Neutral Citation Number: [2023] EWHC 871 (Admin)

Case No: CO/491/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2023

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE KING on the application of GA — **Claimant**

- and -

(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS

(3) THE SECRETARY OF STATE FOR DEFENCE — **Defendants**

- -

Irena Sabic KC and Maria Moodie (instructed by **Wilson Solicitors LLP**) for the **Claimant**
Edward Brown KC and Richard Evans (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 7 March 2023

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Approved Judgment

This judgment was handed down remotely at 10am on Wednesday 19 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Hon. Mr Justice Bourne :

Introduction

1. The claimant, a national of Afghanistan, has told the Court that she is living in hiding and that the Taliban are searching for her because she is (1) a former employee of the Afghan Ministry of Justice who drafted criminal and family legislation, (2) a lawyer who has defended women and prosecuted men in cases relating to violence against women and has acted as a trial observer in terrorism trials, (3) a women's rights activist and (4) closely related to two individuals who were employed by the US military to protect their personnel. For that reason there is an order protecting her anonymity.

2. In this judicial review claim she challenges the defendant's operation and implementation of the Afghan Citizens Resettlement Scheme ("ACRS").

3. The claimant originally sought permission for four grounds of challenge. There are two surviving grounds, for which Lane J granted permission at a hearing on 21 June 2022 and which were subsequently amended with the court's permission. The material grounds and issues have been helpfully summarised in a joint list:

> "GROUND 3: ALLEGED UNLAWFUL OPERATION OF ACRS
>
> Issue 1: Are the Defendants acting unlawfully and/or irrationally in their operation of ACRS that frustrates the stated purpose of the policy as regards priority cohorts, regional focus and urgency arising from risk?
>
> Issue 2: Does the Defendants' operation of ACRS breach the Claimant's legitimate expectation, arising from the published policy statements regarding prioritisation and regional focus, of being able to access and be considered for eligibility under the scheme within a reasonable timescale relative to risk?
>
> GROUND 4: SSHD's EXERCISE OF DISCRETION
>
> Has the SSHD acted unlawfully and/or irrationally by failing and/or refusing to consider the exercise of her discretion to grant leave outside the Immigration Rules ("LOTR") to enter the UK, whether under ACRS or otherwise, to the Claimant based on her individual circumstances?"

4. However, although those are identified as the grounds and issues, the claimant's counsel Irena Sabic accepts in her skeleton argument that ground 4 stands or falls with ground 3. Accordingly the essential issues are those listed under ground 3.

5. Meanwhile those two issues share a common theme, which is that the operation of ACRS departs in an unlawful way from the stated purpose or purposes of the Defendant's overall policy or policies on relocation of individuals from Afghanistan. Ms Sabic accepts that she needs to show such a departure, or such a difference between the relevant policy documents, in order to succeed on either issue.

6. Therefore the entire focus of the claim is on a comparison between two policy documents or sets of policy documents.

Factual and policy background

7. The details of the claimant's life and career from 2012 onwards are not in dispute for the purposes of this claim. I work on the assumption that she faces a very serious threat from the Taliban.

8. From 1 April 2021, the UK Government had put in place the Afghan Relocations and Assistance Policy ("ARAP") for Afghan citizens who worked for or with the UK authorities in roles which exposed them to threats. It set out eligibility criteria for support including the possibility of relocation from Afghanistan to the UK. ARAP itself replaced pre-existing policies which had existed since 2010.

9. As is well known, the Taliban took control of Afghanistan in August 2021. Between 13 and 28 August 2021 there was a UK military programme to evacuate British nationals and other individuals, known as Operation Pitting. Details of that operation were set out by Lang J in *R (S and others) v Secretary of State for Foreign, Commonwealth and Development Affairs and others* [2022] EWHC 1402 (Admin).

10. On 18 August 2021, the Prime Minister announced the intention to create the ACRS.

11. On 6 September 2021 the Government published guidance which referred to the intention of the policy:

> "The Afghan citizens' resettlement scheme (ACRS) will provide protection for people at risk identified as in need. The eligibility requirements will be published in due course but will include those who have contributed to civil society or who face a particular risk from the Taliban. For example, because of their role in standing up for democracy and human rights, or because of their gender, sexuality or religion."

12. On 13 September 2021, two important documents were published. These more detailed documents effectively superseded the document published on 6 September. They set out the policy which the claimant alleges has not been properly implemented, or from which she alleges that there has been an unlawful departure.

13. The first, entitled *Afghanistan resettlement and immigration policy statement*, is known as "ARIP". It refers to a number of different strands of policy including ARAP and ACRS. In respect of ACRS eligibility, it stated:

> "2. 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.'
> …
>
> **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.

Further details on eligibility

28. The ACRS will be focused on people affected by events in Afghanistan, who are located in Afghanistan or in the region. … "

14. The second document published on 13 September 2021 was entitled *Afghan citizens' resettlement scheme*. It contained new guidance on ACRS, stating:

> "The Afghan citizens' resettlement scheme (ACRS) will provide protection for people at risk identified as in need.
>
> The scheme will prioritise:
>
> • those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights, freedom of speech, and rule of law
>
> • vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT+)
>
> Prioritisation and referral for resettlement will be in one of three ways:
>
> 1. Vulnerable and at-risk individuals who arrived in the UK under the evacuation programme will be the first to 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.
>
> 2. Secondly, the government will work with the UNHCR to identify people most at risk and refer them for resettlement, replicating the approach the UK has taken in response to the conflict in Syria.
>
> 3. Finally, the government will work with our international partners 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 process will likely be affected by the ongoing situation within Afghanistan.
>
>   The focus of the ACRS will be on those people who remain in Afghanistan or the region, primarily Afghan nationals although nationals of other countries, for example in mixed nationality families, will also be eligible …"

15. The claimant relies on these documents published in September 2021 as setting out a policy under which ACRS would prioritise those in a number of categories most of which most applied to her, i.e. those who had stood up for democratic values, women's rights and freedom of speech, those who had stood up for the rule of law and women and girls at risk.

16. ARAP was incorporated into the Immigration Rules from 1 April 2021. Although it is not directly relevant to the present claim, I note that the claimant made an application under ARAP on 29 October 2021 which was later reframed as an application for LOTR. That application remains outstanding, together with a request to waive or defer a requirement for biometric data supporting the application.

17. ACRS was formally launched on 6 January 2022. The following statements on the Government's website included important information about prioritisation and, on the claimant's case, mark the key departure from the policy as previously announced:

> "The scheme will prioritise:
>
> • those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights, freedom of speech, and rule of law
>
> • vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT+)
>
> The government will resettle more than 5,000 people in the first year and up to 20,000 over the coming years. We will work with the United Nations High Commissioner for Refugees (UNHCR) to identify those we should help. This is in addition to the Afghan Relocations and Assistance Policy (ARAP) scheme, which has already settled thousands of Afghans who have worked with the UK government, and their families.
>
> Anyone who is resettled through the ACRS will receive indefinite leave to enter or remain (ILR) in the UK, and will be able to apply for British citizenship after 5 years in the UK under existing rules.
>
> There is no application process for the ACRS. Prioritisation and referral for resettlement will be in one of 3 ways:
>
> 1. Vulnerable and at-risk individuals who arrived in the UK under the evacuation programme will be 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. The first Afghan families have been granted ILR under the scheme.
>
> 2. Secondly, from spring 2022, the UNHCR will refer refugees in need of resettlement who have fled Afghanistan. The UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. We will continue to receive such referrals to the scheme in coming years.
>
> 3. The third referral pathway will relocate 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 offer ACRS places to the most at risk British Council and GardaWorld[1] contractors, and Chevening alumni[2]. The Foreign, Commonwealth and Development Office will be in touch with those eligible to support them through next steps. Beyond the first year, the government will work with international partners and NGOs to welcome wider groups of Afghans at risk.

[1] GardaWorld is a company which provided security staff to guard the British Embassy in Kabul.
[2] "Chevening alumni" are those who have received international scholarships under a scheme funded by the FCDO to enable "outstanding emerging leaders from all over the world" to pursue one-year master's degrees in the UK.

> The focus of the ACRS will be on those people who remain in Afghanistan or the region, primarily Afghan nationals although nationals of other countries, for example in mixed nationality families, will also be eligible. Spouses, partners and dependent children under the age of 18 of eligible individuals will be eligible for the scheme. Other family members may be resettled in exceptional circumstances."

18. The claimant contends that the three ACRS referral pathways, and in particular the parameters of pathway 3, place restrictions on eligibility which are unlawful and inconsistent with the policy statements published in September 2021.

19. The judicial review claim was issued on 11 February 2022.

20. Further publications on the Government website provide a little more detail about the three ACRS pathways. On 13 June 2022 the guidance was further updated as follows:

> "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:
>
> 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.
>
> 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.
>
> 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."

21. It is common ground that the claimant is not eligible under pathways 1 and 2 and will not be eligible under pathway 3 in the first year of the scheme. That is stated in stark terms by a further publication on the website on 14 June 2022 containing guidance on how individuals can submit an "expression of interest" under ACRS:

> "This guidance refers to the first year of Pathway 3 of the ACRS. Under this pathway, the government will offer places to eligible at-risk individuals from these groups in Afghanistan or the region:
>
> • British Council contractors

> • GardaWorld contractors
>
> • Chevening alumni
>
> People in these groups directly supported the UK and international community's efforts in Afghanistan. If you are not a British Council contractor, GardaWorld contractor or Chevening alumnus, you will not be eligible for Pathway 3 in year one."

22. On 5 July 2022, following the commencement of ACRS pathways 2 and 3 on 13 and 20 June 2022, the claimant sent a further pre-action protocol letter notifying her challenge to the operation or implementation of ACRS.

23. That challenge was introduced by amendment of the judicial review claim on 1 August 2022, before the claimant's claim was further amended into its current form on 26 October 2022. No issue is raised about the timing of the claim.

Ground 3, Issue 1

24. By her pleaded case, the claimant complains that the "exclusive and narrowly defined Pathways that serve to implement the policy by granting access to and consideration under the scheme fail to fairly and reasonably give effect to core policy intention repeated within statements published since September 2021 regarding those who would principally be prioritised as eligible under the scheme".

25. Her complaint is not that she has not been offered relocation under ACRS, but rather that under the scheme's restrictive criteria she cannot even submit an expression of interest or be considered.

26. Her counsel, Irena Sabic, submits that when Government publishes a policy with stated aims, it must as a matter of public law rationally and fairly give effect to those stated aims.

27. What is meant by "rationally"? Ms Sabic submits that a policy of the kind in question, which has potential life-and-death consequences for individuals, interferes with fundamental rights, and that in those circumstances the Court does not apply the conventional *Wednesbury* standard. Rather there is a heightened standard of review, requiring decision makers to demonstrate a proper justification for their decisions. She cites *R (BAL and others) v Secretary of State for Defence and another* [2022] EWHC 2757 (Admin). That case concerned the family members of an Afghan judge. The judge and his wife were given relocation to the UK under ARAP, but their offspring's applications for discretionary "leave outside the rules" to enter the UK ("LOTR") were refused. In that context, Steyn J said:

> "85. There is no dispute as to the applicable principles. It is not for the court to stand in the shoes of the decision-maker and substitute its own view. A decision may be held to be 'irrational' where the decision is outside the range of reasonable decisions open to the decision-maker. Or a decision may fail the test of rationality because the reasoning process is flawed so as to rob the decision of logic. The 'common law no longer insists on a single, uniform standard of rationality review based on the virtually

unattainable test stated in the *Wednesbury* case [1948] 1 KB 223'; the Supreme Court has 'endorsed a flexible approach to principles of judicial review, particularly where important rights are at stake': *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, Lord Carnwath JSC at [60], Lord Mance JSC at [98], and Lord Sumption JSC at [109]- [110].

86. In *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] 1 AC 514, Lord Bridge observed at 531F-G: 'The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'

87. It is common ground that in this case, which concerns the risk that the second to fifth claimants will lose their lives, or be subjected to torture or other serious harm, if they are not able to join their parents in the UK, the court is required to scrutinise keenly the application of the policy to them and the reasons given for the challenged decisions."

28. For the obligation to give effect to stated policy aims, Ms Sabic cites *Mandalia v SSHD* [2015] UKSC 59, [2015] 1 WLR 4546. There, an applicant for an extension of leave to remain in the UK was required by the Immigration Rules to produce bank statements showing a minimum balance for a 28 day period, but produced only a statement for a 22 day period. Published policy included an instruction to caseworkers, where an application faced refusal "solely on the absence of a piece of information which they had reason to believe existed" (an example of which was said to be "bank statements missing from a series"), to ask the applicant for the missing information before determining the application. Instead, the applicant's application was simply dismissed. The Supreme Court allowed his appeal. Lord Wilson (with whom the other Justices agreed) said at [29]:

> "… the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]:
>
> > 'Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.'"

29. Lord Wilson also quoted the simple proposition of Lord Dyson in *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245:

> "… a decision-maker must follow his published policy … unless there are good reasons for not doing so".

30. Ms Sabic also relies on dicta from *R (Association of British Civilian Internees: Far East Regions) v Secretary of State* [2003] QB 1397 ("*Abcifer*"). The case arose from an announcement in 2000 of an ex gratia scheme to compensate "British" civilians who had been interned by the Japanese in the Second World War and to whom the UK thereby owed a "debt of honour". It was then announced in 2001 that only those who were born in the UK or who had a parent or grandparent born in the UK would benefit. Some who were British subjects at the time of their internment were thereby excluded, even where they had subsequently acquired a close link with the UK. The claimants claimed that the criteria, which disregarded subsequently acquired links with the UK while also excluding claims for other post-internment reasons (such as being eligible for compensation from another country) were irrational and that they defeated a legitimate expectation arising from the original announcement. The claim failed, the Court of Appeal holding that it was not irrational to limit the scheme to those with a close link to the UK at the time of internment and thus to deny it to others even where they had such a close link at the date of their application. Giving the judgment of the Court, Dyson LJ (as he then was) said:

> "… the distinctions drawn by the Government do not disclose any irrationality. The basic criterion of a close connection with the UK at the time of internment remains as the factor which controls the scheme. It is permissible to admit an exception to this governing criterion where there is a justification for doing so which is rational and does not destroy the very foundation of the scheme."

31. The claimants in *Abcifer* went on to argue that the birth criteria were irrational because they were not sufficiently connected with the policy aim of compensating those who had close links with the UK at the time of their internment, and produced arbitrary results. The Court considered evidence in which the Defendant's officials explained the reasoning that led to the adoption of the criteria, and held that the criteria were a rational means of demonstrating the necessary links.

32. For completeness I note that the legitimate expectation claim in *Abcifer* also failed, because the original announcement did not contain a sufficiently unambiguous representation that all those who were British subjects when interned would be entitled to compensation.

33. Ms Sabic compares and contrasts the present case with *Abcifer*, arguing first that the restrictive nature of the ACRS pathways are an exception to the governing criteria as set out in the earlier policy announcements and that they lack a rational justification, and second that the defendants in the present case have not adduced evidence to explain their reasoning for introducing the ACRS pathways.

34. In relation to the need for evidence, she refers also to *R (FH) v SSHD* [2007] EWHC 1571 (Admin), which was a challenge to the time taken to decide a number of asylum claims. Collins J said at [11] that when deciding whether the time taken was irrational, and where the delay on its face gave grounds for real concern:

> "Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has

decided to deal with the relevant claims and the resources put into the exercise are reasonable."

35. Pulling those strands together, Ms Sabic submits that repeated policy statements such as those on 6 and 13 September 2021 made clear that the intention behind ACRS was and is to offer resettlement to those who have stood up for, inter alia, women's rights and to those who are vulnerable, including women and girls, and to prioritise those who are trapped in Afghanistan or the region. She emphasizes the language of commitment in the ARIP policy document in phrases such as "the scheme will prioritise …" in the key paragraph 23. Whilst paragraph 27, referring to what would become pathway 3, said that the category "may" include those such as women's rights activists, prosecutors and others at risk, she submits that that merely recognised that cases would have to be considered individually.

36. However, Ms Sabic submits, the three ACRS pathways announced on 6 January 2022 fail to implement those policy intentions. Eligibility under pathway 1 flows directly from prior commitments, made during Operation Pitting, to grant LOTR to a limited number of individuals. Pathway 2 applies only to those who have managed to escape Afghanistan and have registered with UNHCR in a third country. For those such as the claimant, who are still in Afghanistan and who were not "called forward" in Operation Pitting, that leaves only pathway 3. But that pathway, in the first year of ACRS, is confined to British Council and GardaWorld contractors or recipients of Chevening scholarships.

37. Given the risks faced by those such as the claimant and the urgency of their need for relocation, Ms Sabic submits that to delay their access to ACRS is irrational and infringes the principle of effectiveness. The restrictive terms of pathway 3 are an irrational departure from the policy of prioritising precisely such individuals. That departure, she submits, is also unjustified. No evidence has been adduced which sets out any justification. Any justification must therefore be found in the policy itself. The ACRS policy document of 13 September 2021 stated that a referral process would be developed with international partners, and to that extent it could justify taking a reasonable time to implement the policy, but that did not justify excluding most potential beneficiaries of the policy from pathway 3. There is no explanation, in evidence or elsewhere, of the exclusion of any such individuals who are not British Council or GardaWorld contractors or Chevening alumni.

38. Ms Sabic submits that the effect of the exclusion is seen particularly clearly in the claimant's case. Whilst she has most of the characteristics which the ARIP policy identified as relevant, she is presently excluded from consideration and there is no indication of whether, or when, that might change.

Ground 3, issue 2

39. This second issue is an alternative way of contending that effect must be given to the ARIP policy statements quoted above.

40. The claimant's pleaded case is that the policy statements from September 2021 onwards contained "clear and unambiguous assurances regarding eligibility and

prioritisation of women, of those who stood up for the rule of law, democracy, women's rights and the freedom of speech and of those who remain in Afghanistan and the region", and thereby gave rise to a legitimate expectation that she – as a person fitting that description – would at least be considered for eligibility once ACRS became operational.

41. However, under ACRS as implemented, she is prevented even from submitting an expression of interest.

42. It is common ground that the circumstances in which a legitimate expectation may arise were stated by Lord Kerr in *Re Finucane's application for judicial review* [2019] UKSC 7; [2019] 3 All ER 191 at [62]:

> "… where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so."

43. Ms Sabic submits that the policy statements were clear and unambiguous representations, giving the claimant a legitimate expectation that she would at least be able to apply for relocation under ACRS, and that it was unfair for the defendant to resile from those representations by framing the pathways in the restrictive terms which presently exclude her.

The Defendant's response

44. For the defendant, Edward Brown KC submits in summary that the ACRS (1) is not being operated unlawfully or irrationally, and (2) is being operated in the spirit of the policy statement made on 13 September 2021.

45. To establish the meaning of the policy, Mr Brown relies on the uncontroversial propositions that policy announcements should be construed not with the strictness applicable to legislation but sensibly, according to the natural and ordinary meaning of the words used, looking at the policy as a whole and in its factual context. If any authority is needed, see *R (KA) v SSHD* [2022] EWHC 2743 (Admin) at [148]-[150].

46. Mr Brown submits that the policy statements of September 2021, so construed, are consistent with the way in which the ACRS scheme has been implemented, and did not give the claimant any legitimate expectation that she would be found eligible under the scheme. But even if the announcement on 6 January 2022 marked a change, it is open to Government to change its policies whenever it considers that it is in the public interest to do so: see *R (Munir) v SSHD* [2012] UKSC 32, [2012] 1 WLR 2912 at [19].

47. The Defendants rely on the witness statement of Elloise Gordon, the first defendant's policy lead for ACRS. Her statement sets out the three pathways. As to pathway 3, Ms Gordon states:

> "On 6 January 2022 it was announced that in the first year of this pathway, the government will offer ACRS places to eligible British Council and GardaWorld contractors and Chevening alumni, to whom commitments were made by the government. There are 1,500 places available in the first year under Pathway 3."

and:

> "Beyond the first year of Pathway 3, the government will work with international partners and NGOs to welcome referrals for wider groups of Afghans at risk – the policy beyond the first year of the third pathway is still under development and no decisions on eligibility have been made"

48. Ms Gordon also explains that the scheme:

> "… will not have the capacity to accept all Afghan nationals who are at risk, and does not guarantee that all the members of any particular group or profession will be accepted for re-settlement."

49. Mr Brown submits that that simple explanation and the policy documents themselves contain any necessary justification.

50. In respect of the intensity of the Court's review, Mr Brown resisted the suggestion that this case calls for anxious scrutiny or a heightened standard of review. That standard was applied in *BAL* because the Court was reviewing decisions, namely refusals of applications, which could endanger the lives of individuals. It did not follow that the same approach was required in this case, which is a challenge to the framing or implementation of a general policy and not to any decision on an individual application.

51. So, applying the traditional *Wednesbury* test, Mr Brown submits that it cannot be said that no reasonable Secretary of State could have implemented ACRS by way of the identified pathways. It is indisputable that the situation in Afghanistan affects a great number of people, not all of whom can be assisted within a specific timescale. The framing of the pathways was a reasonable means of organizing the scheme. Its effect, he submits, is not to be equated with delay in assessing an individual's asylum application, still less with the kind of prima facie culpable delay which was held to call for an explanation in the case of *FH*.

52. In respect of issue 2, Mr Brown succinctly submits that the claimant's attempt to rely on a legitimate expectation falls at the first of the hurdles identified in *Finucane*. The defendants did not make any "clear and unambiguous" representation (or any representation) that the claimant would be entitled to have her case individually considered under ACRS, within any specific timescale or at all.

Discussion

53. It is convenient to deal with that second issue first. The parties are agreed on the test for a legitimate expectation. The recent cases refer to the classic statement in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 per Lord Justice Bingham at 1569G: the promise or representation relied upon must be "clear, unambiguous and devoid of relevant qualification".

54. I agree with Mr Brown that the defendants did not make a clear, unambiguous and unqualified representation that the claimant would be entitled to have her case individually considered under ACRS, within any specific timescale or at all.

55. The two documents published on 13 September 2021 must be read as a whole. Collectively they contain the following information:

    i. There was a policy intention to prioritise those who "have assisted the UK efforts in Afghanistan and stood up for values" including democracy and women's rights among others.

    ii. There was a policy intention to prioritise vulnerable people, including women and girls at risk.

    iii. It was known that the scheme would be over-subscribed.

    iv. The intention was to work with partners to select and refer beneficiaries rather than to have an application process.

    v. Pathway 3 would be for individuals "who supported the UK and international community effort in Afghanistan". Women's rights activists and prosecutors were mentioned as examples of people whom that category "may include".

    vi. The details of the process remained to be finalised.

    vii. The focus of the ACRS would be on those people who remain in Afghanistan or the region.

56. The recognition that the scheme would be over-subscribed meant that no individual could be guaranteed a place.

57. From the decision to create a referral process rather than an application process, it was clear that nobody would have a right to make an application.

58. Those two points, by themselves, prevent the claimant from proving the legitimate expectation on which she relies.

59. But in addition, it was repeatedly stated that there would be a focus on those who had directly assisted the UK or its international partners in Afghanistan. The claimant does not fit that description so closely that she could expect, with confidence rather than just hope, to benefit from the scheme. That does not mean that she is not in great danger. Nor am I questioning her contribution to the democratic values which the UK and its partners sought to uphold in Afghanistan. However, whilst her contribution identifies her as one of those who "may" be included in the pathway 3 cohort, the policy documents simply did not state that she, or others like her, would definitely be included or included from the start.

60. In addition to that, any expectation of inclusion (or immediate inclusion) on the part of the claimant or any other individual was at the very least qualified, in my judgment, by the clear statement that the details of pathway 3 remained to be determined. That policy

statement, read in the context of the extraordinary difficulty and sensitivity of this policy area, expressly disavowed any "clear and unambiguous representation" to anyone who had not been evacuated or called forward during Operation Pitting.

61. For those reasons the claimant has failed to establish a legitimate expectation.

62. I return to the first issue, of whether the announcement of 6 January 2022 marked an irrational or unlawful departure from, or inconsistency with, the policy statements of September 2021.

63. The first question is the standard by which rationality is to be decided.

64. It is axiomatic that in a rationality challenge, the intensity of review will vary according to what is at stake. That was recognised by Lord Bridge in *Bugdaycay*, as quoted in the extract from *BAL* above.

65. Whilst the effect on the fundamental rights of one or more individuals is the key consideration, I do not accept that this principle is limited to reviews of decisions in individual cases. A wider policy decision may determine what the decision in any individual case will be, as the present case demonstrates. So in *R v MoD ex p Smith* [1996] QB 517, the policy of excluding gay people from the Armed Forces was challenged on rationality grounds, alongside the decisions to discharge individual claimants. The Court of Appeal, per Sir Thomas Bingham MR at 554, accepted that the test was correctly framed as follows:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

66. That, however, was not the only consideration. The Master of the Rolls added at 556:

> "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations."

67. In the present case there are factors pulling both ways. It is true that the policy decision setting the parameters of pathway 3 may have life-and-death consequences for individuals and therefore affected fundamental rights. But that decision also depended on expert knowledge about the situation in Afghanistan and the relative strength of the claims for protection by different groups of people. Unavoidably, it required the making of choices of a painfully invidious nature. It also touched on security

considerations. The subject matter was indeed remote from ordinary judicial experience.

68. In those circumstances I am not persuaded that the rationality test is modified in any way which realistically could change the outcome of this case. The task of the Court is to scrutinise the evidence and, having due regard to the seriousness of the subject matter while also allowing an appropriate margin of appreciation to those with expert knowledge, to decide whether the parameters of ACRS were set in a way which was open to a reasonable decision maker.

69. The next question is whether those parameters, as announced on 6 January 2022, can properly be viewed as a change from the previously published policy.

70. In my judgment they cannot. In September 2021 it was announced that the details of pathway 3 remained to be determined; on 6 January 2022 it was announced that they had been determined for the first year of operation. Essentially the latter announcement merely answered the question of how the authorities would begin to decide which of many deserving people would benefit from an over-subscribed scheme.

71. I am therefore not greatly assisted by authorities such as *Mandalia*. As the quotation above from *WL Congo* shows, those cases are not really about any requirement for policies to be interpreted and applied in light of statements of intention. Rather, they make the simpler point that published policy must be followed unless there is good reason to do otherwise. In the present case, as I have said, I see no departure from published policy.

72. That leaves Ms Sabic's submission that the implementation or operation of ACRS was irrational or ineffective because it was inconsistent with the scheme's aims.

73. When reviewing the qualifying criteria for beneficial entitlements, the Court will in principle decide whether the criteria are rationally or logically connected to the objectives of the scheme in question. *Abcifer* is an example of that process.

74. Ms Sabic placed particular emphasis on the lack of evidence adduced by the defendants to justify the parameters of pathway 3. She submitted that an approach of anxious scrutiny would heighten the requirement for such a justification to be advanced.

75. That last point has troubled me. It would not have been difficult or burdensome for the defendants to state in evidence the reasons why British Council and GardaWorld contractors and Chevening alumni were adjudged to merit priority treatment. Given the considerations referred to in paragraph 67 above, it seems unlikely that the Court would go behind such a statement. It is unsatisfactory that, in the absence of any such statement, the justification is left to be deduced from the policy announcements themselves or inferred from the known circumstances.

76. Nevertheless, the claimant has the prior burden of showing that the decision is at least arguably inconsistent with the scheme's objectives.

77. In my judgment that burden has not been discharged. The policy announcements, read as a whole, make it clear that priority was and is to be given to those who have

supported the UK and international effort in Afghanistan, including individuals who have stood up for values such as democracy and women's rights.

78. That objectively justifies the choice of the three groups included in pathway 3. They all have a strong and obvious connection with the UK or, as the further guidance on 14 June 2022 put it, "directly supported the UK and international community's efforts in Afghanistan". Individuals in those groups are obviously at very serious risk. It cannot be said, and indeed the claimant does not suggest, that it was irrational to extend help to those groups of people.

79. The guidance published on 13 June 2022 added the important detail that there will be only 1,500 places in this cohort in the first year, including dependants. That emphasizes the need to make restrictive and painful choices which would exclude some deserving individuals.

80. Although the policy announcements have repeatedly referred to the intention to help women's rights activists, those who worked to further democratic values in the Afghan legal system and otherwise and vulnerable women and girls, I cannot interpret those announcements as making a commitment to helping, in the first year of the scheme, any minimum quantity of individuals who fit any of those descriptions but who were less directly connected with the activities of the UK or its international partners. Pathway 3 therefore does not breach any such commitment.

81. That conclusion is reinforced by reading the ACRS policy as a whole, because it is clear that at least some such individuals will be helped under pathway 1 or pathway 2. The policy as a whole does not exclude any category containing the claimant, although she unfortunately will not qualify in the first year.

82. For those reasons I conclude that the implementation of ACRS was not unlawful, and that would be my conclusion whether or not a heightened standard of anxious scrutiny is applied.

Ground 4

83. By ground 4 the claimant contends that the defendant has unlawfully and unreasonably refused to consider exercising in her favour a discretion to relocate her to the UK. The refusal is said to be unlawful because of the matters identified in ground 3 and so, as I have said, Ms Sabic accepts that ground 4 stands or falls with ground 3. In those circumstances it is unnecessary to give separate consideration to ground 4.

Conclusion

84. Nothing in this judgment is intended to call into question the extraordinary courage of those who have stood up for democratic values in Afghanistan or the dangers which face them. As I have said, decision makers in this area are faced with profoundly difficult and painful choices. There being no error of law in the relevant decisions, the claim for judicial review must be dismissed.