JR-2022-LON-001667

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King
on the application of

S & AZ
(Anonymity Order Made)

Applicants

v

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge O'Callaghan

HAVING considered all the documents lodged on behalf of the parties, and having heard from Ms Sonali Naik KC and Ms Emma Fitzsimons for S, instructed by Wilsons Solicitors; Ms Irena Sabic KC and Mr David Sellwood for AZ, instructed by Wilsons Solicitors; and Mr Richard Evans, instructed by the Government Legal Department at a hearing on 19 June 2023

UPON the parties agreeing that the Applicants be at liberty to submit any further representations and evidence in support of a decision 'in principle' by the Respondent in respect of their outstanding applications for Leave Outside the Rules ("LOTR") within 14 days of this order

AND UPON the parties making oral submission on consequential matters before Judge O'Callaghan at Field House on 22 March 2024

IT IS ORDERED THAT:

1. The order for anonymity in respect of the Applicants in these proceedings shall remain in force.

2. The Applicants' application for judicial review is granted for the reasons given in the Tribunal's judgment of 22 March 2024.

3. The Respondent's decisions of 22 July 2022 and 5 September 2022 in respect of both S and AZ, refusing their applications for LOTR (and biometric enrolment at a Visa Application Centre to be deferred until a decision in principle has been made in respect of AZ), are quashed.

4. The Respondent shall make within 35 days of receipt of any further representations described in the recital:

    a. Fresh decisions in principle on the Applicants' applications for LOTR;

b. In respect AZ, a decision on deferral of biometric enrolment at a Visa Application Centre until after a decision in principle has been made.

5. The Respondent shall, when assessing the Applicants' circumstances for the purposes of their applications for LOTR (and AZ's request for biometric enrolment at a Visa Application Centre to be deferred until a decision in principle has been made), have regard to the Applicants' proximity to the ARAP and PITTING LOTR policies, the judicial findings of Lang J in her decision, *R (on the application of S and AZ) v Secretary of State for the FCDO & Ors* [2022] EWHC 1402 (Admin), and the judicial findings of Upper Tribunal Judge O'Callaghan in his decision dated 21 March 2024 (JR-2022-LON-001667).

6. The Respondent shall pay the Applicants' reasonable costs to be assessed on the standard basis, if not agreed. The Respondent shall pay 50% of the total sum on account within 56 days of receipt of the final schedules of costs from the Applicants.

7. There be a detailed assessment of the Applicants' publicly funded costs.

D O'Callaghan
Upper Tribunal Judge
Immigration Asylum Chamber

22 March 2024

The date on which this order was sent is given <u>below</u>

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *25 March 2024*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2022-LON-001667

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

22 March 2024

Before:

UPPER TRIBUNAL JUDGE O'CALLAGHAN

- -

Between:

THE KING
on the application of
S and AZ
(Anonymity Order Made)

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms Sonali Naik KC, Ms Emma Fitzsimons
(instructed by Wilsons Solicitors LLP), for S

Ms Irena Sabic KC, Mr David Sellwood
(instructed by Wilsons Solicitors LLP), for AZ

Mr Richard Evans
(instructed by the Government Legal Department) for the respondent

Hearing date: 19 June 2023
Further written submissions received from S on 25 September 2023

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J U D G M E N T

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The Tribunal confirms the anonymity order made by UTJ Lindsley by an Order sealed on 1 March 2023 in the following terms:

Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the applicants (S and AZ). This order applies to, amongst others, the applicants and the respondent. Any failure to comply with this order could give rise to contempt of court proceedings.

Judge O'Callaghan:

i. Introduction

1. The applicants in this matter are two Afghan judges who through their judicial role in public security and counter-terrorism matters are fearful of the Taliban. Both went into hiding in the summer of 2021 and one remains in Afghanistan. Both seek leave to enter the United Kingdom outside of the Immigration Rules ('LOTR') along with dependent family members. The respondent has refused their applications.

2. This judgment is in ten main parts, as follows:

3. At the outset I express my gratitude to the legal representatives, both solicitors and counsel, for the high quality of their work both in preparation and at the hearing. There has been delay in this judgment. An explanation has been provided to the parties and their representatives.

4. The applicants are nationals of Afghanistan. Prior to the Taliban coming to power in August 2021 they worked in various judicial roles. Both served, *inter alia*, in Primary Courts hearing criminal and public security cases including matters concerned with counter-terrorism. At the time of the Taliban coming to power S was sitting in the Juvenile Court of Kabul at appeal level.

5. In these proceedings the respondent acknowledges that S "may have received threats, as a result of the upheaval that occurred both before and during the period of regime transition". However, it was considered unclear as to whether these threats are "only due" to her judicial work or have arisen on "a generalised basis due to other outside factors such as financial, property or other examples": paragraph 15(c) of the "in principle" decision dated 22 July 2022.

6. The respondent has accepted that AZ is at real risk of serious harm or death "as a result of the upheaval that occurred both before and during the events of August 2021". However, it was considered unclear as to whether the threat to his safety originated "only" because of his judicial work or "on a generalised basis due to other outside factors such as financial, property or other examples": paragraph 16(b) of the "in principle" decision dated 22 July 2022.

7. The applicants observe that in related proceedings before the High Court, the respondent did not dispute that they were at risk of serious harm or death at the hands of the Taliban: *R(S) v. Secretary of State for the Foreign, Commonwealth and Development Affairs* [2022] EWHC 1402 (Admin) ('the Lang judgment'), at [1] and [95].

8. The applicants challenge decisions issued separately to them on the same day initially refusing them leave to enter the United Kingdom outside of the Immigration Rules ('LOTR') and then confirming the initial decision. The challenged decisions are those of Entry Clearance Officers, Joint Afghan Casework Unit, dated 22 July 2022 and Entry Clearance Managers, Joint Afghan Casework Unit, dated 5 September 2022.

9. Additionally, AZ challenges a decision not to defer the requirement that he and his dependent family members provide their biometric information. This decision was conveyed in the letter dated 22 July 2022 and confirmed in the decision of 5 September 2022.

10. Several family members of the applicants are Interested Parties to these proceedings.

11. The applicants filed separate claim forms and grounds of claim. They requested that their claims be linked and considered together. The Upper Tribunal acceded to the request and the claims proceed under one claim number.

12. Both claims were initially brought against the Secretary of State for the Foreign, Commonwealth and Development Affairs and the Secretary of State for Defence, as well as the respondent. Over time, the respondent has been identified as the relevant party to these proceedings.

13. By means of detailed grounds of defence and skeleton argument, the respondent has identified an 'entry clearance officer' as the relevant decision-maker, but no point has been formally taken that the identity of the respondent in these proceedings should be amended and so the 'Secretary of State for the Home Department' is the respondent to these claims.

Post-hearing developments

14. In September 2023, Wilsons Solicitors wrote to the Upper Tribunal and confirmed that S and her family have relocated to Spain following receipt of visas. The firm was seeking to ascertain the nature of the visas issued to the family, and their length. The Upper Tribunal has not received an update as to S's present circumstances. Wilsons Solicitors confirmed their instructions to proceed with the challenge.

Related judicial consideration

15. The circumstances of Afghan judges have been subject to judicial consideration in several recent decisions both before and after the substantive hearing in this matter: *R (JZ) v. Secretary of State for the Home Department* JR-2022-LON-001012; *R (KBL) v. Secretary of State for the Home Department* [2023] EWHC 87 (Admin); *R (GA) v. Secretary of State for the Home Department* [2023] EWHC 871 (Admin); *R (AB) v. Secretary of State for the Home Department* [2023] EWHC 287 (Admin); *R (FMA) v. Secretary of State for the Home Department* [2023] EWHC 1579 (Admin), [2024] 1 WLR 723; *LND1 v. Secretary of State for the Home Department* [2023] EWHC 1795 (Admin); *R (CX1) v. Secretary of State for Defence* [2024] EWHC 94 (Admin); *R (MA) v. Secretary of State for Foreign, Commonwealth and Development Affairs* [2024] EWHC 332

(Admin); and *R (MP1) v. Secretary of State for Defence* [2024] EWHC 410 (Admin).

16. The judgments above handed down after the conclusion of the substantive hearing in this matter raise no issue(s) requiring the hearing to be reconvened. I observe Julian Knowles J in *MP1*, at [82]: "That former Afghan judges are now at considerable risk cannot seriously be doubted." The same paragraph references expert evidence directed to credible evidence of the continued threat posed by the Taliban towards those perceived as associated with the previous government and its institutions, including judges, as recorded in the Lang judgment.

ii. Anonymity

17. Upper Tribunal Judge Lindsley granted the applicants anonymity by an Order sealed on 1 March 2023.

18. This is a paradigm case for maintaining anonymity. The applicants are Afghan Judges whose lives are at risk from the Taliban. One of the applicants remains in hiding in Afghanistan.

19. The Order of Judge Lindsley is confirmed above.

iii. Procedural History

20. Both applicants filed their judicial review claims on 21 October 2022.

21. Upper Tribunal Judge Lindsley granted the applicants permission to apply for judicial review by an Order dated 31 January 2023, sent to the parties on 1 March 2023.

iv. Legislative and Policy Framework

Afghanistan

22. Prior to the announcement of withdrawal of international troops from Afghanistan, the United Kingdom government operated two schemes aimed at supporting Afghan nationals who worked with or alongside British forces, often in dangerous and challenging situations: the ex-gratia scheme and the Intimidation Policy. The Intimidation Policy ran until 31 March 2021 when it was replaced with the Afghan Relocations and Assistance Policy ('ARAP') incorporated into the Immigration Rules ('the Rules'). The ex-gratia

scheme, which provided redundancy payments, closed in November 2022.

23. On 15 April 2021, NATO Foreign and Defence Ministers confirmed the decision to start withdrawing all remaining forces from Afghanistan. Operation Toral, the codename for the United Kingdom contribution, concluded on 8 July 2021 alongside the withdrawal of other NATO forces.

24. The United Kingdom military deployed again to Afghanistan on 13 August 2021 as part of Operation Pitting, the military operation to evacuate British nationals and eligible Afghans from Afghanistan following the 2021 Taliban offensive and the subsequent fall of the Afghan Government.

Operation Pitting

25. Operation Pitting was the United Kingdom's military operation to evacuate British nationals, and other individuals at risk from the Taliban. The initial plan was to evacuate two groups. First, British nationals and their families who were the responsibility of the Foreign, Commonwealth and Development Office. The second group were Afghans given leave to enter the United Kingdom under the Afghan Relocations and Assistance Policy (ARAP) for whom the Ministry of Defence were responsible.

26. From the week beginning 9 August 2021, Ministers sought to evacuate other at-risk Afghan nationals who were not eligible for ARAP. Selected persons who met agreed criteria would be eligible for a grant of leave outside of the Immigration Rules by the respondent. The selection criteria were identified as:

    (1) Contribution to the United Kingdom Government's objectives in Afghanistan: evidence of individuals making a substantial impact on operational outcomes, performing significant enabling roles for the United Kingdom Government's activities and sustaining those contributions over time.

    (2) Vulnerability due to proximity and high degree of exposure of working with the United Kingdom Government: evidence of imminent threat or intimidation due to recent association with the United Kingdom Government or the United Kingdom.

    (3) Sensitivity of the individual's role in support of the United Kingdom Government's objectives: where the specific nature of activities/ association leads to an increased threat

of targeting. Or where there would be specific threat to the United Kingdom Government from data disclosure.

27. The Contribution criteria had to be met in all cases and then either the Vulnerability criterion or the Sensitivity criterion.

28. Successful persons would be called forward to board evacuation flights, subject to security checks. The scheme was informally known as “Pitting LOTR”. As the Government did not have time or capacity to process Pitting LOTR applications in Afghanistan, they had to be approved either at a staging post in Dubai or on arrival in the United Kingdom.

29. Operation Pitting began on 13 August 2021. Kabul fell to the Taliban on 15 August 2021 and by the following day the only territory under NATO control was Kabul airport. Lang J observed in her judgment, at [15]-[16]:

‘15. Operation Pitting was challenging. The FCDO received thousands of requests for evacuation, both directly from Afghans, and by way of recommendation from Ministers, Members of Parliament, military officers, senior officials, judges and others. It is estimated that the ten relevant mailboxes in the FCDO received 175,000 communications from 13 to 31 August 2021. The FCDO did not have the capacity to fully scrutinise or prioritise all these applications within the short time available. The numbers applying far exceeded the capacity of the airplane seats available, and so potentially eligible persons were left behind. Approximately 1,000 people were called forward for evacuation under Pitting LOTR (that figure includes the dependants of eligible persons).

16. Conditions outside the airport in Kabul were chaotic, and at times dangerous, because of the huge crowds of people who had gathered at the airport, seeking to flee the country. There were also threats of attacks on the airport, which materialised on one occasion when a suicide bomber exploded a bomb in the crowd, causing injuries.’

30. Operation Pitting ended on 28 August 2021 when the final British personnel withdrew from Afghanistan.

Afghan Citizens Resettlement Scheme (ACRS)

31. Four days after the commencement of Operation Pitting the then Prime Minister, the Rt. Hon. Boris Johnson MP, and the then Home Secretary, the Rt. Hon. Priti Patel MP, announced there would be a capped Afghan-specific resettlement scheme committed to resettling up to 20,000 Afghan nationals.

32. The ACRS was formally opened on 6 January 2022, with the intention of resettling up to 20,000 Afghan citizens at risk. The then Minister for Afghan Resettlement, Victoria Atkins MP, confirmed

during Parliamentary debate that the primary objective of Operation Pitting was to prioritise the saving of as many Afghan and British nationals' lives as possible, all while ensuring the safety of the British public.

33. The scheme provides a route to safety for those placed at risk by the withdrawal of international troops from Afghanistan and the coming to power of the Taliban. The respondent's Afghanistan Resettlement and Immigration Policy Statement confirms that the scheme prioritises several identified cohorts, including '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)'.

34. A relevant concern is the Taliban's previous record of human rights abuses, and the serious threat of retribution that remained directed towards Afghan nationals who supported the United Kingdom and the international community effort in Afghanistan.

35. The ACRS does not permit a person to make an application at a United Kingdom embassy or reception centre. Eligible individuals are prioritised and referred for resettlement to the United Kingdom through one of three referral pathways:

ACRS Pathway 1

Vulnerable and at-risk individuals who arrived in the United Kingdom under the Operation Pitting evacuation programme.

This includes eligible persons who were notified by the United Kingdom Government that they had been called forward or specifically authorised for evacuation but were not able to board flights.

If an individual had leave in a country considered safe by the United Kingdom and so is no longer in Afghanistan that individual may no longer be eligible for referral under the ACRS, even if called forward.

Being deemed eligible and referred onto the ACRS is not confirmation of a place on the ACRS.

Pathway 1 was opened 6 January 2022. Two additional pathways were formally opened on 13 June 2022.

Pathway 2

Enables the United Kingdom to receive referrals from the UNHCR of vulnerable refugees it deems in need of resettlement.

Pathway 3

There are two stages to this Pathway. Under the first stage the United Kingdom Government is offering places to eligible and at-risk individuals from three cohorts who supported the United Kingdom's efforts in Afghanistan: British Council contractors, GardaWorld contractors and Chevening alumni. In the second stage, the United Kingdom Government will work with international partners and Non-Government Organisations to identify wider groups of at-risk Afghan nationals.

36. The ACRS operates alongside ARAP.

The 'Afghan Relocations and Assistance Policy' (ARAP)

37. ARAP was announced on 29 December 2020 and was introduced jointly by the respondent and the Secretary of State for Defence with effect from 1 April 2021. Its stated purpose is to "offer relocation or other assistance to current and former Local Employed Staff in Afghanistan to reflect the changing situation in Afghanistan."

38. ARAP is for Afghan citizens who worked for or with the UK Government in Afghanistan in exposed or meaningful roles and may include an offer of relocation to the UK for those deemed eligible by the Ministry of Defence and who are deemed suitable for relocation by the Home Office. The respondent confirms on the www.gov.uk website that ARAP does not recognise an obligation, or imply a commitment, to assist those who worked for or with the United Kingdom Government in other countries or theatres of operation, past, present or future.

39. It was established to replace the Intimidation Policy which had been in place since 2010, and to run alongside the ex-gratia scheme which had been in place since 2013 and which was subsequently closed in November 2022. The Intimidation Policy supported local staff whose safety was threatened in Afghanistan due to their work with the United Kingdom. The ex-gratia scheme provided assistance or relocation to Afghan interpreters who were made redundant, or who resigned, providing they worked directly for the United Kingdom Government on 1 May 2006 and had served more than 12 months.

40. ARAP remains open and is located at Appendix ARAP of the Rules, though provision for those not employed by the United Kingdom Government was not made until the now deleted paragraph 276BB5 was introduced into the Rules on 14 December 2021.

41. There are four categories for assistance, against which all ARAP applications are assessed. At present the categories are:

Category 1

The cohort eligible for urgent relocation comprises of employees of the United Kingdom Government in Afghanistan on or after 1 October 2001 and who, because of that employment, are assessed to be at high and imminent risk of threat to life.

Category 2

The cohort eligible for relocation by default comprises of those who were directly employed by the United Kingdom Government in Afghanistan, or those who were contracted to provide linguistic services to or for the benefit of the United Kingdom's Armed Forces in Afghanistan, on or after 1 October 2001.

The nature of the applicant's role must have been such that the United Kingdom's operations in Afghanistan would have been materially less efficient or materially less successful if a role of that nature had not been performed. Furthermore, the applicant's role must have exposed them to being publicly recognised as having performed that role and, as a result of that public recognition, their safety is now at risk.

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

Category 3

The cohort eligible for other support are those who are neither assessed to be at high and imminent risk of threat to life nor eligible by default due to holding exposed meaningful enabling roles.

This cohort are eligible for all other support short of relocation as deemed suitable by the ARAP team.

Category 4

The cohort eligible for assistance on a case-by-case basis are those who:

- on or after 1 October 2001 were directly employed in Afghanistan by a United Kingdom Government department; provided goods or services in Afghanistan under contract to a United Kingdom Government department; or worked in Afghanistan alongside a United Kingdom Government department, in partnership with or closely supporting and assisting that department; and

- in the course of that employment or work or provision of services they made a substantive and positive contribution to the United Kingdom's military objectives or national security objectives (which includes counter-terrorism, counter-narcotics and anti-corruption objectives) with respect to Afghanistan; and

- because of that employment or work or provision of services, the person is or was at an elevated risk of targeted attacks and is or was at a high risk of death or serious injury; or

- hold information the disclosure of which would give rise to or aggravate a specific threat to the United Kingdom Government or its interests

Checks will be made with the United Kingdom Government department by whom the applicant was employed, contracted to or worked alongside, in partnership with or closely supported or assisted.

42. There is a two-stage application process. An eligibility application is first made by the principal Afghan national to the Ministry of Defence which will decide whether the applicant meets the eligibility requirements for assistance or relocation under the ARAP. It is not an asylum application under the 1951 United Nations Convention on the Status of Refugees, rather it is an application to determine eligibility for the scheme. Where the Foreign, Commonwealth and Development Office is the relevant government department it will provide notification of its decision back to the Ministry of Defence for the entry clearance application to be made to the respondent.

43. When an Afghan national and their family members are deemed eligible for relocation to the United Kingdom, an application for

entry clearance – if they are outside the United Kingdom – or settlement – if they are in the United Kingdom – is made to the respondent on their behalf, under the ARAP Immigration Rules, for biometric and security checks to be carried out.

Leave Outside of the Immigration Rules

44. The respondent is always entitled to consider the grant of LOTR even where leave would not be given under the Rules. Such power derives from section 3 of the Immigration Act 1971: *R (Munir) v. Secretary of State for the Home Department* [2012] UKSC 32, [2012] 1 WLR 2192, at [44].

45. From time to time the respondent publishes guidance to caseworkers on how to examine claims for LOTR. The version of 'Leave outside the Immigration Rules' applying at the date of the decisions in this matter was Version 2.0, published on 9 March 2022. At paragraphs 3 to 4 it provided that each application is to be considered on its merits and on a case-by-case basis taking into account individual circumstances:

> "LOTR on compelling circumstances grounds may be granted where the decision maker decides that the specific circumstances of the case includes exceptional circumstances. These circumstances will mean that a refusal would result in unjustifiably harsh consequences for the applicant of their family, but which do not render refusal a breach of ECRH Article 8, Article 3, refugee convention or other obligations."

46. As to reasons to grant LOTR, the policy provided at paragraphs 6 to 7:

> "Compelling compassionate factors are, broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, refugee convention or obligations. ... Where the Immigration Rules are not met, and where there are no exceptional circumstances that warrant a grant of leave under Article 8, Article 3 medical or discretionary leave policies, there may be other factors that when taken into account along with the compelling compassionate grounds raised in an individual case, warrant a grant of LOTR. ..."

v. General Background

47. The Taliban assumed *de facto* control of Afghanistan on 15 August 2021.

48. The respondent's Country Policy and Information Note '*Afghanistan: Fear of the Taliban*' Version 3.0 (April 2022) was in

force at the date of the challenged decisions and remains so. It details, *inter alia*:

‘2.4.4 There are reports of human rights abuses, including targeted killings, torture, threats and intimidation, against civilians associated with, or perceived to have supported, the former government or international community, former members of the security forces (which may depend on their previous role), women (particularly in the public sphere), LGBTI persons, ethnic and religious minorities, journalists, human rights defenders, **members of the judiciary**, persons deemed to have transgressed cultural or religious mores (which may include those perceived as ‘Westernised’), and persons deemed to have resisted or opposed the Taliban.’

…

2.4.9 The current evidence suggests that persons likely to be at risk of persecution, because they may be considered a threat or do not conform to the Taliban's strict interpretation of Sharia law, include but are not limited to:

…

- Human rights defenders, lawyers and **judges’**

[Emphasis added]

The Court system in Afghanistan

49. There are three tiers of courts in Afghanistan: the Primary Courts, the Appeal Courts, and the Supreme Court.

50. Primary Courts are courts of first instance and exist in each District in the country. They have original jurisdiction over a wide variety of cases, both civil and criminal, ranging from commercial disputes to the most serious of crimes.

51. Under the Law on Organization and Jurisdiction of the Supreme Court of Afghanistan within the jurisdiction of each Court of Appeal several Primary Court jurisdictions are formed, including the Juvenile Primary Court and the Central Primary Court, the latter being further separated into five divisions, or *dewans* - General Criminal, Civil, Public Rights, Public Security, and Traffic Criminal. Each division consists of a head of division and a maximum of four judicial members. When necessary, the head of the Provincial Primary Court can temporarily appoint a member from one division to another division.

Afghan Judiciary

52. In a statement published in an article in the Law Society Gazette on 26 August 2021, the then Lord Chancellor, the Rt. Hon. Robert Buckland, stated that he aimed to do all he could to protect Afghan judges "in recognition of their dedication to establishing and protecting the rule of law in the country ... 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."

53. In her judgment, Lang J noted expert evidence provided by Tim Foxley MBE, Research Fellow with the European Foundation for South Asian Studies, in a witness statement dated 28 April 2022 as to the United Kingdom's role in promoting the rule of law in Afghanistan. This witness statement was expressly relied upon by S in her application for leave to remain outside of the Rules and implicitly relied upon by AZ in his application through his reliance upon the judgment of Lang J.

54. Mr Foxley's expertise on the current situation in Afghanistan in respect of the Afghan judiciary was not challenged by the respondent before Lang J or this Tribunal.

55. Lang J records:

'22. 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.

23. 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…."

56. Mr Foxley's summary of the potential risk of Afghan judges being targeted by the Taliban where one or more of the following factors are present is recorded at [69] of the Lang judgment:

    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."

57. On the face of their evidence to the respondent, several of these risk factors arise in respect of the applicants.

58. At the time of the decision the respondent's April 2022 CPIN detailed in respect of the risk to judges, *inter alia*:

'5.7.4. Although Turabi [Mullah Nooruddin Turabi, a founder of the Taliban and former Justice Minister] claimed that women judges would adjudicate cases, Sky News reported on 25 December 2021 that over 100 female judges and their families had left Afghanistan in fear of their lives.

...

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.'

...

'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…'

59. AZ relied in his application upon a report from Mr Foxley dated 2 December 2021. Mr Foxley opined, *inter alia*:

“16. ... The UK’s mission in Afghanistan was Afghanistan-wide because the development of credible Afghan government capacity across the country, including an army, police and functioning rule of law was seen as the key to allowing the UK mission to complete and withdraw. ...

23. A core component of the UK effort in Afghanistan throughout the entire time of its engagement in Afghanistan from 2001-2021 was to enable and empower the Afghan government to grow its own governance capabilities and security forces. Developing justice and rule of law sectors were a significant part of the UK effort. The UK used a wide range of military, civilian, financial, training and diplomatic resources in aid of this effort, spending billions of pounds:

> “FCO staff in Afghanistan (both UK based and locally engaged) work alongside UK civil servants from a range of government departments, and contacted specialists working as governance, rule of law, justice, counter-narcotics, infrastructure and economics advisors.”

24. The UK provided support to capacity building across a range of security, police, justice, criminal, rule of law and governance structures, recognising the UK stabilisation and reconstruction mission in Afghanistan was crucial to enhancing security in and around Afghanistan ....

28 ... A 2021 British government review of UK ‘objectives and interests from 2015’ gives the following issues in priority order:

...

Priority 2: Serious and organised crime, including counter narcotics (in Afghanistan this involved counter narcotics operations, intelligence gathering, mentoring/liaison with Afghan government, security and justice forces.

....

31. I believe the applicant's position and activities would have been crucial. 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" ...

34. If the applicant had participated in the jailing of insurgents and terrorists he would have made a significant material contribution to the UK's mission in Afghanistan and made a contribution to the protection of the UK ... Furthermore, if an Afghan legal professional had engaged in detaining and imprisoning members of the Taliban and Islamic State he or she would be at significant, direct and specific risk of being targeted by the Taliban, Islamic State, the Haqqani network or other insurgent groups.

...

37. The work of Afghan judges – particularly those who worked on terrorism, counter-narcotics and security matters – was difficult and very dangerous. The Taliban and other insurgent groups were hostile to the prosecution of their fighters and also opposed to the new justice system being established, which they saw as Westernised and corrupt. Other groups, such as criminals, warlords and corrupt government officials, also benefitted from the breakdown of law and order in Afghanistan. Instability worked in their favour and undermined the mission of the UK and the international community. Judges were routinely targeted by the Taliban for assassination, including in the applicant's home province, as he plausibly describes in his witness statement ...

45. Since August, the Taliban have had access to government databases, including names, professions, locations and personal information of thousands of former government workers ..."

vi. <u>Factual Background - S</u>

Personal history

60. S is an Afghan national. She recently served as a judge in the Juvenile Court of Kabul City, which is a Primary Court. During her career she investigated criminal and national security cases, including cases involving the Taliban and Islamic State in Khorasan.

61. She is a member of the International Association of Women Judges and was a member of the affiliated association, the Afghan Women Judges Association.

62. Her close family were targeted by the Taliban consequent to her judicial work. In 2004, her husband was abducted, beaten and interrogated about her whereabouts, at a time when she was investigating a case against the Taliban. He was disabled by his injuries and requires the use of a wheelchair as he cannot walk.

63. When the Taliban took power in Kabul in August 2021, S was prevented from returning to her judicial office to retrieve her documents and records, due to the risk to her personal safety. Her neighbours informed her that the Taliban had come to her neighbourhood looking for a female judge. She and her family went into hiding and were required to change location more than once. During this time, she received calls and messages from unknown numbers asking for her location. The Supreme Court sent her a letter warning of terrorist attacks against judges by the Haqqani Network, an Afghan Islamist group that was placed in charge of domestic security by the Taliban following the fall of Kabul.

Application

64. On 9 September 2021 Mischon de Reya wrote to the respondent requesting that their clients, who were 27 Afghan judges and lawyers, including S, be issued with entry visas relying on ARAP, ACRS and LOTR routes, in the alternative. On 20 September 2021, the Government Legal Department sent a general reply refusing the requests, observing that the representations set out in correspondence did not constitute valid LOTR applications, as applications made outside the United Kingdom had to be made through a visa application centre.

65. S maintains that she completed an online ARAP application for resettlement to the United Kingdom on 24 September 2021. The recipient, the Ministry of Defence, has been unable to trace it. Nevertheless, the Ministry of Justice decided to determine the application.

66. On 8 October 2021, Mischon de Reya sent a pre-action letter, together with a bundle of evidence relating to S. A document was compiled with the content of emails sent by S to her legal representatives detailing, *inter alia*:

‘I have investigated criminal cases and national security, and I have investigated the cases of Taliban and Daish in different years and different courts.

In 2004 when I investigated one of the cases of Taliban, so on that year my husband was taken away by the Taliban to get information about my location when he was going to his office, but my husband didn't say anything about my location, so Taliban beat my husband on that year.

After some weeks Taliban released my husband and he came to home and he was not well.

After some years my husband became paralyzed.

…

After the fall of the Afghan government our situation was not well.

Some weeks ago our neighbours told us that Taliban said: "We have heard in this area is one of the houses of female judge and we are looking for that home."

But our neighbours told them: "We don't know about the location of the female judge in this area": our neighbours told us secretively this issue.

We are at big risk nowadays in Afghanistan and it is mentionable that we have changed (left) our home and are in another home now.

There are also more numbers that we receive call from them and WhatsApp accounts that we receive messages from them and they ask about our location.

…

Yes, I have a photo from a WhatsApp account of a person who sent me a message and when I asked him who you are, he did not answer and later called and told me that there is no escape route and we will find you and your family and kill you.

And I receive calls from different numbers and they tell me that they will soon find me and my family and kill us.

…

This is a document that was sent to us from the Supreme Court and told us that the Haqqani group has decided to kill the judges. The Haqqani network is linked to the Taliban.

And the Haqqani network is currently in the Taliban government.'

67. The ARAP application was refused by a decision dated 27 October 2021 with S being informed, *inter alia*, that:

    (i) She was not eligible under ARAP Category 4, on the basis that the decision-maker was not satisfied that she worked

in a role that made a material contribution to the United Kingdom's mission in Afghanistan, or that without her work the United Kingdom's operations would have been adversely affected.

68. No decision was made on the LOTR application as S had not submitted an application form, the time for deciding whether to waive or defer the provision of biometrics under regulation 5 of the Immigration (Biometric Registration) Regulations 2008 had not yet arisen, and no such decision was being made at the time.

Judicial Review proceedings (CO/4106/2021 and CO/315/2022)

69. S issued judicial review proceedings (along with AZ) challenging the respondent's decision. The defendants in the proceedings were (1) the Secretary of State for Foreign, Commonwealth and Development Affairs, (2) the Secretary of State for the Home Department, and (3) the Secretary of State for Defence.

70. Before the High Court the respondent acknowledged that S (and AZ) were at risk of harm from the Taliban "because of their judicial roles", at [95].

71. Reliance was placed by the applicants upon witness statements from six Afghan judges who were relocated during Operation Pitting. One judge (Judge W) was relocated under ARAP, the other five were female judges (Judges A, B, C, X and Y) who sat in various courts in Afghanistan. None of the judges were employed directly by the United Kingdom government, but a decision was made to issue the five judges with Call Forward notices and grant LOTR.

72. The issues advanced by the applicants before the High Court were:

    (i) Was any difference in treatment between them and the comparator judges irrational or otherwise unlawful?

    (ii) Were the procedural requirements imposed by the defendants to the proceedings in respect of LOTR applications irrational and /or in breach of the applicable LOTR policy (version 1.0), dated 27 February 2018.

73. At the request of Lang J, the FCDO produced a note for the proceedings on Operation Pitting and the judges who were granted LOTR during Operation Pitting. The note provides:

"11 female judges, 1 female prosecutor and 1 female head of a court of appeal (i.e., 13 in total) who were part of a UK-Afghanistan twinning programme for female judges were relocated through Op Pitting LOTR.

This includes A, B, C, X and Y. Some were able to reach Kabul airport and were evacuated to the UK on UK military flights during the period of Op Pitting (i.e., before end August). Others were able to leave Afghanistan and reach third countries only after Op Pitting. They were then able to submit their biometric data from a third country, and the Home Office granted them Leave to Enter the UK because they had received Call Forward Instructions during the evacuation. We understand that Baroness Helena Kennedy/International Bar Association helped a number of judges reach third countries – we believe that there was a special flight to Greece. The International Bar Association has then sought to encourage states to grant those judges resettlement. We understand that the Home Office agreed entry to the UK for those judges who had been issued Call Forward Instructions during the evacuation under Op Pitting LOTR but did not agree entry to the UK for those who had not been issued Call Forward Instructions during the evacuation."

74. Lang J handed down her judgment on 9 June 2022. While the United Kingdom Government had been entitled to find that S and AZ were not eligible for ARAP after the Taliban take-over in August 2021, she found that the decision to refuse to consider their applications for LOTR was irrational. In particular, the suggestion that they should use a Visa Application Form requiring them to state that they would submit biometrics, despite that not being possible in Afghanistan at the time, was irrational. The LOTR policy dictated that applications should be made on the visa form most closely matching an applicant's circumstances, because any compelling compassionate circumstances would be decided by reference to the Rules that most closely matched the case. The visa route most closely matching S and AZ's circumstances was ARAP, but their LOTR applications using the ARAP online form were rejected. The other online visa routes did not match their circumstances.

75. Lang J concluded that the suggestion that they should falsely name a visa application centre where they would submit biometrics, even though that was not possible, was irrational. S and AZ were law-abiding judges and could not properly be expected to make false entries, especially given the penalties for falsifying immigration applications. The rational course would have been to amend the online form to include an application for waiver/deferral of biometric registration.

Escape from Afghanistan

76. In 2022, S's son was kidnapped by the Taliban as he was collecting medication for his father. He was badly beaten before his release. Consequent to her son's experience, and with the aid of an organisation identified to this Tribunal, S and her family secured their exit from Afghanistan, arranging clandestine crossing of the

border in June 2022, and using previously secured short-term medical visas to enable them to enter Pakistan. Because of the Taliban presence in Pakistan, the family kept a low-profile, and restricted leaving their rented home.

Court of Appeal (CA-2022-001264)

77. By an Order sealed on 8 July 2022 Andrews LJ granted the respondent permission to appeal so as to permit the Court of Appeal to provide a definitive ruling on the question whether the refusal to consider the applications for LOTR in the circumstances was lawful. The respondent contended that the ARAP form should not be used as a Visa Application Form for the purposes of the LOTR policy.

78. Permission was granted on the condition that the appeal did not operate as a stay on Lang J's Order quashing the decision refusing to accept S and AZ's applications for LOTR, which were to be treated as validly made and progressed towards a decision on their merits without further delay.

79. By a judgment handed down on 29 July 2022, the Court of Appeal held that the respondent's refusal to depart from a policy which required applicants for LOTR to use an online Visa Application Form which required information that the applicant would be unable to provide was irrational and procedurally unfair: *S & AZ v. Secretary of State for the Home Department* [2022] EWCA Civ 1092. The Court of Appeal further confirmed that the ARAP relocation procedure was *sui generis* and was inapt for determination of the issues raised by a LOTR application. The assessment performed by Ministry of Defence staff following receipt of an ARAP form was directed solely to the applicant's eligibility under ARAP. They were unable to determine the issues which formed the basis of the LOTR application. The use of the ARAP procedure as a gateway to the issue of a Visa Application Form achieved nothing except complication and confusion.

Post-High Court representations

80. S applied for leave to remain outside the Rules by a letter dated 6 July 2022. The letter is detailed, running to six pages, and expressly relied upon witness statements and other evidence placed before Lang. J.

81. The concise and careful representations addressing the grant of LOTR are detailed in full:

"18. Our client remains at risk as a result of her work as a female Afghan judge who investigated criminal and national security cases over the course of her career. Her contribution to the UK mission by upholding the rule of law has been recognised by Mrs Justice Laing [sic] in her recent judgment. The fact that she remains in hiding from the Taliban as a direct result of her work and contribution is a highly material factor for the purpose of exercising discretion. Her interests and commitment alight [sic] with those of the UK, working to uphold the rule of law. Further, the fact that she is a female Judge is recognised as an additional factor in terms of vulnerability/risk (see in particular Lang J at §124 on this).

19. The judgment above makes clear that Pilling LOTR process was operated arbitrarily and inconsistently; there was no rational justification between the circumstances of our client, S, and the comparator judges A,B,C,X & Y, all of whom were evacuated and granted Pitting LOTR. It is important to note here in our client's case that Mrs Justice Lang specifically highlights that she was also a member of the IAWJ and yet not evacuated during Pitting.

20. Qualification for Pitting LOTR required an individual to meet the contribution criterion and vulnerability criteria; in the view of Mrs Justice Lang our client **could have been eligible under Pitting LOTR had her name been put forward**, the distinguishing factor was the lack of lobbying on her behalf which was not a fair or objective means of selection. In our client's case, all other relevant factors identified by Mrs Justice Laing [sic] at §124-125 of the judgment are met.

21. Our client's contribution to the rule of law as a female judge, risks arising from that role and relevance of their eligibility under Pitting LOTR criteria are all material factors that need to be considered by the decision maker when exercising their **wide** discretion under the LOTR policy. We note in respect of the **wide discretion**, Lang J's recognition of the same with respect to the evacuation of the Afghan Girls Football Team outside the ARPA or Pitting LOTR processes."

82. An Entry Clearance Officer within the Joint Afghan Casework Unit issued a negative in principle decision on 22 July 2022. It is noted that a negative in principle decision was issued to AZ on the same day, and the decision concerned with S erroneously refers to AZ on occasion.

83. The decision-maker confirmed at para. 11 that regard was had to paragraph 355 of the Rules, concerned with applications for temporary protection. It proceeds:

"12. S and her accompanying relatives are currently outside the UK so I am not satisfied they have met the requirement of paragraph 355(I). I also do not consider that S has made an asylum claim under paragraphs 327 and 327AB of Part 11 of the Rules."

84. At para. 13 the decision-maker observed that S and her accompanying relatives were not at a designated place of asylum claim.

85. LOTR was addressed at paras. 14 to 16 of the decision:

“14. As set down in the Leave Outside the Rules guidance, leave outside the Rules is for leave on compelling and compassionate grounds other than asylum, protection, medical, family and private life.

15. I have also considered whether any applications by S and her accompanying relatives would raise any exceptional or compassionate circumstances which, consistent with the right to respect for family life contained in Article 8 ECHR, warrant consideration by the Secretary of State of a grant of entry clearance outside the requirements of the Immigration Rules. I remind myself this is a qualified right, proportionate with the need to maintain an effective immigration and border system. The best interests of any children are a primary but not the paramount consideration, and are in general to remain with their parents, normally as their primary care giver. In this context I have noted all of the following:

a. I note there are no children linked with S and her accompanying relatives now.

b. S and her accompanying relatives are outside the UK and have not provided any information to show any family members for them in the UK. As such I am not satisfied that Article 8 has been engaged for them.

c. I acknowledge that S may have received threat, as a result of the upheaval that occurred both before and during the period of regime transition. Whether these threats may have originated only due to her work as one of a number of primary court judicial and legal personnel in the juvenile courts in Kabul, or on a generalised basis due to other outside factors such as financial, property or other examples is not clear. No examples of specific threats or targeting specifically against S and her accompanying relatives has been shown now.

d. I have noted the stated assault by stated Taliban supporters suffered by the husband of S some eighteen years ago, in 2004. The passage of time since this happened, together with the husband’s indicated physical condition also happening some years after this event, would mean that I am not satisfied that they are directly connected to the more recent events during 2021.

e. Had S and her family considered their position in Afghanistan to be excessively dangerous and hazardous as is claimed, they would have been at liberty to remove themselves from the situation well before now. Upon leaving Afghanistan, S and her accompanying relatives could attempt to regularise their position from that point. As previously noted, S and her accompanying relatives turned down an opportunity to travel to Greece in particular, citing reasons other than those connected with their claimed situation as now.

f. At page 76 of the agreed hearing bundle, S has indicated that "... [she and her accompanying relatives] live in my father's house with my sisters ..." This demonstrates that S and her accompanying relatives have unrestricted accommodation available to them and are in a position to support themselves with any necessities. Taking all this into account now assumes only a general presumption of inability and unwillingness to travel out of Afghanistan by them, rather than any specific inability preventing them from doing so.

Having taken account of all the circumstances, I am not satisfied that S has demonstrated that her own situation and circumstances warrant an exceptional consideration. Furthermore, I am not satisfied that S and her accompanying relatives have demonstrated sufficient compassionate grounds in any of their circumstances so as to further warrant any other consideration for leave outside the Rules."

86. Representations were sent to the GLD, dated 3, 10 and 26 August 2022, seeking a LOTR decision.

87. On 5 September 2022, following pre-action correspondence, an Entry Clearance Manager upheld the Entry Clearance Officer's decision:

"3. ... I note that it has now been confirmed that S and her family successfully crossed the border into Pakistan on 1 June 2022. Taking this new information into account I remain satisfied that their circumstances are not compelling so as to outweigh the public interest considerations of protecting public safety and justify treating them differently from other individuals who need to attend a VAC to enrol their biometrics as part of the application. ... Furthermore, for the reasons stated below, I am not satisfied that sufficiently compelling circumstances have been put forward to warrant a grant of LOTR and therefore I am not satisfied that there would be sufficient merit in waiving or deferring the requirement to submit biometrics. I am satisfied that the ECO's decision not to waive or defer the requirement to attend a VAC and enrol biometrics was correct."

"6. I have reviewed the statements provided dated 25 July 2022 and 27 July 2022. I have given regard to the further threats and abuse detailed in relation to the family of S however, I note that these family members are now safely in Pakistan and S has not highlighted any particular failing by the Pakistani authorities to provide adequate protection. As such I am satisfied that this threat has now been dealt with.

7. In view of the above points along with the points already raised in our letter dated 22 July 2022, I remain satisfied that S has not demonstrated that her own situation and circumstances warrant an exceptional consideration. Furthermore, I remain not satisfied that S and her accompanying relatives have demonstrated sufficient compassionate grounds in any of their circumstances so as to further warrant any other consideration for leave outside the Rules."

vii. Factual Background – AZ

Personal history

88. AZ is an Afghan national. He qualified as a judge in 2008 and sat in the Primary Court throughout his career, mainly hearing criminal cases. He worked in Nangarhar and Nuristan provinces. In Jalalabad he sat in the public security court. Several judges in Jalalabad were killed by the Taliban, and he felt he would be safer in a more rural area, so he requested and secured a transfer. He worked in a district in Nangarhar.

89. At the beginning of 2021, there was an increase in the number of targeted killings carried out by the Taliban and Islamic State in Khorasan, including three judges who were his colleagues. He was warned by the Supreme Court in Kabul that he was on a Taliban list of planned killings and provided two armed bodyguards. He was given a gun.

90. AZ believes that his life is in danger because of the decisions he has made as a judge over the course of his career. He made over 40 decisions in counter-terrorist cases, mostly against Taliban and Islamic State in Khorasan members. He passed lengthy prison sentences for terrorist offences on members of the Taliban who have now been released from prison and hold positions of power and influence.

91. Following the Taliban taking power, he received direct threats to his safety. He is now in hiding and no longer able to work.

Application

92. On 26 October 2021 AZ applied along with his family for leave to enter the United Kingdom under ARAP. In his accompanying witness statement, AZ confirmed, *inter alia*:

    i. Upon the Taliban assuming control, he was at home with his family. He was contacted by the District authorities. He understood that he was being warned that he was in grave danger as a high-profile judge. He went into hiding.

    ii. He detailed his sentencing a named person to a number of years imprisonment for smuggling weapons. He was subject to a number of threatening telephone calls from this person's associates. Following the Taliban's ascendency to power, this person is in a position of authority. He has received telephone calls from this person. Despite regularly changing his phone number, this person continues to call him.

    iii. He sentenced a second person to a number of years imprisonment for planning attacks on Afghan and coalition forces. This person is now in a position of authority.

    iv. Before the Taliban's coming to power, a member of the Taliban requested that local elders pass on messages saying that he should resign his judicial position as he was sending many Taliban members to prison. He refused to do so. This person is now in a position of authority and has threatened him by telephone and sent threatening messages over social media.

93. AZ further stated:

> "15. While most of the cases I was involved with were security related, I did do some which related to the rights of women for example assisting women who wanted to divorce their husbands (because of violence and physical assault carried out against them) or helping soldier's wives who had been killed receive their pension. These are also things which make me hated by the Taliban.
>
> 16. Life for me and my family is extremely hard at the moment. There are nine of us living in a two bedroomed house. As explained, we are hiding … and I cannot leave the house for fear of my life. If we need to buy food or necessities, then my wife or younger son goes to the market to buy it and then comes straight back. However, we cannot afford to buy much at the moment because I cannot work and so our family does not have a salary …"

94. A pre-action letter was served on 27 October 2021, making an alternative request for leave to enter under ACRS, which at that

time was not in force, or alternatively LOTR. Supporting documentation was provided.

95. On 17 November 2021, the GLD sent a letter in reply, accompanied by an FCDO Decision Maker's Assessment dated 5 November 2021, which found that AZ was not eligible under ARAP. It was further decided that no formal application had been made for leave to enter via a Visa Application Form.

Judicial Review proceedings (CO/4106/2021 and CO/315/2022)

96. AZ challenged the respondent's decision in linked proceedings with S, detailed above.

Post-High Court representations

97. An application for 'entry clearance outside of the Immigration Rules' was made on 23 June 2022. Reliance was placed upon the judgment of Lang J, in particular [124] and [125] of her judgment:

'124. … On the other hand, AZ's anti-terrorist work had made him a Taliban target to a much greater extent that some of the comparator judges, particularly those sitting in civil jurisdictions …'

125. In my view, both S and AZ could have been eligible under Pitting LOTR criteria, if their names had been put forward … They and their families are in hiding, but realistically they will be found by the Taliban at some point. There is verified evidence that other judges have been summarily executed by the Taliban.'

98. On 22 July 2022, an Entry Clearance Officer within the Joint Afghan Casework Unit issued a negative decision, much of which is in similar terms to the decision of the same day issued to S. This is not surprising as S is referenced as 'AZ' on occasion in her decision, and in the same decision reference is also made to S and 'his family'. There is consideration of the Rules in respect of temporary protection and asylum, neither of which were relied upon by AZ.

99. In respect of the requirement to enrol biometrics, the decision details:

'8. There has never been a VAC in Afghanistan; from both before and since August 2021 Afghan nationals have always used one of the VACs in neighbouring countries. No information has bene provided now by AZ or his family members that would suggest that he and his family members are physically incapable of attending a VAC in a neighbouring country due to infirmity or providing biometric information. I have also and further considered their own particular circumstances and location as stated. I note there is nothing to indicate that AZ and his family members

are actually being prevented from travelling to other countries if they so wished. At page 67 of the agreed hearing bundle, it is stated that "... *the ability to extract [AZ and those accompanying him] exists at this moment, without any risk to the UK or its armed forces ...*" As such I am satisfied they could travel out of Afghanistan of their own volition and by their own arrangements.'

'10. Having carefully considered all of the above and all of the information put forward about AZ and his family members, and on behalf of the SSHD, I am not satisfied that their circumstances are so sufficiently compelling so as to outweigh the public interest considerations of protecting public safety and justify treating them differently from other individuals who need to attend a VAC to enrol their biometrics as part of their application.'

100. As to leave outside of the Rules the decision concludes:

'16. I have also considered whether any applications by AZ and his family group would raise any exceptional or compassionate circumstances which, consistent with the right to respect for family life contained in Article 8 ECHR, warrant consideration by the Secretary of State of a grant of entry clearance outside the requirements of the Immigration Rules. I remind myself this is a qualified right, proportionate with the need to maintain an effective immigration and border system. The best interests of any children are a primary but not the paramount consideration, and are in general to remain with their parents, normally as their primary care giver. In this context I have noted all of the following:

a. AZ and his family group are outside the UK and have not provided any information to show any family members for them in the UK. As such I am not satisfied that Article 8 has been engaged for them.

b. I acknowledge that AZ is at risk, as a result of the upheaval that occurred both before and during the events of August 2021. Whether these threats may have originated only due to his work as one of a number of primary court judicial and legal personnel in the criminal courts in [...] in Nangarhar province, or on a generalised basis due to other outside factors such as financial, property or other examples is not clear. No examples of specific threats or targeting specifically against AZ and his family members has been shown now.

c. Had AZ and his family considered their position in Afghanistan to be excessively dangerous and hazardous as is claimed, they would have been at liberty to remove themselves from the situation well before now. Upon leaving Afghanistan, AZ and his family could attempt to regularise their position from that point. At pages 74 and 75 of the agreed hearing

> bundle it is stated that "... *There are nine of us living in a two bedroom house ... if we need to buy food or necessities then my wife or younger son goes to the market to buy it and comes straight back ... it is my brother-in-law's house ... and there was some food already here when we arrived.* [The brother-in-law] *was able to send us bit of money* [sic] *and we are using that to buy what we need."* This demonstrates that AZ and his family have accommodation available to them and are able to support themselves with food and other necessities. Taking all this into account now assumes only a general presumption of inability and unwillingness to travel out of Afghanistan by them, rather than any specific inability preventing them from doing so.

Having taken account of all of the circumstances, I am not satisfied that AZ has demonstrated that his own situation and circumstances warrant an exceptional consideration. Furthermore, I am not satisfied that AZ and his family have demonstrated sufficient compassionate grounds in any of their circumstances so as to further warrant any other consideration for leave outside the Rules.'

101. The applicant observed in his pre-action protocol letter, dated 27 July 2022, that the reference at page 67 of the agreed bundle clearly referenced the United Kingdom extracting him from Afghanistan, and not his travelling outside the country of his own volition. Further, the possibility of extraction was mooted and premised on his having a valid visa to travel to the United Kingdom.

102. Additionally, AZ observed as to para. 16 of the Entry Clearance Officer's decision:

'22. We refer you to:

> i. The acceptance by your clients of risk in the ARAP decision and;
>
> ii. The findings of Lang J that as a judge hearing anti-terrorism and national security cases, our clients contributed to the UK government's objectives in Afghanistan and that he placed himself and his family at considerable personal risk, which has now heightened. Realistically he '*will be found by the Taliban and some point*' [para. 125]. These findings clearly show that our client is at risk on account of his work as a judge. Yet the decision maker has entirely failed to take them into account or alternatively to explain why the decision maker departs from the findings of Lang J.

23. Further, it is unclear on what basis the decision maker suggests that there could be other factors causing the risk to our client and it is equally unclear why '*financial, property and other examples*' are mentioned. This has not been brought up before either by our client or the Defendants in this judicial review and in pre-action correspondence prior to this. There has never been a suggestion that our client and his family are at specific risk for any reason other than his work as a Judge.

24. The decision maker states that there are no examples of specific threats however this is simply not correct and we refer to our client's witness statement submitted with the application of leave outside the Rules for details of the specific threats.

103. The adverse decision was upheld by an Entry Clearance Manager on 5 September 2022 who observed, *inter alia*:

'5. I have given consideration to the assertion that it was likely that AZ met the selection criteria for LOTR under Operation Pitting and was not selected because the process was not fair. The criteria and processes applied during Operation Pitting were temporary in order to facilitate evacuation during a crisis. It did not entail any commitment that those criteria and processes would continue to apply after the operation concluded. This was recognised in the High Court's decision on 9 June, noting that our Afghanistan Resettlement and Immigration Policy Statement made clear that we would honor [sic] commitments given under Operation Pitting and that otherwise it was lawful to discontinue the approach taken during Operation Pitting. AZ's case therefore falls to be considered under the TOTR policy guidance now in force.

6. I have reviewed the representations provided in your letter dated 27 July 2022. In view of the above points along with the points already raised in our letter dated 22 July 2022, I remain satisfied that AZ has not demonstrated that their own situation and circumstances warrant an exceptional consideration. Further I remain not satisfied that AZ and their accompanying relatives have demonstrated sufficient compassionate grounds in any of their circumstances so as to further warrant any other consideration for leave outside the Rules.'

viii. <u>Grounds of Claim</u>

104. The applicants present two grounds in unison but have additionally advanced individual grounds of claims.

105. S and AZ jointly raise two issues: (1) the respondent failed to have regard to 'proximity' - or material considerations - under ARAP and/or Pitting LOTR when assessing their individual cases; (2) the respondent reached an irrational conclusion as to no compelling compassionate circumstances arising in their individual cases.

106. S raises on her own account: (1) the respondent failed to have regard to historic injustice/absence of fair procedure and arbitrariness in determining Pitting LOTR; (2) the respondent failed to have regard to material considerations in respect of her circumstances in Pakistan.

107. In respect of the LOTR decision AZ raises: (1) the respondent failed to consider highly material findings of fact made by Lang J; (2) there was procedural unfairness by the respondent not giving him the opportunity to address the motive behind the serious harm directed towards him upon the respondent being minded to amend his previously stated position.

108. AZ additionally raises in respect of the decision not to defer biometrics that there was a mistake of fact/ failure to consider material facts and evidence.

109. S seeks, *inter alia*:

i. An order quashing the decisions of 22 July 2022 and 5 September 2022 refusing to exercise discretion in her favour pursuant to her application for LOTR.

ii. An order declaring that the respondent, when assessing her circumstances for the purpose of LOTR, was required to have regard to her proximity to the ARAP and Pitting LOTR policies, and the judicial findings of Lang J in her decision, *R (S and AZ) v. Secretary of State for the Foreign, Commonwealth and Development Affairs & Others* [2022] EWHC 1402 (Admin).

110. AZ seeks, *inter alia*:

i. An order declaring the decisions of 22 July 2022 and 5 September 2022 refusing to exercise discretion in his favour as unlawful and *Wednesbury* unreasonable.

ii. An order quashing the decisions of 22 July 2022 and 5 September 2022 refusing to exercise discretion in his favour pursuant to his application for LOTR.

iii. A mandatory order that the respondent make a further decision on the LOTR application and deferral of biometrics.

iv. An order declaring that the respondent, when assessing her circumstances for the purpose of LOTR, was required to have regard to his proximity to the ARAP and Pitting LOTR policies.

ix. Decision

111. A decision to grant LOTR requires an exercise of judgement by a decision-maker. The Tribunal's function is only to consider the legality of the decision by reference to well-established public law principles. I am therefore required to remind myself that I am not the primary decision-maker. In going about my task, I am informed by the substance of the relevant policy applicable at the date of decision.

112. For the reasons detailed below, I am satisfied that the majority, but not all, of the applicants' grounds of challenge are well-founded on public law grounds and so the applicants should succeed in their claims.

Irrational conclusion that there were no compelling, compassionate circumstances: failure to consider relevant factors.

113. The applicants face a high hurdle in establishing irrationality: *R (Sandiford) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697, at [66]. As Lord Hailsham observed *In re W (An Infant)* [1971] AC 682, 700D-E, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable: "Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable."

114. In *R v. Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1, Sedley J helpfully described 'irrationality' as "a decision which does not add up - in which, in other words, there is an error of reasoning which robs the decision of logic".

115. In my judgment the applicants meet the high threshold in respect of this ground and whilst I proceed to consider the additional grounds advanced, the applicants' success on this ground requires the challenged decisions in respect of LOTR to be quashed. I detail my reasons below.

116. On behalf of the respondent Mr Evans observed the express confirmation by the relevant policy that a grant of LOTR should be rare, discretion used sparingly and consideration of whether to grant LOTR should not undermine the objectives of the Rules or create a parallel regime for those who do not meet them. However, consideration of the policy requires the decision-maker to commence their assessment on the correct factual basis. As Lady

Hale confirmed in *Braganza v. BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661, at [24], the Wednesbury test has two limbs: "The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision."

117. A foundation of the respondent's decisions in both matters was it was "unclear" as to whether the risk to the applicants flowed from their judicial work.

118. In respect of S, the respondent concluded:

"15. I have also considered whether any applications by S and her accompanying relatives would raise any exceptional or compassionate circumstances which, consistent with the right to respect for family life contained in Article 8 ECHR, warrant consideration by the Secretary of State of a grant of entry clearance outside the requirements of the Immigration Rules ... In this context I have noted all of the following:

...

c. I acknowledge that S may have received threats, as a result of the upheaval that occurred both before and during the period of regime transition. Whether these threats may have originated only due to her work as one of a number of primary court judicial and legal personnel in the juvenile courts in Kabul, or on a generalised basis due to other outside factors such as financial, property or other examples is not clear. No examples of specific threats or targeting specifically against S and her accompanying relatives has been shown now."

119. As to AZ:

"16. I have also considered whether any applications by AZ and his family group would raise any exceptional or compassionate circumstances which, consistent with the right to respect for family life contained in Article 8 ECHR, warrant consideration by the Secretary of State of a grant of entry clearance outside the requirements of the Immigration Rules ... In this context I have noted all of the following:

...

b. I acknowledge that AZ is at risk, as a result of the upheaval that occurred both before and during the events of August 2021. Whether these threats may have originated only due to his work as one of a number of primary court judicial and legal personnel in the criminal courts in [....] in Nangarhar province, or on a generalised basis due to other outside factors such as financial, property or other examples is not clear. No examples of specific threats or targeting specifically against AZ and his family members have been shown now."

120. In both decisions when considering exceptionality there is no express reference as to the applicants having been engaged in judicial work concerned with public security and counter-terrorism matters: work directed towards holding the Taliban, Islamic State of Khorasan, Al Qaeda and the Haqqani Network to account under domestic law. Nor is there express consideration of S being a female judge. Instead, S's LOTR application was considered through her work as one of "a number" of judges at the Juvenile Court in Kabul – her appellate level appointment is not referenced – whilst consideration of AZ's application was undertaken through the prism of his work as one of "a number" of judges appointed to criminal courts. An unlawfully narrow approach was adopted despite the wider extent of their judicial roles being placed front and centre of their respective representations: S - "Our client remains at risk as a result of her work as a female Afghan judge who investigated criminal and national security cases over the course of her career ... she remains in hiding from the Taliban as a direct result of her work"; AZ - "On the other hand, AZ's anti-terrorist work had made him a Taliban target to a much greater extent ..."

121. As noted above, the applicants' personal history as judges, whether as a female judge or through anti-terrorism work, was clearly identified by Lang J as resulting in their being Taliban targets, at [124].

122. In my judgment the identified failure played a material, and adverse, part in the decision-maker's reasoning. The applicants' respective judicial roles in public security and counter-terrorism matters are at the core of their subjective fear, and objectively well-founded: Lang J, at [125]. Their role is a factor properly to be considered when considering exceptionality. The absence of any adequate consideration of the foundation to the applicants' LOTR application, their targeting by the Taliban for their judicial work through which they were engaged in holding the Taliban to account under domestic law, is striking. In a stroke, the respondent abrogated his public law duty to properly consider and address the material core of the application before him. There was a failure to give conscientious consideration to relevant factors.

123. In the challenged decisions, the respondent stepped back from his position before Lang J, as recorded at [95]: "The Defendants acknowledge that the Claimants are at risk of harm from the Taliban because of their judicial roles." The respondent presently accepts AZ to be at generalised risk, and S to have received threats, but considers that the risk of serious harm flows from the recent upheaval in Afghanistan alone. The reasoning for this change of permission was explained by Mr Evans that it resulted

from an assessment of the evidence before the respondent. I observe that in the challenged decisions there was no acceptance that a different position had been expressly advanced before the High Court, and no reasons given as to why a subsequent assessment of the same evidence had resulted in an amendment of position on a core issue. I consider this to be a significant change of position to that adopted before Lang J.

124. Pertinently, and in my assessment erroneously, the respondent required the applicants to establish that the threat of serious harm flowed from judicial work "only" and not in combination with other factors such as financial, property or other unidentified examples. The inability to establish that the threats originated from judicial work was deemed sufficient to justify a refusal of LOTR. The relevant policy is directed towards the "unjustifiably harsh consequence" that would result from a refusal to grant LOTR. In my judgment, an assessment as to compelling compassionate circumstances under the relevant policy is not properly to be adversely concluded by the possibility that other attendant reasons may underpin the Taliban's decision to target the applicants for reasons other than their judicial engagement in security matters including counterterrorism and the imprisoning of Taliban members. The approach adopted was unlawful.

125. By adopting this erroneous approach, the respondent has excluded from his assessment the expert evidence of Mr Foxley, and in particular the risk of serious harm arising for judges who were previously involved in highly sensitive cases including terrorism and criminal cases, who presided over trials of members of the Taliban, Islamic State of Khorasan, Al-Qaeda and the Haqqani Network, and who sentenced members of these organisations to terms of imprisonment. Relevant to the assessment is Mr Foxley's evidence that since August 2021 the Taliban has enjoyed access to government databases including the names and professions of thousands of government workers. The failure by the respondent to consider Mr Foxley's evidence is a material error of law.

126. The applicants challenge the respondent's conclusion that no examples of specific threats or targeting specifically against them and their family members have been shown as irrational.

127. S explained by her ARAP application as to being informed by neighbours that members of the Taliban were searching for her. Additionally, she confirmed that she had received threatening telephone calls and WhatsApp messages. Threats were made to kill her and her family. She recalled that in September 2021 the Supreme Court informed judges that the Haqqani Network had decided to kill judges. In her witness statement of July 2022, post-

dating the in principle decision, but served prior to the reconsideration decision, she detailed that her son had been kidnapped by the Taliban in March 2022, taken away and beaten badly. She further confirmed that she had relocated to Pakistan having continued to receive threats made by telephone from different numbers, and the threats continued though she sought to block numbers sending threats. The situation she found herself in and the attendant threats left her "terrified" for the safety of herself and her family.

128. In a witness statement accompanying his ARAP application AZ confirmed that in August 2021 he was warned as to his safety by a local of chief of police and he went into hiding. Even before the Taliban returned to power, he was receiving threats having sentenced a man to twenty years in custody for smuggling weapons. He also received threats having sentenced a man to a number of years imprisonment for planning attacks on Afghan and coalition forces. That man is now in a position of authority and has sought to contact him. Details of other threats, one in a position of authority in his home district, are provided in the witness statement.

129. Mr Evans explained that the reference in the decision to "no threats" related to there having been no 'recent' threats. There was an acceptance by the respondent that there had been threats made to the applicants, but there were appropriate questions as to the reasons and source of the threats. In any event, the existence of the threats was not material as there were other reasons given for rejecting the existence of exceptional or compassionate circumstances.

130. Whilst I consider the use of the word "now' at the end of the relevant paragraph in both AZ's and S's decisions establishes the respondent's contention that he was considering the present situation in July 2022, I consider it material that the respondent did not consider a consequential effect of the threats being that both applicants went into hiding, with one subsequently taking an opportunity to flee the country. The threats, which are presented in detailed form, particularly by AZ, are a relevant component to the assessment of serious risk which goes to the heart of what the applicants assert are compelling circumstances. That the applicants were forced into hiding for fear of their lives consequent to the substance of the threats is the obvious difficulty for the respondent when considering the rationality of his decision-making; it is a key fact upon which the respective decisions are silent. I conclude that these are decisions that do not add up.

131. Ms Sabic KC advanced a separate but complementary challenge on procedural unfairness grounds to the respondent's change of position in respect of the risk to AZ. It was submitted that if the respondent was minded to amend his position from that adopted before Lang J as to the motive behind AZ being at risk of serious harm or death, he should have provided AZ with an opportunity to address the issue prior to making the LOTR decision, thereby enabling AZ to address motive directly. Reliance was placed upon *Balajigari v. Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 W.L.R. 4647.

132. The basis of the obligation to make sufficient inquiry was first set out in *R v. Secretary of State for Education and Science ex parte Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064-1065. The relevant principles were summarised by the Divisional Court in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [99]-[100], and approved by the Court of Appeal in *Balajigari,* at [70]. As summarised in *Balajigari*, the principles are:

> "70. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para.35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

133. Consequently, a complaint as to failure to make reasonable enquiries will succeed only if the decision-maker's approach to the scope of the appropriate enquiries was irrational. The *Tameside* test is applicable and so it is not whether further inquiries would have been sensible or desirable, but whether no reasonable authority could have been satisfied that it possessed the necessary information.

134. The respondent's position is that the approach in *Balajigari* is of no relevance to this matter as it refers to allegations of dishonesty in the specific circumstances of paragraph 322(5) of the Rules. This narrow assessment of the ratio in *Balajigari* enjoys no merit.

135. Underhill LJ, at [59]-[60] of his judgment in *Balajigari,* to which all members of the panel substantially contributed*,* considered the well-known judgment of *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560, where Lord Mustill summarised the principles to be derived from the authorities as to fairness in six propositions:

"(1) [W]here an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

136. Therefore, although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached fairness will usually require that to be done where that is feasible for practical and other reasons. By his judgment Lord Mustill emphasised that the exercise of determining the requirements of fairness was "essentially an intuitive judgment" and highly dependent on context, at 560.

137. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, at [179], Lord Neuberger said in respect of the exercise of statutory power:

"179. In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power

is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

138. Underhill LJ said in *Balajigari*, at [60}:

"60. This leads to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of the right to be consulted, in *Sinfield v London Transport Executive* [1970] Ch 550 , 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming "unduly fixed" before representations are made. He said:

"any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals—before the mind of the executive becomes unduly fixed.""

139. Underhill LJ recognised in respect of a decision concerned with the Rules that [179] of Lord Neuberger's judgment in *Bank Mellat* was an accurate attempt to summarise and reformulate the passage from Lord Mustill's judgment in *Doody*. The latter offered three possible requirements of fairness in a decision-making process: an opportunity (1) before, or (2) after the decision, or (3) both. Whilst allowing the possibility that any of the three options may suffice, it did not explain how a court or tribunal may decide what the requirements of fairness are in any given decision-making process. As explained by Edis LJ in *R (Timson) v. Secretary of State for Work and Pensions* [2023] EWCA Civ 656, at [62], the House of Lords in *Doody* was not faced with an argument that the existence of a means of post-decision review meant that fairness did not require an opportunity to make representations before the decision. Edis LJ, in a judgment with which Warby and Phillips LJJ agreed, held that the dicta in *Bank Mellat* and *Balajigari* are not inconsistent with *Doody* but represent an application of the principles in *Doody* to a situation which did not arise in that case.

140. The respondent's position in this matter is that it was lawful for him to amend his position as to motive, without notice to AZ and without seeking further information. The respondent submitted, unattractively, that it had been open for the applicants to address the issue of motive prior to the issuing of the decisions. That the applicants could reasonably have relied upon the respondent's position before Lang J was redundant in the submission. At the same time, the respondent's case as advanced by his detailed grounds of defence was that AZ could not rely upon post-decision evidence addressing motive as it was not before the decision-maker. AZ is reduced to considering a Morton's fork. Having no notice of the change in the respondent's position as to motive, at no time could he properly address it if the respondent's defence to these proceedings is successful.

141. It is trite that the wider the discretion conferred on the respondent, the more important it must be that he has all relevant material to enable him properly to exercise it: *R (Venables) v Secretary of State for the Home Department* [1998] AC 407, at 466G.

142. I am mindful that *Tameside* is not to be used as a proxy for what is a process challenge. The duty on the decision-maker to call his own attention to considerations relevant to his decision springs from a duty to inform himself to arrive at a rational conclusion.

143. In my judgment, a *Tameside* duty arose in the consideration of LOTR under Immigration Act 1971 powers as the applicant was unaware of the amendment of the respondent's position as previously advanced before the High Court in public law litigation and the amendment was significant. I am satisfied that no reasonable authority could have been satisfied that it possessed the necessary information as to motive where it was minded to change its position, and proceeded to so amend in the absence of any information from AZ who reasonably understood at the time that the respondent would act consistently with her position before the High Court.

144. This is an exceptional case where an obligation fell upon the respondent to consult AZ as to the motive underpinning the accepted risk of serious harm. The failure to do so led to conspicuous unfairness. The reference by the respondent to the possibility of the threats being generalised in nature "due to other outside factors such as financial, property or other examples" appears to engage in speculation which is an anathema to good decision-making. The respondent identifies no evidence before him that the threats and fears flowed otherwise than from the Taliban's attitude to judges who engaged in matters against its members, as confirmed by expert opinion. As speculation alone it should not

have found its way into the decisions. However, if the respondent held a genuine belief that there was more to the applicants' concerns than was being identified in the application, and being mindful of her acceptance as to the nature and substance of risk before Lang J, I consider that no reasonable authority in the position of the respondent would have proceeded to make this decision without having sought further information as to the motive underpinning why AZ was being threatened. The high threshold of demonstrating that the respondent acted irrationally has been met by AZ.

145. Both S and AZ raise several other challenges as to irrational conclusions, including a failure to consider their ongoing risk from the Taliban, that at the time of decision (and still with respect to AZ, though the present position as to S is unknown) they enjoyed very limited sources of income and they were carers for disabled or elderly members of their family. I consider that there is no requirement to engage with the additional challenges advanced. The respondent commenced his assessment on an erroneous footing, and each of these concerns will have to be properly and lawfully reassessed upon the respondent engaging with the nature and the substance of the risk faced by the applicants and the impact it has on their daily lives.

Failure by the respondent to take into account findings made by Lang J.

146. On behalf of AZ, Ms Sabic submitted that the respondent failed to expressly consider highly material findings made by Lang J in his decisions of July and September 2022.

147. The respondent's position is that AZ did not explain why a failure to consider aspects of Lang J's judgment rendered the decisions manifestly unlawful. For the reasons detailed below, there is no merit to this defence.

148. AZ relies upon [121] of Lang J's judgment:

'121. In my judgment, as it was impossible to assess and prioritise the huge numbers of people seeking evacuation from Afghanistan, in the limited time available, the selection of persons for Pitting LOTR was likely to be inconsistent and arbitrary, despite the commendable efforts of the staff involved. It is also apparent from the evidence that the process strongly favoured those who had the benefit of lobbying by influential persons on their behalf. That was not an objective or fair means of selection as it was likely that others who did not have influential sponsors were deserving too. The Claimants did not have anyone to lobby for them and they were unaware that they could be eligible under Pitting LOTR, as this was not a published policy.

149. The conclusion as to the selection of persons being inconsistent and arbitrary is a finding of fact made on the papers placed before the High Court, as is the finding as to the benefit of lobbying. Lang J was required to undertake fact resolution on these issues, and judicial review is a sufficiently flexible form of procedure to permit fact resolution when required: *R (King) v. Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384, at [126]. The findings were relevant to the legal issues before her, and she was permitted to proceed on written evidence with the burden of proof being placed on the party asserting a fact to be true: *R (Talpada) v. Secretary of State for the Home Department* [2018] EWCA civ 841, at [2]. The same papers were before the respondent when he made the decisions challenged in this matter.

150. The conclusion as to AZ (and S) not having anyone to lobby on their behalf, and their being unaware of their eligibility were undisputed facts before Lang J.

151. At [124]:

> 124. In my judgment, there was no rational distinction between the comparator judges and the Claimants which could justify a grant of Pitting LOTR to the comparator judges but not to the Claimants. They were all judges who were implementing the rule of law in Afghanistan, consistently with the UK's mission, but none of them had any direct or indirect connection with the UK Government. Their membership of the IAWJ and their participation in the mentoring scheme, neither of which are UK Government schemes, could not rationally justify the grant of LOTR to them, but refuse it to the Claimants. In any event, S was also a member of the IAWJ and its affiliated association, the AWJA. They were all at risk from the Taliban because of their occupation. As female judges they were at greater risk than AZ. On the other hand, AZ's anti-terrorist work had made him a Taliban target to a much greater extent than some of the comparator judges, particularly those sitting in civil jurisdictions. The sole reason why the comparator judges were selected was because they had contacts in the UK who were able to lobby the FCDO on their behalf. This illustrates the inconsistency and arbitrariness of Operation Pitting, and the extent to which lobbying and connections influenced the selections made, instead of the application of fair and objective criteria.

152. The conclusion as to there being no rational distinction between the circumstances of five other Afghan judges considered by the Court who were granted Pitting LOTR and the applicants in this matter that would justify the latter not also being granted Pitting LOTR was reached as part of the exercise Lang J was required to undertake. The findings of fact as to the risks to S and AZ were findings of fact they established in proceedings before the High Court with the burden of proof falling upon them. That several comparator judges and the applicants were implementing the rule

of law in Afghanistan, consistently with the United Kingdom's mission, and none of them had any direct or indirect connection with the United Kingdom Government is incontestable.

153. At [125]:

125. In my view, both S and AZ could have been eligible under Pitting LOTR criteria, if their names had been put forward. In their work as judges, hearing counter-terrorism and national security cases, they contributed to the UK Government's objectives in Afghanistan to promote the rule of law, and to combat terrorism (albeit not working for or alongside the UK Government, so as to meet the ARAP criteria). In doing so, they placed themselves and their families at considerable personal risk. That risk has heightened since the Taliban seized power. They and their families are in hiding, but realistically they will be found by the Taliban at some point. There is verified evidence that other judges have been summarily executed by the Taliban.

154. That AZ (and S) would have been eligible under Operation Pitting LOTR criteria if their names had been put forward for the same is a finding of fact made by the Judge when undertaking fact resolution relevant to the legal issues before Lang J.

155. At [126]-[127]:

126. However, the Pitting LOTR criteria are no longer in operation as they were only introduced for the purposes of Operation Pitting, which has now concluded. The Claimants' applications had to be considered in accordance with LOTR policy as at the date of the decisions made in their cases in October and November 2021 respectively. However, I consider that factors such as their role in promoting the rule of law, and the risks to their safety arising from their work as judges, will still be relevant in any assessment of their cases. In my view, the factors set out at paragraphs 124 and 125 above are also relevant considerations to take into account in the Claimants' favour, in any substantive consideration of their applications for LOTR.

127. Insofar as the Afghan Girls Development Football team were treated in line with Operation Pitting cases, despite their evacuation taking place in November 2021, this demonstrates the wide discretion which the SSHD enjoys under LOTR. No meaningful comparison can be drawn between the position of the football team and the Claimants.

156. This is an identification of law. The Pitting LOTR criteria is no longer in operation, and applications for LOTR are to be considered in accordance with LOTR policy as at the date of decision. However, the respondent enjoys a wide discretion under his LOTR policy, as evidenced by his approach to the Afghan Girls Development Football Team. Within that discretion, the applicants could properly expect their role in promoting the rule of law, and the risk to their

safety arising from that role, to be considered as relevant in any assessment of LOTR.

157. It is trite that an executive decision will be unlawful on public law grounds if a decision-maker fails to take into account relevant matters: *R (Keyu) v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, at [127]. The applicants had the benefit of relevant findings of fact, findings as to comparators as well as judicial confirmation that both their professional employment and identification that the risks flowing from their judicial employment were relevant when the respondent exercised his wide discretion under the LOTR. I observe that each of these paragraphs, save for [127], were expressly relied upon in AZ's representations for LOTR, dated 23 June 2022. In the classic sense that *Wednesbury* is understood, the respondent acted unreasonably in respect of the approach adopted to his decision-making process. Relevant matters core to the application of AZ, as well as S, were simply ignored. Such approach on the facts arising in this matter was unreasonable and unlawful.

158. This conclusion flows into the next ground to be considered, which is advanced by both applicants.

Failure to have regard to 'proximity' under (a) ARAP and/or (b) Pitting LOTR when examining individual cases.

159. As advanced in writing the applicants' case on this ground is that their 'proximity' to the requirements of ARAP and to Pitting LOTR, with particular respect to the findings made by Lang J in her judgment, is a relevant consideration to the determination of their LOTR applications, both to the structural starting point for making an assessment of discretion outside of the Rules, as well as disclosing what are relevant and irrelevant considerations.

160. By means of his Detailed Grounds of Defence, dated 4 April 2023, repeated in his skeleton argument, the respondent complained that reference to 'proximity' was imprecise and lacked adequate meaning.

161. In oral submission Ms Naik KC clarified that S was not seeking to advance a 'near miss' challenge and confirmed that the ground was founded upon a failure to consider material circumstances, not legitimate expectation. Ms Sabic agreed. Mr Evans raised no complaint to the clarification. Ultimately, the clarification has brought the essence of this challenge closer to the ground addressed above.

162. The applicants rely upon [130] of the Lang judgment. The LOTR policy requires a decision-maker to first consider the position under any relevant Rule before moving onto the compelling compassionate question. This is the structured approach establishing the starting point for an LOTR application which is to be made on the form for the visa type which most closely matches the circumstances. Any compelling compassionate circumstances will be decided by reference to the Rule which most closely matches the circumstances existing, and the criteria in the Rules which they are unable to meet.

163. The respondent contends that the LOTR policy does not require decisions to follow a particular structure. The policy is not prescriptive as to the mechanism of consideration. However, the question posed by the policy is one of exceptionality, and the answer will usually require an assessment as to why an applicant has not been successful under the Rules. I agree with the applicants as to the nature of the structured approach applicable when considering an application under the LOTR policy: exceptionality is decided by reference to the Rules most closely matching the circumstances, why the criteria of the Rules were not met and then deciding whether compelling compassionate circumstances exist. The latter is a holistic assessment permitting in this matter consideration of the Pitting LOTR criteria and Lang J's conclusion as to the comparator judges. Such consideration does not act contrary to the principle established in *Odelola v. Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 that applications for leave to enter or leave to remain had to be considered in the light of the version of the Rules [or in this matter, policy] in force at the date of decision. The applicants do not rely upon Pitting LOTR itself, but upon the continuing grave situation existing in Afghanistan which underpinned the policy as well as ARAP and ACRS. The grave situation, say the applicants, continues for those who upheld the justice system without which, Mr Foxley opines, the United Kingdom's presence in Afghanistan would have been untenable and the mission to stabilise Afghanistan and rebuild the government structures would have failed.

164. Adopting this structured approach, the applicants contend that the respondent should have considered the principles underlying both ARAP and Pitting LOTR when considering their applications for LOTR, and for the respondent to have factored into his assessment when exercising of discretion that both ARAP and Pitting LOTR were intended to recognise persons to whom HM Government had made commitments to and were now at risk because of their work alongside HM Government. In their LOTR applications the applicants relied upon Lang J's finding that they both could have

been eligible under Pitting LOTR if their names had been put forward. Instead, complaint is made that the respondent considered potential routes under the Rules that were plainly not applicable – Parts 11 and 11A of the Rules (asylum and temporary protection) were considered the closest applicable for consideration - and failed to consider ARAP as well as Lang J's findings of fact in respect of Pitting LOTR.

165. The applicants rely upon the success of the applicant on a related ground in *R (JZ) v. Secretary of State for the Home Department* (JR-2022-LON-001012) (13 June 2023), at [98]:

> "98. ... However, we accept the applicant's argument that these matters were treated not only as the starting point but the end point. The applicant made an application outside of ARAP, without the straight jacket of category 4 and the narrow criteria that apply. He specifically relied on matters which went beyond the conclusions reached by the decision maker in ARAP which he said amounted to compassionate and compelling circumstances, including his work as a judge in the JCIP convicting terrorists captured by ISAF including British troops. His application was not based on Article 8; it was an application that he should be granted LOTR on compelling compassionate grounds because of the specific circumstances of his case. Those circumstances were not limited to the risk to the applicant and his family and a narrow "near miss" argument. He raised matters that were relevant to the consideration of LOTR; however, the respondent excluded them from consideration. This was, in our view, irrational."

166. The respondent relies upon the applicants having been found to be ineligible under ARAP on the grounds that they were not employed by HM Government, they did not work alongside HM Government and their work did not make a material contribution to HM Government's mission in Afghanistan. Additionally, it is not apparent that the United Kingdom's operation would have been adversely affected without their work. Whilst the respondent can properly rely upon the applicants' being unsuccessful under ARAP, I find that ineligibility under this Rule is not by itself determinative of the LOTR application. As explained above, the respondent was properly to consider the risks flowing from their employment, expert evidence and judicial findings as to comparators successful under Pitting LOTR when considering the exercise of discretion. In exercising discretion under the LOTR policy, the starting point is that the applicants were unsuccessful under the Rules, but this fact is not determinative.

167. I conclude that the respondent erred in considering Parts 11 and 11A of the Rules rather than ARAP as the closest Rules to the applicants' circumstances. The starting point of the decisions was erroneously founded upon the applicants being incapable of

claiming asylum outside of the United Kingdom, which they were not seeking to, and being unable to meet Rules that they had not sought to rely upon in their LOTR applications and were irrelevant to them. The respondent's decisions therefore had no meaningful reference to the criteria applied in applications comparable to the applicants, and so failed to place at the forefront of the exceptionality consideration the circumstances pertaining to and specific to Afghanistan at the time of decision. In my judgment, the closest Rule, ARAP, would have channelled the respondent to considering highly relevant and material principles identified by Lang J at [124] to [127] of her judgment. The failure to identify ARAP as a starting point for the LOTR assessment can properly be considered irrational in circumstances where the imperative underpinning both Pitting LOTR and ARAP is the acceptance of the risk of serious harm from the Taliban towards individuals now at risk because of their contribution to HM Government's work in Afghanistan from 2001. In the circumstances, the respondent's decisions in respect of the LOTR applications are irrational.

Failure to have regard to historic injustice/ absence of fair procedure and arbitrariness in determining Pitting LOTR

168. S contends that the respondent's decision failed to acknowledge the historic injustice suffered by her consequent to procedural flaws arising in Pitting LOTR. She places reliance upon Lang J's observation at [121] of her judgment that the selection of persons for Pitting LOTR was likely to be inconsistent and arbitrary, strongly favouring those who had the benefit of lobbying by influential persons on their behalf. Lang J further observed: "That was not an objective or fair means of selection as it was likely that others who did not have influential sponsors were deserving too."

169. Ms Naik submitted that the fact that Pitting LOTR was granted to certain Afghan judges, in the absence of a fair procedure, published policy, and with the influence of lobbying, are all relevant factors going to the arbitrariness of selection. She contended that this is relevant to S's case because she is in a materially identical position.

170. Mr. Evans observed that a decision-maker is required to determine an immigration application based on the policies and criteria in force at the time of the decision, subject to any transitional provisions or legitimate expectation. The circumstances of Operation Pitting were wholly exceptional, and it was never intended or envisaged that the policy and evacuation criteria adopted for a specific crisis event would be applied on an on-going and open-ended fashion to those remaining in Afghanistan after the departure of United Kingdom forces. As to S, the decision-

maker was not required to consider whether she would have qualified under a previous policy. No decision was taken in respect of S during Operation Pitting which was wrong or could amount to historic injustice.

171. During her oral submissions Ms Naik properly acknowledged that due to the logistics underpinning Operation Pitting more people may have qualified that could have been evacuated. However, S's case is that if she had been called forward, she would have met the criteria. She was not called forward because the system was inconsistent and arbitrary.

172. In *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 00351(IAC), [2021] Imm AR 355 a Presidential panel confirmed that the expression "historic injustice", as used in the immigration context, should be reserved for cases which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now. The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as "historical injustice", the operation of historic injustice will not depend on the particular interaction between the individual member of the class and the respondent. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.

173. The circumstances at the core of Operation Pitting are properly to be considered. The operation was authorised by the Prime Minister and announced on 13 August 2021. It concluded fifteen days later on 28 August 2021. It was a non-combatant evacuation operation to evacuate British and eligible Afghan nationals from Kabul following the rapid military offensive by the resurgent Taliban to take control of the country. It ran alongside evacuation efforts undertaken by other countries. In the region of 1,000 British service personnel were involved. Approximately 15,000 people, including 8,000 Afghans, were airlifted to safety by means of over 100 flights in what proved to be the largest airlift since the Berlin Blockade of 1948–9. Logistically, it was a challenging, intense and complex overseas operation. The British Government was required to secure a dedicated airport terminal in Dubai for the use of its evacuation flights, through an agreement signed with the Emirati authorities in August 2021. This permitted flights to travel to and from Kabul to Dubai, rather than the longer journey from Kabul to the United Kingdom. At the conclusion of Operation Pitting there was recognition that not everyone who wanted to leave

Afghanistan had been able to. The Secretary of State for Defence told the Defence Committee on 26 October 2021 that 1,870 people called forward under ARAP were not evacuated to the United Kingdom.

174. In observing that the selection of persons for Pitting LOTR was likely to be inconsistent and arbitrary, Lang J noted at [121] that such outcomes flowed from it being impossible to assess and prioritise the huge number of people seeking evacuation from Afghanistan in the limited time available in what was a brief period during a military humanitarian operation. S (and AZ) were hindered by not having influential sponsors acting on their behalf. This was the case for others. The selection of evacuees was not objective or fair. However, as Ms Naik properly recognised, even with the application of a consistent and fair selection policy, not every deserving person would have been evacuated. Logistically, this was simply not possible in the short period of time available. In my judgment, the class of person who met the relevant criteria but were not evacuated do not form a cohort to whom it is uncontroversial that they suffered historic injustice, as they enjoyed no guarantee of evacuation. Some would not have been identified at the relevant time. Some may have been identified, but unable to leave territory recently controlled by the Taliban. Others would not have been able to enter Kabul airport.

175. S cannot succeed on this public law challenge.

Failure to have regard to material considerations; the circumstances existing in Pakistan

176. This ground is advanced by S alone. Noting that she has been successful on other grounds, the decisions challenged are properly to be quashed and she no longer resides in Pakistan, there is no requirement for this ground to be further addressed.

Refusal to defer biometrics: Mistake of fact/ failure to take into account material facts and evidence

177. The final ground is AZ’s challenge directed to the refusal of the respondent to defer the requirement to enrol biometric information outside the United Kingdom. This was initially advanced as a procedural fairness challenge, but Ms Sabic reframed it as a reasons challenge during oral submissions. Mr Evans did not oppose the refinement of the ground, and it was proper for him not to do so.

178. The respondent concluded by his decision letter of 22 July 2023:

"8. There has never been a VAC in Afghanistan; from both before and since August 2021, Afghan national applicants have always used one of the VACs in neighbouring countries. No information has been provided now by AZ or his family members that would suggest that he and his family members are physically incapable of attending a VAC in a neighbouring country due to infirmity or providing biometric information. I have also and further considered their own particular circumstances and location as stated. I note that there is nothing to indicate that AZ and his family members are actually being prevented from travelling to other countries if they so wished. At page 67 of the agreed hearing bundle [before Lang J] it is stated that "... *the ability to extract [AZ and those accompanying him] exists at this moment, without any risk to the UK or its armed forces ...*" As such I am satisfied they could travel out of Afghanistan of their own volition and by their own arrangements.

9. I have also considered if there is a reasonable degree of certainty as to the identities of AZ [...] family members, and his parent as an additional relative – nine people in total. I note that only four passports are shown to be held – by AZ, his spouse [...]; otherwise only handwritten untranslated identity papers - "tazkeras" - are available [...]. [The respondent reminded himself of various published country information on Afghan identity information]. Having taken into account all of the above, while I can be satisfied as to the identity of AZ [...] as holding passports, on balance and based on the information provided I am not satisfied as to the identities of [...].

10. Having carefully consider all of the above and all of the information put forward about AZ and his family members, and on behalf of SSHD, I am not satisfied that their circumstances are so sufficiently compelling so as to outweigh the public interest considerations of protecting public safety and justify treating them differently from other individuals who need to attend a VAC to enrol their biometrics as part of their application."

179. Having secured passports for the remaining members of his family, copies of all relevant bio-data pages from the passports accompanied AZ's pre-action protocol letter dated 27 July 2022.

180. The respondent observed in her pre-action response letter dated 5 November 2022: "I note that all nine family members now have passports ..."

181. As Mr Evans accepted, the respondent noted the fact that all family members now have passports. Such fact was not disputed in the respondent's pre-action response, which did not positively approve para. 9 of the original decision. The issue of identity therefore fell away in this matter.

182. Reliance is placed by AZ upon the conclusion reached by Lang J in her judgment, at [135]: "In my view, the Claimants and their dependants [...] had a strong case for a deferral of the requirement

to provide biometrics until such time as they could safely reach a Visa Application Centre in a third country, without being detected by the Taliban." Additionally, it was submitted that the pre-action response failed to consider the ramifications of the family possessing passports. It was submitted that the respondent placed reliance upon the need for biometrics, in the form of facial image and fingerprints, in underpinning the United Kingdom's immigration system, but he now has copies of the family's bio-data pages.

183. I accept that these are matters that a decision-maker would be expected to expressly consider on the facts arising in this matter, particularly as the High Court has previously considered the facts arising, and there is no challenge to AZ and his family being reduced to hiding from the Taliban.

184. In my judgment, the conclusion that the respondent's decision in respect of deferring biometrics is unreasonable can properly be founded upon, as addressed above, the failure to lawfully engage with the reasons as to why the applicant and his family are in hiding, namely his assertion that he is wanted by, and therefore at risk from, the Taliban because of his work as a judge. In the circumstances, AZ succeeds on this ground.

185. An additional limb to AZ's challenge to the refusal to defer was founded upon a mistake of fact, namely that the respondent misunderstood what was said by AZ in a document before Lang J as to his being capable of being "extracted" from Afghanistan without risk to the United Kingdom or its armed forces. Neither Ms Sabic nor Mr Evans dealt with this matter in detail at the hearing, and the Upper Tribunal was not provided with a copy of the relevant document. As I have decided to quash the decision not to defer biometrics, AZ can properly address this issue in any further representations to the respondent.

Conclusion

186. The applications for LOTR submitted by the applicants are careful, considered and well-constructed. They placed at their fore the key facts and issues relied upon, and clearly identify the elements of Lang J's judgment favourable to the applicants. The applicants' written cases for LOTR were advanced with clarity.

187. This judgment identifies multiple public law failings by the respondent including a failure to engage with findings of fact made by the High Court, a breach of *Tameside* duty and a failure to lawfully engage with the risk of serious harm flowing from the applicants' judicial engagement in holding the Taliban, Islamic

State of Khorasan, Al Qaeda and the Haqqani Network to account in criminal and security cases. In recent times the High Court has identified that there is no serious doubt that former Afghan judges are now at considerable risk from the Taliban. The expert evidence filed in this matter is consistent as to this concern. The respondent does not challenge that the two applicants in this matter went into hiding with their families, and one has fled Afghanistan. AZ continues to remain fearful and in hiding, requiring female members of his family to go to markets to purchase food as he is fearful to leave a place of safety. That multiple decision-making failings occurred in respect of carefully presented applications can properly be considered by this Tribunal to be of concern.

188. S is successful on grounds 1 and 3 of her claim. Ground 4 is academic. She is unsuccessful on ground 2.

189. AZ is successful on all grounds.

x. Further Steps

190. I invite the parties to agree an order reflecting my judgment, with attendant consequential orders if deemed necessary.

D O'Callaghan
Upper Tribunal Judge
Immigration and Asylum Chamber

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