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Case No: CO-4091-2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2022

Before :

MRS JUSTICE HILL DBE

Between :

THE QUEEN

on the application of

JZ

Claimant

- and -

- (1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**
- (2) THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS**
- (3) THE SECRETARY OF STATE FOR DEFENCE**

Defendants

Sonali Naik QC, Irena Sabic and Emma Fitzsimons (instructed by **Wilson Solicitors LLP**)
for the **Claimant**
Edward Brown QC and Hafsah Masood (instructed by the **Government Legal Service**) for
the **Defendants**

Hearing dates: 8 and 9 June 2022

Approved Judgment

This judgement was handed down remotely by circulation to the parties’ representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 2pm on Friday 1st July 2022

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MRS JUSTICE HILL

Mrs Justice Hill:

Introduction

1. The Claimant (“JZ”) is a judge in Afghanistan. He seeks judicial review of the Defendants’ decision dated 18 October 2021, maintained on 24 November 2021, refusing his application under the Afghan Relocations and Assistance Policy (“ARAP”).
2. On 1 April 2022 Lieven J granted his application for interim relief: *R(JZ) v Secretary of State for the Home Department & Ors* [2022] EWHC 771 (“JZ No. 1”).
3. By an application notice dated 7 June 2022 JZ seeks further information from the Defendants about other judges who were relocated to the UK under ARAP, and judges evacuated from Afghanistan during Operation Pitting in August 2021 and granted Leave Outside the Rules (“LOTR”).
4. JZ’s case came before me for a two day full hearing on 8 June 2022. Initially, the outstanding Part 18 application formed part of the basis for an application to adjourn the hearing by JZ, but it was eventually agreed that the hearing could proceed. The Part 18 application was re-visited at the end of the hearing and is maintained by JZ. It was opposed by the Defendants. This is my judgment on the Part 18 application.

The factual background

5. From July 2008 to May 2011 JZ was a Primary Court (first instance) judge in the Parwan Justice Centre at Bagram Air Force Base and at Pol-e-Charkhi prison in Kabul. During this time he was assigned to the public security bench hearing terrorism cases. Most of the cases involved insurgents and Taliban fighters who had been arrested by the International Security Assistance Force (“ISAF”). From May 2011 he sat as an Appeal Court judge in Kabul. He was still in that post in August 2021.
6. JZ’s evidence is that most of the Taliban fighters sentenced by him have been released from prison, have re-joined the Taliban and actively fight for them. He is being actively sought by the Taliban and has received threats, including death threats, since August 2014. Some of the death threats have said that he and his children will meet the same fate as that of his cousin, Judge Rafieddin. He was assassinated by the Taliban on 22 January 2020, while a sitting judge in the Appeal Court in Nangarhar. JZ and his family are currently in hiding, separately, in Afghanistan.
7. On 14 August 2021 JZ applied under ARAP. The details of this policy were set out by Lang J in another very recent case involving the relocation of judges from Afghanistan, *R (S) v Secretary of State for Foreign and Commonwealth and Development Affairs and Ors* and *R (AZ) v Secretary of State for the Home Department and Ors* [2022] EWHC 1402 (Admin) (“*S and AZ*”) at [58]-[64]. As at 15 September 2021 those “who worked in meaningful enabling roles alongside HMG, in extraordinary and unconventional contexts, and whose responsible HMG unit builds a credible case for consideration under the scheme” were eligible to apply under ARAP Category 4. The previous, 1 April 2021, version had referred to “those who worked in meaningful enabling roles for HMG”: *S and AZ* at [60]-[61].
8. During August 2021 several judges were evacuated from Afghanistan to the UK under Operation Pitting. They were “called forward” to board evacuation flights and later granted LOTR. This scheme became known informally as “Pitting LOTR”. Those selected for Pitting LOTR had to show a “contribution” to UK government objectives in Afghanistan, as well as either particular “vulnerability” or “sensitivity”: *S and AZ* at [9]-[17]. JZ had initially understood that he had been called forward: *JZ No. 1* at [4]-[9]. However the Defendants’ evidence in this claim showed that this was not the case: he had been identified as someone who might be eligible for Pitting LOTR, but due to the rapidly deteriorating security situation in Afghanistan a panel to consider whether to call him forward could not be convened.
9. By a decision dated 18 October 2021, upheld on 24 November 2021, the Defendants rejected JZ’s application under ARAP. This was later reviewed and the refusal maintained on 26 May 2022. The Defendants initially declined to make a decision on JZ’s request for LOTR. On 1 April 2022, Lieven J’s grant of interim relief in *JZ No. 1* required the First Defendant to make an ‘in principle’ decision on the LOTR application. On 6 April 2022 JZ’s application for LOTR was refused. On 25 April 2022 this decision was maintained by the Entry Clearance Manager.

The issues in JZ's claim

10. JZ's Ground 1 argues that the Defendants' decision-making in relation to ARAP has been inconsistent and incoherent, both with respect to how ARAP itself operates and how Operation Pitting operated. He is in a materially similar position to other judges who were relocated under ARAP and/or Operation Pitting, most notably judges W, X, Y, A, B and C (from whom he has provided evidence). The Defendants have not provided a cogent and lawful reason for the different treatment between the Claimant and those similarly situated comparator judges. The Defendants' systems and processes for ARAP and Pitting LOTR were incoherent or otherwise procedurally unlawful in the way they were expressed or operated.
11. JZ argues that consistency of treatment is a particular application of rationality and that it is well recognised in administrative law that people should be treated uniformly unless there is some valid reason to treat them differently: see, for example, Lord Sumption in *Gallaher Group Ltd v Competition and Markets Authority* [2018] UKSC 25 at [50] and Rose LJ in *SSHD v BK (Afghanistan)* [2019] EWCA Civ 1358 at [39]. Further, where there are divergent decisions in materially the same situations, the Court is required to "consider with the greatest care how such a result can be justified as a matter of law": *R v Department of Health, ex p Misra* [1996] 1 FLR 128 at [133]; see also *R (Gurung) v Ministry of Defence* [2002] EWHC 2463
12. The Defendants resist Ground 1 on the basis that equality of treatment is not a free-standing ground for judicial review: see, for example, *R (Gallaher Group Ltd) v CMA* [2018] UKSC 25; [2019] AC 96. In so far as the court is concerned with alleged inconsistent treatment, the argument has no merit: Afghan judges may be eligible under ARAP but whether they are in fact eligible depends on a case-specific evaluation of the individual facts. While there are some similarities in the criteria used in the ARAP scheme and those used under Operation Pitting LOTR, it is unrealistic to compare the application of nominally similar criteria during an emergency evacuation with the situation as it pertained after the evacuation ended.
13. JZ's Ground 2 argues that his case should be treated as if he had been called forward during Operation Pitting given his proximity to the group of people who were actually called forward. It is said that his proximity to the call forward group is a factor that is highly relevant to the exercise of the Defendants' residual discretion under ARAP or LOTR.
14. The Defendants resist Ground 2, arguing that JZ does not have permission to argue it in the way it is now advanced. In any event the ARAP decision which is challenged was rationally reached and there is no challenge to the 4 April 2022 LOTR decision before the court.
15. JZ's counsel identified the issues for the full hearing of his claim as follows:
 - (1) Is the Claimant in a materially similar position as to eligibility under ARAP and/or Pitting LOTR to those who were relocated under ARAP and/or Pitting LOTR, most notably judges X, Y, W, A, B and C?

- (2) Have the Defendants provided a cogent and lawful reason for the acknowledged differential treatment between the Claimant and the similarly situated comparators?
- (3) Were the Defendants' systems and processes for ARAP and/or Pitting LOTR incoherent or otherwise procedurally unlawful in the way they were expressed or operated?
- (4) What is the relevance of the Claimant's proximity to being called forward during Operation Pitting for a lawful decision on ARAP/LOTR?

The procedural history of the Part 18 application

16. After the close of business on Friday 27 May 2022 JZ's solicitor served a detailed Part 18 request on the Defendants. This comprised 35 substantive questions of which several included sub-questions. The questions covered the issuing of call forward instructions, ARAP and Pitting LOTR.
17. On Monday 30 May 2022 the Government Legal Department ("GLD") replied on behalf of the Defendants expressing concern that these requests had not been made earlier and indicating that contrary to CPR PD18 paragraph 1.1 insufficient time to respond had been given, as the Claimant had asked for a request by 1 June 2022. The imminent judicial review hearing date of the 8 June 2022 was noted, as was the fact that GLD offices would be closed for the extended Bank Holiday from the 2-6 June 2022 inclusive. It was also said that the Part 18 request was disproportionate. The letter indicated that if JZ served a more proportionate and focussed request by no later than 9.30am on 31 May 2022, the Defendants would endeavour to respond by close of business on 7 June 2022.
18. On 1 June 2022 the Claimant served a reformulated Part 18 request. This contained four substantive questions about ARAP, 10 substantive questions about Pitting and one about the identified comparator judges. One of the ARAP questions contained 6 sub-questions.
19. On 8 June 2022, the morning of the full hearing, the Defendants responded to the Part 18 request. Having not received a response during 7 June 2022, the Claimant had issued the Part 18 application.
20. At the end of the hearing on 9 June 2022, certain further potential Part 18 questions were raised in submissions.

The legal framework

21. Under CPR 18.1 the court may at any time order a party to "(a) clarify any matter which is in dispute in the proceedings; or (b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case".
22. The court may exercise its powers under Part 18 on an application or of its own initiative: White Book, paragraph 18.1.9.

23. When considering whether to make an order under Part 18, the court must have regard (a) to the likely benefit which will result if the information is given; and (b) to the likely cost of giving it; and (c) to whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with such an order: White Book, paragraph 18.1.10.
24. Requests for further information under Part 18 should be “concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet”: PD 18, paragraph 1.2.
25. Part 18 does not apply to matters that may be put in dispute in the future and may not be used as an investigative tool to seek to identify matters so that they can be put in dispute: *Trader Publishing Ltd v Autotrader.com Inc* [2010] EWHC 142 (Ch).
26. Part 18 requests in judicial review claims should remain exceptional and a court should only direct that information is provided when it is necessary to do so in order to resolve the matter fairly and justly: *R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 2480 (Admin) at [20].
27. However, as Lang J held in *R (KBL) v Secretary of State for the Home Department and Ors* [2022] EWHC 1545 (Admin) (“*KBL*”), another Part 18 application in a case about relocation from Afghanistan, at [30], in deciding what is “reasonably necessary and proportionate in order to resolve the matter fairly”, the court may properly have regard to the context in which the application under CPR 18 is made. If, as here, the context is a claim for judicial review, it is relevant that the duty of candour applies, unlike in private law proceedings.
28. The duty of candour is a “very high” one and requires public authorities to assist the court with “full and accurate explanations of all the facts relevant to the issue the court must decide”, making “candid” disclosure: *R (Quark) Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50] per Laws LJ and *Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment* [2004] UKPC 6 at [86] per Lord Walker.
29. Part of the reason for the importance and scope of the duty of candour is that departments of state have an advantage in this field in that they have access to materials to which other parties have no access. Further, the requirement is to disclose “the unwelcome along with the helpful”: *Lancashire County Council v Taylor* [2005] EWCA Civ 284 at [60], per Lord Woolf CJ.
30. The court must not be left guessing about some material aspect of the decision making process: *Abraha v Secretary of State for the Home Department* [2015] EWHC 1980 (Admin) at [114], per Singh J.
31. Witness statements filed on behalf of public authorities must not either deliberately or unintentionally obscure areas of central relevance. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact: *Citizens UK v Secretary of State for the Home Department* [2018] Civ 1812, at 106(4) and (5).

The parties' submissions

The Claimant

32. JZ argues that the information sought in respect of other judges relocated under ARAP and Pitting LOTR is “manifestly relevant” to the court’s examination of his Ground 1 in respect of consistency of decision-making and coherence of the system. The Defendants should have provided the information about the decision-making in the cases of the other judges in accordance with the duty of candour.
33. JZ has provided the court with comparator evidence in relation to one judge who was relocated under ARAP (Judge W) and five judges who were granted Pitting LOTR (Judges A, B, C, X and Y). He has therefore done all he can to provide evidence to the court on the consistency issue, notwithstanding the extraordinary circumstances he finds himself in. The Defendants are aware of the identities of these comparator judges and have control and possession of further information about them and the other judges within the ARAP and Pitting LOTR cohorts.
34. This is not a fishing expedition: he has raised an arguable case that the Defendants’ systems and decisions for ARAP/Pitting LOTR are infected by inconsistency or incoherence and the material falls within the duty of candour.
35. A picture had emerged during *S and AZ* suggesting that judges working in the Anti-Terrorism courts in Kabul, including Judge W, were generally considered to fall within ARAP Category 4 (see *S and AZ* at [108]). However if this was the case, the Defendants should provide evidence to this effect, not least because JZ had worked in that court. It was therefore incumbent on the Defendants to explain why he had been treated differently.
36. Further the request is proportionate. The number of judges in question is relatively small: the Defendants’ evidence is that 13 members of the Afghan judiciary have been relocated to the UK under ARAP and 12 under Pitting LOTR. Further information about these groups should be capable of being collated relatively quickly and it was not uncommon at the end of a judicial review hearing for the judge to request a modest amount of further information. Indeed the same had occurred at the end of the *S and AZ* hearing before Lang J. Redactions could be used to reduce the risk of jigsaw identification of the judges and a public interest immunity application could be made if need be.
37. The requests were made within a reasonable timescale given the fast-moving nature of the claim. It was sight of evidence underpinning the Foreign Affairs Committee report, *Missing in Action: UK leadership and the withdrawal from Afghanistan* on 24 May 2022 which had framed the way in which the further information was sought. It was appropriate to obtain the information and then decide on next steps but further submissions or a short hearing could be arranged if need be.

The Defendants

38. The Defendants' position is that they are not obliged to provide further information about the ARAP/Pitting LOTR judges as the same is not relevant to the claim and/or will not assist the court in resolving the issues: *Gallagher* makes clear that equality of treatment is not a free-standing ground for judicial review; each ARAP or Pitting LOTR case had to be determined on its own facts and the court will not be assisted by knowing why decisions were reached in particular cases. In any event, sufficient evidence had already been provided in the Defendants' witness statements. Lang J had been able to make her decision in *S and AZ* without responses to a similar Part 18 request and this court should do the same.
39. The requests should have been made much earlier: the claim had been issued on 30 November 2021 and the evidence from Judges X and Y provided in December 2021. A request for some information of this nature had been made in December 2021 and this had been responded to on 4 February 2022. The Defendants' grounds had been served on the 26 April 2022 and the substantive hearing of the claim was originally listed on the 24/25 May 2022. The delay in making the Part 18 request had not been properly explained, not least as the evidence said to be pertinent from the *Missing in Action* report had been published on 27 January 2022.
40. It was unprecedented for a Part 18 order to be made at the end of a full hearing. The full hearing was not a "dress rehearsal" of the issues. The Claimants' conduct was not consistent with the procedural rigour that was important in judicial review proceedings and was unsustainable. Any information provided pursuant to this request would likely lead to yet further questions and render the litigation unmanageable.
41. Further, there were a series of privacy and security concerns about making disclosure of the details about individual judges.

Analysis and conclusions

42. The Part 18 application includes questions numbered 2-16. I have borne the competing submissions carefully in mind in considering each of the questions.
43. My overall assessment is that some, but not all, of the questions set out in the application should be answered by the Defendants. I consider that the court has sufficient information available to it about Judge W, the Pitting LOTR judges including A, B, C, X and Y and the Defendants' processes generally, such that no Part 18 order should be made in respect of these topics. However an order is appropriate about the decision-making in respect of the ARAP judges other than Judge W. The application in this respect is not a fishing expedition or an attempt to identify a new issue. Rather it is relevant to the main issue that is already live in the claim, namely the argument of inconsistency of decision-making which underpins Ground 1. The information should be disclosed in accordance with the Defendants' duty of candour.
44. I am conscious that the issues in *S and AZ* were resolved without this information. However the Claimants in that case chose not to pursue their Part 18 application, as that would have delayed the expedited hearing of their claims: *S and AZ* at [104]. JZ and KBL have taken a different approach, as they are entitled to do. I note that Lang J granted the Part 18 application in *KBL* in part.

45. With respect to the factors set out at the White Book, paragraph CPR 18.1.10, the likely benefit which will result if the information is given is that the court will have greater visibility on the decision-making with respect to this cohort of judges so as to inform its approach to Ground 1. The likely cost will be relatively limited given the focussed nature of the requests and the Defendants' financial resources are likely to be sufficient to enable them to comply with the order.
46. I have considered whether each of the proposed questions is suitably concise and strictly confined to matters which are reasonably necessary and proportionate for the purposes of PD 18, paragraph 1. I have reformulated them in some respects to better achieve these aims.
47. I have also modified some of the questions in the exercise of the court's power to make a Part 18 request of its own initiative, in order to reflect the issues that emerged during the hearing, around the location where judges served and the dates when they served.
48. I am very conscious of the context of this claim and of the privacy and security issues raised by the Defendants. However, at least in the first instance, I would hope that anonymity, redaction and gisting will enable the questions to be answered satisfactorily and reduce the risk of jigsaw identification of the judges. A public interest immunity application could be made if need be. I note that these issues did not prevent Lang J making Part 18 orders in *KBL*.
49. The Part 18 application has been made very late in the proceedings. I did not find the Claimants' argument that it flowed from the *Missing in Action* report persuasive. Rather, I struggled to see why the application had not been made earlier given the central nature of the consistency issue. I accept that it is unusual to consider and make a Part 18 order at the end of a full hearing. However I note that under CPR 18.1 the court may make an order for further information "at any time" and that Lang J required further information at the end of the *S and AZ* hearing, albeit not by way of Part 18 order.
50. Ultimately I consider that provision of this information is necessary in order to resolve the matter fairly and justly; that the Claimant's conduct with respect to the application is likely to be relevant to the decision as to the costs of the application; and that the case will need to be, and can be, robustly case managed once the questions are answered.
51. I set out below each of the proposed questions, the Defendants' response and my decision on whether an order should be made in respect of the question.

(a): ARAP questions

Question 2

52. **Request:** Please confirm in respect of the 13 Judges relocated to the UK under ARAP: (a) What level/branch/division of Court within the Afghan judicial system did these Judges work in? (b) What was the nature of their judicial work and what sort of cases did they preside over in Afghanistan? Is it correct that they were part of the criminal justice system in Afghanistan? (c) What does 'work directly alongside HMG' mean for

these 13 Judges? (d) How did the Defendants assess whether these 13 Judges made a ‘material contribution to the UK’s national security objectives in Afghanistan?’ (e) What date were these 12 Judges known to the FCDO/MoD and Home Office? (f) How did these 12 Judges become known to the FCDO/MoD and Home Office?

53. **Response:** Irrespective of the issue of relevance, the Defendants do not consider it proportionate, appropriate or necessary to provide details regarding the personal circumstances of other cases. This is because (a) sufficient evidence has been provided in the witness statement served in this action; (b) no consent has been provided by other individuals; (c) no protection is in place regarding identification of individuals; (d) in some cases the information in question (even at a general level) concerns sensitive matters of national security; and (e) it is appropriate and proportionate that such individuals have an opportunity to be heard and make representations before details of their cases are released.
54. **Decision:** Judge W is within the ARAP cohort. As explained under Question 16 below, sufficient material is available from both Judge W himself, the Defendants and the judgment in *S and AZ* to explain why he was evacuated under ARAP, such that no Part 18 order is appropriate in respect of him.
55. The position is different for the other 12 judges in the ARAP group. The Defendants’ evidence on this group is, effectively, limited to providing the number of judges in the group and asserting that they were all judges who were considered by individual decision-makers to meet ARAP Category 4 whereas JZ was not. The Defendants declined to disclose any further details of this group in *S and AZ* and have taken the same stance in this claim.
56. The Defendants have justified their position on the basis of the *Gallaher* principle that equality of treatment is not a free-standing ground for judicial review. However that is not a complete answer to the question of whether this material is relevant given that JZ acknowledges the principle, but frames his claim as one of consistency of treatment as an element of irrationality, which is a legally recognised approach: see [11] above. Indeed, the central issues in the claim are whether JZ is in a materially different position to the comparator judges and whether there has been a material and unlawful inconsistency of treatment between different groups of judges: see [15](1) and (2) above.
57. It appears from *S and AZ* that some, perhaps all, of the ARAP had worked in the Anti-Terrorism courts in Kabul: see [35] above. However this is not directly evidenced by the Defendants in this claim. Judge W’s evidence is that he understood that all 20 Primary and Appeal Court judges of the Anti-Terrorism Court were relocated under ARAP, but this does not correlate with the Defendants’ evidence to the effect that a total of 13 Judges were relocated to the UK under ARAP. It remains unclear where, geographically, the judges in the ARAP cohort served, and a focus on Kabul emerged in *S and AZ* as a relevant factor to distinguish between different judges: *S and AZ* at [108]-[110]. To the extent that any of the judges worked in the Anti-Terrorism Court in Kabul it is unclear when they did so. This is potentially significant because the

Defendants at least implicitly from Mr Pinfield's evidence rely on the different dates of service of JZ and Judge W in that court as a valid distinction between them.

58. For these reasons I find myself "guessing" about several material aspects of the decision making process with respect to the ARAP judges other than Judge W. Per *Abraha* at [114], the duty of candour requires that the Defendants remedy this.
59. I therefore consider that the Defendants should address the following, which is a modification of JZ's draft Questions 2(a) and (b) to reflect the issues raised at [57] above:
- "With respect to the judges relocated to the UK under ARAP other than Judge W, (a) what level/branch/division of Court within the Afghan judicial system did these Judges work in? (b) What was the nature of their judicial work? (c) Where, geographically, did they serve? (d) If any of them served in the Anti-Terrorism Court in Kabul, when was their service?"
60. JZ proposes that the Defendants answer "What sort of cases did they preside over in Afghanistan?" and "Is it correct that they were part of the criminal justice system in Afghanistan?". These questions appear otiose in light of questions (a) and (b) at [59] above.
61. In draft questions (c) and (d), JZ proposes that the Defendants answer "What does 'work directly alongside HMG' mean for these...Judges?" and "How did the Defendants assess whether these Judges made a 'material contribution to the UK's national security objectives in Afghanistan?'"
62. I consider that the first of these questions should be answered as this reflects part of the ARAP criteria. The answer will enable the court better to test the proposition that inconsistent approaches were applied between different groups applying under ARAP. The information provided in response to this question need only be brief. I note with respect to Judge W that the factors in question related to his contact with UK Counter-Terrorism team staff and matters of that nature, which can be succinctly expressed.
63. The second of these questions focusses on the LOTR criteria and so in my view need not be answered for the reasons given with respect to the LOTR questions below.
64. As to JZ's draft question (e) "What date were these 12 Judges known to the FCDO/MoD and Home Office?", I am not persuaded that these details are necessary to resolve the central consistency question.
65. As to (f) "How did these 12 Judges become known to the FCDO/MoD and Home Office?", I consider that there is sufficient information available about how the ARAP policy operated, such that a Part 18 order on this topic is not necessary.

Question 3

66. **Request:** Is it correct that these Judges were assessed by FCDO, exercising discretion under ARAP, as being eligible for evacuation under Category 4 Special Cases ARAP?

67. **Response:** As for question 2 above.
68. **Decision:** The hearing before me proceeded on the understanding that Category 4 of the ARAP policy was the main one in issue in this claim. It therefore appears likely that the answer to this question is yes, but the Defendants should clarify the position.

Questions 4 and 5

69. **Requests:** Please confirm in respect of the one remaining Judge in this 13-person-strong cohort, why HMG approved a Judge as ARAP Category 4 when GLD has seen no evidence that particular judge worked directly alongside HMG. Please also confirm in respect of this one remaining judge, what is meant by the relevant judge “worked at a court which received support from the UK Government.”
70. **Responses:** As for question 2 above.
71. **Decision:** These requests relate to one judge who was apparently approved under ARAP Category 4 despite not meeting the wording of the policy: as set out at [7] above, in September 2021 Category 4 did require that the person worked in a meaningful enabling role alongside HMG.
72. The Defendants submitted that one judge whose case might be seen as anomalous could not possibly suggest an inconsistently applied policy. This point might be a powerful one in the context of a very large group of people about whom decisions were being made, but it has less force given that the pool for consideration here is so small (only 13 judges) and given that so little is currently known about how the decisions for that group were made. In my view the approach to this judge is relevant to the Claimant’s Ground 1 and is necessary for the court to reach a proper determination of the consistency issue. As it relates to only one judge, it is proportionate for the Defendants to answer the questions as drafted.

(b): Pitting LOTR questions

73. Ms Naik QC accepted at the end of the hearing that the questions relating to Pitting LOTR were less crucial for this claim. This was a pragmatic approach to take given that (i) it is now clear JZ was not actually called forward during Operation Pitting; (ii) there is no LOTR decision under challenge in this case; and (iii) the general process and criteria used for selecting the Pitting LOTR judges is now relatively clear in light of the Defendants’ evidence, their responses to the Part 18 requests and the detailed consideration given to the issue by Lang J in *S and AZ* at [118]-[126]. These factors have informed my approach to this group of questions.

Questions 6 and 7

74. **Requests:** Is it correct that 12 Judges and 1 prosecutor were relocated through Operation Pitting LOTR? Is it correct that all of these individuals were female?
75. **Responses:** At least 11 judges, 1 head of a court of appeal and 1 prosecutor were accepted for relocation under Op Pitting LOTR. The Defendants are analysing their

data to determine if there were any further evacuees from the Afghan legal profession under Op Pitting LOTR and will inform the Claimant at the conclusion of this work. Their gender is irrelevant to the issues in the claim. But for the avoidance of doubt, all of the aforementioned 11 judges were female.

76. **Decision:** The Defendant has answered this question appropriately and so no order is required.

Questions 8 and 9

77. **Requests:** What level/branch/division of Court within the Afghan judicial system did these Judges work in? What was the nature of their judicial work and what sort of cases did they preside over in Afghanistan?
78. **Responses:** As for question 2 above.
79. **Decision:** It now seems tolerably clear that the key reason why certain judges were granted Pitting LOTR was that they were part of a twinning / mentoring programme with the UK: see the analysis under Questions 10-11 and 13-14 below and *S and AZ* at [118]-[126]. Accordingly the details of their judicial service is less relevant. In light of this, and the general factors with respect to the LOTR questions set out at [73] above, I do not consider it appropriate to make a Part 18 order in respect of this question.

Questions 10-11

80. **Requests:** When did the Operation LOTR Pitting Judges become known to the FCDO, MoD and Home Office? How did the Operation LOTR Pitting Judges become known to the FCDO, MoD and Home Office?
81. **Responses:** Various forms of communication were used, including e-mail, during the course of Operation Pitting. The 11 female judges were part of a UK-Afghanistan twinning programme for female judges. They first came to FCDOS' attention on the evening of 20 August 2021 when a list of the 11 judges was emailed by an MP to Lord Ahmad. Lord Ahmad's private office shared this list with FCDO officials.
82. **Decision:** The Defendants have answered this question appropriately and so no order is required.

Question 12

83. **Request:** Were decision-makers given any specific guidance on how to approach the issue of advocacy when reviewing Judges eligibility for LOTR?
84. **Response:** The process for and approach to assessing and prioritising cases during Operation Pitting, for the purpose of Op Pitting LOTR, is sufficiently addressed in Philip Hall's witness statements dated 26 April 2022 and 27 May 2022.

85. **Decision:** I agree that the Defendants have already provided sufficient evidence on the process and approach to Pitting LOTR in the witness evidence, such that no order is appropriate.

Questions 13-14

86. **Requests:** How many Judges that were granted Operation Pitting LOTR had advocacy from UK citizens? Who acted as advocates for qualifying Afghan Judges?
87. **Responses:** This is sufficiently addressed above.
88. **Decision:** The information about the twinning programme given above indicates that all the Pitting LOTR judges were part of this programme. The twinning / mentoring programme and the role of the UK Afghanistan Women Judges Association, acting under the auspices of the International Association of Women Judges, was also considered by Lang J in *S and AZ* at [122] and [124]. Accordingly sufficient information is available on this issue and an order is not appropriate.

Question 15

89. **Request:** Were any other Afghan Judges approved for LOTR but not actually evacuated during Operation Pitting? If so, what was the number?
90. **Response:** Yes. The number is not presently known.
91. **Decision:** The Defendants' evidence indicates that an immigration route was established for those who were called forward for evacuation under Operation Pitting LOTR but were not able to get onto a UK aircraft. It is helpful that the Defendants have clarified in the answer to this question that there were some judges in this category. However in my view it is not necessary or proportionate to require the Defendants to investigate this issue further so as to establish the precise number of judges in the group, again bearing in mind the factors set out at [73] above.

Question 16

92. **Request:** We have provided you and the Court with the witness statements and identities of Judges A, B, C, X, Y and W. Please provide specific reasons as to why each Judge was considered to have qualified, either under ARAP or Pitting LOTR.
93. **Response:** As for question 2 above.
94. **Decision:** Judge W was relocated under ARAP and Judges A, B, C, Y and Y under Operation Pitting. It is therefore appropriate to consider them separately.

Judge W

95. Judge W had been a Judge at the Anti-Terrorism Court in Kabul. His evidence was used by the Claimants in *S and AZ* as comparator evidence. Lang J made the following finding in respect of the reasons why he was evacuated under ARAP:

“In the case of Judge W, and his fellow judges at the Anti-Terrorism Court in Kabul, the Defendants appear to have been satisfied that they met the criteria in Category 4 in the ARAP policy because of their role in presiding over the Anti-Terrorism Court, which benefited the UK Government. The judges had a working relationship with UK officials in Kabul, in particular, the Counter-Terrorism Unit which arranged for their sponsorship under ARAP. The UK Government provided the Anti-Terrorism Court with logistical and operational support, and organised training and meetings for the judges. Their roles were public and high profile and they were at risk from the Taliban”: *S and AZ* at [108].

96. In his second witness statement Judge W confirmed that JZ had also been a judge in the Anti-Terrorism Court in Kabul but at different times: JZ had worked there from 2008-2011 whereas he worked there from 2015 until he was evacuated in August 2021.
97. During the hearing, the Defendants provided a witness statement from Alexander Pinfield of the FCDO in response to Judge W’s second witness statement. Mr Pinfield had been the Deputy Ambassador to Afghanistan from 5 April 2021 to 26 August 2021 and the line manager of the Head of the Counter-Terrorism Team in the British Embassy in Kabul. He explained why the UK government considered that Judge W had links with them (even though Judge W appeared doubtful about this, saying in his first witness statement that he did not work for, or have contact with, the UK government either directly or indirectly). Mr Pinfield explained that Judge W had met the Head of the Counter-Terrorism Team in Kabul several times between February and April 2021 and was one of the judges in the Primary Court dealing with terrorism issues in Kabul with whom the Government had developed substantial links, through the Counter-Terrorism Team in particular.
98. Lang J also considered Judge W’s case in some detail: *S and AZ* at [101]-[103] and [105]-[108].
99. I therefore consider that sufficient evidence is available explaining why Judge W was evacuated under ARAP, such that no Part 18 order is appropriate.

Judges A, B, C, X and Y

100. These judges were all part of the Pitting LOTR cohort and so fell within the twinning / mentoring arrangement described under Questions 10-11 and 13-14 above. Their cases were also considered by Lang J in some detail: *S and A* at [101]-[103] and [105]-[108]. I therefore consider that sufficient evidence is also available explaining why these judges were granted Pitting LOTR, such that no Part 18 order is appropriate.

Further questions raised in oral submissions

101. At the end of the hearing on 9 June 2022, Ms Naik QC submitted that in addition to the questions listed in the Part 18 application, JZ also sought (i) information about a judge who was understood to have been initially processed under ARAP scheme but then “converted” to the LOTR scheme on arrival in the UK; and (ii) clarification of whether

all 13 of the judges who had been accepted under ARAP had made formal applications under the scheme.

102. I indicated that I was not minded to approve these questions given that they had not featured in the Part 18 correspondence or the application. They also do not bear as closely on the key issues as those questions I have approved above. I remain of the view that Part 18 orders on these questions would not be appropriate.

Conclusion

103. Accordingly JZ's Part 18 application is allowed to the extent that the Defendants should answer the following:
1. *With respect to the judges relocated to the UK under ARAP other than Judge W, (a) what level/branch/division of Court within the Afghan judicial system did these Judges work in? (b) What was the nature of their judicial work? (c) Where, geographically, did they serve? (d) If any of them served in the Anti-Terrorism Court in Kabul, when was their service?*
 2. *With respect to the above group please describe in brief terms what evidence there was that each judge "worked alongside" HMG.*
 3. *Is it correct that these Judges were assessed by FCDO, exercising discretion under ARAP, as being eligible for evacuation under Category 4 Special Cases ARAP?*
 4. *Please confirm in respect of the one remaining Judge in this 13-person-strong cohort, why HMG approved a Judge as ARAP Category 4 when GLD has seen no evidence that particular judge worked directly alongside HMG. Please also confirm in respect of this one remaining judge, what is meant by the relevant judge "worked at a court which received support from the UK Government".*
104. My order will reflect that (i) the Defendants should respond by 4 pm on 19 July 2022; (ii) the parties should make submissions as to the impact of the answers to the Part 18 requests on the issues in this claim by 4 pm on 22 July 2022; and (iii) the parties should liaise with the Administrative Court office to list a short further hearing before me during the week of 25 July 2022, should the same be needed.
105. I consider these timescales proportionate bearing in mind the relatively limited number of questions the Defendants have been ordered to address compared to those in the application and the continued need for a prompt resolution of this claim, given the context of JZ's position.