

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

Royal Courts of Justice
Strand, London, WC2A 2LL
21st December 2021

Before :

MR JUSTICE FORDHAM

Between :

The Queen on the application of BA
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT,
SECRETARY OF STATE FOR FOREIGN
COMMONWEALTH AND AFFAIRS,
AND
SECRETARY OF STATE FOR DEFENCE

Claimant

Defendants

Sonali Naik QC and Ali Bandegani (instructed by Wilson Solicitors LLP) for the **Claimant**
Richard Evans (instructed by Government Legal Department) for the **Defendants**

Hearing date: 21.12.21
Judgment as delivered in open court at the hearing

Judgment Approved

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission for judicial review. Permission was refused on the papers on 9 December 2021 by Lane J. There is also a contested application by the Claimant to adduce as evidence a document which is in the form of a statement (by Raphael Marshall) which was given as written evidence (AFG0038) for the House of Commons Foreign Affairs Select Committee on Government Policy on Afghanistan (7.12.21). There is, it transpires, an overlap between some of the issues in the present case – including as to the admissibility of that evidence – and issues which were considered by Kerr J on 15 December 2021 in the case of JZ CO/4090/2021. Both parties have referred to Kerr J’s ruling. Neither of them provided me with any materials relating to that case other than his court order. I have necessarily been reliant on what Counsel tell me, based on their participation in that case or their having seen information provided by those who did participate. One of the consequences of the ethical duties applicable to members of the Bar in our civil justice system is that I am able to rely, without more, on descriptions given to me by Counsel in that way.

Mode of hearing

2. The mode of hearing was by Microsoft Teams. Both Counsel were satisfied, as am I, that this involved no prejudice to the interests of their clients. The open justice principle has been secured, and indeed promoted, in the context of the pandemic and the current guidance. We eliminated any risk from any person from having to travel to a court room or be present in one. The case was listed on the Court’s cause list, published yesterday afternoon online, as was its start time and the mode of hearing. Also published on the cause list was an email address usable by any member of the press or public who wished to observe this hearing. There are, currently, 22 people in the virtual court room. I am quite satisfied that the mode of hearing was justified and appropriate.

Actions

3. Three actions are at the heart of the case. (1) The first action was an evacuation on 26 August 2021 out of Afghanistan. That action will have been undertaken in extremely challenging circumstances. Lane J referred to that contextual point and it is at the forefront of my mind. The British authorities arranged for a female Afghan judge (“the Judge”) to be evacuated, accompanied by the Judge’s sister. An application for evacuation assistance had been made by the Judge. She and her sister were ‘called forward’ for evacuation. The Claimant is the brother who had accompanied them, to whom there is evidence that the Judge’s application for evacuation assistance had also related, but who was not ‘called forward’. (2) The second action was a reconsideration of the merits of the non-acceptance of the Claimant. That reconsideration took place on 22 November 2021. (3) The third action is a letter on 1 November 2021 concerning the Claimant’s entitlement to make an application for a visa from Afghanistan, which letter refers to a biometrics requirement as being maintained.

4. As it seems to me, so far as concerns the lawfulness, reasonableness and fairness of the first action of not calling the Claimant forward for evacuation in August 2021, the essential focus of this claim must necessarily now be on the second action: the reconsideration decision of 22 November 2021. That is not to say that the context of what happened in August 2021 is irrelevant. Far from it. The essential reason for the essential focus to be on the reconsideration decision is this. Absent a public law duty constituting an entitlement on the part of the Claimant to be ‘called forward’ – and Ms Naik QC accepts, in my judgment correctly, that even if she is right about the applicable policy instruments and their criteria, there would have been no such automatic entitlement – the position is this. Even if this Court were satisfied, ultimately, that there was a public law error in the approach taken ‘on the ground’ in those difficult circumstances in August 2021, the most that the Claimant could realistically obtain by way of a public law remedy would, in my judgment, be an order requiring a fresh consideration of the merits of his position against the relevant criteria. That is precisely what happened in the reconsideration decision of November 2021. The essential focus in this case, leaving aside Ground 5 which relates to the third of the actions and to which I will come, necessarily has to be on the reconsideration determination.
5. It is to be noted that, when the merits were reconsidered in November 2021, the decision-making panel making the redetermination did not simply consider the position as it had been ‘on the ground’ in August 2021, in light of what was then being communicated to the British authorities concerned. Rather the panel also looked, entirely properly in my judgment, at the position in the light of all the evidence being put forward by and on behalf of the Claimant.

Grounds

6. There are five Grounds for judicial review put forward in this case. I have already indicated that the fifth of them gives rise to distinct questions. The other four Grounds are intimately connected. In broad terms they come to this. Ground 1: a failure in August 2021 to apply the correct policy instrument. Ground 2: a failure after August 2021 to approach the case by means of the legally correct enquiry and response. Ground 3: a failure in the November 2021 decision to act consistently, in light of applicable policy guidance. Ground 4: an error of approach in the November 2021 decision, specifically by ignoring a legally relevant consideration namely the risk of harm to the Claimant.

Strands of policy instruments

7. In order to understand the case it is necessary to distinguish two strands of policy instruments. The first strand is the ‘Afghan Programme’. Its full name is the Afghan Relocations and Assistance Policy (“ARAP”). The Afghan programme was the subject of Additional Guidance in June 2021 (“Additional guidance on the eligibility of additional family members under the Afghan locally employed staff relocations schemes”; version 1.0). Its original focus was on “locally employed staff”, together with eligible additional family members.
 - i) In July 2021 the Afghan Programme was treated as expanded so that ARAP Category 4 included individuals who were assessed to have “worked in a role that made a material contribution to HMG’s mission in Afghanistan, without

whose work the UK's operations would have been adversely affected, and who were now at risk because of their work given the changing situation in Afghanistan". It has been acknowledged by the Defendants that some female Afghan judges were evacuated pursuant to the Afghan Programme, as expanded in July 2021 ("A small number of Afghan judges were accepted under ARAP Category 4").

- ii) The position of "additional family members" under the Afghan Programme is specifically addressed in the June 2021 Additional Guidance. It is addressed in a section which is headed "Consideration of exceptional circumstances" (p.11). Within that section there is a sub-heading which is entitled: "What constitutes exceptional circumstances?". And within the section under that sub-heading there is a sub-sub-heading which is entitled "security concerns".
8. The second strand is the 'LOTR Programme'. Its full name is "Leave Outside the Immigration Rules" (LOTR).
- i) This is the subject of Principal Guidance (or 'parent' guidance) for decision-makers dated 27 February 2018 ("Leave outside the Immigration Rules: Guidance for decision makers considering leave outside the Immigration Rules, on the basis of compelling compassionate grounds (grounds that are not related to family and private life, medical or protection matters"; version 1.0). The Principal Guidance (p.6) describes "Reasons to grant LOTR" on the basis of "compelling compassionate factors", which are "exceptional circumstances" involving "unjustifiably harsh consequences" and constituting "compelling compassionate grounds". Reference is made in the context of those descriptions to the consequences for an LOTR applicant or for "their family".
 - ii) In August 2021 there was promulgated an instrument entitled "FCDO's interpretation of Leave Outside the Rules guidance". That Interpretation Document was referable (p.1) to the Afghan programme ("the ARAP scheme") to which it referred. The position of family members is described, and one category (of 16) is "Dependent sibling(s) – male". There is a Table with columns containing "Summary Guidance" (left hand column), "Relevant Context" (Middle column) and "Recommendation" (right hand column). The Recommendation in the Table relating to Dependent Sibling(s) – male (p.11) sets out a series of *cumulative* features ("criteria") which could not be met by a male sibling unless, for example, they "require[] long term care due to illness or disability".
9. There is an overlap between the Afghan Programme and the LOTR Programme. In the first place the Afghan Programme is referred to in the Interpretation Document (p.1). But secondly LOTR is described as the basis on which a family member will be admitted in the June 2021 Additional Guidance (p.11), leaving aside family members who are able to meet the criteria of the Immigration Rules. At that point in the Afghan Programme instruments (Additional Guidance p.11), reference is made to the contents of the Principal Guidance of February 2018 (p.6).

The issue for today

10. The essential issue for me is whether to grant permission for judicial review; and, if so, in relation to which aspects of the claim; and, if granting permission for judicial review, what to do about the fresh evidence.

Directing an explanation?

11. At one point in her submissions Ms Naik QC told me that if permission were being granted the Claimant would be seeking “a direction” from the Court to require “an explanation” to be given by the Defendants. I am quite satisfied that that would not, on any view, be an appropriate course. If permission for judicial review is justified in this case and is granted, the next stage will be for the Defendants to decide what steps are necessary and appropriate, in order to respond to the claim, and to ensure that the Court is fully informed at a substantive hearing. I would not entertain the suggestion of targeted ‘directions’ requiring particular ‘explanations’. That, in my judgment, is not a justified course and certainly not at this stage in the proceedings.

Ground 5

12. So far as the distinct Ground 5 is concerned, I have been told – and I accept – that the points being raised as Ground 5 in the present case fall within (even if not coterminous with) a ground on which Kerr J granted permission for judicial review on 15 December in the case of JZ. The essence of Ground 5, as I see it, comes to this. The Claimant complains that he is hamstrung, by a precondition requiring the submission of biometric data in order to seek to secure a visa, which is a practical impossibility for him in hiding in Afghanistan. It is also said that there is a practical impossibility in his solicitors, on his behalf, submitting the online form that would be a trigger for requesting a waiver of the biometrics requirement. It is said, on the face of the correspondence at the beginning of November (the third action), there has been no waiver of the step that is said to be a practical impossibility.
13. The answer put forward by the Defendants, as I understand it, by way of a ‘knockout blow’ for the purposes of today, is this. The online application should be made by the solicitors. They should enter information, relating to the Claimant’s ‘ability to leave’ Afghanistan and ‘a place’ to which he is able to go, which would enable the application to pass the block that would otherwise apply. They should do this, even though that information would not accurately record the Claimant’s position. That is a practical ‘workaround’ which would then reach the position where they could request, on the Claimant’s behalf, consideration of a waiver of the biometrics requirement. At that point, that request would be considered and, if appropriate, it will be granted.
14. In my judgment, even leaving aside what I am told about the grant of permission for judicial review by Kerr J last week, that is a response which introduces some real difficulties as to whether that can be what an applicant is being asked to do, not least given the seriousness with which one might otherwise expect the authorities to take inaccurate statements in applications. Moreover, it is not immediately obvious to me why those hoops ought to need to be jumped through before the question of waiver could be considered. I am not the primary decision-maker as to policies and practices, and the merits of decisions are not matters for me. But I am satisfied that there is a sufficient concern in relation to Ground 5 that this challenge reaches the threshold of arguability with a realistic prospect of success. I do not consider that the Defendants have a ‘knockout blow’ on this part of the case. I confess to being fortified by the fact

that permission for judicial review has been granted by another judge on a ground which at least includes this same point.

A central topic of concern

15. Having said all of that, Ground 5 – in my judgment – clearly does not occupy the central ground in the present claim. As it seems to me, there is really one central topic of concern in the present case, from which the four interrelated Grounds (Grounds 1-4) draw any momentum. A central point comes to this. Is it the case that the following position arises?

A judge ('Judge A') falling within the Afghan Programme, accompanied by a brother, who has served as her bodyguard and is said to face a risk to life and limb as a consequence, in making an application and being evacuated from Afghanistan, would find that her brother can have the merits of his position addressed by reference to the question of the threat to life and limb that he faces.

Another judge ('Judge B') who does not fall within the Afghan Programme, but who is given evacuation assistance by the British authorities, accompanied by a brother facing precisely the same sort of threat to life and limb arising in the same sort of way, would find that her brother cannot have the merits of his position addressed by reference to the question of the threat to life and limb that he faces.

16. That is not a consistency point simpliciter, bearing in mind that there are two different Programmes, operating side-by-side. But it is clearly a point of some real concern and some real importance. It is, in my judgment, a point which brings into sharp focus questions about the relevant policy instruments, and how they are to be interpreted and needed to be applied. None of that is to suggest, for one moment, that the judicial review Court 'descends into the arena' of being the primary decision-maker. Risks and evaluation of risks are questions for primary decision-makers. The role of the judicial review Court is the supervisory and secondary role. But questions as to the interpretation of applicable policy instruments are (at least arguably) questions of law for the judicial review Court. Moreover, questions as to whether features are legal relevancies, which public law requires a decision-maker at least to address, are also (at least arguably) questions of law in this case for the Court.

Security threat 'not an eligibility criterion'

17. One of the features of the reconsideration decision is that the panel treated the "security threat" faced by an "individual family member" as not being a relevant matter for them to consider. The way it was put was this: "Security threat faced by individual family members was not an eligibility criteri[on]". That, in my judgment, is a central focus of the challenge which is brought in the present case. Was it right, as a matter of public law, to regard risk to life and limb on the part of the Claimant as being irrelevant to the applicable criteria?

The prior question

18. There is also an important prior question. This is recorded at an early stage in the reconsideration decision. The panel there records that the Judge in this case “was put forward by FCDO to be called forward under the ... LOTR arrangements ... as she falls within the cohort of at-risk Afghan judges”. That, as it seems to me, was being adopted by the panel by way of a premise for the assessment that then follows. There is certainly no independent evaluation of the evidence or facts relating to the historic question of the way in which the Judge’s application in fact came to be made and considered. It is with that prior question that I start.
19. Mr Evans points to contemporaneous emails from 24 and 25 August 2021 which have, in their subject line headings and in their text, references to this “application” being treated as within “LOTR”, to “UK LOTR travel”, and to “the LOTR category”. That evidence however does need to be put alongside other parts of the picture to which Ms Naik QC is able to point in the present claim. There is evidence that the Judge was acting in the context of an ‘Information Sheet’ that was being used by Afghan women judges who were being assisted by facilitators and supporters. That Information Sheet was clear in its description: the scheme that was understood to be being invoked was the ARAP: the Afghan Programme. Indeed, the Information Sheet on its face then gave the ARAP online application and the ARAP email address. There is also evidence that the Judge pursued that course. There is also evidence acknowledging that several female Afghan judges were not only treated as making applications under the ARAP Afghan Programme but were granted permission to come to the UK and were relocated under that Programme. In addition to that, the Judge and her accompanying sister were both given Aspen support cards which say on their face “ARAP SUPPORT”. Alongside that is the fact that, although the Defendants have confirmed that they have “no record” of any ARAP application being received, they have also confirmed that they have “no record” at all of the consideration that was given to the Judge’s application, or of the criteria that were applied.
20. This is not a case where the panel has examined and evaluated the evidence and given a reasoned decision in relation to the question of what arrangements were relevant. Nor is it a case where the Court has visibility so far as concerns the Judge and other female Afghan judges who were being evacuated at around the same time and through the operation of these same arrangements. If it were the case that some of them were specifically identified as ARAP scheme evacuees, and others of them specifically recognised as LOTR scheme evacuees, there will doubtless be a pattern. It will also be possible to explain what it is about the work of some of these endangered Afghan judges – whose nexus to the UK and its operations and objectives brought them within ARAP – and the position of the imperilled others whose work did not. It would, for example, be possible to examine the equivalent contemporaneous emails to see deliberate choices in the subject line headings and text, where some judges were treated as LOTR and others as ARAP.
21. In my judgment, bearing in mind the importance of this case and the possible implications for the protection of basic rights of those affected, and in circumstances where the panel did not address the detail of the evidential picture, this case crosses the threshold of arguability so far as the underlying prior question is concerned, reflected in the premise adopted in the reconsideration decision. In my judgment, the supervisory jurisdiction of this Court is engaged by the question marks relating to the

categorisation applicable to this Afghan judge, by contrast with known others. There is a case to answer, and it is one which relates to the applicability of instruments which, on the Defendants' arguments, have very significant implications. That is because they lead to the 'Judge A'/'Judge B' dichotomy which I addressed earlier.

Consequences for life and limb

22. Leaving all of that to one side, in my judgment, the interrelated Grounds 1-4 in this case are properly arguable so far as concerns the applicability and consequences of the relevant policy instruments. Ultimately, those are all questions which bring into focus the central topic of concern which I have already emphasised. The critical question is this. Was it a legal relevancy, under the applicable instrument or instruments, that the threats to life and limb of a brother, who had served as a bodyguard to the Afghan Judge being evacuated, ought to have been considered in the reconsideration decision rather than treated as irrelevant and 'not a criterion'?
23. The reason why that matter has been treated as irrelevant, and 'not a criterion', is to be found in the Interpretation Document of the FCDO. That is a document whose which is said (p.1) to have "inform[ed] the[] departmental stance" in relation to "each LOTR application", including in the context of "the ARAP scheme". As I have mentioned already, the columns within the Table in the Interpretation Document address the position of the category "Dependent sibling(s) – male". The right-hand column is the Recommendation of the FCDO. It describes the position where five criteria are met. One of them (criterion five) is: "There are relevant exceptional circumstances". But the five criteria, as I mentioned earlier, are framed as cumulative: all five must be met. Accordingly, a male sibling would need not to have any "other adult male blood relative in Afghanistan with whom they are in contact" (criterion two); and he would also need to "require[] long-term care due to illness or disability" (criterion four). It is on the basis that those "criteria" provide the prism for the consideration of the accompanying family member, where the principal evacuee judge is being treated as a LOTR case (rather than an ARAP case) that threat to life and limb is 'removed' as not being part of 'eligibility'.
24. In my judgment, that approach, on the basis of these policy documents, raises a range of questions.
 - i) One of them is this. Why is it that the FCDO "Recommendation" (within an FCDO "Interpretation") has come to govern, or be regarded as governing – as if by way of a set of exhaustive criteria – questions relating to accompanying family members and principal evacuees? After all, the left-hand column in the same Table (as part of the same "Interpretation" instrument) contains "summary guidance" which is broader. The "summary guidance" speaks of "unjustifiably harsh consequences" for a "family member", and of "exceptional circumstances".
 - ii) At one point in his submissions, Mr Evans came close to recognising that a threat to life and limb could engage Article 8 ECHR rights were the consequences sufficiently harsh. That is relevant because the "summary guidance" (left-hand column) speaks of "exceptional circumstances which would render refusal of the application a breach of Article 8". I would not hold that apparent recognition against Mr Evans. What this feature of the case

illustrates, in my judgment, is that there may be an open question in that regard. Leaving aside whether it constitutes the Defendants' position in these proceedings, if it is the case that the risk to life and limb could fall within those parameters, then that would be a reason by reference to the "summary guidance" in the Interpretation Document why those matters could and should at least – as a matter of legal relevancy – be considered by the decision-maker.

- iii) Another question arising from the Interpretation Instrument is this. How does it fit alongside the LOTR Principal Guidance of February 2018? In my judgment, it is at least arguable that the Interpretation Document does not have the role of 'occupying the entirety of the field', viewed objectively alongside the other guidance documents. In the papers before the Court is a description from the Defendants themselves of the Interpretation Document as "not specifically designed for the LOTR decisions taken during" Afghan evacuations, but that "its principles were used to assess requests for extended family members to be evacuated". That language is at least consistent with the idea that the Interpretation Document was a 'reference document' that was not exhaustive. That might explain how it could exist side-by-side with Principal Guidance that remained extant and was not being said to have been withdrawn. The relevance of that, as I see it, arises out of the section in the Principal Guidance to which I referred at the start of this judgment. There, in the Principal Guidance (p.6) is the description of "compelling compassionate factors" involving "exceptional circumstances" and "unjustifiably harsh consequences". There, is also the reference not only to an applicant but to a "relevant family member". In my judgment, it is at least arguable that – on the correct interpretation of the instruments – a risk to life and limb on the part of a specific family member would be a legal relevancy, even in a LOTR case. It is, in my judgment, at least arguable that, if that is so, it remained the position notwithstanding the contents of the Interpretation Document.
- iv) There is a further point, in my judgment, which would support this analysis. At the start of the Interpretation Document (p.1) there is a description of the position in a paragraph under a heading: "Risk". Reference is made to the assessment of "risk to the applicant" as having already needed to have taken place. There is then reference to a general presumption about dependents and the risk they face ("LOTR takes the position that the risk (of targeted harm) to additional dependents is lower than that for the applicant"). Then there is reference to an exception to that presumption, "where specific and credible threats are documented". In my judgment, it is at least arguable that – even on the face of the Interpretation Document, and even if that document were to be treated as 'occupying the field' – questions of risk fall within that opening paragraph. On that basis, the Table that follows is a Table of categories that relate not to "risk" to an applicant or relevant family member, but rather to special considerations regarding the strength of dependency.
25. On the basis of those features and those arguments, in my judgment, it is at least arguable that the panel was wrong in public law terms in not considering the question of risk to life and limb of the Claimant, and in concluding that there was no need to do so on the basis that the security threat faced by individual family members was not an eligibility criterion.

Congruent pathways?

26. At this point, I return to the Afghan Programme (ARAP), additional family members, and the policy documents which relate to that. The final passage (p.11) of the Additional Guidance of June 2021 addresses relocation of family members, describing: “Consideration of exceptional circumstances”. It makes clear that “genuine, verifiable concerns about the safety and security, or [other] vulnerabilities of, specific family members” can constitute “exceptional circumstances”. It goes on to explain that there can also be “exceptional circumstances where the work of the [principal evacuee] has led to specific threats or intimidation of members of their family who would not normally qualify under the immigration rules”. What is interesting in those passages – which, on the face of them, would clearly make risk to life and limb to the family member a legal relevancy – is the link that is made in the text between that category and LOTR (“exceptional circumstances that would lead to a consideration of ... LOTR”) and the guidance on LOTR (“separate guidance relating to LOTR”).
27. In my judgment, it is at least arguable that what that means in fact is that the family member in the scenario relating to ‘Judge A’ would fall to be considered under LOTR and LOTR guidance. What that, at least arguably, would mean is that the Interpretation Document would in fact be applicable to both categories and both cases (‘Judge A’ and ‘Judge B’), because the Interpretation Document was promulgated in the context of “the ARAP scheme” and in the context of considering “LOTR” (p.1). That congruence between the two possible pathways, puts the scenario of the brother of ‘Judge A’ and the brother of ‘Judge B’ into a position where the following may in law be the correct analysis. (i) Each of them falls to be considered by reference to LOTR. (ii) In the case of each of them consideration not only can be, but should be, given to any question of risk to life and limb. (iii) The ‘strength of dependency’ Table, within the reference document as to the “interpretation” of LOTR, does not displace that position. (iv) Risk to life and limb is and remains a legally relevant consideration.

Conclusion

28. I have emphasised that I am only applying a threshold of arguability. But I am satisfied, having had full and careful assistance by Counsel for both sides, as the half-day permission which Kerr J directed in the present case, that the permission threshold is crossed in this case.

Scope of permission

29. I have made observations about what seem to me to be the key focus points in this case. Grounds 1-4 are, in my judgment, interrelated and there could be a distorting consequence in limiting the scope of permission for judicial review. I ought I think to say that I did not find persuasive an argument on behalf of the Claimant based simply on the fact that the sister who accompanied the Judge was called forward, which was said by Ms Naik QC to give rise to an inconsistency given that their brother (the Claimant) was not.

No sufficient risk?

30. I ought also to say that Mr Evans foreshadowed orally (though not in his skeleton argument or summary grounds) the submission that, even if risk to life and limb is a legal relevancy, there is not in this case any evidence which could be sufficient for there to be found to have been a sufficient risk to the Claimant. That will be a matter for the Defendants to develop, if they wish, at the substantive hearing.

Public interest?

31. That leaves two matters. The first is that, in my judgment, this is plainly an important and anxious case. It may have been a case which would have engaged questions of public interest as being relevant to the grant of permission for judicial review. However, in the circumstances what I have done is what the parties have done. I focused on the arguability, or otherwise, of the legal merits.

The Marshall evidence

32. The other matter is the contested application to adduce evidence. The appropriate course so far as that is concerned, in my judgment, is that that evidence should be before the Court at the substantive hearing “de bene esse”. There are arguments about whether it is wrong in principle for that evidence to be adduced and there is a line of relevant authorities in relation to that point. In my judgment, the ultimate questions as to “admissibility” are in this case intimately bound up with the questions as to “relevancy” and what assistance the Court can derive from that material. The reasons why, in my judgment, that material should be before the Court are: it is material which provides illuminating information as to the operation of the schemes ‘on the ground’ at the relevant time; specific references made to email inboxes, to criteria that were applied, and to the position of Afghan judges and others. If I were dealing today with the substantive hearing in this case, based on the information presently before the Court, my conclusion would be that this material is only of tangential relevance, but nevertheless is of some relevance, when put alongside the confusion arising as to categories and documents. I am not prepared to shut out this evidence at this permission stage. In the light of the grant of permission for judicial review, the Defendants will need to consider what evidence they wish to put before the Court to provide an explanation of matters relevant to the issues raised in this case. Mr Evans submitted, when I asked him, that had the Marshall evidence been an internal report it would not, on his submissions as to relevance, have fallen to be disclosed under the duty of candour. In light of the important and anxious issues that arise in this case, and in light of the grant of permission for judicial review, I am not convinced that material which describes the functioning ‘on the ground’ of the various policies and categorisations would fall outside the duty of candour.
33. Ultimately, my conclusion in relation to this material is this. It ought properly to stay ‘in the frame’ before the Court in this case. The Court grappling with the issues at the substantive hearing will have full visibility and will be able to consider, alongside the arguments as they then are, and in light of the authorities, the linked questions of relevance and admissibility. That, in my judgment, in all the circumstances, is the appropriate way forward. As it happens, I am told, Kerr J considered the same evidence in the case of JZ. I am told that he declined to rule that there was any ‘admissibility bar’ on this evidence. His concerns about it were the lateness of its production in that case and as to its relevance. As to the latter, JZ was a case where he was only granting permission for judicial review on the ground which most closely

corresponds to Ground 5 in the present case. Moreover, he expressed the view (giving the claimant permission to file amended judicial review grounds) that it was possible that this evidence might come to be adduced and admitted in that case at a subsequent stage. I find some comfort in the fact that Kerr J's approach is not many steps removed from the one which I have taken. I defer, to the Court dealing with the substantive hearing, the question of admissibility of this evidence. The parties will not, in my judgment, be prejudiced in their preparation. If the report is ruled inadmissible, the Court will be perfectly able to disregard it in analysing the issues arising in this case.

Order

34. After hearing further argument, I made the following Order (leaving aside recitals and directions for bundles and skeletons). As I made clear to the parties, the time frame for the Defendants' detailed grounds was a week longer than the usual 35 days, which had been sought by them, because I recognised the nature of the work envisaged, I was concerned given the holiday period, and I wanted to avoid a situation where they needed to make an application to extend time. I reserved all questions of costs. The substantive Order was: (1) Permission for judicial review is granted. (2) The anonymity order made by Julian Knowles J on 3 December 2021 to continue until judgment or further order. (3) Defendants' detailed grounds and any written evidence pursuant to CPR 54.14 by 4pm 1 February 2022. (4) Any reply evidence from the Claimant 7 days thereafter. (5) The application to adduce the evidence of Mr Marshall to be deferred to the substantive hearing, the evidence to be before the Court on a "de bene esse" basis. (6) The substantive hearing to be listed on an expedited basis with a time estimate of 2 days, for the first available date after 1 March 2022.