the Claimant under condition 1. The NGO the Claimant worked for did not support or work closely with a UK Government department. Any links with the HPRT was insufficient. Specifically as to his employment as a judge, he had not supplied sufficient evidence of specific cases. Assessment of the weight of evidence was for the Panel.

Discussion

The correct approach the interpretation of policy

121. As this case involves the interpretation and application of a policy, it is important to be clear at the outset about the relevant interpretive principles. I discussed some of these in *R (KA) v Secretary of State for the Home Department* [2022] 1 WLR 896, [149]-[151]. Lane J followed the *KA* approach in *CX1*, [80].

122. In *Mahad (Ethiopia) v Entry Clearance Officer* [2010] 1 WLR 48, Lord Brown said at [9] in relation to the Immigration Rules:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The ECO's counsel readily accepted that what she meant in her written case by the proposition 'the question of interpretation is … what the Secretary of State intended his policy to be' was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in the MO (Nigeria) case, at para 33: 'the question is what the Secretary of State intended. The rules are her rules.' But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations."

123. In *Raissi v Home Secretary* [2006] QB 836, the headnote states at p837 (approving *dicta* of Lawton LJ in *R v Criminal Injuries Compensation Board ex parte Webb* [1987] QB 74, 78):

> "… that the test to be applied in interpreting a ministerial policy statement was to ask what a reasonable and literate man's understanding of it would be, and not whether the meaning attributed by the minister to the words of the policy was a reasonable one; and that, accordingly, it was for the court to decide what the *ex gratia* scheme meant on

> the basis of what a reasonable and literate person would understand the circumstances to be in which he could be paid compensation under it"

124. In *R (O) v Secretary of State for the Home Department* [2016] 1 WLR 1717, [28], Lord Wilson said:

> "… there is no dispute that the court's approach to the *meaning* of the policy is to determine it for itself and not to ask whether the meaning which the Home Secretary has attributed to it is reasonable ..."

125. In *R (CX1) v Secretary of State for Defence* [2024] EWHC 94 (Admin), where the Divisional Court considered the case following Lane J's quashing of the original decision (hereafter, *CX1* (DC)), Dingemans LJ said at [55]-[56]:

> "55. It is common ground that if there is a dispute about the interpretation of a policy such as ARAP, this is an objective question for the Court whose task is to decide what a reasonable person's understanding of the policy would be. This requires looking at the words used in the policy, taking the policy as a whole and in the light of its context and purpose, see *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48 at paragraph 10; *R(O) v Secretary of State for the Home Department* [2016] UKSC 19; [2016] 1 WLR 1717 at paragraph 28; and *R(KA) v Secretary of State for the Home Department* [2022] EWHC 2473 (Admin); [2023] 1 WLR 896 at paragraph 151.
>
> 56. The background to the introduction of ARAP was analysed by Lang J in *R (S) v Secretary of State for Foreign and Commonwealth and Development Affairs and others* [2022] EWHC 1402 (Admin). In *R(JZ) v The Secretary of State for the Home Department and others* [2022] EWHC 2156 (Admin) Hill J addressed the claim of a judge who had been refused leave under ARAP and leave outside the rules. In the materials before the Court in that case was evidence that HMG had developed a partnership with some judges where judges had been resettled because of their role in presiding over terrorism trials."

126. Hence, it follows that whether the Second Review Panel's interpretation of the conditions in Category 4 was 'reasonable' is not the correct approach. The conditions in Category 4 have to be understood as meaning what a reasonable and literate person would understand them to mean, and determining that meaning is a matter for the court. This is consistent with what Swift J said in *LND1*, [9]:

> "The words of the ARAP should be applied in accordance with their ordinary meaning having regard to the context in which the words are used."

127. Thus, to the extent that the Secretary of State suggested that it was enough that the Second Review Panel's interpretation of the conditions in the ARAP was 'reasonable' – and he expressly did so in his Skeleton Argument at [35(7)] ('… it is clear that the decision maker's interpretation and application of the criteria are reasonable') was wrong. In fairness to Mr Brown, he accepted orally that the *KA* approach was the right one. This point is important because, as I shall show, both the Second Review Panel and Ms Kalunga put an unwarranted gloss on the meaning of the conditions in Category 4.

128. Other points are as follows which, in *KA*, [151], I said that I agreed with: (a) individual words and expressions must be not be construed artificially: the exercise is to discern objectively the true object and intent of the policy; (b) in addition, the principle that policy should be construed in its proper context means that, when seeking to construe particular words and expressions within policy, regard must be had to the policy as a whole and the context in which those words and expressions were chosen; (c) context is particularly important as an aid to interpretation where the words used are either ambiguous or a term of art: cf *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983, [21].

129. As to the particular context of the relevant parts of the ARAP, Swift J said in *LND1*, [11], in relation to condition 1 in Category 4:

> "As to what is the proper approach to and meaning of the provision, context is important. The context is provided by the two preceding paragraphs in the Condition, each of which rests on some form of established contractual connection between the applicant and the United Kingdom government department. Set against those provisions, the notion of 'working alongside' is intended to capture a further category of applicant whose connection with a United Kingdom government department is measured by some form of qualitative yardstick. That being so, considering the rubric in its totality seems better likely to capture all members of the intended category than an approach that rests on breaking it down into one or more constituent parts."

130. Specifically in relation to the interpretation of condition 1, in *CX1*, [85], Lane J said:

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

> matter, independent journalists may find it difficult to satisfy this aspect of condition 1."

131. I am content to adopt the same approach in this case.

132. Lane J also said at [86] (my emphasis):

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

133. Again, I agree, and find his *dictum* that 'significant activities which were closely aligned with the 'democracy-building' activities of an HMG department' may be sufficient, to be especially pertinent.

134. At [87] he said about condition 2 (my emphasis):

> "Condition 2 of category 4 requires the person, in the course of their work etc, to have made a substantive and positive contribution towards the achievement of the UK government's military objectives or the UK government's national security objectives. Mr Blundell questioned whether, conceptually, Afghan journalists could satisfy condition 2. Again, I accept that, as a general matter, they are likely to find it difficult to do so. However, the provision of intelligence, such as was highlighted in the 18 August 2021 submission, is clearly a way in which condition 2 could be satisfied, subject to this having the necessary substantive and positive qualities. *More broadly, national security objectives (which are not exhaustively defined in terms of counterterrorism etc) could properly include significant contributions to the building of democratic, open and transparent systems, as well as informing the Afghan population of such things as the corruption of the Taliban.* All of this could be done by an independent journalist, working for the BBC."

Grounds 1A, 1B and 1C

135. I think these grounds of challenge can be taken together.

136. By way of preliminary point, it is right that just because someone was a judge of whatever type in Afghanistan prior to 2021 does not of itself qualify him or her for relocation under Category 4 of the ARAP. Hill J said in *AZ*, [35]:

> "There is no statement or principle that the status of being an Afghan judge is sufficient to establish eligibility under ARAP. Afghan judges may be eligible under ARAP, but whether they are in fact eligible depends on a case-specific evaluation of the individual facts: *S and AZ* at [103]."

137. I was taken to various passages in *JZ*, however it was concerned with a different version of the ARAP to the one I am concerned with, and the arguments related to a suggested difference in treatment between the judge in that case and comparator cases, which was not an issue before me. Thus, I did not find it to be of particular assistance on what I have to decide (although some of the general points made in it were helpful).

138. The second preliminary point, and this was common ground, is that whether the Panel's process (including the giving of reasons) was fair is to be determined by the court; it is not whether what was done was reasonable. In *R (Osborn) v Parole Board* [2014] AC 1115 the Supreme Court confirmed the proposition that the test for whether there has been procedural fairness or not is an objective question for the court to decide for itself. The court's function is 'not merely to review the reasonableness of the decision-maker's judgment of what fairness required' : see [65] per Lord Reed.

139. I am prepared to accept on the basis of Ms Kalunga's evidence that, as a matter of fact, the members of the Second Review Panel had the Claimant's evidence and in particular the Foxley report available to it, in the sense that it was held in a form which the members could access - if they chose to. As I said in argument, I accept it did not stay in a box, without the Panel 'having taken the wrapping off.'

140. However, in my judgment, the general picture which emerges from Ms Kalunga's account of how the Claimant's case was dealt with is that although Panel members had access in theory to the evidence, in practice it was left to them individually to decide how they prepared for the hearing, and what they did - or did not - read. For example, she said at [41], [43]:

> "41. The Panel discussion having commenced, it was expected that the panel members were ready and willing to deliberate. The Panel discussed the case, citing various issues of interest according to each individual's assessment of the Applicant's eligibility. It is for each Panel member to raise a matter, agree or object and/or to incite further discussions. Panel members worked from their own notes and investigatory findings to present their individual questions and concerns to the Panel for consideration or comment …
>
> …

> 43. For the purpose of a review, invited Panel members were given the Caseworker's Review Panel Notes to read and to independently investigate the DACS system for the Claimant's application review …"

141. Then, at [52]-[54] of her statement Ms Kalunga said:

> "52. … The panel assessed all of the information held on file for the Claimant, including several media posts and various immigration/relocation policy references submitted by the Claimant and their representatives (*sic*), but could not determine a substantive link to any UK government department nor could they find evidence of a direct link to His Majesty's Government.
>
> 53. The purpose of the ARAP policy, specifically under Category 4, is to assist Afghan citizens who contributed to the UK military objectives and national security objectives in Afghanistan. It was considered that the Claimant, whilst being an Afghan citizen, did not work for or with the UK Government in Afghanistan in an exposed or meaningful role and therefore did not meet the threshold criteria; as such, no offer of relocation to the UK could be made and he was deemed ineligible.
>
> 54. The Review Panel Notes provided comprehensive extracts taken from the Claimant's P-Files. This included a quote relating to the Foxley Report cited in the Claimant's statement of Facts and Grounds. Mr Foxley was discussed in terms of his self-regard as an 'expert' and whether the information provided had, or could be, validated. All Panel members confirmed they had read the Foxley Report and were therefore able to comment upon it and consider its contents as part of their assessment process. It was mentioned that this report was, in part, based on personal opinion and what was believed to be the case, so it was considered as to what degree it could be relied upon as conclusive evidence of fact. The consensus of opinion was that the Foxley Report must be considered but collaborating evidence should be sought to substantiate its assertions."

142. I find Ms Kalunga's assertion that the Panel 'assessed all of the information held on file for the Claimant' difficult to reconcile with her earlier account of the methodology used, which was that it was for *individual* Panel members to decide what they read and for them *individually* to decide what they subsequently raised in the meeting. It is also difficult to reconcile with the absence in the Review Panel's Notes of any reference to Mr Foxley's evidence, which plainly called for reasoned conclusions if the Claimant's case was to be properly assessed against the criteria in Category 4. I therefore place little weight upon Ms Kalunga's evidence.

143. If the Foxley report had been considered by the Panel *en banc* as Ms Kalunga suggests it was, I would have expected it to have been referred to expressly in the Panel's Decision Notes. I therefore conclude that if it was discussed ('assessed'), it could only have been in the most perfunctory of terms, and it was not discussed or considered in a way which was legally sufficient. True it is, as Mr Brown said, there were 1200 pages of material before Panel, and what weight to be attached to any given piece of evidence was a matter for its judgment. However, Mr Foxley is a well-recognised and well-regarded expert; his evidence was lengthy, detailed and referenced; it was bespoke to the Claimant's case; and it contained very important information. It therefore required proper consideration and analysis, even if not in a lengthy way.

144. Ms Kalunga's statement was made three months after the Decision; and also after the SGD had been filed and served; after permission had been granted; and after the DGD had been filed and served. In that time she would no doubt have dealt with many cases. Whether she could remember specifically what had been discussed in the Claimant's case must be doubtful – especially as Mr Foxley no doubt will have provided statements in many of them, as Mr Seddon observed. Ms Kalunga did not produce - or even refer to - any contemporaneous notes of her own. Mr Brown therefore candidly conceded there was always the possibility that she could be wrong. I therefore approach this part of Ms Kalunga's evidence with the dangers identified by Pill LJ in *Young*, [20], firmly in mind. He referred to the:

> "… dangers in permitting a planning authority, whether by its committee chairman or a planning officer, providing an explanatory statement. The danger is that, even acting in good faith, the witness may attempt to rationalise a decision in such a way as to meet a question which has arisen upon the effect of the decision. Moreover, it will usually be impossible to assess the reasoning process of individual members and there are obvious dangers in speculating about them. It is therefore important that the decision-making process is made clear in the recorded decisions of the committee, together with the officers' report to committee and any record of the committee's decisions. Decisions recorded in the minutes should speak for themselves."

145. I also bear in mind what was said about *ex post facto* reasoning in *R (United Trade Action Group Ltd) v Transport for London* [2022] RTR 2, [125], and especially at [125(2)-(3), (5)]:

> "2. … A claim for judicial review must focus on the reasons given at the time of the decision. Subsequent second attempts at the reasoning are 'inherently likely to be viewed as self-serving.'
>
> 3. Evidence directly in conflict with the contemporaneous record of the decision-making will not generally be admitted …

…

> 5. It is not likely to be appropriate for the court to admit evidence that would fill a vacuum or near-vacuum of explanatory reasoning in the decision-making process itself, expanding at length on the original reasons given. Such evidence may serve only to demonstrate the legal deficiencies for which the claimant contends …"

146. I turn to Ground 1B. In judging the Claimant's reasons challenge, the material to be considered as constituting the Panel's reasons are its *pro forma* letter; the Notes of its meeting; and Ms Kalunga's evidence, to the extent that the latter it is admissible and not contradictory of the contemporaneous documents. The question for me is whether these reasons, taken together, were legally adequate. The Panel's notes were disclosed by the Defendant on 2 June 2023 in response to the Claimant's letter before action complaining about a lack of reasons in the *pro forma* letter, in the following terms:

> "In any event, the SSD is prepared to disclose the review panel notes for your client which have been enclosed with this letter. The enclosed panel notes shows that the Defendant carefully considered the Claimant's evidence and concluded that the Claimant is not eligible as he does not meet the criteria for relocation under Category 1, 2 or 4 of ARAP."

147. Hence, the notes stand as part of the Panel's reasons and they stand or fall on that basis. They are a near contemporaneous record of the Panel's discussion (albeit supplied later).

148. It follows that it is not necessary for me to resolve the issue of whether the Second Review Panel's *pro forma* document, by itself, would have been sufficient. As I said earlier, that is an issue on which Lane J in *CX1*, [65]-[72], and Swift J in *LND1*, [29]-30], differed. However, had it been necessary to do so, I would have preferred the reasoning of Swift J, and in particular this passage at [30] of his judgment:

> "30. … Under the ARAP scheme, the eligibility criteria are such that each decision is an assessment of information that an applicant has provided about himself: of matters such as the work he undertook, the circumstance under which the work was performed, and the consequences in terms of personal safety for the applicant of having performed that work. Decisions that turn on the assessment of matters of this sort, of an applicant's personal circumstances set against criteria that are incapable of mechanical application, ordinarily attract an obligation to give reasons so a disappointed applicant can understand why the case he has put forward has not been sufficient to meet the criteria set for a successful application. In that sort of context, reasons are an essential

> element of the obligation to act fairly; they allow the applicant to be satisfied his application has been considered on its merits, and to decide whether any further avenue may be open – in this instance the opportunity to decide whether a review of the decision should be pursued. All this weighs heavily in favour of the conclusion that reasons should be provided. The reasons given do not need to be elaborate or lengthy, but I see significant force in the contention that in this case they do need to go further than the statements contained in the pro-forma letter, which come to no more than that the application has been weighed in the balance but has been found wanting, statements that provide nothing by way of explanation for the conclusion reached. Moreover, in the present context there is no question but that before the pro-forma letters were sent out each application was considered on its own merits. Therefore, it is only the burden of translating the reasons for the decisions that weighs against a conclusion that more specific reasons than those in the pro-forma letter should be provided. Had it been necessary for me to decide the matter, I would have concluded that reasons beyond the bare statements in the pro-forma letter should have been given. Those reasons could have been brief, but they should have provided the sense of the reason why the matters relied on in support of the application had not met the one or more of the eligibility requirements."

149. But as I have said, this issue does not arise. Because the Defendant has chosen to give reasons going beyond the *pro forma* document (whether or not he was required in law to do so), those reasons have to be legally sufficient: see eg *R v Criminal Injuries Compensation Board ex parte Moore* [1999] All ER 90, 94:

> "… since reasons were given in the present case, it is not necessary to decide whether there was a legal obligation to give them. Once given, their adequacy falls to be tested by the same criteria as if they were obligatory. The critical question is, therefore, whether reasons given orally are legally adequate."

150. The general standard of reasoning that is required is well known. It was explained by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, [36]. The reasons relied on must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved and giving rise to no substantial doubt as to whether the decision-maker erred in law. The obligation is to give appropriate reasons having regard to the circumstances of the case: *R (Asha Foundation) v Millennium Commission* [2003] EWCA Civ 88, [24].

151. The importance of appropriate and sufficient reasons resides not only in the ability to challenge a decision (and to make further representations) but also because: they concentrate the mind of the decision-maker: *Osborn*, [67]; they avoid a sense of injustice: Ibid, [68]; and they augment public confidence: *Stefan v General Medical Council* [1999] 1 WLR 1293, 1300. Also, they enable the reviewing court to be confident that no error has been committed: *Alibkhiet v London Borough of Brent* [2018] EWCA 2742, [51].

152. The context of this case requires that I anxiously scrutinise the Defendant's reasons. In other words, I have to apply a more intense standard of review than might be applied in other contexts. That is because an adverse decision may put the Claimant's and his family's lives at risk. That is clear from Mr Foxley's evidence and the Claimant's own evidence. He said at [25]-[26] of his first statement:

> "25. I am struggling a lot and my wife and children now have a very hard life. What we are going through is very difficult. The situation here is much worse than the Taliban are admitting to publicly. We are aware of constant killings and assassinations and terror. The media and the journalists have no access to this and so it is not being properly reported.
>
> 26. … As a Chief Judge I know I will be killed and my family too."

153. Although the Claimant and his family were able to get to a third country to stay with relatives, there is always the risk that they may be forcibly returned to Afghanistan by the authorities of that country: Skeleton Argument, [70]-[72]. I will return to this later.

154. In *R (MN) v Secretary of State for the Home Department* [2021] 1 WLR 1956, [242], the Court of Appeal said:

> "242. There was no real dispute before us as to the nature of the scrutiny required in a case of this kind. Although, strictly, we are concerned only with the court's scrutiny of the original decision, the starting-point must be the standard of reasoning required in the decision itself. As to that, it is clear that a high quality of reasoning is required in a conclusive grounds decision, which engages fully with the case advanced by the putative victim of trafficking. Sir James Eadie and Mr Irwin acknowledged that expressly in their skeleton argument, citing the judgments of Dove J in *R (FK) v Secretary of State for the Home Department* [2016] EWHC 56 (Admin) (see para 27) and of this court in *R (YH) v Secretary of State for the Home Department* [2010] 4 All ER 448, where Carnwath LJ refers to the "need for decisions to show by their reasoning that every factor which tells in favour of the applicant has been properly taken into account" (see para 24 of his judgment). This is for obvious reasons. A conclusive grounds decision is very important for the

> putative victim: we have described above some of the rights to which an established victim of trafficking becomes entitled. Although the potential consequences of a wrong conclusive grounds decision are not generally comparable in terms of gravity to the risk to a victim of persecution if wrongly returned to their country of origin, these are nonetheless gateway decisions that relate to important rights. But the decision is also likely to influence the decision of the state whether to pursue a prosecution against alleged traffickers. The requirement for a high standard of reasoning is all the more important given that in general the decision-making process is a primarily paper exercise conducted by a caseworker, albeit one who is required by ECAT to be 'trained and qualified in preventing and combating trafficking in human beings'".

155. Also relevant is *R (BAL and others) v Secretary of State for Defence and another* [2022] EWHC 2757 (Admin), which concerned the family members of an Afghan judge. The judge and his wife were given relocation to the UK under the ARAP but their offspring's applications for discretionary LOTR were refused. In that context, Steyn J said:

> "85. There is no dispute as to the applicable principles. It is not for the court to stand in the shoes of the decision-maker and substitute its own view. A decision may be held to be 'irrational' where the decision is outside the range of reasonable decisions open to the decision-maker. Or a decision may fail the test of rationality because the reasoning process is flawed so as to rob the decision of logic. The 'common law no longer insists on a single, uniform standard of rationality review based on the virtually unattainable test stated in the *Wednesbury* case [1948] 1 KB 223'; the Supreme Court has 'endorsed a flexible approach to principles of judicial review, particularly where important rights are at stake': *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, Lord Carnwath JSC at [60], Lord Mance JSC at [98], and Lord Sumption JSC at [109]- [110].
>
> 86. In *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] 1 AC 514, Lord Bridge observed at 531F-G: 'The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.
>
> 87. It is common ground that in this case, which concerns the risk that the second to fifth claimants will lose their

> lives, or be subjected to torture or other serious harm, if they are not able to join their parents in the UK, the court is required to scrutinise keenly the application of the policy to them and the reasons given for the challenged decisions."

156. In *R (MKA) v Secretary of State for the Home Department* [2023] EWHC 1164 (Admin), [32], [50]-[52], another decision on the ARAP, Foster J said:

> "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.
>
> …
>
> 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."

157. Applying these standards, the reasons put forward by the Defendant to justify the Second Review Decision are, in my view, manifestly inadequate.

158. The key question which needed to be considered by the Second Review Panel in relation to condition 1 in Category 4 was whether the Claimant worked in Afghanistan 'alongside an HMG department, in partnership with or closely supporting that department'. *Per* Lane J in *CX1*, the Claimant will satisfy this condition if he performed significant activities which were closely aligned with the 'democracy-building' activities of the UK Government.

159. Mr Foxley's evidence about the Afghan judiciary's role in rebuilding and stabilising Afghanistan after 2001 (summarised in full earlier), although lengthy and closely reasoned with multiple footnotes, was in reality straightforward, and can be summarised in the following steps:

    a. The core objective for HMG's mission from 2001 to 2021 was to bring security and stability to Afghanistan by combatting the Taliban and assisting in the construction of a capable and self-sustaining Afghan government, and a key element of that process was the re-building of the Afghan justice sector. A credible, functioning Afghan judiciary was therefore crucial.

    b. The success of the Afghan judiciary contributed directly to the UK's mission in Afghanistan by mitigating the risks of terrorism, narco-trafficking and illegal migration in mainland Britain.

    c. Judicial reform was one of the five pillars for stabilisation and state-building after 2001, and the UK worked with the Afghan authorities to strengthen institutions for governance, rule of law and human rights. Legal specialists were crucial to achieving the HPRT's goals.

    d. The HPRT engaged in a range of interventions including funding criminal defence lawyers and lobbying for more judges; and

    e. Several government departments were involved with the HPRT – the FCO was the one most concerned with rule of law issues.

160. It is relevant here to quote another passage from *S*, [19]-[25], in which Mr Foxley also gave expert evidence:

> **"***The UK's role in promoting the rule of law in Afghanistan*
>
> 19. A joint governmental policy paper, published on 14 January 2014, described the extensive development aid projects, supported and funded by the UK and its partner nations, in Afghanistan. It describes the UK's work to support and build more accountable and democratic institutions, including a written constitution and a democratic government, at both national and local levels. The paper stated:
>
> > 'Across Afghanistan the UK continues to support legal and institutional reform and invests in training, including on human rights.'
>
> 20. It described in particular the introduction of an effective justice system in Helmand Province, where British troops were stationed. Prior to 2006, Helmand had no effective formal justice system. It explained that:
>
> > 'As the Afghan justice system was unable to demonstrate its credibility by resolving disputes, the Taliban filled this vacuum. Their informal system was severe, including barbaric punishments such as amputation.'
>
> 21. Mr Foxley describes the UK's engagement with the Afghan courts and the judiciary, at paragraphs 52 to 58 of his witness statement. Rule of law initiatives included financial support for training of judges; developing capacity for the successful investigation and prosecution of terrorism; establishing the Anti-Corruption Justice Centre to investigate and prosecute serious corruption cases; establishing the Criminal Justice Task Force to prosecute drug-related crimes; and ongoing mentoring and training for judges and prosecutors.
>
> 22. Mr Foxley states, at paragraph 27, that, although there was always a major British diplomatic, civilian, military and administrative presence in Kabul, it did not mean that the UK was solely focused on developing Kabul at the expense of the rest of the country. It is evident that the goal of the UK and its NATO allies was to implement a reformed justice system across Afghanistan.

23. The importance of the work of the Afghan justice system to the UK's mission and operations in Afghanistan was acknowledged by the UK Government in "The UK and Afghanistan", published by the House of Lords Select Committee on International Relations and Defence Government Response 12 March 2021:

> ‘Since 2001, the UK has provided significant support to the people of Afghanistan; this has in turn helped to protect the UK…The Afghan government has the capability to lawfully investigate and prosecute terrorism, organised crime and corruption. These gains have been achieved through a decade of multinational investment and are designed to operate alongside wider initiatives to address economic reform, poverty and agriculture. A loss of these capabilities would be irreversible and undermine any UK or international efforts to strengthen the Afghan state.’

24. As Mr Foxley observes at paragraph 73:

> ‘Without a justice system, Afghanistan's security situation would have deteriorated further and quicker. Confidence in governance would have evaporated. Local groups – Taliban, Islamic State and warlords – would have filled the justice "vacuum". International forces would not have been capable of running a justice system and would have increasingly been viewed as an occupying force if they had tried. The UK's presence in Afghanistan would have been untenable and the mission – stabilising Afghanistan and rebuilding the government structures - would have failed. The risk to the UK mainland from terrorism, narco-trafficking and illegal migration would have increased."

25. However, there were risks for judges involved in implementing an effective justice system in Afghanistan, as Mr Foxley describes at paragraph 72:

> ‘The work of Afghan judges – particularly those who worked on terrorism, counter-narcotics and security matters – was difficult and very dangerous because the Taliban and other insurgent groups were hostile to the prosecution of their fighters and also opposed to the justice system being established. Other groups, such as warlords and corrupt government officials, were also benefiting from the

> narcotics trade and other criminal activities. Judges were targeted by the Taliban for assassination ...'"

161. Turning to the Claimant specifically, Mr Foxley directly addressed what I have called the key issue at [33]-[36], in response to a question from the Claimant's solicitors:

> "*In your opinion did members of the Justice system - in particular our client as firstly district Judge in Helmand, then Judge in the City Court Penal Section dealing with a wide range of violent crimes, then in Lashkar Gash Appeal Court dealing with public security cases, drug smuggling, kidnapping, administrative corruption and terrorist crimes including cases of terrorism perpetrated by the Taliban and Daesh and finally as Chief Judge in Lashkar Gash Primary Court again dealing with public security cases as well as a range of other serious cases– work alongside a UK government Department, in partnership with or closely supporting it.*
>
> 33. Three main HMG ministries were involved in Afghanistan during the 2001 – 2021 timeframe. There was a lot of overlap and inter-departmental collaboration on activities over these years and other government ministries had smaller-scale engagements in Afghanistan as well. The Ministry of Defence led on the major war-fighting and counter-terrorism aspects, including the training and development of Afghan security forces. The Foreign and Commonwealth Office and the Department for International Development (which were merged in 2020 to form the Foreign, Commonwealth and Development Office - FCDO) addressed developmental aspects, including governance, rule of law, justice, democracy, women's rights, aid and reconstruction. The British Embassy in Kabul was a major hub for delivery of FCO and DFID objectives.
>
> 34. During the period 2008 to 2014, the UK security effort was closely focused on Helmand province, in southern Afghanistan. From the information your client has provided, and based on the information detailed and cited above, I believe his work closely supported and assisted UK government activities in stabilising Afghanistan and helping to secure rule of law across the country. It is harder to be more confident as to whether he specifically worked alongside any given UK government department, but he states that he was supported by the UK-led Provincial Reconstruction Team (PRT) in Helmand. The UK PRT was a mixed multi-national military-civilian group "helping the Afghan Government establish improved governance and development across Helmand Province". During the life of the PRT, several British

> government ministries and departments were involved, including the MOD, FCO, DFID and the Stabilisation Unit.
>
> 35. In Helmand, the UK gave significant support and mentoring to justice sector and rule of law initiatives at the local level:
>
> > 'In Helmand Province, we improved access to the state-administered justice sector through a range of initiatives. We provided ongoing mentoring and case-tracking support to judges, prosecutors and huquq representatives who form part of the Ministry of Justice, coupled with salary support and performance management for prosecutors. In addition, we provided training for legal professionals on criminal procedure, judicial ethics and fair trials and funded Helmand's only 'publicly funded' lawyers to provide criminal defence representation.'
>
> 36. It seems very plausible, therefore, that your client worked alongside or in support of a range of UK departments during his time in Helmand and supported efforts to achieve the UK mission in Helmand."

162. From all of this, it seems to me that even looking at condition 1 in isolation (which is not the correct approach, as I shall discuss later), it is self-evident that the Claimant worked alongside an HMG department, in partnership with or closely supporting that department, and so satisfied that condition.

163. That is because: by being willing to work as an Afghan judge (a role many others would not do) he personally and directly contributed to the furtherance of the rule of law in Afghanistan, which was a key aspect of HMG's mission there; the FCO and DFID (merged in 2020) was particularly concerned to ensure the fulfilment of that goal, and worked in Afghanistan to achieve it; the Claimant therefore 'supported' the FCO in achieving its aim by working as a judge; and as the FCO and he were working towards achieving the same goal, he worked 'alongside' them. Furthermore, officials from different departments from HMG headed the HPRT. In short, he satisfied Lane J's test in *CX1*.

164. I am reinforced in the self-evident nature of this conclusion by *LND1*, [22]. In that case the claimant worked for a time as an anti-terrorist judge in in the Kabul Terrorism Court. At [22] Swift J referred to:

> "… a rather obvious point, that the work of the judges of that court directly affected and supported the United Kingdom's natural security objectives in Afghanistan."

165. In my judgment, no distinction in this case can or should be drawn between LND1 working in a specialist terrorism court and the Claimant, who presided over both terrorist and narcotic cases, as well as other types of case in Helmand Province.

166. The Second Review Panel did not grapple or address these issues and its reasoning was plainly faulty. Some key points that strike me are as follows.

167. Firstly, as I have already noted, and as Mr Brown conceded, it did not refer at all to Mr Foxley's evidence and so did not explain why, for example, it did not accept the conclusions at [33]-[36] of his report which were *in terms* that the Claimant satisfied condition 1, or other important parts of his report, such as [62]. As I have noted, Ms Kalunga (three months later, *ex post facto* and after this claim was launched) says that the Panel considered his report. Given I have to adopt the anxious scrutiny test, I cannot attach much weight to her assertions for the reasons I have already given.

168. Second, the Panel did not explain why working as a judge to uphold the rule of law in furtherance of the FCO's goals, which had officials on the ground in Afghanistan working on it as part of the HPRT and otherwise, was not sufficient to count as working 'alongside' and in 'support' of one of HMG's departments. There is scant reference to the rule of law having been one of HMG's key goals, nor any recognition of the role that an assiduous judge like the Claimant played in upholding the rule of law in terrorist cases and other serious criminal cases which engaged with HMG's mission. By doing the job they do, judges fulfilling the role which the Claimant fulfilled, upheld and developed the rule of law in furtherance of HMG's mission. I note the Lord Chancellor's reply to Lord Carlile QC and Lord Anderson QC quoted in the Law Society Gazette in August 2021:

> "Afghan judges are eligible to relocate to the UK due to their close work with the UK government and immediate threat to safety, the Lord Chancellor [Sir Robert Buckland MP] has confirmed.
>
> Several leading voices in the profession, including the profession's representative bodies and former Supreme Court president Baroness Hale, have expressed concern for the safety of judges, particularly women judges, who are now under Taliban rule.
>
> In a letter yesterday to Lord Carlile of Berriew CBE QC and Lord Anderson of Ipswich KBE QC, both former independent reviewers of terrorism legislation, Robert Buckland said he aimed to do all he can to protect Afghan judges 'in recognition of their dedication to establishing and protecting the rule of law in the country'.
>
> Buckland said: 'Legal professionals in Afghanistan have done this in the face of risks to their personal safety and that of their families, with particularly grave risks to the lives of female members of the judiciary and it is right that we do what we can to help them."

169. Third, the Panel said it had not been able to determine a 'substantive link' or a 'direct link' between the Claimant and any UK Government department. There are two points here: (a) it did not explain what it meant by 'substantive link' or 'direct link'; and (b)

those phrases are not used in condition 1, or anywhere in Category 4, and in my judgment are more restrictive. These were therefore self-misdirections by the Panel on an absolutely key issue.

170. Earlier versions of the ARAP required something in the nature of a formal link between the applicant and HMG (eg, an employment contract). Mr Seddon said, and I agree, that later versions of the ARAP relaxed or removed this sort of requirement, and the ARAP began to be cast more in terms of a qualitative or functional assessment of what the applicant had done in Afghanistan.

171. Thus, the version of the policy in force immediately before the one applicable to the Claimant (quoted in *S* at [60]), defined the cohort eligible for assistance under Category 4 as being 'those who worked in meaningful enabling roles alongside HMG, in extraordinary and unconventional contexts'. Hence, the Panel's approach of requiring a 'substantive' or 'direct' link seems to me to go against the grain of the changes in the wording of ARAP up to 2022.

172. Fourth, I find the Panel's treatment of the Claimant's evidence about his work to be flawed. Mr Brown was quite clear in response to a direct question from me: 'There is no dispute he acted as a judge'. The Panel therefore did not in terms disbelieve his evidence, but equally said in effect that it had not been corroborated. The Panel therefore seems to have adopted a kind of half-way house approach, whereby it did not disbelieve the Claimant, but it did not entirely believe him either. Mr Brown accepted that the Panel had to act fairly and said that was 'uncontroversial'. The approach the Panel adopted was an unfair and unreasonable approach which undermines its reasons and conclusion. It should either have said, fairly and squarely, that it tended to disbelieve the Claimant's account of his work (and given reasons for that conclusion, having put its concerns to him for his response), or it should have said it accepted it, and then weighed it properly against the conditions. If it required further details of precisely what cases he worked on including, for example, the names of Taliban defendants, then it should have sought them.

173. In short, unless the Panel was minded to accept the Claimant's account, then fairness and proper decision making required that its concerns be put to the Claimant. In *R v Hackney London Borough Council, ex p Decordova* (1995) 27 HLR 108, 113, Laws J said, in the context of a housing decision but by reference to immigration law as well:

> "In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer accommodation in a particular area, they are bound to put to the applicant in interview, or by some appropriate means, the matters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it

> does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it."

174. Because the Panel did not ask directly for further evidence, the only rational conclusion open to it was to accept the Claimant's account in full. The evidence that the Claimant had worked as a judge was detailed and uncontradicted. He gave the names of the courts where he had served in Helmand and the positions he had held. All of that was verifiable by the Defendant and was, or ought to have been, sufficient for the Panel's purposes. Once it concluded, as it should have done, that the Claimant had indeed worked as senior judge handling terrorist, narcotics and corruption cases for a significant period up to 2021, then it should have gone on to assess the evidence properly.

175. It is no answer to this point to say that making inquiries would have imposed an impossible burden on the DARR. Indeed, Mr Brown expressly accepted that the Panel could have asked for further information. The Claimant's solicitors had been asked for further information on other matters by DARR earlier in the process, and the Panel could therefore have asked for details of particular cases – especially as the Claimant had already been turned down twice in the initial decision of 30 March 2022 and then by the (first) Review Panel. Furthermore, as Ms Kalunga herself said at [34]:

> "34. Should there be any ambiguity as to the facts or where there is insufficient evidence to consider a case, it may be postponed pending further investigation by the Review Panel Caseworker and re-considered at a later date. It is for each Panel member to raise any objections and bring to the fore those evidential pieces from the files that both support and/or dispute a case."

176. Nor do I accept Mr Brown's oral 'straw man' argument that the Panel could not have been expected to have go into every facet of the evidence. That is not suggested by the Claimant (and was not being suggested by me orally). The position here was that the Panel had identified an issue with the evidence, which was important enough to be one of the few things it did mention in its Notes. It was therefore important enough that, as a matter of fairness, it should have been put to the Claimant. As I put to Mr Brown, and he did not disagree, an email could have been sent to the Claimant's solicitors asking for examples of specific cases to be supplied within (say) seven days, in default of which the application would be dealt with on the existing material.

177. Fifth, Ms Kalunga's statement at [54] shows that the Panel did not appear to properly understand the nature of Mr Foxley's evidence and so did not assess it correctly (if indeed it did so at all). She said:

> "54. The Review Panel Notes provided comprehensive extracts taken from the Claimant's P-Files. This included a quote relating to the Foxley Report cited in the Claimant's statement of Facts and Grounds. Mr Foxley was discussed in terms of his self-regard as an 'expert' and whether the information provided had, or could be, validated. All Panel members confirmed they had read the Foxley Report and were therefore able to comment upon it and consider

> its contents as part of their assessment process. It was mentioned that this report was, in part, based on personal opinion and what was believed to be the case, so it was considered as to what degree it could be relied upon as conclusive evidence of fact. The consensus of opinion was that the Foxley Report must be considered but collaborating evidence should be sought to substantiate its assertions."

178. Mr Foxley was not a witness of fact and did not claim to be. He was an expert witness. He clearly explained the basis upon which he was giving evidence at [1]-[7] of his report. As an expert witness, he was allowed to express opinions. That is what experts do, but factual witnesses generally do not. Hence, the Panel's sentence, 'It was mentioned that this report was, in part, based on personal opinion and what was believed to be the case, so it was considered as to what degree it could be relied upon as conclusive evidence of fact' shows the Panel misunderstood his evidence. Mr Foxley could not say, and did not purport to say, that what the Claimant was saying he had done as a judge was true: see at [34]: 'From the information your client has provided …'. His approach was thus to express opinions in light of his expertise, *if* the factual material he had been supplied with were true. He did not usurp the Panel's function of deciding whether it *was* true. His methodology was therefore entirely orthodox and correct. And his report contained many citations to the source material on which his opinions were based. No further 'collaborating evidence' was therefore necessary, as the Panel wrongly believed.

179. Sixth, I accept that weight of evidence was a matter for the Panel. However, that is subject to its assessment being reasonable. The Panel's conclusion that the Claimant had not provided 'specific details of how [he] contributed to the UK's counter-terrorism mission in Afghanistan (in his position of Judge or any other of the judiciary roles mentioned)' was one which was not reasonably open to it on the evidence, and was wrong. Again, there are a number of points that can be made. Firstly, as Swift J said in *LND1*, it is 'obvious' that fairly and assiduously judging terrorist cases – and so ensuring that the guilty were convicted and the innocent acquitted – contributed to HMG's counter-terrorist and national security mission. Second, by working as a defence lawyer and judge (not just on terrorist cases), the Claimant contributed to upholding the rule of law more generally, which was one of HMG's strategic objectives (and of which counter-terrorism was just one component). As I said earlier, this follows *ipso facto* from being a judge dealing with serious cases (and also a defence lawyer). Third, the Claimant's witness statement was as specific as to details as it could be, given the circumstances the Claimant was then living (in hiding and in fear of his and his family's life and barely surviving).

180. Seventh, the Panel's conclusion that 'the Applicant being supported *by* a UK Government department is not necessarily the same as the Applicant working in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department …' was semantic hair splitting. The question was whether the evidence provided by *this* Claimant as to what he did showed that as well as being supported *by* a department, he provided support *to* it. For the reasons set out earlier, he obviously did. Mr Brown fairly accepted this aspect of the Panel's reasoning was flawed.

181. Eighth, Ms Kalunga's summary of the Panel's reasons concluded at [52] of her statement:

> "The panel assessed all of the information held on file for the Claimant … but could not determine a substantive link to any UK government department nor could they find evidence of a direct link to His Majesty's Government."

182. To the extent I can rely on this evidence, given my earlier misgivings about Ms Kalunga's evidence, it again demonstrates a misunderstanding of the conditions in Category 4 and therefore a misapplication of them by the Panel. Neither of the phrases 'substantive link' or 'direct link' appears in Category 4.

183. Ground 1B is therefore made out and the Defendant's decision cannot stand. Even allowing for an 'attenuated' standard of reasoning, the Defendant's reasons are deficient. The requirement (per *MN* at [242]) that 'Every factor which tells in favour of the applicant has been properly taken into account' was not met in this case.

184. I also consider that Ground 1C is made out. The Panel's Decision was irrational for all of the reasons already given. I adopt the approach of Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), at [29]-[35], [40]-[41] under the heading 'Irrationality and reasons':

> "29. I have set out the evidence before the Panel at some length above. That was necessary in order to properly assess the rationality challenge. The essential submission is that in the light of that evidence the Panel's conclusion that Mr Well's risks could not be safely managed in the community was irrational. As I explain below, I prefer to approach this Ground 2 (the rationality challenge) and the Ground 4 challenge (reasons challenge) together.
>
> 30. As is obvious, a rationality challenge in public law is always a substantial challenge for a Claimant; and particularly so, when dealing with a specialist quasi-judicial body which will have developed experience in assessements of risk in an area where caution is required.
>
> 31. A modern approach to the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) test is not to simply ask the crude and unhelpful question: was the decision irrational?
>
> 32. A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.

> 33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in *Wednesbury* (at 230: "no reasonable body could have come to [the decision]") but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?
>
> 34. This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion.
>
> 35. I should also emphasise that under the modern context-specific approach to rationality and reasons challenges, the area with which I am concerned (detention and liberty) requires me to adopt an anxious scrutiny of the Decision: see Judicial Review (Sixth Edition), Supperstone, Goudie and Walker at para.8.12.
>
> …
>
> 40. The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting …
>
> 41. I accordingly conclude that the Panel's decision failed to reflect the evidence before it or to explain in more detail why such evidence was being rejected …"

185. Mr Brown submitted that irrationality sets a higher bar than procedural law challenges for failure to give reasons. He said even if the Claimant succeeded in part of the challenge under the procedural law grounds, it was not the case *a priori* that the Defendant's conduct fell so far short of the public law duties as to be deemed irrational. He relied on *MKA*, [48]:

> "In my judgement the Defendant is correct to characterise the [ARAP] 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."

186. I would observe that the Defendant's reliance on this passage – and his oral reference to the Defendant's supposed 'institutional know-how' - sits rather uneasily with his

submission that the Panel is made up of lay people who cannot or should not be expected to give detailed explanations: DGD, [8(a)]; Skeleton Argument, [21(b); *R v Governors of the Bishop Challoner Roman Catholic Comprehensive Girls' School ex p Choudhury* [1992] 2 AC 182, p197E (the court should not approach decisions and reasons given by committees of laymen expecting the same accuracy in the use of language which a lawyer might be expected to adopt). Whilst that general principle is uncontroversial, on Mr Brown's case it does not really fit the decisions of the Panel.

187. The Panel's decision must therefore be quashed.

Ground 2

188. Mr Brown submitted that Ground 2 really runs alongside Ground 1B. I think that is right. Many of the matters going to the insufficiency of the Panel's reasons also sound, in public law terms, as the Panel having misapplied the conditions in Category 4. My discussion of Ground 2 should therefore be read with my discussion of Ground 1B.

189. On the authority of *LND1*, it is clear from all of its reasons that the Second Review Panel adopted a wrong approach to Category 4, and for that reason also, its Decision cannot stand. In short, it wrongly considered condition 1 in isolation, whereas the proper approach required it to consider the factual matters underpinning conditions 1 and 2 together, and especially because the Claimant was not in either of the first two classes of person within condition 1, ie, he was not employed and did not work under contract.

190. For convenience, I will set out conditions 1 and 2 again:

> "(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);"

191. *LND1* was also a case about a judge who had been refused under the ARAP on the grounds that he did not satisfy condition 1 in Category 4. At [18] Swift J noted that LND1's evidence about the work he had done between 2008 and 2021 had been accepted as true by the defendant. From 2008 until August 2021 he had held several judicial and related posts. Between 2008 and 2009 he was a member of the Primary (ie, the first instance) Court for Crimes Against Internal and External Security in Kabul (referred to by him as the 'Terrorist Court') which included working on cases of Taliban combatants. From 2013 to 2016 he was a member of the General Directorate of Investigation and Legal Studies of the Afghanistan Supreme Court. The Directorate developed the legislation and rules governing the Afghanistan Anti-Corruption Justice Centre (the ACJC), which was established in 2016. From 2016 to 2021 LND1 was the Director General of the Directorate of Investigation and Legal Studies. In this position he was responsible for interpretation of the law applicable to the ACJC and the law applicable to the Counter-Narcotics Justice Centre (the CNJC) which had been established in 2005 to investigate and prosecute drug related offences. LND1 also said that between 2019 and 2021 he was actively involved in the work of the CNJC. Neither the FCDO nor the NCA, whom the MoD had consulted, was supportive of his claim that he satisfied condition 1 in Category 4 and neither was prepared to sponsor him.

192. Swift J said at [19]-[21]:

> "19. Drawing this together, it is apparent that the question of whether the First Claimant had worked in partnership with or closely supporting or assisting a government department was considered in terms of whether the First Claimant had held office at the Terrorism Court at a time when the Foreign Commonwealth and Development Office considered itself to have been 'in partnership' with that court (ie, from 2015), or whether his name was known to anyone at the Foreign Commonwealth and Development Office or the National Crime Agency, or whether he had been in receipt of any form of payment (see the reference to the National Crime Agency's 'payment schedule').
>
> 20. I do not consider this is a correct approach to the application of this part of Condition 1 in ARAP 3.6. The overall effect of the responses from the Foreign Commonwealth and Development Office and the National Crime Agency involved consideration of Condition 1 in isolation from Condition 2. ARAP 3.6 contains four conditions. An applicant must satisfy Conditions 1 and 2 and either Condition 3 or Condition 4. There is a clear distinction between Conditions 1 and 2 on the one hand, and on the other hand, Conditions 3 and 4. Put generally, the latter concern risk arising by reason of the work the

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

21. That was not the approach taken in this case, and for that reason the Secretary of State for Defence failed properly to consider the First Claimant's application in accordance with his policy. That being so, the next issue is whether the application of Conditions 1 and 2 ought to be

> remitted to the Secretary of State for Defence for further consideration or whether that is unnecessary so far as concerns compliance with those Conditions because, given the First Claimant's circumstances it is clear on any proper application of this part of the scheme there would only be one legally permissible outcome."

193. In *CX1* (DC), the Court said at [72]-[74] under the heading 'The interpretation of condition 2 of ARAP Category 4':

> "72. It was submitted on behalf of the claimants that the defendants had taken too narrow an approach to condition 2 of category 4 of ARAP. For *CX1* and *CX6* the defendants had asked whether UK national security objectives were the goal of the work carried out by those claimants, rather than considering whether the claimants had made a contribution to the UK national security objectives.
>
> 73. It was submitted on behalf of the defendants that it was for their caseworkers to make the assessment whether there was compliance with the objectives because they were the core functions of the relevant departments. There was no rationality challenge to the decisions made by the defendants, meaning that it was simply a matter of the proper interpretation and application of the policy. The use of the term goal did not mean that the policy had not been properly applied.
>
> 74. It is clear that condition 2 does link the 'employment', 'work' or 'the provision of those services' to the substantive and positive contribution to the achievement of the relevant objectives. This is because the policy refers to 'that employment or work' and 'those services', and not some other employment or work or services. Condition 2 required that the claimant 'in the course of that employment or work or the provision of those services" to have 'made a substantive and positive contribution to' the achievement of the relevant objectives. Condition 2 does not require however, the achievement of the relevant objectives to be the 'goal' of the 'employment', 'work' or 'the provision of those services'."

194. It is plain from the decision letter that the Second Review Panel considered condition 1 in isolation and, having concluded that the Claimant did not satisfy it, did not go any further or meaningfully consider condition 2. It wrongly focussed on trying to identify some substantive or direct link between the Claimant and a UK Government department, which are words not used in Category 4, rather than the right functional question, which was: did what the Claimant do (as put forward in support of the claim under condition 2 as having made a substantive and positive contribution towards the

achievement of the UK Government's national security objectives), qualify him under condition 1 ? Another way of putting it is: was there an alignment between what the Claimant did, and the goals of the UK Government ?

195. As well as misdirecting itself on 'links', the Panel appears to have allowed itself to get side-tracked into 'wood for the trees' type points, such as whether the Claimant had named specific cases, or could name individuals or officials from the PRT with whom he had worked in partnership with or was closely supported and assisted by.

196. Pressed by me to give his client's case on the meaning of 'partnership' in condition 4, Mr Brown said it meant 'a sufficiently strong relationship that could properly be described as one of partners in the sense of two or more entities working together to achieve a particular purpose or goal'. That was not the approach adopted by the Panel. In relation to 'closely supporting or assisting', Mr Brown said that 'closely' imported a high threshold. The focus is on the 'level of connection'. Mr Brown accepted an example suggested by me in argument of the British Army identifying an area of opium production, and passing intelligence to the Afghan authorities, which led in turn to the Claimant presiding over the trial of the alleged opium producers. He accepted this example could satisfy condition 2 as 'closely supporting or assisting'.

197. It therefore seems to me that the Panel committed the same error as did the decision maker in *LND1* by not considering conditions 1 and 2 in Category 4 together in the way Swift J said that they should with regard to function. In mitigation, it is right to note that *LND1* was handed down two months after the Decision in this case.

198. Mr Brown said that the following paragraph showed consideration by the Panel of conditions 1 and 2:

> "The panel considered the assertions made by the Applicant and his representatives that he was supported by the Helmand Provincial Reconstruction Team (PRT) in his role as Defence Lawyer and that his work as Judge will have been carried out alongside and/or in partnership with and/or closely supporting and assisting UK Government departments as part of the UK's counter-terrorism mission in Afghanistan. But it was noted that the Applicant did not go beyond these assertions to expressly detail the nature of that support, provide details of any relevant cases dealt with or individuals/officials from the PRT with whom he worked in partnership with or was closely supported and assisted by. The panel also noted that the evidence supplied by the Applicant did not include details of the specific terrorist crimes he presided over in his role as Judge, or details of how he specifically contributed to the UK's counter-terrorism mission in Afghanistan."

199. I disagree. There is no trace of the language of condition 2 in this paragraph ('substantive and positive contribution') and Mr Brown's suggestion is inconsistent with both the *pro forma* letter (which made no mention of condition 2) and also the Panel's Notes, which said in terms that condition 2 was not considered.

200. I also reject any suggestion based on Ms Kalunga's evidence that the Second Review Panel did, fact, consider conditions 1 and 2 together. She said at [55]: (emphasis added):

> "55. … The Panel's consensus was that the Claimant's PRT association provided very little in terms of meeting Conditions 1 and 2 of Category 4 of ARAP. *Because Conditions 1 and 2 were not met, the remaining conditions were not assessed.*"

201. This evidence is not admissible and I reject it. My conclusion is in accordance with well-understood public law principles. The cases are collected in *Fordham*, Judicial Review Handbook (Seventh Edn), [64.4.7]. For example, in *R (Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290, [64], a planning case, Jackson LJ said:

> *"*Save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached. In the present case the officer's report, the minutes of the Planning Committee meeting and the stated reasons for the grant of planning permission all indicate a misunderstanding of policy H20. These are official documents upon which members of the public are entitled to rely. Mr Findlay's submission that this is not a 'reasons' case like *Ermakov* [*R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302] misses the point. The Council should not have been permitted to rely upon evidence which contradicted those official documents. Alternatively, the judge should not have accepted such evidence in preference to the Council's own official records."

202. More recently, in *R* (*Inclusion Housing Community Interest Company) v Regulator of Social Housing* [2020] EWHC 346 (Admin), [78], Chamberlain J said (citations omitted):

> "78. So far as *ex post facto* reasons are concerned, the authorities draw a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons … Evidence of the former kind may be admissible; evidence of the latter kind is generally not. Furthermore, reasons proffered after the commencement of proceedings must be treated especially carefully, because there is a natural tendency to seek to defend and bolster a decision that is under challenge …"

203. Ms Kalunga's evidence suffers from both of these vices. It is both inconsistent with the Second Review Panel's Decision in its pro forma letter and Notes, both of which

rejected the Claimant on condition 1 only, and it was only provided after these proceedings had commenced. I therefore I reject it. In saying this, I do not attribute any bad faith to Ms Kalunga; it is just that this aspect of her evidence is wrong and inadmissible.

204. In his submissions Mr Seddon speculated that one reason the Panel may not have mentioned Mr Foxley's evidence (which also focussed on the nature of the functions performed by the Claimant which aligned with the UK Government's goals), was because it simply did not grasp that functionality is the foundation of the correct approach. Be that as it may, I conclude that the Panel went wrong.

205. It is beyond doubt that the Claimant's work as a defence lawyer and judge over a number of years (especially in relation to terrorism, narcotics and corruption cases) made substantive and positive contribution towards the achievement of the UK government's national security objectives in condition 2.

206. In summary, therefore, the Claimant's case succeeds on Grounds 1A, 1B and 1C and Ground 2.

207. The next question (per *LND1* at [21]), is whether the application of conditions 1 and 2 in Category 4 ought to be remitted to the Defendant for further consideration, or whether that is unnecessary so far as concerns compliance with those conditions because, given the Claimant's circumstances and the evidence, it is clear on any proper application of this part of the ARAP there can only be one legally permissible outcome.

208. As Swift J said at [22] of *LND1*, it is in the nature of the application of provisions such as conditions 1 and 2 that instances where there will be only one such outcome will be rare. However, like him in that case, I am satisfied that this is such a case.

209. The Claimant's case, which was not rejected by the Defendant, was that that Claimant worked in the roles he says that he did, first between 2008 and 2015 as a defence lawyer, and then as a judge in Helmand in various roles up to appeal court level from 2015 until 2021. During the latter period he handled a range of cases including terrorism cases, drug smuggling cases and administrative corruption cases (see his first witness statement, [12]).

210. These matters clearly evidence an extended period of work over many years in important rules in the Afghan justice system and judiciary, the work of which was obviously central to the HMG's UK's national security objectives in Afghanistan, as described in condition 2 (counter-terrorism, counter-narcotics and anti-corruption being specified as included in those objectives). There is direct evidence from Mr Foxley that the FCO worked alongside judges and others in Helmand (see his report at [33]-[36]). The Claimant therefore performed significant activities which were closely aligned with the democracy-building and rule of law building activities of the UK Government in Afghanistan and in Helmand in particular. He made significant contributions to the building of a properly functioning criminal justice system in the fields of terrorism, anti-narcotics, and anti-corruption, among others. Conditions 1 and 2 are therefore plainly satisfied on the evidence.

Final points

211. Finally, for completeness, I deal with two points.

212. Firstly, the Claimant applied in an application notice dated 15 November 2023 (the day before the hearing) to admit evidence contained in an Addendum Supplementary Bundle. This is evidence which has gone to the Home Office in support of an application for LORT. I was shown the material *de bene esse*.

213. Mr Seddon said that it went to the procedural fairness issue of what the Claimant might have been able to say on review if he had been given proper reasons from the outset for the rejection of his claim. It included a further witness statement from the Claimant giving more details about his work as a lawyer and judge, including numbers of cases he dealt with and the name of at least one high profile Taliban defendant he dealt with.

214. The Defendant objected to this additional material being admitted (but did not object to my seeing it *de bene esse*).

215. I need not determine this application as I have found for the Claimant on his existing grounds. I have left the material out of account in reaching my decision.

216. Second, at the very end of his submissions, Mr Seddon argued that the Taliban's perception of the Claimant's role was relevant to conditions 1 and 2, and not just condition 3, in Category 4, basing himself on [98] of Lane J's judgment in *CX1*:

> "98. Whilst I accept that the Taliban's perception of the relationship between the BBC and HMG cannot alter the ordinary meaning of the words contained in sub-paragraph (c) of condition 1, that perception is clearly relevant so far as condition 3 is concerned. Condition 3 requires there to be or have been an elevated risk of targeted attacks, death or serious injury 'because of …that work.'"

217. He referred to [40(5)] of his SFG, where it was argued that Category 4 had been misapplied because 'perception was relevant whether the work done alongside the UK Government put the Claimant at an elevated risk of attacks, death or serious injury: [*CX1*] at [98] but this was not considered by the Panel.' The specific relevant condition(s) were not identified.

218. Mr Brown said that his client had been taken by surprise by the way Mr Seddon had put the point orally, and he objected. Given I have found for the Claimant on the points set out above, I do not need to resolve this issue.

Conclusion and disposal

219. The Claimant's' claim for judicial review succeeds on the grounds I have indicated. The consequence of my conclusions is that the Claimant meets conditions 1 and 2 in Category 4 of ARAP within [276BB5] of the Rules.

220. It will now be for the Defendant to consider whether either condition 3 or condition 4, or both, in Category 4 is met. If his decision is that either or both of those conditions is

met then, subject to any other relevant point arising under the Rules, the Claimant's and Interested Party's applications for entry clearance will fall to be determined by the Home Secretary in accordance with the Rules.