Neutral Citation Number: [2023] EWHC 87 (Admin)

Case No: CO/32/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2023

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimant**
on the application of	
KBL	
- and -	
(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT **(2) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS** **(3) SECRETARY OF STATE FOR DEFENCE**	**Defendants**

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- -

Sonali Naik KC, Maria Moodie and Maha Sardar (instructed by **Wilson LLP**) for the **Claimant**
Lisa Giovannetti KC and Hafsah Masood instructed by the **Government Legal Department**) for the **Defendants**

Hearing date: 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 23 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lang :

1. The Claimant, who is a national of Afghanistan, seeks judicial review of the Defendants' failure to grant her leave to enter the United Kingdom ("UK"), on 13 December 2021, in response to applications made in October and December 2021.

2. The Defendants do not dispute that the Claimant may be at risk of serious harm or death at the hands of the Taliban, because of her work on women's rights, human rights and government anti-corruption under the previous regime.

3. The issues may be summarised as follows:

   i) **Ground 1**

   In regard to the Claimant's application for Leave Outside The Rules ("LOTR"):

   a) Did the Secretary of State for the Home Department ("SSHD") act irrationally (1) in refusing to accept as valid the Claimant's application for LOTR because it was made in her online application under the Afghan Relocation and Assistance Policy ("ARAP"); and (2) by requiring her to submit her application for LOTR in an online visa application form which was inapplicable to her circumstances?

   b) Did the SSHD act irrationally, and contrary to the relevant LOTR guidance, in refusing to accept the Claimant's application for LOTR when the consequence was that the Claimant was not provided with a GWF Reference Number and so was prevented from making a biometric registration appointment at the Visa Application Centre ("VAC") in Pakistan?

   ii) **Ground 2**

   a) Did the Defendants treat the Claimant inconsistently in comparison with other women's rights/human rights activists and government officials who were prioritised for evacuation from Afghanistan? If so, were the inconsistencies in treatment unlawful? The Claimant contends that the Defendants' systems and processes for identifying eligible individuals lacked coherence; there was no justification for discontinuing the eligibility criteria adopted during Operation Pitting; and they were procedurally unfair because the policy criteria were not published, which meant that applicants could not make meaningful representations.

   b) Did the guidance given on the GovUK web page titled "Support for British and non-British nationals in Afghanistan", published on 22 August 2021, give rise to a legitimate expectation that (1) the Claimant met the criteria for priority evacuation groups, and (2) the Defendants' decision as to prioritisation within these groups, and her systems governing those decisions, would be made fairly and consistently? If so, was there an unlawful breach of the legitimate expectation?

c) The Defendants submit that Ground 2 is premature and ought not to be determined, since the Claimant has not made a valid application for LOTR, and the Defendants have not made a substantive decision on whether or not to grant the Claimant LOTR.

Procedural history

4. The claim was issued on 6 January 2022. I granted permission to apply for judicial review on the papers on 25 January 2022, and made an order for expedition. At a case management hearing on 18 March 2022, Swift J. ordered that this claim should be heard with the claims in CO/4106/2021 ("*S*") and CO/315/2022 ("*AZ*").

5. On 17 May 2022, I granted the Claimant's request to adjourn the substantive hearing in her case until the contested application for further information under CPR Part 18 had been determined.

6. I proceeded to hear the claims in *S and AZ* on 17 and 18 May 2022, and made an order on 9 June 2022 in the following terms:

   i) I dismissed the claim for judicial review of the Defendants' refusal of applications to be relocated to the UK under ARAP.

   ii) I granted judicial review of the Defendants' refusal to accept applications for LOTR as valid because they were made using the ARAP online application form, and because *S and AZ* had not attended a VAC for biometric testing.

   iii) Although I found that many of the allegations made by *S and AZ* of inconsistent treatment by the Defendants, in comparison with the treatment of comparator judges during Operation Pitting, were well-founded, I made no order for judicial review in respect of their applications for LOTR, as the Defendants had not yet made substantive decisions on their applications for LOTR which were capable of being quashed.

7. The First and Third Defendants applied for permission to appeal to the Court of Appeal against my order under paragraph 6(ii) above in the *S and AZ* claims. On 8 July 2022 permission to appeal was granted. Andrews LJ made it a condition of the grant of permission that, to avoid delay, the Defendants should progress their applications for LOTR as if permission had not been granted, and there was no stay imposed on my order.

8. On 15 July 2022, I adjourned the Claimant's substantive hearing and stayed the claim until the handing down of the judgment of the Court of Appeal in the *S and AZ* claims.

9. On 22 July 2022, the First Defendant considered and refused *S and AZ*'s applications for LOTR, on an "in principle" basis.

10. The Court of Appeal handed down judgment on 29 July 2022 (Neutral Citation Number: [2022] EWCA Civ 1092). The grounds of appeal were limited to the procedural issues arising in the applications for LOTR (at [7]). The Court:

i) allowed the appeal against my conclusion that it was irrational to reject the applications for LOTR because they were made in the ARAP online application form; and

ii) dismissed the Defendants' appeal against my conclusion that it was irrational and procedurally unfair to refuse to consider visa applications without prior attendance at a VAC Centre for biometric testing, with no option for waiver or deferral, and *S and AZ* did not want to take the risk of making a false entry on the form, which they were advised to do by the Government Legal Department ("GLD").

11. On 21 October 2022, I lifted the stay on this claim and directed that an expedited hearing be listed in the Michaelmas term 2022.

Factual background

History of events in Afghanistan

12. Following the terrorist attacks against the United States of America ("USA") on 11 September 2001, the USA led a military intervention against Al Qaeda groups, and the Taliban government in Afghanistan. The UK took a significant part in the USA's initial intervention. Subsequently, the operation was supported by NATO and a joint international force, collectively called the International Security Assistance Force ("ISAF"), in which the UK played a leading political, diplomatic and military role.

13. Mr Tim Foxley MBE, in his witness statement dated 28 April 2022, set out a helpful chronology, based upon 'The UK and Afghanistan', House of Lords Select Committee on International Relations and Defence, p.11-12 (13 January 2021) and Farrell, T. 'Unwinnable: Britain's War in Afghanistan, 2001 – 2014', (The Bodley Head, London 2017). He said, at paragraph 23:

> "The mission evolved and expanded between 2001 and 2021. The emphasis of the UK mission changed focus over the years, with several overlapping themes:
>
> a. 2001 – 2002 - defeating the Taliban and hunting Al Qaeda.
>
> b. 2002 – 2005 – establishing democratic Afghan government processes and supporting infrastructure (a judiciary, an army, a police force, counter narcotics and a democratic electoral process).
>
> c. 2005 – 2006 – major British force deployment into Helmand province.
>
> d. 2007 - 2014 – Helmand: ongoing combat operations against Taliban guerrilla resistance in southern Afghanistan.
>
> e. 2011 – 2014 – preparing for departure from Afghanistan, transitioning to Afghan government and enabling the Afghan

> National Security Forces to take over responsibility for protecting the country.
>
> f. 2014 – 2021 – The withdrawal of ISAF. A drawdown of UK military forces to a non-combat, residual military presence, mentoring, coaching, training the Afghan security forces. Continued support for Afghan government capacity building, support for negotiations with the Taliban."

14. On 29 February 2020, the USA and the Taliban signed the Doha Agreement (officially titled the "Agreement for Bringing Peace to Afghanistan") that provided for the withdrawal of all USA and allied military forces and civilian personnel from Afghanistan by 1 May 2021. The withdrawal was conditional upon the Taliban upholding the terms of the agreement that included not to allow Al Qaeda or any other extremist group to operate in the areas they controlled. The withdrawal of the USA was later deferred to 31 August 2021.

15. In May 2021, the Taliban launched a major offensive against the Afghan Armed Forces, and then made rapid advances. By 15 August 2021, the Taliban had seized Kabul. USA and NATO troops retreated to Kabul airport from where they operated an emergency airlift for all NATO's civilian and military personnel, other foreign nationals, and at-risk Afghan nationals. The British Government's evacuation mission was called "Operation Pitting". The final British flight from Kabul took place on 28 August 2021. The last USA military planes left Afghanistan on 30 August 2021. Taliban soldiers then entered the airport and declared victory. The Taliban government has been in total control of Afghanistan since that date. The UK Embassy and other NATO Embassies have remained closed.

Operation Pitting

16. "Operation Pitting" was the name given to the UK Government's mission to evacuate British nationals, and others at risk from the Taliban, when Kabul fell. It was initially planned with the intention of evacuating two groups. First, British nationals and their families, who were the responsibility of the Foreign and Commonwealth Development Office ("FCDO"). Second, Afghans who were given leave to enter the UK under the ARAP, who were the responsibility of the Ministry of Defence ("MoD").

17. From the week beginning 9 August 2021, Ministers were also seeking to evacuate other at-risk Afghan nationals, who were not likely to be eligible for ARAP, to take advantage of spare flight capacity not required to evacuate the two groups originally identified. To achieve this objective, it was agreed that selected persons, who appeared to meet the agreed criteria, would be eligible for a grant of LOTR by the SSHD, and would be called forward to board evacuation flights, subject to security checks. The Government did not have time or capacity to process their applications for LOTR in Afghanistan: applications had to be approved either at a staging post at Dubai, or on arrival in the UK. This scheme became known informally as "Pitting LOTR".

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

19. An Evacuation Handling Centre ("EHC") was set up at the Baron Hotel, located near the airport in Kabul. Support was provided from a Crisis Centre, housed at the FCDO in London, and military support was also provided there. The logistics operation was co-ordinated by the MoD and Permanent Joint Headquarters ("PJHQ").

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

21. Some people who had been called forward for evacuation were prevented from reaching the Baron Hotel or the airport, either because of Taliban checkpoints on the roads to the airport, or because of the huge crowds of people gathered at the airport, blocking their access.

22. By 22 August 2021, PJHQ had imposed a quota on the number of evacuees, as the evacuation was becoming increasingly difficult and the period for evacuation was expected to end in the near future. Strict prioritisation within the agreed cohorts was needed.

23. According to Mr Philip Hall, who led the FCDO team responsible for Operation Pitting, three selection criteria were applied for Pitting LOTR, as set out in paragraph 5 of his second witness statement:

> "(i) **Contribution** to HMG objectives in Afghanistan: evidence of individuals making a substantial impact on operational outcomes, performing significant enabling roles for HMG activities and sustaining these contributions over time; and either
>
> (ii) **Vulnerability** due to proximity and high degree of exposure of working with HMG: evidence of imminent threat or intimidation due to recent association with HMG/UK; or
>
> (iii) **Sensitivity** of the individual's role in support of HMG's objectives: where the specific nature of activities/association leads to an increased threat of targeting. Or where there would be specific threat to HMG from data disclosure."

In practice, the key criteria were Contribution and Vulnerability.

24. In his first witness statement, at paragraph 17, Mr Hall said that, on 19 August 2021, FCDO officials recommended to Ministers the following cohorts for evacuation under Pitting LOTR, flight capacity permitting:

> "(i) 232 journalists and media
>
> (ii) 80 contractors working in exposed roles for the Embassy
>
> (iii) 44 women's rights activists
>
> (iv) 23 female members of the Afghan National Army
>
> (v) 160 Afghan Government officials with close connection to the UK
>
> (vi) 24 Afghan officials working in Anti-Terrorism Prosecutions Department, National Directorate of Security and Counter Narcotics police
>
> (vii) 50 ARAP family members
>
> (viii) A very few named individuals working for NGOs and implementing partners who had a base outside the UK. which we believed they would likely return if we enabled them to leave Afghanistan."

25. Each of these cohorts was linked to a list of individuals, drawn up by FCDO staff. A further recommended list was put forward on 21 August 2021, including a small group of extremely vulnerable individuals.

26. A Discussion Paper referred to women's rights activists being at significant personal risk of violence, intimidation and assassination at the hands of the Taliban. Many will have cooperated with the British Embassy and their knowledge and contacts have been a significant support to the work of the Embassy in support of British Government priorities in Afghanistan.

27. According to Mr Hall, at paragraphs 18 and 19 of his first witness statement, the FCDO's Gender and Conflict Team provided a consolidated list of 20 vulnerable women "peacebuilders" who had delivered work for the British Government directly, or supported the Government's Women, Peace and Security ("WPS") objectives, but were ineligible for ARAP. Mr Hall added, at paragraph 48 of his first witness statement, that the FCDO Gender and Conflict Team provided a list of vulnerable women peacebuilders and women who had supported the WPS objectives, and who had worked with the British Government. Those who had worked most closely with the British Government were included in the 19 August submission. Those whom the Military Team could reach were called forward in the first phase of the LOTR arrangement, before a quota was imposed by PJHQ (see paragraphs 32 and 33 of Mr Hall's first witness statement).

28. On 22 August 2021, the SSHD published online guidance on support for British and non-British nationals in Afghanistan, which the Claimant relies upon as giving rise to

a legitimate expectation that she is eligible for a grant of leave to enter the UK under LOTR or Afghan Citizens Resettlement Scheme ("ACRS").

29. Mr Hall stated, at paragraphs 51 and 52 of his first statement, that the Claimant was not known to the FCDO during Operation Pitting. Her name did not appear in any of the mailboxes. The Gender Equality Hub and the Gender Conflict Team were unaware of the Claimant. The Human Rights Team in the Afghanistan Task Force has since contacted the relevant lead who was formerly in the British Embassy in Kabul, who confirmed that she was aware that the Claimant was an activist, but she did not believe that she had ever met or spoken to the Claimant.

The British Government's support for human rights and women's rights

30. The British Government summarised the support it gave to women's rights in its review "The Future of Afghanistan: Development Progress and Prospects after 2014":

> "Securing women's rights was one of the main goals of the UK's intervention in Afghanistan in 2001. In addition, the Department for International Development (DFID) has prioritised the rights of women and girls in its work. The status and security of women can therefore be used as a litmus test of the UK's impact and legacy in the country….. Over the past decade, the UK government has helped achieve much towards this effort, including:
>
> • Establishing a new constitution which enshrines equal rights for women and men
>
> • Enacting a new landmark Elimination of Violence against Women (EVAW) law
>
> • Initial endorsement of a new National Action Plan for the Women of Afghanistan (NAPWA)
>
> • Establishing women's shelters for the first time
>
> • Ensuring just over 27% of MPs are women
>
> • Ensuring 25% of government jobs are filled by women
>
> • Ensuring over 2 million girls are now in school
>
> • Ensuring more women are free to participate in public life and to work outside their homes as doctors, teachers, entrepreneurs and lawyers – a situation once made impossible by the Taliban…"

31. The Claimant adduced in evidence a number of reports from the British Government, in particular, from the Foreign and Commonwealth Office ("FCO") and the Department for International Development ("DFID"). They describe the British

Government's support for human rights in Afghanistan; for programmes promoting women's equal participation in governance, and improving women's rights in the political, social and economic spheres.

32. The FCO's National Action Plan on Women, Peace and Security, First Annual Review, October 2013, refers to work done to increase female employment in the civil service. British Embassy staff met regularly with Afghan's women's civil society organisations, and participated in the monthly EU Human Rights & Gender Working Group. British Embassy staff had regular dialogue with the Afghan Independent Human Rights Commission ("AIHRC") and the Ambassador met with its Commissioners. The UK had provided £1.4 million to the AIHRC over the last three years.

33. The Corporate report, Afghanistan – Country of Concern, October 2014 affirmed the UK's commitment to upholding historic gains made since 2001, including human rights, education and health. A further £500,000 was contributed to the AIHRC to support its work on human rights and human rights defenders.

34. Sir Nicholas Kay KCMG, British Ambassador to Afghanistan from 2017 to 2019, wrote to the Claimant's former solicitors describing the British Government's work in Afghanistan. He said:

> "……. Over two decades there were changes in emphasis and in execution of HMG's mission and strategy in Afghanistan, but what never changed was the fundamental belief that UK security interests would only be achieved and sustained if Afghans enjoyed basic human rights, good governance and the rule of law. Funding and supporting work in these areas was an integral component of our "comprehensive approach" to Afghanistan, which also included direct military action, training advice and assistance to the security sector, countering narcotics, tackling corruption, improving governance and institutions, economic and social development and humanitarian assistance. HMG's long-term mission and strategy in Afghanistan therefore cannot be viewed in terms of military and security action only. The UK's direct and sustained support to establish a functioning and credible legal sector, good governance and the empowerment and protection of women and girls was an integral part of our security and stabilisation objectives.
>
> UK support to establish democracy, the rule of law, human rights and women's rights entailed funding, technical assistance, political lobbying and public diplomacy to showcase Afghan successes. Our aim was to promote Afghan ownership and so our funding was often indirect or excluded payment of salaries. Nevertheless, the UK was widely known to be the lead partner for institutions such as the Counter Narcotics Justice Centre (CNJC), Anti-Corruption Justice Centre (ACJC) and the counter-terrorism courts. Afghan leaders and officials in these institutions were often trained and mentored by the UK in

> Kabul and abroad. UK advisers and consultants helped on the ground in Kabul. Contact with Embassy staff was frequent as we built strong relationships with Afghan judicial, legal and human rights workers as well as women's rights defenders.
>
> Within the British Embassy in Kabul, we had specialist teams of civil servants from different government departments, including the Foreign and Commonwealth Office, Department for International Development and the Home Office to achieve HMG's objectives. By way of example, within the British Embassy a multi-disciplinary team was responsible for supporting the advancement of women's rights in line with the objectives of HMG's Afghanistan strategy and the UK's National Action Plan on Women Peace and Security. This entailed direct engagement with leading institutions such as the Afghan Independent Human Rights Commission and other NGOs within this sector to improve their performance and support them politically.
>
> As Ambassador, I hosted events at the Embassy to support the work of the ACJC and CNJC and I also made well publicised visits to the Afghan Independent Human Rights Commission and the Independent Administration Reform and Civil Service Commission to reinforce the UK's support for these institutions and their work. Senior staff from these institutions were invited frequently to the British Embassy for seminars, ceremonies and other events.
>
> ……
>
> The abrupt ending of the mission in Afghanistan in August 2021 has exposed many Afghan human rights defenders, judges, lawyers, government officials and civil society actors to the risk of retribution or persecution. Afghans who once looked to the UK for professional development, expertise and partnership - and received it - now look to us for compassion and refuge."

35. The importance of the British Government's involvement in promoting human rights and women's rights in Afghanistan was described by Ms Heather Barr, associate Director of the Women's Rights Division at Human Rights Watch, in her witness statement. She states that the AIHRC was the most important human rights organisation in Afghanistan.

Risk of harm from the Taliban

36. There is credible evidence of the continued threat posed by the Taliban towards those perceived as associated with the previous government and its institutions. The Taliban also perceive women in the public sphere as transgressing Taliban cultural and religious mores.

37. This threat was identified by the United Nations High Commissioner for Refugees ("UNCHR") in August 2021 ("Position on Return to Afghanistan") and confirmed in the detailed "Country Policy and Information Note Afghanistan: Fear of the Taliban" published by the Home Office in October 2021.

38. Heather Barr of Human Rights Watch states in her witness statement:

> "15. After the Taliban gained control of the country on August 15, 2021, the women's rights situation changed and worsened very dramatically. Virtually every aspect of the rights of women and girls was rolled back in devastating ways, in the areas including freedom of movement, association, and speech, education, employment, access to health care, gender-based violence, political representation, participation in public life, and sport and music. In the wake of the Taliban takeover in August 2021, almost all high profile women's rights activists fled the country, and those who did not flee often faced situations where Taliban members searched for them, threatened them or their family, and intimidated them or their family. Human Rights Watch has documented the threats that individual women viewed as having been activists have faced, for example here: https://www.hrw.org/news/2022/01/18/afghanistan-taliban-deprive-women-livelihoods-identity. Women's rights protesters have been detained in abusive conditions by the Taliban and a women's rights activist was murdered in the north, in Mazar-i-Sharif, under circumstances that remain unclear due to a failure by the Taliban to investigate her death in a comprehensive and transparent manner.
>
> 16. We are in contact with women's rights activists within Afghanistan and others who have recently escaped, and they continue to face serious risks. Women who have participated in protests against Taliban violations of women's rights have been particular targets of Taliban abuse, facing Taliban threats and coercion that have extended to their families. Many activists have tried to escape, but they face great difficulties doing so as it has become extremely difficult for people to access passports and visas, including for neighbouring countries. We have received reports of the Taliban monitoring passport offices to locate people they are searching for including women's rights activists and blocking them from leaving the country. When activists do reach neighbouring countries such as Iran and Pakistan, the crisis is not resolved for them as no neighbouring countries are permitting newly-arrived Afghans to settle there and as a result fleeing Afghans, including women's rights activists, face major difficulties accessing protection."

The Claimant

39. The Claimant, who is aged 45, is a widowed single mother with two adult children. She has a Bachelor's degree in law and a Master's degree in international law.

40. Between 2004 and 2019, she was employed as the Women's Rights Unit Team Leader in the Mazar-i-Sharif regional office of the AIHRC. The AIHRC was established pursuant to Article 58 of the Afghan Constitution to monitor the observance of human rights as well as to protect and promote human rights in the country. As part of her work she was involved in cases of human rights violations committed by the Taliban in North Afghanistan. Since the Taliban seized control, the AIHRC has no longer been able to function.

41. She was appointed by the Director of AIHRC to be the representative of the High Commission for the Prevention of Violence against Women for Northern Afghanistan. This High Commission was created by the Ministry of Women's Affairs and chaired by the Minister of Women's Affairs. In this role she worked on issues such as presidential pardons for women prisoners, the establishment of the first female only prison and the creation of shelters for women. She regularly delivered training to government officials on women's rights in international and domestic law, and women in Islam.

42. Since 2010 the Claimant has been a prominent member of the Anti-Violence against Women Network which sought closer cooperation between government and non-government agencies in combating violence against women. She has published articles, carried out numerous television and radio interviews, and contributed to international conferences on the topic of women's rights. She gave a speech at the annual conference of prosecutors, met with the Afghani President, and with the US Ambassador. She was nominated by the Embassy of the USA in Afghanistan for the International Leadership Program of 2021. Her work as a women's rights activist has led to threats from supporters of the Taliban.

43. From 2019 she was a high-ranking government employee within the Independent Administration Reform and Civil Service Commission ("IARCSC"). She was responsible for tackling corruption and she was the only female Director amongst government officials in Balkh. In this role she received numerous threats from members of the Taliban when she refused their requests to engage in corrupt practices by hiring their members.

44. The Claimant's case is that, through this work, she supported and advanced the UK's efforts and mission in Afghanistan by protecting and promoting values such as democracy, the rule of law, freedom of speech and gender equality.

45. Two witnesses with first-hand knowledge of the Claimant's work have made statements describing the contribution that she made.

46. MFH is the former Attorney General of Afghanistan who is now in the United States. MFH was appointed as a Commissioner of the AIHRC in 2002. The main office was in Kabul, and there were 14 local offices. MFH was responsible for two local offices, including Mazar-e-Sharif where the Claimant worked from 2004.

47. The Claimant's responsibilities included dealing with cases of violence against women, protecting victims, referring them to safe houses, liaising with police departments, the Attorney General's office and courts, and monitoring the conditions in women's detention facilities.

48. The work that she carried out at the AIHRC and in other roles was extremely difficult and dangerous because of opposition from the Taliban. The Claimant was very well-known in her field. Due to her expertise, she was invited to participate in many public events and was interviewed by local and national media on the subject of women's rights. The fact that she was so well-known made it even more dangerous. During her time at the AIHRC, MFH was aware of the Claimant receiving several threats to her life from the Taliban and other groups. One of these threats was reported in an article by the UN Secretary-General's Special Representative for Afghanistan. MFH considers that she now "faces a severe risk of being targeted and killed by the Taliban because of her work".

49. MFH confirms that the UK Government provided financial and other support to the AIHRC. As a Commissioner, MFH had many meetings with UK Government staff. The UK Government also organised and funded scholarships and training programmes for AIHRC staff in the UK.

50. The Claimant was issued with a Special Passport in Afghanistan (a copy of which has been filed at court). MFH observes:

> "18. …. The Special Passport was only issued by the former government to high-ranking government officials above a specific grade. I myself hold a Diplomatic Passport, due to my positions as Commissioner at the AIHRC and then Attorney General. The Diplomatic passport was issued to the highest-ranking government officials, including government Ministers and the President and Vice-President."

51. BB is a former Chairman of the IARCSC, who has known the Claimant since 2006, when he was a Commissioner at the AIHRC. He confirms that the Claimant is very well known in the field of women's rights, and he was aware of threats to her life from the Taliban while she was working at the AIHRC.

52. BB states that the Claimant's appointment as a Director of the IARCSC, responsible for the office in Mazar-e-Sharif, was extremely important, both in practice and symbolically. It was widely reported in the press at the time. Her specific responsibilities included organising competitive merit-based recruitment; carrying out the IARCSC's reform programmes at the provincial level and district level; and a key component of her work was to promote women's participation, and increase the proportion of women working in the civil service sector. She worked to achieve the full range of IARCSC's objectives. At a symbolic level, by taking on this role, the Claimant also showed the Afghan public that women could take on leadership roles in the Afghan government.

53. BB describes the links between the UK Government and IARCSC, which led to the Claimant's appointment:

"IARCSC links with the UK government

17. In my capacity as Chairman at the IARCSC I attended many meetings with representatives from the UK government. I had many meetings with staff from the UK Embassy in Kabul regarding the IARCSC's work. I am aware that the UK government was committed to tackling corruption in Afghanistan and therefore strongly supported the work of the IARCSC.

18. I was in regular contact with British Ambassador Sir Nicholas ('Nick') Kay and his successor Alison Blake. These meetings covered topics including the public sector in Afghanistan, the IARCSC's reform work, anti-corruption efforts, and increasing the participation and capacity of women in the public sector. We also discussed the support that the UK Embassy could provide to strengthen IARCSC's work in tackling corruption. I also had meetings with Sir Kay in his subsequent role as NATO Civilian Representative.

19. While I was Chairman, the UK government provided a significant amount of funding to the IARCSC. This included a significant amount of funding for a programme called Capacity Building for Results ('CBR'). This was a multi-year project. The budget was in the range of hundreds of millions of dollars. In particular, the UK was very interested in increasing the number of female Directors recruited to Afghanistan's civil service through the CBR. [The Claimant] was herself recruited through the CBR programme when she was recruited as an IARCSC Director and was therefore a key example of the UK government and IARCSC together achieving a common objective.

20. The UK government also funded other training and capacity building initiatives to support the IARCSC. This included a capacity building programme in which [the Claimant] herself took part. As mentioned previously, she was part of a delegation of senior Afghan government officials sent to Singapore for training on public administration, which was funded by the UK and Australian governments.

21. The UK government also provided direct technical support to the IARCSC. This included sending a delegation of three public administration advisors to help us reform the Afghan Civil Service Institute, which was part of the IARCSC. The advisors came on two visits to the IARCSC to provide technical assistance. This was arranged through the British Embassy and the UK's Department for International Development. These advisors were described as coming from "Number 10." I assumed that this meant they were public administration experts from the British Prime Minister's office at 10 Downing

> Street. Their first visit lasted roughly 1 week, and the second lasted roughly 10 days. They conducted an assessment of the Civil Service Institute. They spent most of their time at the IARCSC interviewing employees and reviewing documents. Afterwards they produced a report with recommendations to assist the IARCSC."

54. BB also comments on the risks that the Claimant now faces as a result of work at the IARCSC:

> "22. The work [the Claimant] carried out at the IARCSC was challenging and dangerous. The fact she was so well-known and a woman in a high-ranking position made it even more dangerous. During her time at the IARCSC I was aware of her receiving threats from the Taliban who were accusing her of encouraging women to go against Afghan culture and religion. They also tried to force her to recruit people loyal to the Taliban into government positions, and because she refused to do so she received further threats. She was forced to move to a different address for her own safety.
>
> 23. The IARCSC's Directors responsible for both the Herat and Nangarhar offices have been evacuated from Afghanistan by the US government. Herat and Nangarhar are two larger provinces comparable in size with Balkh, the province for which [the Claimant] was responsible as Director. I am also aware that a number of female Directors who were working at the IARCSC's headquarters in Kabul who have been evacuated to Germany and Norway for their safety.
>
> 24. I am extremely concerned about [the Claimant] and the fact she is still in Afghanistan. She faces a severe risk of being targeted and killed by the Taliban because of her work and her high profile."

55. Since the Taliban seized control of Afghanistan in August 2021, the Claimant's association with the UK and her promotion of western values exposes her to a real risk of severe harm. A number of the Claimant's colleagues at the AIHRC and IARSC have been victims of targeted assassinations. Her laptop and personal papers were seized from her office by the Taliban and a guard at her office was questioned about her whereabouts. She had to leave her home in Mazar-i-Sharif shortly before the Taliban took over, and go into hiding. Since then, the Taliban have repeatedly questioned family members about her whereabouts. The Claimant can no longer work, and has no funds.

The Claimant's applications and the Defendants' decision

56. On 20 October 2021, the Claimant made an online ARAP application.

57. On 29 October 2021, the Claimant's former solicitors submitted written representations to the Defendants in support of an application for leave to enter under ARAP, the ACRS, or LOTR. The representations were supported by a witness statement and documentary evidence.

58. Following further correspondence, the Claimant's solicitors sent a letter before claim on 17 November 2021. It identified the decision under challenge as the Defendants' delay in making a decision on the Claimant's applications.

59. On 13 December 2021, the GLD replied, stating that, because of the high volume of applications received, they were not yet in a position to take a decision on the Claimant's ARAP application, but would do as quickly as possible. ACRS was not yet in operation, and in any event, the scheme would not have an individual application process. In respect of the application for LOTR, the GLD said:

> "**Leave Outside the Rules ("LOTR")**
>
> The Secretary of State for the Home Department has a discretionary power to grant leave outside the Immigration Rules, including on compelling compassionate grounds. That power will not normally be exercised in a way which would undermine the objectives of the Immigration Rules or create a parallel regime for those who do not meet them. The usual policy in respect of applications for LOTR is that applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges; the application will not be complete, and will not be considered, until biometrics are provided at a Visa Application Centre. The requirement to provide biometrics is underpinned by legislation and will only be waived in very exceptional circumstances (see biometric-information-introduction-6.0.pdf (publishing.service.gov.uk) for full details). The use of biometrics is critical to protecting the UK and its residents, and therefore the threshold for waiving the requirement is commensurately high.
>
> There is currently no option to give biometrics in Afghanistan. The British Embassy in Kabul has suspended in-country operations and all UK diplomatic and consular staff have been temporarily withdrawn. The UK is working with international partners to secure safe routes out of Afghanistan as soon as they become available, but while the security situation remains extremely volatile, we recommend people in Afghanistan do not make applications and pay application fees at this time as they will not be considered until biometrics are provided, save in exceptional circumstances. Those Afghans who are outside of Afghanistan and able to get to a Visa Application Centre (VAC) to provide their biometrics are able to make an application in the usual way.

> In the absence of a completed application in accordance with the process described above, no decision whether or not to grant LOTR will be made at this time."

60. On 15 December 2021, the Claimant's solicitors replied, stating that a valid application for LOTR had already been made with the ARAP application which was the route which most closely matched the Claimant's circumstances. The refusal to consider it was irrational and outwith the terms of the LOTR policy. Further, there was no viable option for the Claimant to provide biometrics so her circumstances fell within the criteria for a waiver of biometrics at the initial stage. The delay in establishing the ACRS and the restrictions on applying under the scheme were discriminatory and in breach of a legitimate expectation arising from the announcement of the scheme on 18 August 2021. The letter relied upon evidence from FCDO staff given to the Foreign Affairs Select Committee Enquiry on Government Policy in Afghanistan.

61. The GLD replied on 24 December 2021 confirming the position set out in its letter of 13 December 2021. It explained that an application for LOTR could not be made on an ARAP application form. There was currently no option for biometric testing in Afghanistan. Although the online visa application form did not enable an applicant to request a waiver or deferral of biometric testing, the Claimant could complete the form by stating that she could travel to a VAC in another country, which would then enable the application to be registered. She could then ask the Defendants to consider waiving or deferring biometric testing on the ground that she was not in fact able to travel to the identified VAC, and this would not be used by the Defendants as adverse evidence in any decision-making process.

Events since the filing of the judicial review claim in January 2022

62. The claim for judicial review was filed on 6 January 2022. I granted permission on 25 January 2022, and made an order for expedition.

63. Because of the increasing threat of discovery by the Taliban, the Claimant fled to Pakistan with her two adult children, on a temporary 60 day visa, on 27 January 2022.

64. On 4 February 2022, she registered with the UNCHR in Pakistan and they told her she would be called in for interview, but they did not do so before her visa expired. She was unable to extend her visa beyond its expiry date of 25 March 2022. If she remained in Pakistan without a valid visa, she was at risk of being arrested by the Pakistani authorities and returned to Afghanistan into the custody of the Taliban. Therefore she returned to Afghanistan.

65. On 29 March 2022, the Defence Afghan Relocation and Resettlement ("DARR") team in the MoD wrote to the Claimant informing her that she was not eligible for relocation under ARAP as she did not meet the criteria in the scheme. She was advised of her right to seek a review of the decision, and other options, including ACRS and LOTR.

66. On 6 April 2022, the Claimant's solicitors applied on her behalf for a review of the ARAP decision, on the grounds that she had provided substantial evidence to show

that she met the criteria which had not been properly taken into account. They also maintained that the Claimant had made a valid application for LOTR, on the basis of her ARAP application.

67. On 20 April 2022, the DARR team in the MoD wrote to the Claimant retracting the decision of 29 March 2022, on the grounds that two items of evidence relied on by the Claimant were not included in the pack. They directed that they should be supplied (with an English translation) to enable a further review of eligibility to be conducted. They were duly sent on 3 May 2022.

68. On 14 July 2022, the Claimant submitted an "Expression of Interest" to be considered for eligibility under ACRS Pathway 3, which commenced on 13 June 2022.

69. On 3 August 2022, the Claimant fled to Pakistan, fearing for her safety.

70. On 17 August 2022, the Defendants made a fresh decision refusing the Claimant's ARAP application.

71. On 28 September 2022, the Claimant's solicitors wrote to the SSHD requesting a substantive LOTR determination without submission of a further visa application form, because neither the Claimant nor her solicitors were in a position to submit one. That request was refused.

Policies

ARAP

72. ARAP was introduced jointly by the Secretary of State for Defence ("SSD") and the SSHD with effect from 1 April 2021. Its purpose is to offer relocation or other assistance to Afghan nationals who were employed by the British Government in Afghanistan, and are thereby at risk. It also includes a narrowly defined category of individuals who have not been employed by the British Government, but who have worked with it and contributed to its objectives. The terms of the policy have been regularly revised. It was incorporated into the Immigration Rules from 1 April 2021.

Afghanistan Resettlement and Immigration Policy Statement September 2021

73. After the end of Operation Pitting, the Home Office published its "Afghanistan Resettlement and Immigration Policy Statement" dated 13 September 2021.

74. Paragraph 2 of the Introduction stated:

> "Following rapid work by the Foreign, Commonwealth and Development Office (FCDO), Home Office and Ministry of Defence (MoD) during Op PITTING, we were able to 'call forward' a number of other people for evacuation, in addition to the ARAP contingent and British nationals. These people were identified as being particularly at risk. They included female politicians, members of the LGBT community,

> women's rights activists and judges. Those who were called forward will form part of the Afghan Citizens Resettlement Scheme (ACRS) cohort."

75. Paragraph 17 confirmed that the ARAP scheme remained open to eligible applicants who would be given indefinite leave to remain ("ILR").

76. Paragraphs 21 – 27 introduced the new ACRS (see below).

77. Paragraph 44 made clear there was "no change" to the Home Office's "longstanding policy that a person can only claim asylum from within the UK. We will not accept asylum claims at our Embassies, High Commissions or VACs overseas or otherwise; whether by online application or through other correspondence."

ACRS

78. ACRS was described in the Afghanistan Resettlement and Immigration Policy Statement as follows:

> "21. On 18 August 2021, the Prime Minister announced the ACRS. This scheme will resettle up to 20,000 people at risk, with 5,000 in the first year. This is in addition to those brought to the UK under ARAP and is in line with the New Plan for Immigration commitment to expand legal and safe routes to the UK for those in need of protection, whilst toughening our stance against illegal entry and the criminals that endanger life by enabling it.
>
> 22. This makes the UK's humanitarian response to the crisis in Afghanistan one of the most ambitious in the world to date and builds on our proud record of resettling more people than any other European country since 2015.
>
> **Eligibility and referrals**
>
> 23. The ACRS will provide those put at risk by recent events in Afghanistan with a route to safety. The scheme will prioritise:
>
> a. those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights and freedom of speech, rule of law (for example, judges, women's rights activists, academics, journalists); and
>
> b. vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT).
>
> 24. There will be many more people seeking to come to the UK under the scheme than there are places. It is right that we take a considered approach, working with partners to resettle people to the UK. There will not be a formal Home Office owned

> application process for the ACRS. Instead, eligible people will be prioritised and referred for resettlement to the UK in one of three ways.
>
> 25. First, some of those who arrived in the UK under the evacuation programme, which included individuals who were considered to be at particular risk – including women's rights activists, prosecutors and journalists - will be resettled under the ACRS. People who were notified by the UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK. Efforts are being made to facilitate their travel to the UK.
>
> 26. Second, the government will work with the United Nations High Commissioner for Refugees (UNHCR) to identify and resettle refugees who have fled Afghanistan, replicating the approach the UK has taken in response to the conflict in Syria, and complementing the UK Resettlement Scheme which resettles refugees from across the world. UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. UNHCR has expertise in the field and will refer refugees based on assessments of protection need. We will work with UNHCR and partners in the region to prioritise those in need of protection, such as women and girls at risk, and ethnic, religious and LGBT minority groups at risk. We will start this process as soon as possible following consultations with UNHCR.
>
> 27. Third, the government will work with international partners and NGOs in the region to implement a referral process for those inside Afghanistan, (where safe passage can be arranged,) and for those who have recently fled to countries in the region. This element will seek to ensure we provide protection for members of Afghan civil society who supported the UK and international community effort in Afghanistan. This category may include human and women's rights activists, prosecutors and others at risk. We will need some time to work through the details of this process, which depends on the situation in Afghanistan."

79. ACRS was formally opened on 6 January 2022. Further details were provided in guidance issued on 13 June 2022 which states:

> "The scheme is not application-based. Instead, eligible people will be prioritised and referred for resettlement to the UK through one of 3 referral pathways:
>
> 1. Under Pathway 1, vulnerable and at-risk individuals who arrived in the UK under the evacuation programme have been

> the first to be settled under the ACRS. Eligible people who were notified by the UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK.
>
> 2. Under Pathway 2, we are now able to begin receiving referrals from the United Nations High Commissioner for Refugees (UNHCR) of vulnerable refugees who have fled Afghanistan for resettlement to the UK. UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. UNHCR will refer individuals in accordance with their standard resettlement submission criteria, which are based on an assessment of protection needs and vulnerabilities.
>
> 3. Pathway 3 was designed to offer a route to resettlement for those at risk who supported the UK and international community effort in Afghanistan, as well as those who are particularly vulnerable, such as women and girls at risk and members of minority groups. In the first year of this pathway, the government will consider eligible, at-risk British Council and GardaWorld contractors and Chevening alumni for resettlement. There are 1,500 places available in the first year under Pathway 3. This number includes the principal applicants and their eligible family members."

LOTR

80. The SSHD, at all times, is entitled to consider the grant of LOTR. Such power derives from section 3 of the Immigration Act 1971: *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32 [2012]; 1 WLR 2192, at [41].

81. The SSHD from time to time publishes guidance as to how to make a LOTR application. Version 1.0 of the guidance "Leave outside the Immigration Rules", which was published on 27 February 2018, remained in force at the date of the decisions in the Claimant's case.

82. The guidance sets out the principles of LOTR as follows:

> "**Background**
>
> The Immigration Rules are designed to provide for the vast majority of those wishing to enter or remain in the UK however, the Secretary of State has the power to grant leave on a discretionary basis outside the Immigration Rules from the residual discretion under the Immigration Act 1971.
>
> …..

> LOTR on compelling compassionate grounds may be granted where the decision maker decides that the specific circumstances of the case includes exceptional circumstances. These circumstances will mean that a refusal would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, Article 3, refugee convention or other obligations.
>
> Not all LOTR is granted for the same reason and discretion is applied in different ways depending on the circumstances of the claim and the applicant's circumstances….
>
> **Important principles**
>
> A grant of LOTR should be rare. Discretion should be used sparingly where there are factors that warrant a grant of leave despite the requirements of the Immigration Rules or specific policies having not been met. Factors raised in their application must mean it would not be proportionate to expect the person to remain outside of the UK or to leave the UK.
>
> The Immigration Rules have been written with clear objectives and applicants are expected to make an application for leave to enter or remain in the UK on an appropriate route under the relevant Immigration Rules and meet the requirements of the category under which they are applying – including paying any fees due.
>
> Considerations of whether to grant LOTR should not undermine the objectives of the rules or create a parallel regime for those who do not meet them.
>
> …
>
> The period of LOTR granted should be of a duration that is suitable to accommodate or overcome the compassionate compelling grounds raised and no more than necessary based on the individual facts of a case. Most successful applicants would require leave for a specific, often short, one-off period. Indefinite leave to enter or remain can be granted outside the rules where the grounds are so exceptional that they warrant it. Such cases are likely to be extremely rare. The length of leave will depend on the circumstances of the case. Applicants who are granted LOTR are not considered to be on a route to settlement (indefinite leave to remain) unless leave is granted in a specific concessionary route to settlement."

83. The process to be followed for an overseas application is as follows:

> "**Applying overseas for LOTR**

> Applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry clearance on their chosen route. Any dependants of the main applicant seeking a grant of LOTR at the same time, must be included on the form and pay the relevant fees and charges."

84. A revised version 2 of the guidance was issued on 9 March 2022. It contains new guidance in respect of ARAP:

> "**Afghanistan Relocations and Assistance Policy (ARAP)**
>
> Applicants (whether overseas or in the UK) cannot use the Afghanistan Relocations and Assistance Policy online application form to apply for leave outside the Immigration Rules. This form is only for relevant Afghan citizens who meet the requirements of the ARAP policy, as a principal applicant or a dependent family member of a relevant Afghan citizen who is eligible under the policy. Any application for LOTR should be made via a valid application on the application form for whichever other route most closely matches the applicant's circumstances."

Legal principles

Rationality

85. The test for irrationality was described by the Divisional Court (Leggatt LJ and Carr J.) in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649:

> "98. …. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see eg *Boddington v British Transport Police [1999] 2 AC 143*, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the

> reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

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

87. Inconsistency, unequal treatment, unfairness or arbitrariness in public decision-making are contrary to good administration, and may lead to a conclusion that a decision is irrational. However, such flaws are not to be treated as free-standing grounds for judicial review.

88. This distinction was clarified by the Supreme Court in *R (Gallagher Group Ltd) v Competitions and Markets Authority* [2018] UKSC 25, [2019] AC 96, per Lord Carnwath, as follows:

> "Equal treatment and fairness
>
> *The submissions*
>
> 19. It was central to the reasoning of both courts below that the OFT was subject (as Collins J put it) to "public law requirements of fairness and equal treatment". That analysis was not seriously challenged by counsel for the appellant in this court. They accepted that "the principle of equal treatment" applied to the OFT, but submitted that it did not require it to replicate a mistake, at least in the absence of "conspicuous unfairness". They rely on the approach of Lord Bingham in *R (O'Brien) v Independent Assessor* [2007] 2 AC 312, para 30:
>
> > "It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed. But the assessor's task in this case was to assess fair compensation for each of the appellants. He was not entitled to award more or less than, in his considered judgment, they deserved. He was not bound, and in my opinion was not entitled, to follow a previous decision which he considered erroneous and which would yield what he judged to be an excessive award."
>
> ……
>
> *Equal treatment*
>
> 24. Whatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of

administrative law. Consistency, as Lord Bingham said in the passage relied on by the appellant (para 19 above), is a "generally desirable" objective, but not an absolute rule.

…..

26. ….. in domestic administrative law issues of consistency may arise, but generally as aspects of rationality, under Lord Diplock's familiar tripartite categorisation.

27. The authorities cited by the respondents provide illustrations. The passage cited by Lord Pannick from Lord Sumption's judgment in *Bank Mellat (No 2)* (above) at para 25 was concerned directly with the question of proportionality under the European Convention on Human Rights, but it was expressed in terms which could be applied equally to common law rationality. Lord Sumption spoke of a measure which, while responding to a real problem, may nevertheless be "irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification". He gave as the "classic" illustration *A v Secretary of State for the Home Department* [2005] 2 AC 68, in which it was held by the House of Lords that a derogation from the Human Rights Convention permitting the detention of non-nationals considered a risk to national security, was neither a proportionate nor a rational response to the terrorist threat, because it applied only to foreign nationals; it was not explained why, if the threat from UK nationals could be adequately addressed without depriving them of their liberty, the same should not be true of foreign nationals. He quoted Lord Hope (para 132): "the distinction … raises an issue of discrimination…But, as the distinction is irrational, it goes to the heart of the issue about proportionality also."

28. At a more mundane level, *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin) …. concerned a statutory order under the Agricultural Wages Act 1948, which established a new category of worker, the Manual Harvest Worker (MHW), whose minimum wage was lower than that of a Standard Worker, but the order uniquely excluded mushrooms from the definition of produce the harvesters of which might be paid at the lower rate. This was challenged successfully by the mushroom growers. Having rejected as baseless the various reasons put forward for the distinction, the judge (Stanley Burnton J) concluded that there was no lawful justification for the exclusion of mushroom pickers from the lower rate. He cited inter alia Lord Donaldson's reference to the "cardinal principle of public administration that all persons in a similar position should be treated similarly" (para 74) (*R (Cheung) v Hertfordshire County Council,* The Times, 4 April 1986). He

concluded that the exclusion of manual harvesters of mushrooms from the MHW category was "*Wednesbury* unreasonable and unlawful", or in other words irrational.

……

Fairness

31. Fairness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law. Addition of the word "conspicuous" does not obviously improve the precision of the concept. Legal rights and remedies are not usually defined by reference to the visibility of the misconduct.

32. Simple unfairness as such is not a ground for judicial review. This was made clear by Lord Diplock in *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 637:

> "judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of *only as being unfair* or unwise, …" (Emphasis added)

33. Procedural fairness or propriety is of course well-established within Lord Diplock's trilogy. *R v National Lottery Commission, Ex p Camelot Group plc* [2001] EMLR 3, relied on by the respondents, is a good example. It concerned unequal treatment between two rival bidders for the lottery, one of whom was given an unfair procedural advantage over the other. That was rightly seen by Richards J as amounting to a breach of procedural fairness (see paras 69-70). Although he used the judgment to discuss principles of fairness in a wider context, that was not essential to his decision, which ultimately turned on the proposition that the Commission had "decided *on a procedure* that results in conspicuous unfairness to Camelot - such unfairness as to render the decision unlawful": para 84, emphasis added.

…..

41. In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson's words at para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles

> of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

89. In *R (Patel) v Secretary of State for the Home Department* [2012] EWHC 2100 (Admin), Mr John Howell QC (sitting as a Deputy High Court Judge) found unlawfulness by reason of failing to provide a 'rational reason' for treating the Claimant less favourably than others (at [141]). He said, at [114]:

> "The "principle of equality" thus simply means that distinctions between different groups or individuals must be drawn on a rational basis. It is thus no more than an example of the application of *Wednesbury* rationality …."

90. In *R (Hussain) v Secretary of State for the Home Department* [2012] EWHC 1952 (Admin), Mr James Dingemans QC (then sitting as a Deputy High Court Judge) said, at [46]:

> "There is an established principle of public law that "all persons in a similar position should be treated similarly", see Stanley Burnton J. in *R(Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 144 at [74], quoting Lord Donaldson MR in *R(Cheung) v Hertfordshire County Council*, The Times 4 April 1998. Any discretionary public law power "must not be exercised arbitrarily or with partiality as between individuals or classes potentially affected by it", see Sedley J. in *R v MAFF, ex parte Hamble Fisheries* [1995] 2 All ER 714 at 722a-b. One reason for that rule is that it provides consistency in decision making, and some certainty about the application of rules."

91. 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 and see also *R (Gurung) v Ministry of Defence* [2002] EWHC 2463 (Admin), a successful challenge on rationality grounds by Nepalese nationals and survivors of Japanese prison camps from their exclusion in the ex-gratia compensation scheme, having served in a Gurkha brigade.

Policies

92. As a general principle, a person's case falls to be considered according to the policy and criteria applicable as at the date of decision (*Odelola v SSHD* [2009] UKHL 25; [2009] 1 WLR 1230).

93. In *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098, Hickinbottom LJ held at [72]:

> "Therefore where there is a policy with published criteria against which the conferring of a potential benefit will be

> assessed, an individual is entitled to be assessed against the criteria which were in place at the time of the assessment, with a reasonable expectation that, if he satisfies them, he will obtain the benefit…."

94. The operation of an unpublished policy is procedurally unfair and unlawful: *R (Lumba) v SSHD* [2011] UKSC 12.

Procedural unfairness

95. It is well-established that procedural unfairness is a distinct ground for judicial review (see *Gallagher*, per Lord Carnwath at [33]).

96. The Claimant referred to *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 which concerned a challenge to the procedures adopted by the SSHD before and after the closure by the French Government in October 2016 of the tent encampment in Calais, known as 'the jungle'. The process was expedited in light of the time limitation for the demolition. Singh LJ held:

> "86. …It could be said that, because the expedited process was one which was entirely discretionary and which the Secretary of State had no obligation to introduce in the first place, the duty of procedural fairness did not apply. If that were the argument, I would not accept such a sweeping proposition of law. The point can be tested by reference to the facts of a case such as *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213, which concerned an ex gratia compensation scheme for civilians who had been interned by the Japanese during World War II. That ex gratia scheme of compensation was administered by reference to certain criteria which had been set out in exercise of the Royal Prerogative. There can be no doubt that the Government had no obligation to introduce any such scheme but the fact is that it had chosen to do so and it had set up for itself certain criteria which had to be met by an applicant before compensation was payable under the scheme. In those circumstances, if the Secretary of State had failed to act fairly, for example by failing to give a person any opportunity to make representations as to why he or she qualified for compensation according to the criteria set out in the scheme, that would appear to be a breach of a legal duty to act fairly. It seems to me that it would be no answer to say that the Secretary of State was under no obligation to set up the scheme in the first place. That is irrelevant to the question of whether fairness is required once the decision has been taken to set up such an ex gratia scheme."

Legitimate expectation

97. A legitimate expectation may arise from an express promise or representation made by a public body. We are not concerned here with the class of legitimate expectation that may arise from custom and practice.

98. In order to found a claim of legitimate expectation, the promise or representation relied upon must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G.

99. Bingham LJ's classic test has been widely approved and applied. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; [2009] 1 AC 453, Lord Hoffmann said, at [60]:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

100. The onus of establishing a clear, unambiguous and unqualified representation rests on the Claimant.

101. The Courts have given guidance on how Bingham LJ's test in *MFK* is to be applied. In *Paponette and Ors v Attorney General of Trinidad and Tobago* [2010] UKPC 32, Lord Dyson JSC, giving the judgment of the majority of the Board, said, at [30]:

> "As regards whether the representations were "clear, unambiguous and devoid of relevant qualification", the Board refers to what Dyson LJ said when giving the judgment of the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 56: the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made."

102. In *R (Patel) v General Medical Council* [2013] EWCA Civ 327, the court considered whether a statement made by the General Medical Council to the appellant was sufficiently clear, unambiguous and unqualified to give rise to a legitimate expectation. Lloyd-Jones LJ (with whose judgment the Master of the Rolls and Lloyd LJ agreed), confirmed that the test was one of "objective intention" (at [43]) and the statement had to be considered in the context in which it was made (at [45]).

Grounds of challenge

Ground 1

The application form

103. Under Ground 1, the Claimant challenged the procedural requirements imposed by the SSHD for her application for LOTR, which were set out in the GLD's letter of 13 December 2021, and confirmed in the letter of 24 December 2021.

104. The Claimant submitted that the SSHD acted irrationally in (1) refusing to accept as valid the Claimant's application for LOTR because it was made in her online application under ARAP, and (2) by requiring her to submit her application for LOTR in an online visa application form which did not match her circumstances. According to the SSHD's guidance, any compelling compassionate circumstances should be decided by reference to the Immigration Rule which most closely matches their circumstances. Merely entering "not applicable" in answer to questions on the form for a visa type for which she was plainly not eligible (as suggested by the GLD) would place her at an unfair disadvantage in the determination of her application.

105. The SSHD submitted that this issue had been resolved in their favour by the Court of Appeal in *S and AZ*. LOTR applications made on ARAP application forms were not valid as they had to be made on the online visa application forms, specified in the relevant LOTR guidance and the Gov.UK website.

106. In *S and AZ*, I upheld this submission by the Claimants, and held that this was an irrational requirement. My decision was overturned by the Court of Appeal. Underhill LJ held, at [25] to [27], that the ARAP application form was not one of the online visa application forms referred to in version 1.0 of the LOTR guidance, and therefore the Claimants had simply not submitted an application form at all. Furthermore, the ARAP relocation procedure was inapt for the determination of a LOTR application as MoD staff could not determine a LOTR application.

107. The Claimant in this case submitted that, despite the Court of Appeal's conclusions on the use of the ARAP application form, it remained open to her to argue that it was irrational that the only means of applying for LOTR is by using a form which had nothing to do with the actual basis of the application, relying on Underhill LJ's observations at [28] – [31], where he contemplated a possible irrationality challenge based on the use of inappropriate online visa forms and the absence of a separate form for LOTR applications.

108. However, since the Court of Appeal gave "careful consideration" to this point, but decided that it would not be appropriate to find irrationality on this basis, I do not consider that I can now find for the Claimant on this ground. In the light of the Court of Appeal's concern about the lack of a fully pleaded case and the absence of evidence, it is relevant to note that the Claimant in this claim relies upon very similar pleadings and evidence to that in *S and AZ* as all three claimants were represented by the same counsel and solicitors, and the three claims were originally listed to be heard together. The alternative case postulated by Underhill LJ was not pleaded in the

alternative in this case, nor was there any evidence, pleading or submission from the SSHD addressing it.

Biometrics

109. The Claimant submitted that the SSHD acted irrationally, and contrary to the relevant LOTR guidance, in refusing to accept the Claimant's application for LOTR, when the consequence was that the Claimant was not provided with a GWF Reference Number and so was prevented from making a biometric registration appointment at the VAC in Pakistan, following the closure of the VAC in Kabul.

110. In my judgment in *S and AZ*, I held:

> "135. The Claimants were also unable to proceed with their applications for LOTR in October and November 2021 because of the general rule that an application is not complete, and will not be considered, until biometrics are provided at a Visa Application Centre. However, the British Embassy in Kabul closed in August 2021, and since then there has not been a Visa Application Centre in Afghanistan. In my view, the Claimants and their dependants (including AZ's six young children and elderly mother, and S's paralysed husband) had a strong case for a deferral of the requirement to provide biometrics until such time as they could safely reach a Visa Application Centre in a third country, without being detected by the Taliban. Under regulation 5 of the Immigration (Biometric Registration) Regulations 2008, the SSHD has power to waive or defer biometrics testing. However, the application form in force at the time required applicants to identify the Visa Application Centre at which they intended to provide their biometrics, and made no provision to apply for a waiver or deferral. In my view, this was irrational and procedurally unfair.
>
> 136. The GLD advised the Claimants to resolve this problem by making a false entry on the form, by naming the Visa Application Centre at which they intended to provide biometrics, when they knew they could not do so. They were advised that they should then 'contact the Home Office and inform it of any difficulties they face enrolling their biometrics'. The GLD advised that 'using the form in this way … will not be used as adverse evidence in any decision-making process'. In my judgment, it was irrational for the GLD to expect the Claimants to take the risk of making a false entry on the form, given the penalties for making false statements in immigration applications, on the basis of such a limited and unenforceable assurance contained in a solicitor's letter. It was far from clear that Home Office officials would permit a subsequent amendment to the application to correct the false statement and apply for waiver/deferral instead, without any authorised procedure for doing so.

> 137. In my view, the rational and fair course of action was for the SSHD to amend the online form so as to include the option of applying for a waiver/deferral of biometrics testing. The SSHD has now done this, but only after the decisions in the Claimants' cases were made."

111. The Court of Appeal dismissed the SSHD's appeal against my decision on this ground. Underhill LJ said, at [33]-[34]:

> "33. I would broadly endorse that reasoning, though I would put the central point slightly differently. The Secretary of State declined to entertain the Claimants' applications, the substance of which was clear from their written representations, on the basis that they should have used one of the online VAFs. However, the position was that an application made by that route would not in fact be considered because the applicant could not conscientiously complete the biometrics application. That being so, it would plainly be irrational of the Secretary of State, subject only to the question of the workaround, not to depart from her normal policy and consider an application which was not made in that way.
>
> 34. As to the workaround, that involved the Claimant making an entry on the form which was not true. Ms Giovannetti submitted that the assurances given by the GLD that the Claimants would not be prejudiced by taking that course should have been sufficient to remove any objection to its adoption. I see some force in that: I may, as appears above, be rather more sanguine than the Judge about the risk of the Claimants being prejudiced by taking a course positively recommended by the GLD. But in my view the Judge was entitled to take the view that she did. The fact remains that the Claimants were being invited to say something on the form that was plainly wrong – and to do so in order to resolve a problem which was entirely of the Secretary of State's making. I can see why an applicant might be less than confident that they would suffer no ill consequences from following the workaround, whatever assurances were made. It is in the nature of institutional decision-making that different officials, possibly in different countries, may not when making a particular decision be aware of what has been said by colleagues in different contexts and on a different occasion."

112. The Claimant in this case received the same advice as *S and AZ*: see the GLD letters dated 13 and 24 December 2021 (paragraphs 59 and 61 of my judgment). However, the Claimant's circumstances were fundamentally different to those of *S and AZ*.

113. *S and AZ* could not safely cross the border to Pakistan (or any other third country) for biometric testing because they had to travel with their vulnerable dependants. If they named "Pakistan" as the VAC at which they would attend to provide their biometrics,

they would be making a false statement on the visa application form. That was the basis upon which their claims succeeded.

114. However, as the SSHD submitted, the Claimant was able to travel to Pakistan with her adult children in January 2022, and then again in about August 2022. The Claimant's case was that the SSHD was preventing her from giving her biometrics at the VAC in Pakistan by not accepting her application for LOTR as valid, and thereby not providing her with the necessary reference number to make a VAC appointment.

115. The Re-Re-Amended Statement of Facts and Grounds stated as follows:

> "108. It is respectfully submitted that on a plain reading of the applicable LOTR policy and an assessment of the Claimant's circumstances, it is clear that the ARAP application and, for the avoidance of doubt, the detailed representations including an invitation to consider the application under the applicable LOTR policy, amounted to a valid and policy compliant application for LOTR. As such, the SSHD was and remains under an obligation to ~~consider the requirement to waive~~ accept the application as valid in order to facilitate the Claimant being able to provide biometrics ~~now that she is as at present in Pakistan~~ and subsequently to determine the application under those policy criteria. The SSHD's refusal to do so is unreasonable and unlawful.
>
> 109. The practical consequence of the SSHD's refusal to treat the Claimant's LOTR application as valid is that the Claimant is deprived of a GWF Reference Number, without which she is entirely prevented from making a biometric registration appointment at the Visa Application Centre ('VAC') in Pakistan.
>
> 110. As detailed in the witness statement of Ms Marcela Navarrete, dated 23 March 2022, a GWF Reference Number is a prerequisite to accessing the on-line biometric appointment portal via the SSHD's contracted third party providers, TLS contact or VFS Global. Without a GWF Reference Number an applicant is unable to make an appointment at VAC to provide biometrics. This is expressly accepted by the Defendants (*para 9,Ds Reply dated 30 March 2022*).
>
> 111. It is not permissible for an applicant to attend a Visa Application Centre to provide biometrics without an appointment and without the necessary documentation and barcode, all of which are generated after and as a result of the GWF Reference Number being assigned."

116. It follows that, unlike *S and AZ*, the Claimant did not have to make a false entry on the visa application form. She was able to make a truthful statement that she would provide her biometrics at the VAC in Pakistan.

117. As the SSHD submitted, following the Court of Appeal's decision in *S and AZ*, the Claimant had not made a valid application for LOTR because she used an ARAP application form, not one of the online visa forms specified on the Gov.UK website and the relevant LOTR guidance. Therefore the SSHD did not err in law when she refused to accept her LOTR application as valid, with the inevitable consequence that the Claimant could not make an appointment to provide her biometrics at the VAC in Pakistan.

118. Therefore Ground 1 does not succeed.

Ground 2

Submissions

119. The Claimant was not called forward for evacuation during Operation Pitting, and she did not apply for evacuation at that time, as she was unaware of the scheme. However, the Claimant's case was that she could not rationally be distinguished from others who were granted LOTR under Operation Pitting. Her high profile as a women's rights activist, her work in the AIHRC, and her job as a high-ranking government official tackling corruption, placed her in priority evacuation groups under Operation Pitting. She met the criteria for evacuation under Operation Pitting, by reason of her contribution to the work of the British Government, and her vulnerability to Taliban attacks as a result. Therefore she submitted that she should now be given leave to enter the UK under the current policies of LOTR and/or ACRS.

120. The Claimant submitted that the Defendants treated the Claimant inconsistently in comparison with other women's rights/human rights activists, and government officials, who were prioritised for evacuation from Afghanistan. Her treatment was unlawful because the Defendants' systems and processes for identifying eligible individuals lacked coherence and they were procedurally unfair because the policy criteria were not published, which meant that applicants could not make meaningful representations. There was no justification for discontinuing the eligibility criteria adopted during Operation Pitting.

121. The Claimant also relied upon the guidance given on the Gov.UK web page titled "Support for British and non-British nationals in Afghanistan", published on 22 August 2021, which she contended gave rise to a legitimate expectation that (1) the Claimant met the criteria for priority evacuation groups, and (2) the Defendants' decision as to prioritisation within these groups, and her systems governing those decisions, would be made fairly and consistently.

122. The Claimant particularly relied upon the passages in the guidance which are set out below:

> "Guidance
>
> **Support for British and non-British nationals in Afghanistan**

As part of the evacuation effort, we continue to work at pace to assist people facing serious risk in Afghanistan.

British nationals

….

Non-British nationals

ARAP

……

Other prioritised groups

We are also prioritising the following groups:

- current or former Chevening Scholars
- people with existing leave or an open application for student, work and family visas
- journalists and those who worked with British news agencies
- members of civil society groups for women's rights
- Afghan government officials
- Officials working in counter-terrorism and counter-narcotics
- Employees of charities, humanitarian organisations and NCOs.

If you are a non-British national in Afghanistan ….. and in need of assistance, you should call [telephone number] ….

You should be prepared to provide as many details as possible including:

- your full name …
- your date of birth

…….

This helpline is not providing advice on eligibility for the full Afghan citizens' resettlement scheme and it is not for registering interest in the scheme. Please continue checking back on the Afghan citizen' resettlement scheme."

123. The Defendants' primary submission was that Ground 2 was premature and ought not to be decided, since the Claimant had not yet made a valid application for LOTR, and therefore the Defendants had not yet made a substantive decision on whether or not to grant the Claimant LOTR.

124. In the alternative, the Defendants relied upon the evidence of Mr Hall, pointing out that the evacuation had to be conducted at great speed and under very difficult conditions, including a limit on the number of plane seats available. Inevitably that meant that even some deserving candidates for evacuation would not be identified or called forward.

125. The Defendants did not make any commitment to identify, evacuate and/or grant LOTR to everyone in Afghanistan who potentially fell within the priority cohorts identified during Operation Pitting. In particular, the Defendants denied that they made any clear, unambiguous and unqualified representation in the guidance published on 22 August 2021, which related only to Operation Pitting, that everyone within the priority group descriptions would be evacuated, or that there was some ordered and coherent system in place to manage the prioritisation exercise. The application of the criteria identified by Mr Hall - contribution, vulnerability and sensitivity – was a matter for the Defendants to decide. Pursuant to a request for information under CPR Part 18, the Defendants disclosed information regarding the evacuations, including a table of some 35 anonymised women's rights activists, who were evacuated during Operation Pitting. The table describes their links/association to the British Government's mission in Afghanistan in general terms.

126. The policies and processes which applied during Operation Pitting ceased at the end of the evacuation on 28 August 2021. Thereafter, the normal policy and process for relocation and resettlement resumed, as formalised in the Home Office's Afghanistan Resettlement and Immigration Policy Statement dated 13 September 2021. The Defendants have honoured commitments made to those called forward who were not successfully evacuated in August 2021. Any other applications for leave to enter, under ARAP or LOTR should be considered according to the policy and criteria applicable as at the date of the decision.

Conclusion

127. As the Court of Appeal's judgment in *S and AZ* is binding authority for the proposition that the Claimant has not yet made a valid LOTR application, I consider that the appropriate way forward is for the Claimant to make a valid LOTR application now, relying on the impressive material which she has submitted in the course of these proceedings, and in support of her ARAP application. The SSHD's legal representatives have confirmed that such material, if submitted with the Claimant's application for LOTR, validly made, will be taken into account when considering her application for LOTR.

128. However, it will assist the parties if I resolve the dispute over the policy criteria which should apply to any future LOTR application. The general principle that a person's case falls to be considered according to the policy and criteria applicable as at the date of decision (*Odelola v SSHD* [2009] UKHL 25; [2009] 1 WLR 1230) applies in the Claimant's case. As I held in *S and AZ*, at [126], the Operation Pitting criteria for

LOTR ceased to be in operation once Operation Pitting came to an end on 28 August 2021. The Home Office's Afghanistan Resettlement and Immigration Policy Statement, dated 13 September 2021, confirmed the policies that would apply thereafter.

129. In my view, the SSHD was entitled, in the exercise of her discretion, to adopt a policy under which those who had been called forward, or otherwise authorised for evacuation during Operation Pitting, were granted leave to enter the UK, even after the end of Operation Pitting. As the SSHD explained, she was honouring commitments that had been previously made, and that was a reasonable distinction for her to make.

130. In my judgment, the Claimant has failed to establish that the statements made on the Gov.UK web page titled "Support for British and non-British nationals in Afghanistan", published on 22 August 2021, gave rise to a legitimate expectation that (1) the Claimant met the criteria for priority evacuation groups, and (2) the Defendants' decisions as to prioritisation within these groups, and her systems governing those decisions, would be made fairly and consistently. There was no clear, unambiguous and unqualified representation to that effect.

131. The guidance was issued by the SSHD during Operation Pitting and it was clearly intended to inform those affected of the steps being taken by the British Government to assist British nationals and non-British nationals who were at risk in Afghanistan, as part of Operation Pitting only. It was not intended for those seeking to apply for consideration under ACRS. I accept that the Claimant potentially came within one or more of the prioritised groups listed because of her work promoting women's rights, and as a government official. However, applying the test set out by Lord Dyson in *Paponette*, at [30], on a fair reading, the guidance could not reasonably have been understood as an offer to evacuate anyone in the priority groups, without regard to any selection criteria or practical limitations on the number of evacuation flights. Taken at its highest, it was an offer to consider for assistance those non-British nationals who were at risk, and fell within the priority groups, who contacted the help line listed. No representations were made as to the criteria or processes that the Defendants would apply in addressing any requests for assistance. It is common ground that the Claimant did not see this guidance at the time, and did not make any application for assistance.

132. Therefore Ground 2 does not succeed.

Final conclusion

133. The claim for judicial review is dismissed on both grounds.