Neutral Citation Number: [2024] EWCA Civ 278

Case No: CA-2023-001534

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE SWIFT
[2023] EWHC 1795

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 March 2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE LEWIS

- -

Between:

THE KING (on the application of) **(1) LND1** **(2) LND2** **(3) LND 3** **(4) LND4** **(5) LND5** **(6) LND 6**	**Respondents**
- and -	
(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **(2) THE SECRETARY OF STATE FOR DEFENCE**	**Appellants**
-and-	
(1) THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	**Interested Party**

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David Blundell KC and Sian Reeves (instructed by **the Government Legal Department**) for the **Appellants and the Interested Party**
Ramby de Mello and Edward Nicholson (instructed by **Luke & Bridger Law Ltd**) for the **Respondents**

Hearing dates: 22 and 23 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. Grounds 1 to 4 of this appeal concern the proper interpretation of provisions of the Immigration Rules dealing with applications by Afghan citizens for relocation to, or settlement in, the United Kingdom. The current provisions are included in the Immigration Rules' Appendix Afghan Relocation and Assistance Policy (ARAP) ("the Appendix"). Broadly, the provisions contain a two-stage process. First, there needs to be a decision by the Ministry of Defence ("the MoD") that an applicant is an eligible Afghan citizen. Secondly, if that is established, the MoD makes an application for entry clearance and the Secretary of State for the Home Department determines whether to grant that application.

2. An applicant meets the eligibility requirements if conditions 1 and 2 and one or both of conditions 3 or 4 set out in ARAP 3.6 of the Appendix apply. Broadly condition 1 is that, after 1 October 2001, the person was (i) directly employed in Afghanistan by a UK government department (ii) provided goods or services in Afghanistan under contract to a UK government department or (iii) "worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department". Condition 2 is that the person made a substantive and positive contribution in the course of the employment or work or provision of services towards the achievement of the UK government's military objectives or its national security objectives which include counter-terrorism, counter-narcotics and anti-corruption objectives. This appeal does not concern conditions 3 and 4.

3. The first respondent, LND1 (whom I will refer to as LND), was a judge at the Supreme Court of Afghanistan prior to the takeover of Afghanistan by the Taliban regime in August 2021. He had previously been the head of the court for internal and external security in Kabul. He applied for relocation under the Appendix. Details of the basis of his application are described more fully below. In essence, he contended that in his role as General Director of Investigation and Research of the Supreme Court he had worked with the Counter Narcotics Justice Centre formulating policies, rules and guidelines and training judges in the anti-narcotics court that formed part of that centre. He contended that he had been a member of what he describes as the Afghanistan Penal Code and the Anti-Narcotics Law Drafting Committee. He also relied on the fact that between 2010 and 2012 he had been head of the court for internal and external security in Kabul. The second appellant, the Secretary of State for Defence, decided that LND did not satisfy condition 1 of ARAP 3.6 as he had not demonstrated that he worked alongside a UK government department, working in partnership with or closely supporting and assisting that department. The respondent brought a claim for judicial review of that decision.

4. Swift J. ("the judge") allowed the claim on the grounds that the decision was wrong and irrational. In reaching that decision, the judge considered the proper interpretation of condition 1(iii) and its relationship with condition 2. First, he considered that condition 1(iii) had to be applied as part of a single exercise which also considered condition 2 and the person's contribution to the military or national security objectives of the United Kingdom as condition 1(iii) and 2 had to be considered "in the round". He considered that the decision-maker ought to consider a number of factors including the work the applicant had undertaken, the nature of the institutions

in which he worked, the connection between those institutions and relevant UK government departments and the contribution made by the work of those institutions to UK government departments. Secondly, he held that, on the facts of this case, the second appellant had not adopted that approach and its decision that LND was not eligible was flawed. Thirdly, he determined that there was only one rational decision that the second appellant could reach in this case, namely that LND satisfied both conditions 1 and condition 2 of ARAP 3.6 of the Appendix. Fourthly, he considered that reasons for a decision on eligibility had to be given but, as the second appellant had in fact given reasons for its decision, and had not relied solely on a pro-forma refusal, the decision was not unlawful because of a failure to give reasons. Finally, he dismissed the respondents' claim that the first appellant, the Secretary of State for the Home Department alone (and not the Secretary of State for Defence), had to determine eligibility.

5. The two appellants, the Secretary of State for the Home Department and the Secretary of State for Defence, have permission to appeal on four grounds namely that the judge erred in:

   (1) His construction and application of the ARAP Scheme, specifically by conflating Conditions 1 and 2;

   (2) His finding that LND satisfied the eligibility criteria under conditions 1 and 2;

   (3) His finding, in any event, that the only rational outcome was that LND's application had to be granted; and

   (4) His finding that the reasons given in the pro-forma decision letter were insufficient.

6. The respondents had permission to cross-appeal on one ground only, namely that the Secretary of State for the Home Department alone was responsible for determining whether the eligibility criteria were met. At the hearing, counsel for the respondents withdrew the cross-appeal and I say no more about it.

THE LEGAL FRAMEWORK

The Immigration Act 1971 ("the 1971 Act")

7. Subject to some immaterial exceptions, persons who are not British citizens require leave to enter the United Kingdom. The Secretary of State must lay before Parliament statements of the rules laid down by him as to the practice to be followed in granting leave: see section 3(2) of the 1971 Act.

The Policy and the Immigration Rules

8. In December 2020, the Afghan Relocations and Assistance Policy was adopted. That dealt in part with the relocation to the United Kingdom of certain categories of Afghan citizens. Category 2 included, broadly, those individuals employed in Afghanistan by the United Kingdom government in exposed or meaningful roles who were assessed to be at serious risk as a result of their work. The policy also included arrangements for the giving of assistance within Afghanistan to other categories of Afghan citizens. The policy was seen as a means of showing commitment and paying

a debt of gratitude towards those who had worked for or with the United Kingdom Government in Afghanistan. Those requirements as regards relocation were then included within a statement of changes to the Immigration Rules laid before Parliament in April 2021.

9. In May 2021 the policy of allowing applications for relocation to the United Kingdom was expanded to include those providing linguistic services to the United Kingdom Armed Forces and those who worked with or alongside a United Kingdom government department in Afghanistan in exposed or meaningful roles that made a material difference to the delivery of the United Kingdom's mission in Afghanistan. Further changes were made at different times in 2021 and 2022. Changes were made to the Immigration Rules reflecting those amendments to the policy.

The present Immigration Rules

10. The present requirements governing Afghan citizens seeking to relocate to the United Kingdom were made by changes to the Immigration Rules which now include the relevant provisions in the Appendix. The heading to the Appendix confirms that applications under this route are to enable Afghan citizens and their dependent family members to relocate to the United Kingdom (or to settle in the United Kingdom if they are already here) in circumstances where the MoD has decided that they meet the requirements for relocation as an "eligible Afghan citizen". The heading also explains that here is a two-stage application process. An application must first be made, by the applicant, to the MoD, which will decide if the applicant is an eligible Afghan citizen. If the person is eligible for relocation to the UK, the second stage is that the MoD will make an application for entry clearance (if they are outside the UK) or settlement (if they are in the UK) on behalf of the applicant.

11. The relevant eligibility requirements in the present case are included in the Appendix which, so far as material, provides:

> "ARAP 3.1. To be an eligible Afghan citizen the applicant must have applied to, and received from, the Ministry of Defence a decision that the requirements under ARAP 3.2. to ARAP 3.6. are met and that ARAP 3.7. does not apply ("the ARAP eligibility decision").
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> ARAP 3.2. An eligible Afghan citizen is a person who:
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> (a) is an Afghan citizen; and
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> (b) is aged 18 years or over; and
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> (c) meets the eligibility requirements in at least one of ARAP 3.3 to ARAP 3.6; and
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> (d) ARAP 3.7. must not apply.
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> ARAP 3.3. A person meets the ARAP eligibility requirement if:
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> (a) they submit an application on or after 1 April 2021; and

(b) at least one of the following eligibility requirements applies:

(i) ARAP 3.4. (high and imminent risk of threat to life);

(ii) ARAP 3.5. (former employees eligible for relocation); and

(iii) ARAP 3.6. (special cases).

…..

ARAP 3.6. A person meets the eligibility requirement if conditions 1 and 2 and one or both of conditions 3 and 4 applies:

(a) Condition 1 is that at any time on or after 1 October 2001, the person:

(i) was directly employed in Afghanistan by a UK Government department; or

(ii) provided goods or services in Afghanistan under contract to a UK Government department (whether as, or on behalf of, a party to the contract); or

(iii) worked in Afghanistan alongside a UK Government department, in partnership with or closely supporting and assisting that department.

(b) Condition 2 is that the person, in the course of the employment or work or the provision of those services under Condition 1, made a substantive and positive contribution towards the achievement of one or more of the following:

(i) the UK Government's military objectives with respect to Afghanistan; or

(ii) the UK Government's national security objectives with respect to Afghanistan (and for these purposes, the UK Government's national security objectives include counter-terrorism, counter-narcotics and anti-corruption objectives).

(c) Condition 3 is that because of the person's employment or work or those services under Condition 1, the person:

(i) is or was at an elevated risk of targeted attacks; and

(ii) is or was at high risk of death or serious injury.

(d) Condition 4 is that the person holds information, the disclosure of which would give rise to or aggravate a specific threat to a UK Government department or its interests.

> ARAP 3.7. A person does not meet the ARAP eligibility requirements, if either of the following apply:
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> (a) the Ministry of Defence has withdrawn its eligibility decision; or
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> (b) the person was directly employed by, or contracted to, a UK Government department or unit and was dismissed from their job (except in circumstances where the Secretary of State considers that the person was dismissed for a minor reason)."

12. The MoD will make an application for entry clearance on behalf of the applicant (or make an application for settlement if the person is already in the United Kingdom) if the decision-maker in the MoD is satisfied that the eligibility requirements are met: see ARAP 4. An application is only valid if the MoD have decided that the applicant meets the eligibility criteria and certain other criteria are met: see ARAP 1.1.

13. The application for entry clearance is then considered by the Home Office. ARAP 6.1 provides that:

> "ARAP 6.1. If the Home Office decision maker is satisfied that the eligibility and suitability requirements for entry clearance or settlement for an eligible Afghan citizen are met, the application will be granted, otherwise the application will be refused."

14. A person seeking to come to the United Kingdom as an eligible Afghan citizen must have obtained entry clearance under the ARAP scheme before they arrive in the United Kingdom.

15. There are provisions in the Appendix governing the family members and dependants of eligible Afghan citizens. Those provide for the MoD to determine whether they satisfy the eligibility requirements set out in the Appendix, for applications and decisions on the grant of entry clearance for such persons. Further guidance was issued on the Afghan Relocations and Assistance Policy in December 2022.

THE FACTUAL BACKGROUND

Operations in Afghanistan

16. Following the terrorist attacks against the United States of America on 11 September 2001, the United States led a military intervention against Al Qaeda groups and the Taliban government in Afghanistan. The United Kingdom took part in the initial intervention. The military operation was subsequently supported by NATO and by a joint international force, known as the International Security Assistance Force or ISAF. The United Kingdom played a political, diplomatic and military role. Those activities continued between 2001 and 28 August 2021.

17. In May 2021, the Taliban launched a military offensive against the Afghan Armed forces. By 15 August 2021, the Taliban had seized control of Kabul. British and American forces retreated to Kabul airport from where they operated an emergency airlift for all NATO's civilian and military personnel, other foreign nationals and

certain Afghans thought to be at risk from the Taliban. Operation Pitting was the name given to the United Kingdom's operation to evacuate British nationals and others at risk. The final British flight left Kabul on 28 August 2021. The final American flight left on 30 August 2021. Taliban fighters entered the airport. A Taliban government has been in control of Afghanistan since that date.

LND

18. LND is an Afghan national who held various judicial and other posts in Afghanistan between 2008 and August 2021. In summary, his posts include the following. He was a judge of the primary court for crimes against internal and external security of Kabul between 2003 and 2008 and chairman of the court between 2010 and 2012. He subsequently became a judge of the Supreme Court and, in that role, was Director General of the Directorate of Investigation and Studies. In that role he was involved in the Counter Narcotics Justice Centre. That centre contained the anti-narcotics court, and prosecutors and police concerned with the suppression of the trade in narcotics. LND and a colleague were involved in reviewing and providing directions and guidelines for the judges on the anti-narcotics court. LND undertook other roles referred to below.

LND's ARAP Application

19. Following the seizure of power by the Taliban, LND ceased to hold office and went into hiding in Afghanistan as he feared for his and his family's safety. He applied for relocation to the United Kingdom for himself, his wife and his four children as an eligible Afghan under the ARAP scheme first in September 2021 and again in November 2021. The appellants treated the two applications as one.

20. On 23 February 2022, an official in the MoD e-mailed LND asking questions concerning his job and role in Afghanistan, whether he had been directly employed by, or worked alongside, the United Kingdom government or armed forces, and requesting further details.

21. On 28 February 2022, LND replied. He described his job title or role as "General Director of Investigation and Research of the Supreme Court of Afghanistan/Head of Terrorism Court of Kabul." The e-mail then focussed on his work with the Counter Narcotics Justice Centre which involved the formulation of policies and related rules and guidelines and the training of judges in that court for five years ending on 15 August 2021. LND's response also included a letter dated 30 August from Ms Monica Martinez-Fernandez, the chief of the rule of law unit at the United National Assistance Mission in Afghanistan ("UNAMA"). That letter recorded the work that LND had done as a judge of the Supreme Court. It noted amongst other things that he had worked with committees on the preparation of legislation including the Penal Code and the Law Combating Narcotics and Alcohol. It referred to his earlier judicial roles as a judge, and then chairman, of the court for internal and external security of Kabul.

22. As there had been no decision on his application, LND brought a claim for judicial review on 22 April 2022 challenging the time taken in dealing with his application. He made a number of witness statements. In his first, he referred to his work assisting the Counter Narcotics Justice Centre with the formulation of policies, rules and

guidelines, and the training of judges. He noted that that centre had been funded by the United Kingdom. He referred to other work including his involvement with the preparation of legislation including the penal code and the Law Combating Narcotics and Alcohol. He referred to his role as head of the court for internal and external security where he had dealt with more than 700 cases involving Taliban combatants.

23. In a second witness statement, he referred to his work in 2010 to 2012 as head of the court for internal and external security. He explained that the number of cases involving Taliban detainees alleged to have attacked NATO personnel including the British military became very large. He was chairman of the court whose role was to investigate those cases and he had sentenced many members of the Taliban to imprisonment and execution. Many of those sentenced had been released and were working in senior positions with the new Taliban regime. LND said he and his family were at risk from those people and by reason of the fact that he was a well-known judge of the Supreme Court. LND referred to his involvement with the Counter Narcotics Justice Centre, noting that it was funded by the United Kingdom government and operated under the supervision of Emily White, who was the Head of the Office of the United Kingdom Ambassador to Afghanistan. He referred to Andrew Tickner who was the centre's adviser. At paragraph 10 he said:

> "Furthermore, I was a member of the Afghanistan Penal Code and the Anti-Narcotics Law Drafting Committee, part of which was funded by the British Embassy. I drafted chapters and materials related to terrorist crimes, suicide crimes in the penal code, and the provisions of that law were applied to a large number of Taliban and Haqqani Network, who were sentenced to death and long prison terms."

24. By order of Ritchie J. dated 27 October 2022, a timetable for making a decision on the application for relocation was fixed and the first judicial review was therefore withdrawn.

Consideration of LND's Application

25. The relevant steps in the consideration of the application are set out in the judgment below at paragraphs 15 to 17. In essence, the MoD decided first to refer the application to the Interested Party, the Foreign, Commonwealth and Development Office ("the FCDO"). The FCDO replied saying that the material did not demonstrate that LND had "built any kind of partnership, or provided close support or assistance to the FCDO" or its predecessor departments. So far as the work in the terrorism court was concerned, the FCDO only began its partnership with that court in 2015 and LND's involvement predated that. The FCDO response indicated that the "MoD might wish to consider any relationship they had with the applicants, though noting that none appears evident in the supporting documentation". So far as the work on counter-narcotics was concerned, the FCDO official said that that appeared to post-date the transfer of leadership on that role from the former Foreign and Commonwealth Office to the National Crime Agency ("NCA"), and the NCA appeared to be the relevant department to consider eligibility as a result of that work.

26. LND's case (and that of another individual) was then referred to the NCA. One response came from Simone Alleyne who indicated that she could find "no trace of

these individuals working alongside or in partnership with the NCA in Afghanistan". Mr Tickner, to whom LND had referred in his witness statement, was also contacted. He said that he had no knowledge of working with LND while he was deployed in Afghanistan.

Decision

27. By letter dated 9 December 2022, LND was informed that his application under ARAP had been assessed and he was deemed not to be eligible. That was a pro forma letter. The only reason given was that LND did not meet the criteria for-category 4 (which is a reference to ARAP 3.6).

28. By an e-mail also sent on 9 December 2022, the writer noted that detailed reasons for rejection of an application under ARAP were not usually provided, given the delay and expense, as that would add to the administration of the ARAP scheme. In light of the fact that the requirement to make an eligibility decision had been the subject of a court order, however, what were described as high-level reasons for the decision were contained in the e-mail. The material paragraphs of the e-mail say this:

> "6. Whilst the applicant has set out their judicial role(s) they were not able to demonstrate that they worked alongside, in partnership or closely supporting and assisting a UK Government Department. Analysis of records and other assessments did not show the applicant was affiliated or known to a UK Government Department.
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> 7. The applicant's asserted counter terrorism work pre-dates the FCDO's partnership with the Kabul counter-terrorism courts in 2015. The FCDO does not have records of having worked alongside the applicant at those courts. There is no evidence that the applicant's asserted work on the penal code was conducted in partnership with or alongside, or closely supporting the FCDO.
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> 8. The applicant states that his role was as Director General of Investigation and Research at the Supreme Court (2016 – 2021) and that he was actively involved in the work of the Counter Narcotics Justice Centre (CNJC) 2019 – 2021 although the NCA did work closely with the CNJC, in the event that the applicant carried out this role, he was not directly employed by or contracted to the NCA. Neither was he said to have worked alongside in partnership with or closely supported and assisted the NCA in delivering its counter-narcotics mission in Afghanistan. The UK did provide general funding to the Counter Narcotics Justice Centre (as we also did with Kabul Counter Terrorism Courts) but that does not equate to a CAT 4 eligibility for individuals who worked there. In both instances there was a strong relationship built with key individuals.

> 9. Providing a brief at the British Embassy Kabul does not indicate the applicant worked alongside, in partnership or closely supported and assisted HMG.
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> 10. In conclusion, there was insufficient evidence in the applicant's submission to indicate they had worked alongside, in partnership or closely supported and assisted the MOD, FCDO, NCA or any other UK Department or Unit."

The Claim for Judicial Review

29. On 9 January 2023 LND brought a claim for judicial review of the decision that he was not eligible for relocation. There were four grounds of claim. First, it was said that the decision that LND did not meet the relevant criteria was wrong and irrational. It was said that the condition in ARAP 3.6 should be broadly construed in line with the objective of the policy underlying the rules, namely to show commitment to those who worked for and supported the United Kingdom. Among the matters pleaded was the fact that the conclusions that there was no evidence that LND's work on the penal code, or his work with the MoD, were done in partnership or closely supported and assisted the relevant government department were irrational and wrong. That ground also contended that the decision was wrong to treat the work with the Counter Narcotics Justice Centre as not eligible. The second ground of claim was that the decision was procedurally unfair and had placed an excessive evidential burden on LND. The third ground alleged that the reasons given were not adequate. The fourth ground concerned a matter forming part of the cross-appeal and which is no longer at issue in these proceedings. The remedies sought were a quashing order, and various declarations.

30. It appears that LND also requested an administrative review of the eligibility decision within 90 days of the decision but for whatever reason that review has not been carried out. The Secretaries of State did initially submit in their skeleton argument for the Administrative Court that LND had an alternative remedy and that the claim for judicial review should be dismissed on that basis. The judge did not dismiss the claim for that reason. The appellants have not appealed on the basis that the judge was wrong not to do so. The issue of possible alternative remedies has not therefore played any part in the arguments before this Court and I say nothing further about that issue.

The Judgment below

31. The judge said that ground 1 of the claim raised two issues, first the approach to be taken when applying ARAP 3.6 condition 1 and, secondly, whether the conclusion that LND did not meet the conditions was lawfully open to the Secretary of State for Defence. The judge set out the facts of the judicial and related roles that LND had undertaken from 2008. He summarised how the 9 December decision came to be taken. His essential conclusions are at paragraphs 19 to 22 where he said:

> "19. Drawing this together, it is apparent that the question of whether the First Claimant had worked in partnership with or closely supporting or assisting a government department was considered in terms of whether the First Claimant had held

office at the Terrorism Court at a time when the Foreign Commonwealth and Development Office considered itself to have been "in partnership" with that court (i.e., from 2015), or whether his name was known to anyone at the Foreign Commonwealth and Development Office or the National Crime Agency, or whether he had been in receipt of any form of payment (see the reference to the National Crime Agency's "payment schedule").

20. I do not consider this is a correct approach to the application of this part of Condition 1 in ARAP 3.6. The overall effect of the responses from the Foreign Commonwealth and Development Office and the National Crime Agency involved consideration of Condition 1 in isolation from Condition 2. ARAP 3.6 contains four conditions. An applicant must satisfy Conditions 1 and 2 and either Condition 3 or Condition 4. There is a clear distinction between Conditions 1 and 2 on the one hand, and on the other hand, Conditions 3 and 4. Put generally, the latter concern risk arising by reason of the work the applicant has undertaken, either risk to himself or risk to United Kingdom interests. Conditions 1 and 2 must be considered together, in particular when the applicant was not in either of the first two categories within Condition 1, i.e., was not employed and did not work under contract, but was (or claims to have been) in the third, partnership, close support and assistance, category. Conditions 1 and 2 are, obviously, interdependent. Condition 2 is the more important because it identifies the substantive activity that the applicant must have undertaken to meet the eligibility requirement. By contrast, Condition 1 operates as a filter by requiring that activity to have been performed either in consequence of a contractual obligation (the first and second categories) or in consequence of some other sufficiently close connection (the third category). Since the third category is not defined by reference to an objective criterion, I do not think it possible to apply it without, as part of a single exercise, also considering the nature and extent of the applicant's contribution to the relevant military or national security objectives. Put shortly, the position of such an applicant must be considered in the round; whether an applicant has "worked … alongside a UK government department" cannot be reduced simply to whether he worked somewhere while it received specific support from a UK government department (with the consequence in this instance that the First Claimant's work as a judge at the Kabul Terrorism Court between 2008 and 2012 did not count, whereas doing the same work at the same court after 2015 would have counted), or whether his name can be remembered by one or more United Kingdom civil servants who worked in Afghanistan, or whether he received some form of payment from a United Kingdom government department.

An approach that focusses only on matters that are in some respects peripheral, risks missing the wood for the trees. In this case the decision-maker ought also to have taken account of the substance of the work the First Claimant undertook, the nature of the institutions in which he worked, the nature of the connection between those institutions and the relevant United Kingdom government departments, and the contribution made by the work of those institutions to the United Kingdom's military and national security objectives in Afghanistan during the period the First Claimant worked in them.

21. That was not the approach taken in this case, and for that reason the Secretary of State for Defence failed properly to consider the First Claimant's application in accordance with his policy. That being so, the next issue is whether the application of Conditions 1 and 2 ought to be remitted to the Secretary of State for Defence for further consideration or whether that is unnecessary so far as concerns compliance with those Conditions because, given the First Claimant's circumstances it is clear on any proper application of this part of the scheme there would only be one legally permissible outcome.

22. It is in the nature of the application of provisions such as Conditions 1 and 2 that instances where there will be only one permissible outcome will be rare. However, I am satisfied that this is such a case. The First Claimant's case, accepted by the Secretary of State for Defence, includes evidence that he worked as a judge at the Kabul Terrorism Court between 2008 and 2012, and that between 2013 and 2016 he worked in the Directorate at the Afghanistan Supreme Court responsible for establishing the rules and procedures of the Anti-Corruption and Justice Centre. Even disregarding the further work First Claimant undertook thereafter until 2021, these matters evidence an extended period of work in leading roles, in leading Afghan institutions, the work of which was obviously central to the United Kingdom's national security objectives in Afghanistan as described in Condition 2. During the hearing submissions were made on the significance that might properly attach to one part of the First Claimant's evidence, that in 2012 he (with others) attended the British Embassy in Kabul to provide a briefing on the work of the Kabul Terrorism Court. I accept the Secretary of State for Defence's submission that little significance may attach to this event for its own sake. However, what happened on that occasion is indicative of a rather obvious point, that the work of the judges of that court directly affected and supported the United Kingdom's natural security objectives in Afghanistan. The other matters referred to in the emails, set out in paragraphs 16 – 18 above, and in the 9 December email do not, rationally, diminish the strength of the First Claimant's application. The fact that the Foreign

> Commonwealth and Development Office regarded itself as "in partnership" with the Kabul Terrorism Court from 2015 and from that time "supported" some of the judges at that court, but not before, seems somewhat arbitrary since there is no suggestion that the court's work after 2015 differed in any way from its work between 2008 and 2012. The same can be said for the point made in Miss Alleyne's email that the First Claimant did not appear on the National Crime Agency's "payment schedule". While it could be said that had the First Claimant continued to work as a judge at the Kabul Terrorism Court after 2015, or had been on the National Crime Agency's payment schedule his application would have been all the stronger for those matters, I do not consider that on a proper approach to Conditions 1 and 2 it would be rationally be open to the Secretary of State for Defence to conclude that the First Claimant did not meet Conditions 1 and 2 for those reasons alone. Ground 1 of the Claimants' challenge therefore succeeds. In these circumstances I can address the further grounds of challenge more briefly."

32. The judge considered that, in the light of his conclusion as to the proper approach to the interpretation of condition 1 of ARAP 3.6, ground two merged with ground one making the former essentially redundant.

33. The judge then considered the question of the failure to give reasons. He considered that that ground focussed on two matters. First it focussed on whether the reasons in the 9 December 2022 e-mail were adequate and he noted that his decision on that matter merged with his decision on the first ground. Secondly, the ground related to the sufficiency of the pro-forma letter. At paragraph 26, the judge summarised the submissions as follows:

> "26. The second matter was the sufficiency of the pro-forma letter. The Secretary of State for Defence did not dispute that an adverse eligibility decision needed to be sufficiently reasoned. However, his submission was that given the number of eligibility applications made under the ARAP scheme (some 131,000 since the scheme opened in April 2021), it was in practice impossible to provide decision letters that directly addressed the reasons relied on in support of each application. Part of the practical difficulty was the need to translate decisions into local languages (Dari Persian and Pashto). Thus, went the submission, the pro-forma letters were sufficient, even though what is said in them comes to no more than telling each applicant that his application has been considered against the ARAP conditions but did not meet them. It was further submitted that the pro-forma letter informed applicants they could request a review of the decision and that reasons given in the event of a review would also count to discharge any obligation to give reasons."

34. The judge then considered the decision of Lane J. in *R (CX1 and others) v Secretary of State for Defence* [2023] EWHC 284 (Admin). Lane J. considered the evidence of the Secretary of State that over 128,000 applications for relocation under ARAP had been received by the date of his judgment, whereas the estimated number of persons eligible for relocation was 16,500. He noted the fact that decisions were translated and that the Secretary of State for Defence considered that that should be done by human translators and that the giving of reasons would either overwhelm the translation capacity of the department, adding delay to the process, or would significantly increase translation costs. Lane J. held that, taken as a whole, the system of providing pro-forma decision letters stating that the applicant had not satisfied the relevant criteria was compatible with the common law duty of fairness. The judge in this case disagreed with the conclusions of Lane J. and said this:

> "28. The issue before Lane J does not directly arise in the present case because of the 9 December email. Whatever view is taken of the sufficiency of the pro-forma letters in general terms, in this case the pro-forma letter was supplemented by the 9 December email and, save to the extent I have explained at paragraph 25, when these two documents are read together sufficient reasons were provided.
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> 29. Had the position been different, and if in this case the pro-forma letter had comprised the only reasons given for the eligibility decision, I would not have followed Lane J's conclusion in *CX 1* . As he said, the requirements of fairness are shaped by context. In this case, I accept that the context includes the fact that from August 2021 the Secretary of State for Defence faced a very large number of eligibility applications under the ARAP scheme, many more than he could have reasonably expected to have received. I accept the problem presented by the need to translate decision letters into relevant languages. I also accept that in the assessment of what is required to meet the obligation to act fairly, due weight will attach to the consideration that the obligation should not be framed to place an intolerable or unrealistic burden on a decision-maker.
>
> 30. However, when considering the content of the obligation to act fairly so far as it concerns an obligation to provide reasons, the most important matters of context are the decision being taken and the criteria applied to take the decision. Under the ARAP scheme, the eligibility criteria are such that each decision is an assessment of information that an applicant has provided about himself: of matters such as the work he undertook, the circumstance under which the work was performed, and the consequences in terms of personal safety for the applicant of having performed that work. Decisions that turn on the assessment of matters of this sort, of an applicant's personal circumstances set against criteria that are incapable of mechanical application, ordinarily attract an obligation to give

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

35. The judge's conclusion is at paragraph 35 of his judgment, where he said:

> "**C. Conclusion and disposal**
>
> 35. The Claimants' claim for judicial review succeeds on Ground 1 but fails on all other grounds. The consequence of my conclusion on Ground 1 is that the First Claimant meets Conditions 1 and 2 within ARAP 3.6. It will now be for the Secretary of State for Defence to consider whether either Condition 3 or Condition 4 is met. If his decision is that either of those Conditions is met then, subject to any point arising under ARAP 3.7, the Claimants' applications for entry clearance will fall to be determined by the Home Secretary in accordance with the remaining provisions in the ARAP Appendix to the Immigration Rules."

36. The order made by the judge stated simply that "The claim for judicial review is allowed" and dealt with permission to appeal and costs. The order does not include an order quashing the decision of 9 December 2022. It does not include any declaration as to the effect of the judge's judgment. It appears that, in accordance with the usual practice, the parties were asked to draft an appropriate order. LND's counsel indicated that the appropriate order was that the claim for judicial review be allowed and counsel for the Secretaries of State submitted that the order should say that "the claim

for judicial review was allowed on ground 1". In the event, it appears that the judge made the order in the terms proposed by LND's legal representatives.

GROUND 1 – THE PROPER INTERPRETATION OF ARAP 3.6

Submissions

37. Mr Blundell KC, with Ms Reeves, for the appellants, accepts that the interpretation of the provisions in ARAP 3.6 is an objective question for the court whose task is to decide what a reasonable, literate person's understanding of the policy would be. This requires an examination of the words of the policy, taken as a whole, and in the light of its context and purpose. He submitted that conditions 1 and 2 of ARAP were separate conditions each of which had to be satisfied by an applicant for relocation. The fact that the work of an applicant made a positive contribution to one of the United Kingdom's military or national security objectives as identified in condition 2 did not obviate the need for the applicant's work to be done alongside and in partnership with or closely supporting and assisting the work of the United Kingdom government department as required by condition 1(iii). He submitted that condition 1(iii) of ARAP 3.6, read in context, identifies two ways in which an individual can be said to work alongside a UK government department, either working in partnership with it, or through work which closely supports and assists that department. Those words were intended to mean that there had to be a sufficient connection between the work of the individual and the work of the government department. Work by an individual which was aligned with the objectives of the United Kingdom government would not meet the requirements of condition 1(iii) unless it was done alongside a UK government department in one of those two senses. Mr Blundell submitted that the judge erred by conflating conditions 1 and 2 and treating condition 2 as the more significant. He submitted that the judge then erred by assuming that a person's whose work contributed to the UK government's objectives as identified in condition 2 would, in effect, satisfy condition 1. That he submitted, was wrong, and failed to recognise the different functions and purpose of conditions 1 and 2.

38. Mr de Mello, with Mr Nicholson, for LND, submitted that the judge had been entitled to take the approach he did to the interpretation of conditions 1 and 2 of ARAP. He relied upon the observations of Lord Briggs in *R (Wang) v Secretary of State for the Home Department* [2023] UKSC 21, [2023] 1 WLR 2125 which, he submitted, permitted a court interpreting provisions of the Immigration Rules to consider matters in the round and to take a realistic and unblinkered view of the facts. He submitted that that is what the judge did at paragraph 8 of his judgment where he indicated that he was considering all the words in the relevant sub-paragraph and at paragraph 20 when he read conditions 1 and 2 together. He submitted that the judge was entitled to consider matters in the round when interpreting the provisions of the ARAP scheme. He was entitled therefore to consider the contribution made by LND's work to the objectives of the United Kingdom in determining whether, in the round, LND satisfied the eligibility requirements and could be said to be working alongside a UK government department.

Discussion and Conclusion

39. The principles governing the interpretation of provisions of the Immigration Rules, such as the Appendix in the present case, are well-established. The interpretation of

the relevant provisions depends upon the language of the relevant rule, read in context, and having regard to the purpose underlying the rules. As Lord Brown (with whose judgment the other members of the Supreme Court agreed) expressed it in *Mahad v Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 38 at paragraph 10:

> "Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

40. In the present case, the structure and language of ARAP 3.6, read in the context of the Appendix as a whole, indicates that there are certain conditions that an individual seeking to relocate to the United Kingdom must satisfy. Condition 1 concerns the relationship, or proximity, between the work of the individual Afghan national concerned and a United Kingdom government department. Condition 2 is concerned with the contribution that that work makes to the United Kingdom's military or national security objectives.

41. Condition 1 identifies three situations where the work carried out by an Afghan individual in Afghanistan may be such as to satisfy the requirement in condition 1. First the individual may have been "directly employed" by a United Kingdom government department (condition 1(i)). Secondly, the individual may have provided goods or services "under contract" to a United Kingdom government department (condition 1(ii)). In each case, the contractual relationship between the individual and the United Kingdom government demonstrates a sufficiently proximate relationship to satisfy the requirements of condition 1. Neither of those conditions apply in the present case. Condition 1(iii) is an additional category which applies where an individual is working in Afghanistan and is satisfied in one of two ways. The individual may have been working "alongside … in partnership" with a United Kingdom government or "alongside… closely supporting and assisting" a United Kingdom government department. That is the natural and ordinary meaning of the words in condition 1(iii), read in context with condition 1 as a whole, and having regard to the wording and purpose of the remainder of ARAP 3.6, including condition 2. By contrast, condition 2 is concerned with a separate issue. It is concerned with the contribution that the person makes in the course of his work to the United Kingdom's objectives as identified in condition 2. The opening words of ARAP 3.6, and its structure, reinforce that interpretation. They indicate that a person meets the eligibility requirements if condition 1 and 2 and either or both of conditions 3 or 4 applies. The conditions are then structured to reflect different aspects of the eligibility requirements.

42. In the circumstances, therefore, the judge was wrong to approach the application of condition 1(iii) as part of a single exercise considering condition 2 and the nature and extent of the contribution made by the individual to the United Kingdom's military and national security objectives, and to treat the latter as the more important. Rather, the requirement in condition 1(iii) that the individual worked alongside, in partnership with or closely supporting and assisting, a United Kingdom government department is a separate requirement from condition 2. To that extent, I consider that the judge did

err in his interpretation of ARAP 3.6 and, to that extent, ground 1 of the grounds of appeal is made out.

GROUND 2 – THE JUDGE'S FINDINGS ON CONDITIONS 1 AND 2 OF ARAP 3.6.

Submissions

43. Mr Blundell submitted that, by reason of his error in interpreting ARAP 3.6, the judge erred in finding that LND satisfied conditions 1 and 2. He submitted that the judge effectively found that the fact that LND's work contributed to the overall military and national security objectives, that that work should be seen as satisfying both condition 1(iii) and condition 2 and that any different view or approach on the part of the Secretary of State for Defence would be irrational. That was not the case as the MoD had to determine first whether LND satisfied condition 1(iii) because he worked alongside in partnership with or closely supporting or assisting a United Kingdom government department.

44. Mr de Mello submitted that the judge was entitled to reach the conclusions that he did on the material before him. Alternatively, there were key aspects of LND's work that the MoD had not assessed and, therefore, its decision on eligibility was wrong and unlawful. In particular, the MoD had not reached a lawful conclusion on the nature of his work with the Counter Narcotics Justice Centre, his role on committees dealing with the preparation of a Penal Code and anti-narcotics legislation, and his role in the court for internal and external security in Kabul between 2008 and 2012. Those matters had been specifically pleaded in the claim form as ones that had not been addressed by the MoD.

Discussion

45. First, it is correct that the findings of the judge that the eligibility decision was unlawful was based on his view that the MoD had not adopted the correct approach to condition 1(iii) and condition 2. That interpretation of the conditions was wrong. To that extent, the judge's finding that the MoD acted unlawfully because it adopted the wrong approach was itself flawed.

46. Secondly, however, there still remains the question as to whether the decision of 9 December 2022 finding that the appellant did not satisfy condition 1(iii) was unlawful applying the approach outlined in paragraphs 40 and 41 above. The judge did not consider that question. He touched on it in part at the end of paragraph 20 of his judgment where he indicated that the decision-maker would have to consider, amongst other matters, (1) the substance of the work the individual undertook in Afghanistan (2) the nature of the institutions in which he worked and (3) the nature of the connections if any between those institutions and the relevant United Kingdom government department or departments. I agree that those are three matters that are likely to be relevant to determining whether an individual worked alongside a UK government department (there may be other relevant factors, depending on the circumstances). I understand that Mr Blundell accepted that those factors would be relevant. I do not consider that the fourth factor identified by the judge, namely, the contribution made by the institutions where the individual worked to the United Kingdom's military and national security objectives, is likely to be relevant to

whether condition 1(iii) is satisfied. That matter is likely to be principally relevant to an assessment of whether condition 2, not condition 1(iii), was met.

47. In the present case, LND referred to a number of matters which he relied upon as establishing that condition 1(iii) was satisfied in his case. It will usually be necessary to consider the whole picture of the individual's work and activities in Afghanistan when assessing whether he worked alongside in partnership with or closely supporting and assisting a United Kingdom government department. For the purposes of this appeal, it is only necessary to consider the three particular matters which were the focus of oral submissions.

48. First, it is said that the approach taken to the activities of LND in support of the Counter Narcotics Justice Centre were not properly taken into account by the MoD. In that regard, it was said that the MoD erred in focussing on whether LND's name appeared on a payment schedule and on whether he was known to British officials, working in the NCA, who worked with the Counter Narcotics Justice Centre.

49. It is relevant to bear in mind that the evidence is that the Counter Narcotics Justice Centre contains the court dealing with narcotics offences, the prosecutors and the counter narcotics police officers. The evidence (given by way of response to a request for further information) is that the NCA's relationship was primarily with the Intelligence Investigation Unit and involved mentoring seconded Afghani counter narcotics police officers.

50. Against that background, it is important to bear in mind the evidence of LND on his involvement with the Centre. He was not employed as a judge at the Centre. Rather, his work as Director General of Investigation and Studies at the Supreme Court involved him reviewing and providing directions to judges, the preparation of guidelines on sentencing, and training judges. The MoD contacted the person that LND mentions in his witness statement, namely Mr Tickner of the NCA. He had been the country manager from about April 2021 until the fall of Kabul. As he said, he did not have any recollection of LND and did not work directly with judges of the Supreme Court and was not aware of any involvement that the NCA had directly with the Supreme Court. The e-mail from Ms Alleyne, the NCA's operations manager, said that the NCA's records had been checked and there was no trace of LND working alongside or in partnership with the NCA in Afghanistan. The reference to the payment schedule is also explained in the response to the request for further information. The NCA had previously sponsored certain judges and investigators working directly for the Counter Narcotic Justice Centre and payments had been made to a number of individuals to cover additional security measures when their work put them at particular risk. LND was not on that payment schedule. Checks had been made with Emily White, who was also referred to in one of LND's witness statements. She confirmed that she had been due to take up a posting in Afghanistan as the Ambassador's Chief of Staff but did not take up that role because of events in Afghanistan and did not have a supervising role in the Counter-Narcotics Justice Centre.

51. Standing back from the details then, there is no proper basis for considering that the approach of the MoD to the assessment of LND's role in support of judges at the Counter Narcotics Justice Centre was flawed. LND did not work at the court. Those he named as NCA officials involved with the centre did not know him (which was not

surprising as they were concerned principally with supporting police officers investigating narcotics crimes). Records had been checked but there was no record of any payment to LND for additional security. The MoD did not therefore consider that he had worked alongside in partnership with the NCA or closely supporting and assisting the NCA. That aspect of the decision of the MoD is not flawed.

52. For completeness, I note from the evidence provided by way of response to the request for further information that Mr Maloney, the NCA country manager who preceded Mr Tickner, and was in post between April 2018 and March 2021, has confirmed that he has no knowledge of working with LND, did not recognise him from photographs provided, and had no dealings with Supreme Court judges. That information came after the 9 December 2022 decision was taken but it does confirm that this avenue of inquiry was fully explored.

53. Secondly, LND stated in his witness statement that he was a member of the Afghanistan Penal Code and the Anti-Narcotics Law Drafting Committee (it is unclear if this is one committee). There is a reference in the 9 December 2022 reasons to there being no evidence that LND worked on the penal code alongside in partnership with or closely supporting and assisting the FCDO. However, it is clear from the evidence, and Mr Blundell very fairly accepts, that the MoD did not ask the FCDO for information about this matter. It was not, it seems, something that the FCDO did consider when considering the information provided by LND. It appears from the decision of Swift J. in *R (MA) v Secretary of State for Foreign, Commonwealth and Development Affairs and another* [2024] EWHC 332 (Admin), that at least the work on drafting the new penal code between 2013 and 2017 was done in one of three sub-committees of the criminal law working group. The sub-committee's members included Afghan nationals and United Kingdom officials from the FCDO who were not simply observers but played a full-role in the work of the sub-committee. It is not clear from the evidence whether that committee or sub-committee is the one referred to by LND in his evidence. Nor is it clear if that committee also dealt with the reform of the anti-narcotics law to which LND also refers. For present purposes, however, it is sufficient to note that LND's application specifically referred to his work as a member of the committee drafting the penal law and the anti-narcotics law. The MoD does not, on the evidence before us, appear to have invited the FCDO to address the issue of whether LND worked alongside in partnership with or closely supporting and assisting the FCDO in this context.

54. Thirdly, LND also relied upon his work as a judge at the court for internal and external security between 2008 and 2010 and his role as chairman of that court from 2010 to 2012. It is clear from the material that the FCDO was asked about this and indicated that its, the FCDO's, role working with that court began in 2015 after LND had ceased to be a judge there. I can see how it might be said that the material indicated that until 2015 there was no involvement by a United Kingdom government department. However, I do not consider that the evidence before this court does establish that. The issue is whether other UK government departments, and in particular the British armed forces, had any links with the court for internal and external security in Kabul such that judges who worked there might be said to be working alongside in partnership with or closely supporting and assisting the British armed forces. That issue was not considered by the FCDO (who, in fact, suggested in their response to the MoD that the MoD might wish to consider any relationship they

had with LND, although noting that none appeared evident from the documentation). The MoD did not consider the question of whether or not there were links between it and the court in Kabul prior to 2015. Mr Blundell fairly accepted that that was the case. It is right to note that there is evidence of the United Kingdom funding the work of the court (although the 9 December 2022 e-mail indicated that that would not normally be considered sufficient to satisfy the requirements for condition 1(iii)). Further, other case law indicates that the British armed forces provided logistical and operational support to the terrorism court and, on one occasion, a judge, referred to as Judge W, working there was found to meet the eligibility requirements of ARAP requirements (see paragraph 101 of the judgment of Lang J. in *R (S) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2022] EWHC 1402 (Admin)). That latter fact may, however, reflect the fact that that decision was taken as Afghanistan was about to fall to the Taliban and may reflect the urgency of the situation rather than a considered decision that there were sufficient links between the British armed forces and judges at the court to satisfy the requirements of condition 1(iii). In any event, the possibility of LND satisfying condition 1(iii) because of his role at the court in Kabul between 2008 and 2012 has not been specifically considered by the MoD.

55. The failure to consider the position in relation to these two matters, and possibly the failure to make relevant inquiries, are matters that are pleaded in the claim form. In my judgment, the 9 December 2022 decision was unlawful as it failed to consider these aspects of the LND's work in deciding whether or not he satisfied condition 1(iii) of ARAP. 3.6.

56. In summary, therefore, the judge's finding that LND satisfied conditions 1 and 2 is flawed. Nevertheless, the decision of 9 December 2022 is itself flawed by reason of the MoD's failure to consider whether or not the work LND did in connection with the drafting of the penal law and the anti-narcotics law, and the work done as a judge, and then chairman, of the court for internal and external security in Kabul, was done alongside in partnership with or closely supporting and assisting a United Kingdom government department or the British armed forces.

GROUND 3 – THE FINDING THAT THE ONLY RATIONAL OUTCOME WAS THAT LND'S APPLICATION HAD TO BE GRANTED

Submissions

57. Mr Blundell submitted that the judge erred in deciding that conditions 1(iii) and 2 of ARAP 3.6 were met. That was an unusual course. The public body had to determine if those conditions were met. It was not appropriate for the court to determine that matter. Rather the court's role was limited to determining whether the decision was lawful and, if not, to quash the decision and remit the matter to the decision-maker for it to determine the matter in the light of the court's judgment. The court had no power to substitute a decision for that of the public authority. Sub-sections 31(5) and 5(A) of the Senior Courts Act 1981 ("the 1981 Act") conferred a limited power for a court dealing with a claim for judicial review to substitute its decision for that of a court or tribunal but not for that of a public authority.

58. Mr de Mello submitted that matters in the present case had reached an impasse. LND had provided all the evidence that he had and that demonstrated that he had met the

requirements of condition 1 and 2. The MoD was not prepared to obtain further evidence. In those circumstances, he submitted that the judge was entitled to come to a conclusion on the material before him and decide that condition 1 and 2 were satisfied.

Discussion

59. Judicial review describes the process by which the courts exercise a supervisory control over the activities of public authorities. Responsibility for exercising functions rests with the public authority on whom the functions have been conferred. The role of the court is to determine whether a decision or other action (or inaction) of a public body is unlawful in public law terms. If so, the appropriate remedy, generally, is for the court to quash that unlawful decision and remit the matter to the public authority for it to consider the matter in the light of the judgment of the court.

60. In the present case, the judge considered that the Secretary of State for Defence had adopted the wrong approach to the interpretation of conditions 1(iii) and 2 (see paragraphs 19 and 20 of his judgment). He further considered that, given the interpretation of the rules that he considered correct, the only permissible outcome was that LND satisfied conditions 1(iii) and 2 (see paragraph 22 of his judgment). In that regard, I do consider that the judge fell into error. The appropriate remedy if the Secretary of State for Defence had adopted the wrong approach was to quash the unlawful decision and remit it to the decision-maker to reconsider. As the judge recognises, it is rare that there will be only one rational or legally permissible outcome. I do not consider that, even on the judge's own interpretation of conditions 1 and 2, it was correct for the judge to determine that LND satisfied the relevant eligibility criteria. Those were still matters for evaluation and decision-making by the responsible public body, and were not matters for the court to determine.

61. Further, the judge ought to have specified the appropriate remedy in this case. A decision that the claim for judicial review is allowed is not, generally, sufficient to dispose of a claim. Judicial review is a process whereby a claimant seeks to establish that a public body has acted unlawfully in a public law sense and to obtain an appropriate remedy, either one of the prerogative remedies such a quashing order (or a prohibiting or mandatory order if appropriate) or a declaration or injunction. The claimant must specify any remedy he is claiming in the claim form (see CPR 54.6). Where a claimant challenges the lawfulness of a decision of a public body, the appropriate remedy is generally a quashing order to quash, or set aside, the unlawful decision and, if appropriate, remit the matter to the public body concerned (as envisaged by section 31(5)(a) of the 1981 Act and CPR 54.19). Other remedies (such as a declaration that a decision is invalid) may be appropriate. There may also be occasions when no substantive remedy is needed by the time that the claim for judicial review is heard and then it may be appropriate simply to give judgment setting out the legal position rather than granting any particular remedy.

62. In the present case, matters have moved on as this court has decided that ARAP 3.6 is to be interpreted differently from the way that the judge below interpreted it. This court has, however, found that the 9 December 2022 decision of the Secretary of State for Defence is unlawful as it fails to consider two material matters in its consideration of whether or not LND meets the requirement of condition 1(iii). The appropriate remedy is to vary the order of the judge and to provide that the decision of 9

December 2022 is quashed and to remit the matter to the Secretary of State for reconsideration. That reconsideration will need to address first whether there are any institutional links between the FCDO and the committee or committees relating to reform of the penal law and the anti-narcotics law of which LND says he was a member. Essentially, the MoD will be considering if there is evidence of any institutional link, or structural support, between the FCDO and the committees concerned and, in particular whether any FCDO officials were involved in the work of that committee or committees. That will be part of the process of considering whether or not LND worked alongside in partnership with or closely supporting and assisting the work of the FCDO. Secondly, it will need to consider if there were any institutional links between the British military and the court for internal and external security in Kabul between 2008 and 2012 as part of the process of considering whether or not LND worked alongside in partnership with or closely supporting and assisting the work of the British armed forces or the MoD during that period.

GROUND 4 – THE GIVING OF ADEQUATE REASONS

Submissions

63. Mr Blundell submitted that the judge erred in concluding that the pro-forma letter issued on 9 December 2022 did not give adequate reasons for the decision that LND was not eligible for relocation under ARAP as he did not meet the requirements of condition 1. He submitted that Lane J. was correct to conclude in *CX1* that such reasons were adequate. He submitted that the volume of applications, with the delay and difficulties that would arise from translating the decision into one of the two principal languages spoken by Afghans, were such that Lane J. was correct to conclude that this was one of the situations where the giving of brief pro-forma reasons to the effect that the applicant did not meet the relevant criteria was compatible with common law principles of procedural fairness. Mr de Mello submitted that the judge was correct for the reasons that he gave. He relied upon the observations of Lord Reed at paragraph 71 of his judgment in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC, 11, [2017] 1 WLR 823.

Discussion

64. Given the difference in view between the judge in this case and Lane J. in *CX1*, it is appropriate to set out briefly my conclusions on the scope of any duty to give reasons in cases such as the present. In particular, it is appropriate to indicate whether Lane J. was correct to conclude that it was sufficient to give reasons in a pro-forma letter which states no more, in effect, than that the applicant is not eligible because he fails to meet the requirements of the conditions in ARAP 3.6.

65. There are circumstances where common law principles of procedural fairness require that a decision-maker give adequate reasons for his decision and where the giving of pro-forma reasons is insufficient. It is not necessary in this case to explore that area of the law in detail. It is sufficient to state that I consider that the judge was correct in the present case. First, the nature of the decision is one which indicates that the giving of reasons is appropriate and necessary. The decision is one which calls for the assessment of information provided by an applicant as to whether he satisfies certain requirements established by the rules. As the judge observed, decisions of that sort generally attract an obligation to give reasons so that the applicant can understand

why his case has not been accepted and to decide whether any challenge by way of administrative review or judicial review is available. The context is not one involving an essentially mechanical application of criteria.

66. Secondly, the nature of the subject matter of the decisions in question also indicates that procedural fairness will ordinarily require reasons to be given to an applicant. The context is one where individuals who meet certain criteria will be eligible to relocate to the United Kingdom. Those individuals are those who are at risk because they were employed by, or provided services to, or worked alongside and in partnership or closely supporting and assisting a United Kingdom government department in Afghanistan and where they and their families suffer risks to their personal safety, including risk to life, as a result.

67. Given the nature and significance of the eligibility decision, procedural fairness does require more than the simple giving of pro-forma reasons to the effect that the applicant does not meet one of the conditions. It is not necessary, nor appropriate, in this case to consider the precise content of the duty to give reasons. It is sufficient to say that, in general, the reasons must adequately address the principal points relied upon by the applicant. The reasons may be brief and what will be adequate will generally depend upon the content of the decision and the points raised by the applicant.

68. In terms of the submissions advanced as to why no more than pro-forma reasons are required, I need say only this. First, there is no evidence that the giving of reasons itself should be likely to lead to undue delay in the making of decisions. The MoD will already have had to consider the information provided by the applicant and may well have had to obtain information from other government departments (such as, here, the FCDO and the NCA) in order to reach a decision. The giving of reasons for that decision should not, ordinarily, cause a significant additional burden. I recognise that there are many more applicants than it is anticipated will be eligible. But that does not negate the fact that the MoD will in any event have to consider and evaluate those applications. If, as it was submitted, many of the applications will have little chance of success because of the obvious absence of any proximate relationship between the individual and a United Kingdom government department, reasons in those cases can be given succinctly and briefly. Reliance was also placed on the difficulties in translating the decision into one of the two languages used in Afghanistan. No argument was heard as to whether there was any obligation as a matter of common law to translate decisions from English into another language either generally or in particular cases. Even if there were such an obligation, or if the MoD continues to hold the view that providing decisions in translation is a humane way of dealing with such applications, and even if that does create pressures and delay on the part of the MoD or requires the use of other resources to obtain translations, I do not consider that that consideration outweighs the other considerations. In the present context, the principles of procedural fairness did require that adequate reasons be given for the eligibility decision. The particular pro-forma reasons given, which amounted to no more than a statement of refusal, would have been inadequate had they stood alone.

CONCLUSION

69. On a proper interpretation of the relevant provisions of the Appendix, an Afghan national will only establish that he is eligible for relocation to the United Kingdom if he meets conditions 1 and 2 and either or both of conditions 3 or 4 of ARAP 3.6 of the Appendix. Conditions 1 and 2 contain different eligibility requirements each of which must be met by the individual concerned. Condition 1 is concerned with the relationship between the individual and a relevant government department. Condition 1(i) and (ii) require that the individual have been employed by, or provided services under contract to, a United Kingdom government. Condition 1(iii) requires that the individual worked alongside in partnership with, or alongside closely supporting and assisting, a United Kingdom government department. Condition 2 is concerned with a different matter, namely whether the work made a positive contribution to the United Kingdom's military or national security objectives. The judge erred in interpreting ARAP 3.6 differently, and in finding that LND satisfied conditions 1 and 2 and that the matter need not be remitted to the MoD for further consideration. To that extent grounds 1, 2 and 3 of the grounds of appeal succeed. However, the 9 December 2022 decision of the MoD that the appellant did not meet condition 1 was flawed due to the lack of consideration of two aspects of his claim. To that extent, an appropriate order will need in due course to vary the order of the judge below by providing for 9 December 2022 decision to be quashed and the matter remitted to the second appellant to consider in accordance with this judgment. The principles of procedural fairness require in this context more than the giving of pro-forma reasons to the effect that the applicant has failed to satisfy a condition.

LORD JUSTICE PETER JACKSON

70. I agree with both judgments.

LORD JUSTICE UNDERHILL

71. I too agree with Lewis LJ's proposed disposal of grounds 1 to 4 of this appeal, essentially for the reasons that he gives. I need not say anything about grounds 1, 3 and 4, but I should say something about ground 2, which I have not found straightforward.

72. I take in turn the three aspects of LND's work on which he relied as satisfying Condition 1, as identified by Lewis LJ at paras. 48-55 above. As to his work at the CNJC, I have nothing to add to what Lewis LJ says at paras. 48-52. As regards his work as a member of the Penal Code and Anti-Narcotics Law Drafting Committee (or Committees), his evidence was in very general terms. Nevertheless, on balance I would agree with Lewis LJ that there are sufficient indications that that work may have involved him working alongside a UK government department to require the MoD to have expressly considered whether that was the case, making such enquiries as were practicable for that purpose; and there is no evidence that it did. I turn to his role between 2008 and 2012 at the Kabul court for internal and external security. For myself, I would accept the MoD's position that the fact (if established) that it provided some UK funding for the court would not in itself be enough to satisfy Condition 1, and that some more specific relationship between him and the UK government would be required (such as was apparently later developed with a particular group of judges as noted by Hill J in *R (JZ) v Secretary of State for the Home Department* [2022] EWHC 2156 (Admin)); and I am not satisfied that the case of Judge W, referred to in both *JZ* and the case of *S* to which Lewis LJ refers,

suggests to the contrary. I am, however, narrowly persuaded that the FCDO's suggestion that the MoD should consider whether LND's role at the court might have involved him working alongside it, which on the evidence was not pursued, is sufficient evidence that a relevant consideration was not addressed by the decision-taker.

73. On that basis ground 2 succeeds. I emphasise that the effect of that decision goes no further than that the MoD must now reconsider the question of LND's eligibility, taking into account the considerations which it failed to address in its original decision, with the benefit of such further investigations as it can reasonably make, and of course any further information which LND himself may be able to provide. As regards that last point, I am well aware, as Mr Blundell made clear that the MoD is, of the difficulties which ARAP applicants may face providing details and evidence in support of their claims; but it is worth emphasising the importance of them giving as much specific information as they can about their relationships with the UK government and its officials.