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Case No: AC-2023-LON-001965; CO/2359/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2024

Before

MR JUSTICE SWIFT

Between

THE KING
on the application of

MTA

Claimant

– and –

**(1) SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

**(2) SECRETARY OF STATE FOR FOREIGN,
COMMONWEALTH AND DEVELOPMENT
AFFAIRS**

(3) SECRETARY OF STATE FOR DEFENCE

Defendants

Ramby de Mello and Edward Nicholson (instructed by **Luke & Bridger Law**) for the
Claimant

Edward Brown KC and Benjamin Tankel (instructed by **Government Legal Department**)
for the **Defendants**

Hearing date: 20 February 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE SWIFT

A. Introduction

1. On 11 August 2022 the Claimant entered an expression of interest to obtain assistance under the Afghan Citizens Resettlement Scheme (“the ACRS”). The ACRS is a scheme under which Afghan nationals may come to the United Kingdom to live and work. By letter dated 31 March 2023, the Claimant was informed that he would not be offered resettlement under the scheme. The letter set out the following reasons:

“1. Thank you for submitting an Expression of Interest for Pathway 3 of the Afghan Citizens’ Resettlement Scheme (ACRS). Having carefully considered your submission and taking into account the ACRS Pathway 3 requirements, we regret to inform you that you will not be referred for resettlement in the United Kingdom under this scheme. The reason for this decision is set out below.

2. In Year 1 of Pathway 3, we are considering eligible at-risk Chevening alumni and British Council and GardaWorld contractors for resettlement. Based on the information provided, we do not believe you are eligible for consideration as you have not demonstrated you are part of one of these groups.”

In these proceedings the Claimant challenges the legality of this decision. As explained below, the ACRS is a scheme described as comprising three pathways. The decision challenged in this claim concerns what has been termed the third referral pathway.

2. The ACRS was first announced on 18 August 2021 by the Prime Minister and the Home Secretary. Their announcement included the following:

“Thousands of Afghan women, children, and others most in need will be welcomed to the UK under one of the most generous resettlement schemes in our country’s history.

Those who have been forced to flee their homes or face threats of persecution from the Taliban will be offered a route to set up home in the UK permanently.

The UK government’s ambition is for the new Afghanistan Citizens’ Resettlement Scheme to resettle 5,000 Afghan nationals who are at risk due to the current crisis, in its first year.

Priority will be given to women and girls, and religious and other minorities, who are most at risk of human rights abuses and dehumanising treatment by the Taliban.

This resettlement scheme will be kept under further review for future years, with up to 20,000 in the long-term. The ambition

to provide protection to thousands of people fleeing Afghanistan and the complex picture on the ground means there will be significant challenges delivering the scheme, but the government is working at speed to address these obstacles.

...

The UK is working with international partners to develop a system to identify those most at risk and resettle them, insuring help goes to those that need it. The Prime Minister is expected to discuss this with G7 leaders in a virtual meeting in the coming days.”

3. The first version of a guidance document was published on 6 September 2021. That document stated that the scheme was not yet open and that “the eligibility requirement will be published in due course”.
4. On 13 September 2021 the Home Office published a policy document “Afghanistan Resettlement and Immigration Policy Statement”, and a second version of the guidance on the ACRS. The material part of the policy statement was as follows:

“Eligibility and referrals

23. The ACRS provides those put at risk by recent events in Afghanistan with a route to safety. The scheme will prioritise:
 - a. those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women’s rights and freedom of speech, rule of law (for example, judges, women’s rights activists, academics, journalists); and
 - b. vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT).
24. There will be many more people seeking to come to the UK under the scheme than there are places. It is right that we take a considered approach, working with partners to resettle people to the UK. There will not be a formal Home Office owned application process for the ACRS. Instead, eligible people will be prioritised and referred for resettlement to the UK in one of three ways.
25. First, some of those who arrived in the UK under the evacuation programme, which included individuals who are considered to be at particular risk – including women’s rights activists, prosecutors and journalists – will be resettled under the ACRS. People who were notified by the UK government that they had been called forward or specifically

authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK. Efforts are being made to facilitate their travel to the UK.

26. Second, the government will work with the United Nations High Commissioner for Refugees (UNHCR) to identify and resettle refugees who have fled Afghanistan ... UNHCR has expertise in the field and will refer refugees based on assessments of protection need. We will work with UNHCR as partners in the region to prioritise those in need of protection such as women and girls at risk, and ethnic, religious and LGBT minority groups at risk. We will start this process as soon as possible following consultations with UNHCR.
27. Third, the government will work with international partners and NGOs in the region to implement a referral process for those inside Afghanistan (where safe passage can be arranged) and for those who have recently fled to countries in the region. This element will seek to ensure we provide protection for members of Afghan civil society who supported the UK and international community effort in Afghanistan. This category may include human and women's rights activists, prosecutors and others at risk. We will need some time to work through the details of this process, which depends on the situation."

The guidance document also indicated that the ACRS would comprise three elements:

"Prioritisation and referral for resettlement will be in one of three ways:

1. Vulnerable and at-risk individuals who arrived in the UK under the evacuation programme will be the first to be resettled under the ACRS. People who were notified by the UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK.
2. Secondly, the government will work with the UNHCR to identify people most at risk and refer them for resettlement, replicating the approach the UK has taken in response to the conflict in Syria.
3. Finally, the government will work with our international partners in the region to implement a referral process for those inside Afghanistan (where safe passage can be arranged), and for those who have recently fled to countries

in the region. This process will likely be affected by the ongoing situation within Afghanistan.”

One matter that is clear both from the policy statement and the 13 September 2021 version of the guidance document, is that the ACRS was at a formative stage, in the process of development. This was most clearly so for the second and third elements of the scheme. At this stage, the ACRS was not open for business.

5. On 6 January 2022 a third version of the guidance document was published, and the Minister for Afghan Resettlement made a statement in the House of Commons. This marked a partial opening of the ACRS. Both the guidance document and the Ministerial statement described the scheme as comprising “three pathways”. The Minister’s statement included the announcement that the first of the three pathways of the resettlement scheme was now open. The guidance document included the following:

“There is no application process for the ACRS. Prioritisation and referral for resettlement will be in one of three ways:

1. Vulnerable and at-risk individuals who arrived in the UK under the evacuation program will be the first to be settled under the ACRS. Eligible people who were notified by UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK. The first Afghan families have been granted ILR under the scheme.

2. Secondly, from spring 2022, the UNHCR will refer refugees in need of resettlement who have fled Afghanistan. The UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. We will continue to receive such referrals to the scheme in coming years.

3. The third referral pathway will relocate those at risk who supported the UK and international community effort in Afghanistan, as well as those who are particularly vulnerable, such as women and girls at-risk and members of minority groups. In the first year of this pathway, the government will offer ACRS places to the most at risk British Council and GardaWorld contractors and Chevening alumni. The Foreign, Commonwealth and Development Office will be in touch with those eligible to support them through next steps. Beyond the first year, the government will work with international partners and NGOs to welcome wider groups of Afghans at risk.”

The three referral pathways reflected the three elements of the resettlement scheme that had been set out in the September 2021 version of the guidance.

6. The second and third referral pathways of the ACRS opened on 13 June 2022. At this time there was a further Ministerial statement (made by the Minister for Safe and Legal Migration), and a further (fourth) version of the guidance was published. So far as concerns the third referral pathway, the Ministerial statement included the following:

“Under pathway 3, we committed to considering eligible at-risk British Council and GardaWorld contractors and Chevening alumni. The Foreign, Commonwealth and Development Office (FCDO) will refer up to 1,500 people from Afghanistan and the region to the Home Office for resettlement, including any eligible family members. The FCDO will launch an online system on Monday 20 June, where eligible individuals will be able to express interest in UK resettlement. Expressions of interest will be considered in the order they are received, although some groups will be prioritised because the role they performed or the project they worked on mean they are particularly at risk, or because there are exceptionally compelling circumstances. Expressions of interests will be accepted until Monday 15 August 2022, when the online system will close. Guidance on the expression of interest process is available ... from Monday 13 June.”

The June 2022 guidance document included the following:

“The scheme is not application-based. Instead, eligible people will be prioritised and referred for resettlement to the UK through one of 3 referral pathways:

1. Under Pathway 1, vulnerable and at-risk individuals who arrived in the UK under the evacuation programme have been the first to be settled under the ACRS. Eligible people who were notified by the UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK.
2. Under Pathway 2, we are now able to begin receiving referrals from the United Nations High Commissioner for Refugees (UNHCR) of vulnerable refugees who have fled Afghanistan for resettlement to the UK. UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. UNHCR will refer individuals in accordance with their standard resettlement submission criteria, which are based on an assessment of protection needs and vulnerabilities.
3. Pathway 3 was designed to offer a route to resettlement for those at risk who supported the UK and international community effort in Afghanistan, as well as those who are particularly vulnerable, such as women and girls at-risk and members of minority groups. In the first year of this pathway, the government

will consider eligible, at-risk British Council and GardaWorld contractors and Chevening alumni for resettlement. There are 1,500 places available in the first year under Pathway 3, this number includes the principal applicants and their eligible family members.”

This was then, in very similar terms to what had been said about the third referral pathway in the third (January 2022) version of the guidance. The point that is material for present purposes is that the versions of the guidance published in January 2022 and June 2022 both stated that in the first year of its operation, resettlement under referral pathway 3 would only be available to persons who had worked in Afghanistan for either the British Council or GardaWorld, the contractor who had provided security for the British embassy in Kabul, and to the former Chevening scholars. (In this judgment I will refer to these groups collectively as the “three categories”.)

7. The Claimant entered his expression of interest using the online application system referred to in the Ministerial statement. The online system required applicants to provide details in support of their claim to be eligible for resettlement under the scheme. Applicants were required to give details of work undertaken for the British Council and/or with GardaWorld, or details of Chevening scholarships they had held. The online form included a further section “other eligibility grounds”. This was the part of the form the Claimant completed. He inserted the following information.

“I worked for a British company called TOR International in Supreme Truck Park [Branch] where the TOR held the contract of supporting NATO fuels.”

As is apparent from the March 2023 decision letter (at paragraph 1 above), the Claimant’s application failed because he had not worked either for the British Council or GardaWorld and had not been a Chevening scholar.

8. The Claimant’s challenge to the legality of the decision refusing his request for resettlement under ACRS rests on two grounds. The first ground is that because the decision on his expression of interest was made in March 2023 it was not lawful for the Secretary of State to refuse the application for the reason given –that applications under the third referral pathway 3 were restricted to persons in the three categories. The submission is that the January 2022 version of the guidance had stated that this restriction would apply only for one year. The second ground is that, in any event, it was unlawful for the Secretary of State to limit applications under the third referral pathway to persons within the three categories, even for the first year of the operation of that pathway.

B. Decision**(1) Ground 1. Refusal of application for reasons given unlawful because decision made after the first year of operation of the third referral pathway.**

9. Close attention to the announcements made and guidance published in January and June 2022 makes clear that this ground of challenge must be dismissed. The points made in January 2022 were: (a) that the third referral pathway was not yet open; and (b) that in its first year of operation, the third referral pathway would only be available to people in the three categories. The announcement made in June 2022 confirmed that the third referral pathway was open, that applications could be made online between 20 June 2022 and 15 August 2022. The June 2022 guidance stated that for the first year, assistance would be provided to 1,500 persons, and that those persons had to be in one or other of the three categories. The guidance also included a link to the on-line application system.
10. Drawing these points together: (a) in its first year of operation, the third referral pathway was intended to help 1,500 persons; (b) those persons would be drawn from the three categories; and (c) applications for assistance in the first year had to be online between 20 June and 15 August 2022.
11. The Claimant's application was made via the online application process on the 11 August 2022. It was an application made within the first year of operation of the third referral pathway. All this being so, the decision to refuse the Claimant's application for the reasons that he fell into none of the three categories was a decision consistent both with the guidance issued in January and in June 2022, and with the Ministerial statements made at those times. The application was correctly treated as an application made in the first year of operation of the third referral pathway. The date on which the Claimant was informed of the decision on that application is immaterial (although, for what it is worth, the decision was made and communicated within twelve months of June 2022, when the third referral pathway opened). In the premises, the first ground of challenge fails.

(2) Ground 2. Was it unlawful to limit the third referral pathway to those in the three categories?

12. The focal point of the Claimant's submission on this ground is that as described both in the January 2022 version of the guidance and then in the June 2022 version, referral pathway three rests on a contradiction. The January 2022 guidance document contains these two sentences:

“The third referral pathway will relocate those at risk who supported the UK and international community effort in Afghanistan, as well as those who are particularly vulnerable, such as women and girls at-risk and members of minority groups. In the first year of this pathway, the government will offer ACRS places to the most at risk British Council and GARDA World contractors and Chevening alumni.”

The June 2022 version of the document includes materially the same points. Taking the passage set out above as the example, the Claimant submits the second sentence both contradicts the first and, in any event, is inconsistent with the purpose of the ACRS as originally announced in August 2021. In August 2021 the ACRS had been described as a scheme that would give priority to “women and girls and religious and other minorities who are most at risk of human rights abuses and dehumanising treatment by the Taliban”. Thus, contends the Claimant, restricting the third referral pathway to the three categories was unlawful and the Secretary of State ought to have considered the Claimant’s application on its own terms – i.e. by assessing the risk he was exposed to by reason of working to assist NATO forces in Afghanistan.

13. I accept there is practical force in the submission that restricting the third referral pathway, even if only in its first year of operation, to three categories of people each of which has a strong connection with the interests of the Foreign, Commonwealth and Development Office is some way distant from the stated aspiration stated of the ACRS when it was announced on 18 August 2021. There is also practical force in the point that the three categories, as referred to in the second sentence above, are very different from the class identified in the first sentence (the class of women and girls and minority groups), which is a class of persons at risk because of the ideology of the Taliban.
14. However, the court’s role only concerns the legality of the approach the Secretary of State has taken. Absent any matter going to the legality, it is not for the court to determine the content of policy; it is no part of the court’s role to take control of the levers of policy. In this instance the mismatch the Claimant points to does not reveal any unlawful decision by the Secretary of State. The conclusion I have reached is the same as the conclusion reached by Bourne J in *GA v Secretary of State for the Home Department* [2023] EWHC 871 (Admin) who considered similar submissions at §70 of his judgment.
15. For the purposes of assessing the legality of the Secretary of State’s approach, little weight attaches to the statement made by the Prime Minister and the Home Secretary on 18 August 2021. What was said then was essentially aspirational, it was expressed in terms of the government’s “ambition” for a new resettlement scheme. This impression was reinforced by the guidance as published on 6 September 2021, which made clear that the eligibility requirements had not yet been devised. The “work in progress” nature of the resettlement scheme is also made clear in the 13 September 2021 iteration of the guidance, and the passage quoted above, at paragraph 4, cannot be understood in any other way. So far as concerns what became the third referral pathway, that document refers to “working with” “international partners” “to implement a referral process for those inside Afghanistan (where safe passage can be arranged) ...”. Put shortly, at that time the government remained somewhat distant from anything that could be characterised as a statement of policy giving rise to legal consequences.
16. By January 2022 the third referral pathway had come to be formulated as being available to two groups: (a) “those at risk who supported the UK and international community effort in Afghanistan”; and (b) “those who are particularly vulnerable, such as women and girls at-risk and members of minority groups”. The pathway is described in the same way in the June 2022 version of the guidance (see the quotation at paragraph 6 above, first sentence). That being so, there is nothing in terms of inconsistency that

could amount to illegality in the further statement (in the passage above, second sentence) that in the first year of operation assistance was to be provided only to persons in the three categories. Each of those categories comprised persons put at risk by reason of their support for the United Kingdom's presence in Afghanistan. No further explanation is required for those who worked for the British Council, or those who worked for GardaWorld providing security at the British embassy in Kabul. So far as concerns the Chevening scholars, the Secretary of State was entitled to conclude that the persons that took part in that programme, which was funded by the Foreign, Commonwealth and Development Office and which has the objective of seeking to engender good relationships between the United Kingdom and future leaders in other countries, would be considered closely allied to the United Kingdom and thereby be at risk of harm from the Taliban.

17. It was not unlawful for the Secretary of State to exclude from the third referral pathway for one year the "particularly vulnerable" class in its entirety, and persons outside the three categories who were at risk in Afghanistan by reason of having provided support to the work of the United Kingdom in Afghanistan.
18. The evidence relied on by the Secretary of State in this litigation includes papers prepared for ministers and officials between August 2021 and the latter part of that year concerning the development of the ACRS. These documents have been supplemented by information in a witness statement made by Daniel Hobbs, the Director of General of the Migration and Borders Group at the Home Office. In 2021 and 2022 his responsibilities included the government's response following the withdrawal of the United Kingdom and United States from Afghanistan. So far as I am concerned, this evidence is sufficient to fill the gap identified by Bourne J at §75 of his judgment in *GA*. Taken in the round, the evidence indicates that there were significant practical obstacles to a resettlement scheme aimed at making assistance (in the form of resettlement) available generally, to women, girls and members of minority groups in Afghanistan, and persons at risk because of their support for the United Kingdom effort in Afghanistan. For example, which international organisations the United Kingdom should work with to identify those who should be resettled, how candidates for resettlement should be identified, and by whom their circumstances should be evaluated. This latter point is obviously important since it was never the stated intention that the ACRS would offer resettlement in the United Kingdom to all who had assisted the United Kingdom's work in Afghanistan. The number of people who would be resettled under the ACRS was always subject to a cap; demand was always going to outstrip supply, by some margin.
19. What I infer from the evidence I have seen is that as at the beginning of 2022 the work necessary to give effect to the full scope of third referral pathway remained work in progress. In such circumstances it was not unlawful for the Secretary of State to proceed to open the third referral pathway in its first year to the extent considered appropriate at that time: i.e. for the benefit of persons falling within the three categories, to a maximum of 1,500. In this way, there is no inconsistency between the first and second sentences of the passage set out at paragraph 12 above. Rather, the actions specified in the second sentence are steps towards the object in the first sentence. That was a permissible approach for the Secretary of State to take.

20. Given the Claimant's circumstances there is one further matter. The Claimant's application under the ACRS relied on his work for TOR International, work that had assisted the United Kingdom's efforts in Afghanistan. Was it permissible, so far as concerns persons such as the Claimant who had supported the United Kingdom in this way, to give priority to those within the three categories, or when deciding who to assist in the first year of the ACRS ought the Secretary of State to have assessed each applicant only on the basis of the risk to which he was now exposed in Afghanistan?
21. I am satisfied that it was lawful for the Secretary of State to decide as he did and to give priority to the persons in the three categories. This is for two reasons. The first is that in the context of a scheme such as ACRS, a scheme established in the discretion of the Secretary of State to help a limited number of persons drawn from a much wider class, the Secretary of State must be afforded significant latitude to decide how to prioritise the availability of a finite resource. A decision of this nature is self-evidently one that is political, and one for which the boundaries of legality need to be set accordingly. The second is that the Secretary of State's decisions in this instance rested on a rational basis. So far as concerns those who had worked for or with the British Council and those who worked for GardaWorld, the Secretary of State considered that the effect of various public statements by ministers and officials had comprised an assurance that some form of assistance would be provided. The Secretary of State does not contend these statements were such as to give rise to any legally enforceable representation. But that is not to the point. Given the choice the Secretary of State needed to make in respect of how the third referral pathway would operate in its first year, it was open to him to decide that the public statements that had been made were a sufficient reason for priority. So far as concerns the Chevening scholars the reason was different, but none the less legitimate. The Chevening scholarship programme is considered to be an important means of promoting the United Kingdom's international interests. The Secretary of State concluded, in my view permissibly, that the risk of harm to the Chevening scholars at the hands of the Taliban presented a risk to the United Kingdom's international reputation.
22. Drawing these points together, the Claimant's second ground of challenge fails. The Claimant's application for judicial review therefore fails.

C. Coda

23. There is one further matter to address relating to disclosure in this case. The Secretaries of State who are the defendants in these proceedings made their disclosure before the judgment of the Court of Appeal in *IAB v Secretary of State for the Home Department* [2024] EWCA Civ 66. The significance of this is that when the documents were disclosed they were redacted, blacking out the names of civil servants save for those holding posts in the senior grades of the civil service. The Court of Appeal's judgment in *IAB* was handed down on 2 February 2024. That judgment made clear that this practice of redaction was not permitted, that documents disclosed in judicial review claim may be redacted only for cause, and that there was no good reason for systematic redaction of the names of civil servants from disclosable documents.

24. On 15 February 2024 the parties provided the court with a signed consent order in the following terms:

“The Defendants be granted permission to maintain the redactions of the names of the civil servants who feature in the documents exhibited to the witness statement of Dan Hobbs dated 20 October 2023 and Christine Ferguson dated 19 October 2023, which were filed along with Detailed Grounds of Resistance.”

This proposed order was by way of disposal of an application the Secretaries of State had made on 20 October 2023 to redact names of civil servants from the documents they had disclosed. An order made by Stacey J on 13 December 2023, had adjourned consideration of that application pending the judgment of the Court of Appeal in *IAB*.

25. The proposed consent order was sent to the court by the Government Legal Department without further explanation and, in particular, without reference to the judgment of the Court of Appeal in *IAB*, which had been handed down. The matter has not been further explained, but I can only assume that the consent order was devised at the instigation of the Secretaries of State. Given the timing of the proposed consent order, some two weeks after the judgment of the Court of Appeal in *IAB* and following the decision by that court to refuse the Home Secretary’s application for permission to appeal (the Home Secretary being the first defendant in the *IAB* claim), it is no significant stretch of the imagination to conclude that the order proposed was in the nature of a bold attempt to outflank the judgment of the Court of Appeal.
26. The Secretaries of State, who will have had the opportunity to receive expert legal advice from the Government Legal Department led by the Treasury Solicitor, ought to have known better. The conclusion reached by the Court of Appeal in *IAB* rested squarely on the principle of open justice and the common law obligation of candour. It is not open to parties to judicial review claims to attempt to contract out of these obligations. I hope that in future those who advise Secretaries of State will have this rather basic point well in mind.
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