Neutral Citation Number: [2023] EWCA Civ 178

Case No: CA-2022-001790

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Administrative Court and Planning Court
Mrs Justice Hill
[2022] EWHC 2156 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2023

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE SIMLER
and
LORD JUSTICE WARBY

- -

Between :

JZ	**Appellant**
- and -	
(1) 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**	**Respondents**

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Sonali Naik KC, **Irena Sabic** and **Emma Fitzsimons** (instructed by **Wilsons Solicitors LLP**) for the **Appellant**
Edward Brown KC and **Hafsah Masood** (instructed by **the Treasury Solicitor**) for the **Respondents**

Hearing date: 2 February 2023

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. There are two applications before the Court, one for permission to appeal and the other to re-open an earlier refusal of permission to appeal against a related decision in the same proceedings. In view of the nature of the applications I need set out the background only in outline.

2. The Applicant is an Afghan judge. From 20 July 2008 to 30 May 2011 he was a first-instance judge assigned to the "Public Security" bench hearing terrorism cases. He sat at the Justice Centre in Parwan ("the JCIP") at Bagram Air Force Base and also in a Public Security court which sat at the Pol-e-Charkhi prison in Kabul. Most of the cases involved insurgents and Taliban fighters who had been arrested by the International Security Assistance Force ("ISAF"). In May 2011 he was transferred to the Appeal Court in Kabul, where he did not hear terrorism cases. He was still in that post in August 2021 when the Taliban took control. It is not disputed that he is at serious risk from the Taliban, and he is at present in hiding in Afghanistan.

3. By solicitors' letter dated 9 September 2021 the Applicant asked to be relocated under the Afghan Relocations and Assistance Policy ("ARAP"). The first stage in an ARAP application is for the applicant to be "sponsored" by a UK Government entity for or alongside which he or she worked in Afghanistan prior to the Taliban take-over. The Applicant's potential sponsors were the Foreign, Commonwealth and Development Office ("the FCDO") or the Ministry of Defence ("the MoD"). By a decision dated 18 October the FCDO declined to sponsor his application. That decision was reaffirmed in a letter from the Government Legal Department dated 24 November, which also confirmed that the MoD had likewise declined to sponsor the Applicant.

4. By the same solicitors' letter the Applicant asked for leave to enter outside the Immigration Rules ("LOTR"). In relation to LOTR the decision-maker is the Home Secretary. That request has not been granted: I need not give the details.

5. On 30 November 2021 the Applicant issued the present proceedings seeking judicial review of the decisions of the relevant Secretaries of State in relation to the ARAP and LOTR applications (pleaded as grounds 1 and 2 respectively). In relation to the ARAP application he challenged both the 18 October and the 24 November decisions. Although all three Secretaries of State were Defendants, and are formally the Respondents before us, we are in these applications in substance only concerned with the decisions of the FCDO.

6. On 8 December 2021 Lane J refused permission to apply for judicial review. At an oral hearing on 15 December Kerr J maintained that refusal as regards the challenge to the ARAP decision but granted permission to challenge the LOTR decision.

7. The Applicant applied for permission to appeal against Kerr J's refusal as regards the ARAP decision. That was refused by Lewis LJ on the papers on 28 February 2022.

8. Although Lewis LJ's refusal of permission to appeal was on the face of it the end of the road for the challenge to the ARAP decision, the judicial review proceedings remained live because of the grant of permission as regards the LOTR decision. On 5

April 2022 Lieven J granted the Applicant permission to amend the claim form to add a challenge to the ARAP decision on a fresh ground and to pursue that challenge: that decision was later referred to in the proceedings as "JZ no. 1".

9. In response to that amendment and further material filed by the Applicant in connection with the proceedings the Respondents convened a panel to reconsider his ARAP application. By a decision dated 26 May 2022 the application was again refused. There is no challenge to that decision in these proceedings. I will, however, quote a passage from it which clearly expresses the approach which not only that panel but also the makers of the previous decisions believed was required by ARAP:

> "The panel recognised the important contribution certain judges in Afghanistan made to counter-terrorism efforts. The panel approached the issue carefully and having regard to all of the circumstances and evidence. The panel however decided that a general contribution to such efforts is not sufficient to qualify under ARAP in the absence of a clear and direct link to HMG and its mission. The additional evidence did not justify a different decision. Taking into account all the additional evidence, the panel noted that the JCIP was not supported by the UK, and that while the additional evidence demonstrated JZ's role in tackling counterterrorism in Afghanistan, it was not possible to conclude that JZ worked alongside HMG in a role that made a material contribution to HMG's mission in Afghanistan."

10. The amended challenge to the ARAP decision first came before Hill J on 8 and 9 June 2022. That was intended to be the substantive hearing of the judicial review application, but it was in the event devoted to determining an application under Part 18 of the Civil Procedure Rules ("the CPR") for further information about the Respondents' case. By a judgment dated 1 July ("JZ no. 2") Hill J granted the application in part and directed the Respondents to answer four questions. The further information was supplied by the Respondents on 18 July.

11. The adjourned hearing of the substantive claim took place on 25 July 2022, i.e. a week after the provision of the further information. The Applicant sought permission to adduce further evidence in response to that information, in the form of a (fifth) witness statement from the Applicant's brother, SQ ("SQ5"). SQ lives in this country but is in contact with the Applicant and is a channel of communication between him and his solicitors.

12. On 12 August 2022 Hill J handed down a clear and thorough judgment dismissing the claim for judicial review ("JZ no. 3"). As part of that decision, she refused to admit SQ5.

13. The Applicant has applied to this Court for permission to appeal against the dismissal of his claim. He also contends that the further information supplied on 18 July 2022 constitutes a ground for re-opening Lewis LJ's refusal of permission on the original ground 1, and he has made the appropriate application under rule 52.30 of the CPR.

14. On 12 December 2021 I directed that both those applications be determined at an oral hearing, with the opportunity for the Respondents to make submissions. The Applicant has been represented by Ms Sonali Naik KC, leading Ms Irena Sabic and

Ms Emma Fitzsimons, all of whom appeared before Hill J. The Respondents have been represented by Mr Edward Brown KC, leading Ms Hafsah Masood. At the conclusion of the hearing we reserved our decision.

THE APPLICATION FOR PERMISSION TO APPEAL

15. I start with the relevant provisions of ARAP. These are set out in full at para. 8 of Hill J's judgment. For present purposes it is only necessary to record that there are four potential categories for eligibility for relocation. The first three cover current and former Locally Employed Staff in Afghanistan. At the material time category 4, which is the one relied on in the Applicant's case, was defined as follows:

> "The cohort eligible for assistance on a case-by-case basis are those who worked in meaningful enabling roles alongside HMG, in extraordinary and unconventional contexts, and whose responsible HMG unit builds a credible case for consideration under the scheme (in some cases this includes people employed by contractors to support HMG defence outcomes)."

It will be seen that that is in one sense an exceptional category, because it covers people who were not employed by the UK government but who worked "alongside" it. (The "building of a credible case for consideration" is a reference to what I have referred to as "sponsoring".)

16. It is clear from the evidence that the relevant Department in relation to the sponsorship of judges, at least on the basis advanced by the Applicant, is the FCDO, and the submissions before us focussed on the decision of 18 October 2021. This was taken by the Head of Counter Terrorism Afghan Taskforce ("the decision-maker"). As he states in the written reasons for his decision, he reached his conclusion on the basis of a bundle of evidence submitted on behalf of the Applicant, together with his own knowledge developed through heading the counter-terrorism team at the British Embassy in Kabul from January to August 2021 and information obtained by his team from Afghan judges already relocated to the UK.

17. The reasons for the decision were, in summary, that the decision-maker did not accept that the Applicant had worked for or alongside any UK government entity. Para. 6 of his reasons reads:

> "I have no evidence to lead me to believe that [Z] was an employee of Her Majesty's Government, nor does it refer to work alongside or in cooperation with HMG units. The Justice Centre in Parwan was not a UK or HMG led intervention and from June 2010 was indeed an Afghan institution – albeit one that benefitted from extensive donor support."

Para. 7 reads:

> "Based on the evidence reviewed, it does not appear to me that [the Applicant] made a material contribution to HMG's mission in Afghanistan. The UK's capacity building effort around

> justice and the rule of law over the last nine years was focused in Kabul – that was also the focus of HMG's counter terrorism mission in Afghanistan. As [the Applicant] does not claim to have worked in the Anti-Terrorism Courts within Kabul he did not make a material contribution to HMG's mission there."

18. The challenge to that decision before the Judge (so far as relevant to the proposed appeal) was that it was irrational because it was inconsistent with the decision by the FCDO to sponsor eleven other judges under ARAP ("the comparators"), who were in due course relocated to this country. It was common ground that a challenge on that basis was admissible in law to the extent recognised in *Gallaher Group Ltd v Competition and Markets Authority* [2019] UKSC 25, [2019] AC 96. All the comparators were working in the Anti-Terrorism Court in Kabul at the time of the Taliban take-over. The Applicant relied on a witness statement from one of them, Judge W, as evidence that his position was materially indistinguishable from the Applicant's.

19. The broad outline of the Respondents' case as regards the judges who had been found eligible under category 4 of ARAP was stated in a letter from the Treasury Solicitor dated 20 October 2021, which said:

> "[T]hose approved under…category [4] (on a case-by-case basis) have included a number of Afghan judges who were publicly known to have co-operated with the UK or had been involved in highly sensitive cases of particular UK interest (including national security) and were at significant risk as a result."

In a witness statement dated 9 June 2022, the Deputy Ambassador at the relevant time, Alexander Pinfield, said:

> "HMG began providing assistance to this Court [sc. the Anti-Terrorism Court in Kabul] after the introduction of Annex 1 to the Criminal Procedure Code in 2015. HMG developed substantial links with partner judges through the Counter Terrorism Team in particular."

20. Question 2 of the Request for Further Information referred to above asked the Respondents to "describe in brief terms what evidence there was that each judge 'worked alongside' HMG". The answer was:

> "From 2015 onwards, HMG developed a partnership with some judges serving in the Anti-Terrorism Court in Kabul. All 11 judges that were resettled due to their role in presiding over terrorism trials were involved in this partnership, although the full circumstances of this partnership may not have been known to the judges involved. They were invited to attend a series of events run by HMG (colloquia to discuss matters of continuous professional development and debate interpretation on points of law and some of the technical aspects of considering different forms of evidence in complex trials), and, at times, HMG

> officials attended hearings they presided over, where the cases were of interest to the UK."

21. The Applicant did not accept that that answer demonstrated a basis for treating him differently from the comparators. He pointed out that Judge W's evidence did not refer to any partnership relationship of the kind referred to. He also said that the court at Pol-e-Charkhi prison in Kabul heard cases of the kind subsequently heard in the Anti-Terrorism Court: the Judge records at para. 105 of her judgment that the Respondents accepted that the Applicant could for that reason in effect be considered to have been a judge of the Anti-Terrorism Court.

22. Hill J rejected the irrationality challenge for reasons which she gave at paras. 98-120 of her judgment. At paras. 106-116 she said:

> "106. … [A] key difference between JZ and the judges of the Anti-Terrorism Court in Kabul in the successful ARAP cohort relied on by the Defendants is the time of JZ's service.
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> 107. JZ's work in hearing terrorism cases at Pol-e-Charkhi prison ended in 2011. In contrast, Judge W had served at the Anti-Terrorism Court in Kabul from 2015 until he was evacuated in August 2021. Further, the Part 18 response showed that all of the judges from the Anti-Terrorism Court in Kabul who had succeeded under ARAP served in that role after 2015. All of the 11 judges who had been successful under ARAP by 4 February 2022 were serving at the Anti-Terrorism Court in Kabul in 2020-2021.
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> 108. In challenging the rationality of the Defendants' reliance on the dates of JZ's service as a justification for his different treatment, Ms Naik QC understandably highlighted that ARAP has no time limit, that from 2008-2011 the UK mission was active in Afghanistan and that JZ experienced threats as long ago as 2014 as a result of his service from 2008-2011.
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> 109. However, these factors do not bear directly on the central question for the ARAP decision-makers, namely whether there was sufficient evidence of JZ having 'worked alongside' HMG at the material time.
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> 110. Rather, the dates of JZ's service on anti-terrorism cases help explain why the decision-makers considered he did not meet the 'worked alongside' criterion, unlike his comparator judges, because HMG only became involved in supporting the Anti-Terrorism Court in Kabul and building partnerships with the judges there after 2015.
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> 111. The extract of the 20 October 2021 letter quoted at [36] above [i.e. the quotation in para. 18 above], read together with the Part 18 response summarised at [40] above, suggests that evidence of partnership, or perhaps the 'worked alongside' criterion more generally, was made out by factors such as (i) the extent to which a judge was publicly known to have co-operated with the UK; (ii)

> whether the judge had been involved in highly sensitive cases of particular UK interest; (iii) whether HMG representatives had attended their hearings; and (iv) whether they had been involved in colloquia of the sort described at [40] above [i.e. in the Part 18 response]. These were not discrete requirements, but the sort of factors that enabled the 'worked alongside' criterion to be satisfied.
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> 112. As the 18 October 2021 decision letter makes clear, decision-making under ARAP involves an assessment of the evidence provided by the applicant and the Defendants' own enquiries.
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> 113. In JZ's case he had provided evidence during the ARAP decision making process of attending seminars organised/sponsored by the UK government. These may well have been similar to the colloquia referred to above. However, based on the material before them the ARAP decision makers did not consider that sufficient evidence had been provided of the other type of factors referred to at [111] above, nor did their own enquiries apparently generate the content now advanced by JZ in SQ's fifth witness statement which was not before them.
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> 114. The absence of this evidence before the decision makers in JZ's case also helps explain why it was considered he did not meet the 'worked alongside' criterion, while other judges did.
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> 115. I recognise that the '2015 partnership' evidence has been provided late in the chronology of this claim, but I do not consider that it undermines the analysis above. Reasons for the decision in JZ's case were given contemporaneously. These made clear that it was the lack of evidence of work alongside HMG which was the reason why his application had not succeeded. The 2015 partnership evidence essentially provides further detail about how decisions were reached in other cases.
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> 116. It is a slightly unusual feature of the case that the Defendants accept that the judges granted ARAP may not have appreciated that they were considered to be in partnership with the Defendants. There is plainly an element of subjectivity in the Defendants' assessment of whether the 'partnership' existed. However, this is perhaps no more than a further aspect of the evaluative exercise of whether the 'worked alongside' criterion was satisfied. This does not in itself show that the scheme was operated in an irrational way."

23. The Applicant challenges the Judge's reasoning and decision on two grounds. Ground (1) challenges her refusal to admit SQ5, and ground (2) challenges her substantive decision even without reference to that evidence. I take them in reverse order.

24. Ground (2) is pleaded over four paragraphs, but the essence of the challenge is in paras. 9-10, as follows:

> "9. It is respectfully submitted that it was wrong for the Judge to conclude that the timing of the Appellant's service was a rational distinction on the part of the Defendants for refusing to relocate the Appellant to the UK pursuant to the exercise of her discretion under the ARAP immigration rule and policy. The reasons for dismissing the Applicant's argument on this point (summarised at 108) do not respectfully address the thrust of the argument and focus on the factors which could constitute 'working alongside' (see 109–111).
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> 10. Further, it is respectfully submitted that the learned Judge failed to adequately engage with the evidence about the UK's mission in Afghanistan, in explaining why the Appellant's service could not amount to 'working alongside' due to timing."

(Those two paragraphs make substantially the same point and were not developed by Ms Naik separately.)

25. I do not believe that that challenge has any real prospect of success. The starting-point is that the Judge makes it clear that she does not base her decision on "the timing of the Appellant's service" as such: its relevance is that it meant that his work as an anti-terrorism judge did not come under the partnership arrangements developed by the UK Government with the Anti-Terrorism Court in Kabul from 2015 onwards.

26. It was not part of Ms Naik's submissions that the UK Government was not entitled to regard the relationship with the eleven judges as a "partnership" and thus as fulfilling the "working alongside" requirement. Rather, the point being made in the final words of para. 9, and reiterated in the skeleton argument and oral submissions, was that the four factors identified in para. 111 of the judgment as illustrative of a partnership/"working alongside" relationship were present in the Applicant's case also.

27. As to that, there may be an issue about whether on the evidence that was so, or in any event whether it was or should have been known to the decision-maker: I return to this in connection with ground (1). But even if it was, it is wrong to read para. 111 in isolation. The Judge's essential point, clearly stated in paras. 107 and 110, was that the UK Government had, from 2015, developed what it regarded as a special relationship with a group of judges at the Kabul Anti-Terrorism Court, which it reasonably regarded as "working alongside" them within the meaning of category 4 of ARAP. There was no evidence before the decision-maker of any such specific quasi-institutional relationship with the JCIP at Bagram or the Public Service Court in Kabul where the Applicant heard his cases from the Pol-e-Charkhi prison up to 2011, or with the judges there; at most his statement in the bundle supplied showed that he had, on occasion, attended seminars with UK Government representatives. I see no prospect that this Court would disagree with the Judge's conclusion that the decision-maker could reasonably regard the two situations as different: it must be recalled that he was making an evaluative assessment, not conducting a tick-box exercise.

28. I turn to ground (1). The Judge dealt with the application to adduce SQ5 at paras. 72-76 of her judgment, as follows:

"72. By way of an application notice dated 22 July 2022 JZ seeks to rely on a fifth statement from SQ. This statement indicates that (i) JZ met a number of HMG officials during events which he attended from 2005-2021; (ii) he was invited to and attended a series of events organised by the CJTF and the Counter Terrorism Team at the British Embassy in Kabul; (iii) he made presentations at some of the HMG events on topics related to terrorism; (iv) at times, HMG officials attended hearings he presided over from 2008-2011 at the Anti-Terrorism court in Kabul; and (v) in 2021, he had a formal request to transfer back to that court, albeit that this was not concluded before Kabul fell to the Taliban.

73. Ms Naik QC argued that the statement should be admitted in the interests of justice because it included plainly important factual material that went directly to the alleged inconsistency of treatment issue. She submitted that the significance of this evidence had only become apparent once the Defendant's Part 18 replies made clear that at least in respect of the 11 counter-terror judges based in the Kabul courts, the Defendants had interpreted 'worked alongside' HMG as including 'partnership' with the UK via events, professional development, colloquia and attendance at hearings by HMG officials. The statement from SQ had been provided very promptly after receipt of the Defendant's Part 18 replies at 4.48 pm on 20 July 2022.

74. The Defendants opposed the admission of the evidence. The court's role was to decide whether the ARAP decisions made in JZ's case were correctly made, based on the material before the decision-maker, which did not include the contents of SQ's fifth statement. It was therefore not material to the issues before the court. The Defendants did not agree with the gist of the statement and needed the opportunity to respond to it, which would necessitate a further adjournment and the litigation becoming never-ending.

75. I do not consider that it would be appropriate to admit SQ's fifth witness statement. JZ had provided evidence about participating in seminars organised/sponsored by the UK government ahead of the 24 November 2021 decision (and again in advance of the 26 May 2022 reconsideration): see [22] and [30] above. However, the further details of his contact with HMG provided in SQ's fifth statement were not before those who made the 18 October 2021 and 24 November 2021 decisions. I agree with the Defendants that the focus in these proceedings has to be on whether those decisions were properly made, based on the material then available. I also take into account the fact that the contents of the statement are not agreed by the Defendants.

76. As the 24 November 2021 and 26 May 2022 decisions illustrate, reconsiderations of ARAP decisions are possible within that scheme when further evidence is obtained. It may be that because this claim, including the Part 18 process, has shed greater light on how the Defendants' decision-making under ARAP has operated, JZ will seek

> a further reconsideration of the ARAP decision on the basis of the additional information in SQ's fifth statement. However, conducting such a 'rolling' merits-based reconsideration, based on post-decision evidence, is not the role of this court."

29. Ground (1) is also rather discursively pleaded, but the essential points are that: (a) until the production of the Further Information it was not apparent what alleged differences between the Applicant's case and the comparators' were being relied on; (b) the evidence was "material to the issue of whether or not the Respondents had drawn a rational and lawful distinction between the Appellant and the other ARAP Judges relocated to the UK"; and (c) if the Respondents had required further time to respond there could have been an adjournment.

30. None of those points, with respect, addresses the principal basis of the Judge's decision, clearly stated in para. 75, namely that the material now relied on was not before the decision-makers and could not be used to impugn the decision which they made on the basis of the available material: if the Applicant wanted to rely on it now he could seek a further review from them, but he could not ask the Court to engage in rolling judicial review. That reasoning is obviously correct in law and Ms Naik was not able to provide any answer to it in her oral submissions. I can see no prospect that this Court would allow an appeal on this ground.

31. It is true that in the final sentence of para. 75 the Judge referred also to the fact that the contents of SQ5 were not agreed, which implies that she accepted the Respondents' submission that a further adjournment would be required if it were admitted and that was not acceptable. Ms Naik submitted that if an adjournment were necessary that was a price that had to be paid for a just outcome, particularly in circumstances where the Part 18 response had been supplied so shortly before the hearing. I need not consider that point since the Judge's observation was clearly not necessary to her decision: the fact that SQ5 was introducing material that was not before the decision-makers is a complete reason why it should not have been admitted. (In the context of the timing of the provision of the further information, I ought in justice to the Respondents to add that the Judge was very critical in JZ no. 2 of the late stage at which the Part 18 request was made.)

32. In her oral submissions (and in outline in the Applicant's skeleton argument) Ms Naik advanced two criticisms of the Respondents which are not part of the pleaded ground – namely that it was a breach of their duty of candour that they had not made clear at an earlier stage what criteria they were applying to the "working alongside" question, and that they had not themselves made sufficient enquiry into the Applicant's circumstances before making the impugned decision. I do not see how either of those points gets over the fundamental difficulty that I have identified above. It must be recalled that the challenge with which we are concerned is only on the basis of irrationality/inconsistency: no case of procedural unfairness or breach of the *Tameside* duty was before Hill J. I should in any event say that I see real difficulties about both criticisms. The Applicant knew the terms of category 4: I do not see that the further information disclosed any substantially new criteria. He was given the opportunity to put before the decision-maker the facts that he believed showed that he had been working alongside UK Government entities.

33. I accordingly see no real prospect of ground (1) succeeding.

34. The Applicant also seeks permission to appeal against Hill J's decision that he should pay the Respondents' costs (albeit not to be enforced without an order of the Court pursuant to section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) even if permission is refused as regards the substantive decision.

35. The nature of the issue as to costs and Hill J's decision sufficiently appear from the Reasons incorporated in her order of 12 August 2022, as follows:

> "6. In respect of costs (i) the Claimant succeeded in substance in two significant interim judgments in this claim (*JZ No. 1* and *JZ No. 2*); and (ii) the key reason why the Claimant failed on the overall merits in *JZ No. 3* was the late disclosure by the Defendants of a clear explanation for his differential treatment under the ARAP scheme, as recognised in *JZ No. 3*, in the form of both Mr Pinfield's statement and the Part 18 response.
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> 7. However (i) after neither interim application was the Claimant awarded his costs; (ii) success in interim relief applications does not, of itself, dictate that costs should be recovered by the claimant: *Shahi v SSHD* [2021] EWCA Civ 1676; [2021] Costs L.R. 1397, at [68], [79] and [84]; (iii) in *JZ No. 2* at [49]-[50] the court was critical of the Claimant's delay in making the Part 18 application, and this delay has led, overall, to delay in the proceedings being concluded; and (iv) *M v Croydon* [2012] EWCA Civ 595 at [58]–[65], on which the Claimant relies, does not assist as this relates to the principles to be applied where a claim is settled in the Administrative Court and where the Defendants accept that the claimant is entitled to all, or substantially all, the relief which he claims, which is not the case here.
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> 8. In those circumstances there is insufficient basis to depart from the general rule set out in CPR rule 44.2(a) that the unsuccessful party (the Claimant) should pay the successful party's costs. I am not therefore persuaded to make no order for costs as the Claimant requests."

36. The grounds of appeal do not contain a separate numbered ground addressing the costs decision but state simply that "the Appellant also appeals the learned Judge's ruling on costs". A bald statement of that kind would be acceptable, though unnecessary, if the Applicant was only saying that if the appeal were successful the Judge's order as to costs should be reversed. But it is not an appropriate way to plead a self-contained challenge of the kind being advanced here: it was necessary to identify the basis on which the Judge was said to have erred. The Applicant's skeleton argument is also defective. Para. 68 simply repeats, in identical terms, the arguments recorded by the Judge in para. 6 of her Reasons, without any attempt to address the reasons which she gives in para. 7 for rejecting those arguments. Ms Naik did not in her oral submissions repair that deficiency, though she added that the written submission summarised by the Judge as head (ii) had also made the point that the Respondents' late disclosure was a breach of their duty of candour.

37. In the absence of any developed challenge to the Judge's reasoning I need only say that I can see no error whatever in her decision, which was on any view well within

the bounds of her discretion. (I would add for completeness that in fact Lieven J's order in JZ no. 2 provided for the costs before her to be in the case, so that it was not in any event open to Hill J to make no order for costs as the Applicant was seeking.)

38. It follows that I would refuse permission to appeal against both the dismissal of the Applicant's claim for judicial review and the Judge's decision on costs. I understand that Simler and Warby LJJ agree with that decision. I should note that the Practice Direction governing citation of authorities [2001] 1 WLR 1001, provides at paras. 6.1 and 6.2 that decisions on an application for permission to appeal (which are not in any event binding – see *Arthur J S Hall v Simon* [1999] 3 WLR 873, per Lord Bingham CJ at p. 902H) may not be cited as authority unless otherwise specifically directed; and that remains the case even where, as here, they follow an oral hearing and are accordingly under current arrangements automatically available in the National Archives and on BAILII. Since there are a number of current cases involving the ARAP scheme, and parties and others are understandably interested in a decision of this Court in the area, I should make it clear that the Court sees no reason to depart from the usual rule in this case. This is a decision on the particular facts and arguments in the present case and our reasoning is not of any wider application. (For the avoidance of doubt, there is of course no objection to the decision being referred to if necessary to explain points of procedural history or the like: the objection is to it being cited as authority.)

THE APPLICATION TO RE-OPEN

39. The only ground of appeal advanced before Lewis LJ was that on its proper construction category 4 of the ARAP policy was wider than the decision-maker had understood. As summarised by him in refusing permission to appeal against the decision of Kerr J (see para. 4 of his Reasons), the argument was that

> "… there was no requirement that [the Applicant] work for HMG or the UK military, that HMG's mission in Afghanistan was consistent with the mission of the Afghan Government, the US military and other ISAF partners, and that there was no good reason why the applicant could not make a material contribution by performing a role which directly or indirectly contributed to HMG's mission."

40. As to that Lewis LJ held (para. 5):

> "That is not an arguable, or tenable, construction of category 4 of ARAP. Those within the category must have worked in meaningful enabling roles 'alongside HMG'. There is no arguable basis that an indirect contribution by means of a contribution to others with the same underlying mission as HMG means that a person is working in a meaningful enabling role alongside HMG. Consequently there is no arguable basis for contending that the respondents have misinterpreted the relevant policy."

Lewis LJ also went on to hold, at para. 6, that there was no arguable basis for contending that the Respondents misapplied the policy, but the particular argument that he was addressing is not pursued before us and I need not summarise it here.

41. Normally of course Lewis LJ's decision would be final. But rule 52.30 provides for the re-opening of what would otherwise be a final decision where (see paragraph (1)):

> "(a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
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> (c) there is no alternative effective remedy."

There is a good deal of case-law about the interpretation of those criteria but I need not recapitulate it here.

42. The circumstances relied on by the Applicant in seeking to re-open Lewis LJ's decision are that further evidence emerged subsequent to it, in the shape of the contents of the further information provided by the Respondents on 18 July 2022; and it is said that that evidence might have led him to grant permission to appeal on the original ground 1. The case is put in para. 53 (b) of the Applicant's skeleton argument as follows:

> "[Lewis LJ] did not have the full evidence as to how ARAP operated in *practice* during August 2021 and was therefore not aware that the Respondents considered that '*working alongside*' could be satisfied by judges working in the Anti-Terrorism Court in Kabul, an Afghan institution, where judges were said to be in partnership (possibly unbeknownst to the Judges themselves) which included attendance at HMG events, and at times, attendance by HMG officials at their hearings. That evidence shows that ARAP was clearly applied in practice more flexibly by officials at the material time. In short, had the evidence obtained via the Part 18 process – which Hill J considered properly to be within the Respondents' duty of candour – been before the Court, the Court may well have reached a different outcome on whether it was arguable that the Respondents had erred in their application and construction of ARAP policy in the Appellant's case."

43. I do not believe that there is any chance that if the contents of the further information had been before Lewis LJ when he made his decision he would have come to a different conclusion about the meaning of category 4 of ARAP. The construction that he rejected in para. 5 of his Reasons was that a purely indirect contribution to the UK's mission in Afghanistan, by working with others, would suffice. The later information about the "partnership" with the Kabul Anti-Terrorism Court does not bear on that question at all: the relationship in question was, directly, with the UK Government.

44. In fact, however, although the Applicant argues that Lewis LJ might have reached a different conclusion about the construction of category 4, his real point appears to be about how the policy was applied in practice (though not in the way addressed by Lewis LJ at para. 6 of his Reasons). His contention is that, even if (contrary to the case then being advanced) category 4 did require a direct relationship with a UK Government entity, the new evidence shows that the criteria for establishing such a

relationship were "more flexible" than might otherwise be supposed. I will assume in the Applicant's favour that he is entitled to rely on this point, even though it was not the case originally advanced. But in the light of my conclusion on the permission to appeal application, it goes nowhere. The allegedly more flexible criteria relied on are those applied in the cases of the eleven comparators. Hill J has held that, on the evidence available to the decision-takers, the Applicant was not in the same position as them, which means that he did not satisfy those criteria; and I believe that that decision is unimpeachable. There is accordingly no injustice in Lewis LJ not having had the opportunity to consider the evidence in the Part 18 response or the argument that the Applicant might have based on it.

45. I would accordingly dismiss the application to re-open.

46. I should conclude by saying that no-one can fail to sympathise with the Applicant's predicament. But it is the responsibility of the Government to decide how far it should go to assist those in Afghanistan who are at risk because of their work in support of values which this country shares. The choice made by ARAP is that eligibility for relocation should be limited to those who worked directly for UK government entities or alongside them in accordance with category 4: the distinction is clearly recognised in the panel decision quoted at para. 9 above. The Court can only intervene if the decisions which officials have to take under that policy, which will not always be easy, are made irrationally or otherwise not in accordance with the law. The Judge has decided that that was not the case here, and there is no arguable error in her decision. The Applicant has of course a separate challenge to the refusal of LOTR, which I understand remains pending; but that is not before us on this occasion.

POSTSCRIPT

47. On 15 February, when this judgment was almost finished, the Applicant's solicitors wrote to the Court in order, in part, to draw its attention to the recent decision of Lane J in *CX1 v Secretary of State for Defence* [2023] EWHC 284 (Admin), which concerned a decision made under ARAP in the case of Afghan nationals who had worked for the BBC and other news agencies. The issues decided in that case are different from those raised by these applications and nothing in Lane J's decision requires us to reconsider our reasoning or conclusion.

Simler LJ:

48. I agree.

Warby LJ:

49. I also agree.