



Neutral Citation Number: [2025] EWCA Civ 77

Case Nos: CA-2024-000528  
CA-2024-000598

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**Mr Justice Swift**  
**[2024] EWHC 332 (Admin)**

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**Mr Justice Julian Knowles**  
**[2024] EWHC 410 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 05/02/2025

**Before:**

**LADY JUSTICE ANDREWS**  
**LADY JUSTICE ELISABETH LAING**

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**Between :**

**THE KING (on the application of MA)**

**Claimant/  
Respondent**

**- and -**

**1. THE SECRETARY OF STATE FOR FOREIGN,  
COMMONWEALTH AND DEVELOPMENT AFFAIR**  
**2. THE SECRETARY OF STATE FOR DEFENCE**

**Respondents/  
Appellants**

**And between :**

**THE KING (on the application of  
MP1  
and others)**

**Claimants/  
Respondents**

**- and -**

**THE SECRETARY OF STATE FOR  
DEFENCE**

**Respondent/  
Appellant**

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**Edward Brown KC, Richard Evans and Luke Tattersall (instructed by The Government  
Legal Department) for the Appellants**

**Nicola Braganza KC and Maria Moodie (instructed by Wilson Solicitors LLP) for the  
Respondent MA**

**Duran Seddon KC and Ali Bandegani (instructed by Wilson Solicitors LLP ) for the  
Respondents MP1 and others**

Hearing date: 2 December 2024

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 5<sup>th</sup> February 2025 by circulation to  
the parties or their representatives by e-mail and by release to the National Archives.

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**Lady Justice Andrews:**

1. These applications for permission to appeal were directed by Singh LJ to be joined and listed for an oral hearing to determine whether the proposed appeals are academic and if so, whether the Court should exercise its exceptional jurisdiction to grant permission to appeal and allow the appeals to proceed on the basis that they raise issues of wider application. We heard the oral arguments on 2 December 2024 and decided to take time to consider them. These are the reasons why, in my judgment, we should refuse to exercise our discretion to permit these appeals to proceed even though, if they had not become academic, I would have granted permission to appeal.
2. On 29 November 2024, the Supreme Court refused permission to appeal from the decision of the Court of Appeal in *R (on the application of LNDI and others) v Secretary of State for the Home Department and another* [2024] EWCA Civ 278; [2024] 1 WLR 4433 (“*LNDI*”). That case concerned the proper interpretation of certain of the provisions of the Immigration Rules dealing with applications for Afghan citizens for relocation to, or settlement in, the UK. The relevant provisions are included in an Appendix to the Rules entitled “Afghan Relocation and Assistance Policy” (“ARAP”). The proposed appeals in these two cases concern the identical provisions to those with which the Court was concerned in *LNDI*, namely Conditions 1 and 2 of ARAP 3.6 (Category 4 eligibility).
3. The leading judgment in *LNDI* was delivered by Lewis LJ, with whom Peter Jackson LJ agreed. Underhill LJ delivered a concurring judgment which was specifically concerned with the question whether the underlying decision by the Ministry of Defence (“MoD”) was flawed, and therefore is not directly pertinent to these appeals. In consequence of the refusal of permission to appeal by the Supreme Court, Lewis LJ’s judgment sets out the definitive approach to be taken to the assessment of eligibility in accordance with those provisions.
4. As Lewis LJ explains, the relevant provisions of ARAP contain a two-stage process. First, the MoD needs to decide whether the applicant meets the eligibility requirements set out in ARAP 3.6. The applicant must meet both Conditions 1 and 2, and then either or both of Conditions 3 and 4. If that is established, the MoD then makes an application for entry clearance and the Secretary of State for the Home Department (“SSHD”) decides whether to grant that application.
5. The issue in *LNDI* was whether the judge erred in conflating Conditions 1 and 2. The full text of those conditions is set out in Lewis LJ’s judgment at [11]. His judgment also contains a comprehensive statement of the wider legal framework, which it is unnecessary to duplicate for the purposes of determining these applications. As he said at [40], Condition 1 concerns the relationship, or proximity, between the work of the individual Afghan national concerned and a United Kingdom Government department. Condition 1(iii) (referred to in the lower court as 1(c)) requires the individual to either have been working “alongside... in partnership” with a UK Government department or “alongside... closely supporting and assisting” a UK Government department. Condition 2 is concerned with the contribution that *that work* makes to the United Kingdom’s military or national security objectives.

6. Lewis LJ went on to explain why Conditions 1 and 2 are separate and distinct requirements, pointing out at [41] that the opening words of ARAP 3.6, and its structure reinforce that interpretation because:

“they indicate that a person meets the eligibility requirements if Condition 1 and 2 and either or both of Conditions 3 or 4 applies. The conditions are then structured to reflect different aspects of the eligibility requirements.”

His conclusion, at [42], was that Swift J was wrong to approach the application of Condition 1(iii) as part of a single exercise considering Condition 2 and the nature and extent of the contribution made by the individual to the United Kingdom’s military and national security objectives. Conditions 1 and 2 lay down separate requirements.

7. Having found that the judge erred in his approach by conflating Conditions 1 and 2, Lewis J then went on to consider whether, on the facts of that case, applying the correct approach outlined at [40] and [41] of his judgment, the underlying decision of the MoD which was the subject of the claim for judicial review was flawed, focusing upon the conclusion in that decision that LND did not satisfy Condition 1(iii). Having set out at [46] three specific factors which were relevant to that assessment, though he stressed that these were not exhaustive, Lewis LJ concluded that the decision was flawed, because the decision-maker had failed to consider two matters that were material (and to an extent had failed to discharge the *Tameside* duty to make relevant inquiries).
8. The Court of Appeal also held that procedural fairness required that adequate reasons be given for the eligibility decision, and the pro-forma reasons given in this and other similar cases would have been inadequate had they stood alone, though on the facts Swift J was right to find (at [29] of his judgment in *LNDI*) that the reasons were adequate because further reasons were supplied in an email.
9. Finally, Lewis LJ stated that it was inappropriate for the judge to substitute his own decision for that of the public authority. The appropriate remedy if the Secretary of State for Defence had adopted the wrong approach was to quash the unlawful decision and remit it to the decision-maker to reconsider. Cases in which only one outcome is possible are rare, as Swift J had recognised, and contrary to Swift J’s evaluation, even on his own erroneous approach to Conditions 1 and 2, that case was not one of them.
10. Both the present prospective appeals concern claims for judicial review brought by applicants who were held by the MoD to be ineligible under Category 4. The claims succeeded and the decisions were quashed; as in *LNDI* the judges in each case decided there was only one rational outcome and substituted their own decisions. Swift J’s judgment in *MA* was handed down on 16 February 2024, Julian Knowles J’s judgment in *MPI* was handed down on 4 March 2024. The Court of Appeal judgments in *LNDI* were handed down on 21 March 2024.
11. In *MA*, as in *LNDI*, Swift J conflated condition 1(iii) and condition 2. He then held that the decision-maker had misunderstood the evidence, that on a proper evaluation of that evidence it was irrational to reach the conclusion that those conditions were not satisfied, quashed the decision and substituted his own conclusion.

12. In *MPI* Julian Knowles J found for the claimants primarily on the basis of a failure to consider relevant evidence and an absence of sufficient reasons. That part of his judgment is consistent with the approach to proforma reasons adopted and approved by Lewis LJ in *LND 1*. Julian Knowles J then went on to agree with and adopt Swift J’s conflation of condition 1(iii) and condition 2, and therefore made the same error. However, unlike Swift J in *MA*, Julian Knowles J also addressed the position if, contrary to that approach, the two conditions were to be considered separately, and held that on the evidence it was irrational to conclude that Condition 1 taken in isolation was not satisfied. Having made that error, the panel which made the decision did not “meaningfully” consider Condition 2.
13. On each of those alternative approaches he decided that (like *LND1* and *MA*) that case was one of the rare cases in which a proper assessment could give rise to only one outcome, quashed the decision and substituted his own decision for it.
14. In May 2024, the SSHD granted the respondents in both these cases leave outside the Immigration Rules. That meant that these appeals would no longer have any impact on the individuals concerned, as the ARAP policy was not applied to them. There is no longer a live dispute between the parties about whether they should be allowed to enter or remain in the UK. The appellant Secretaries of State nevertheless wish to pursue the appeals.
15. Mr Brown KC contended that the appeals raise issues of wider importance which the decision in *LND1* did not, or did not sufficiently address, and there is good reason in the public interest for the Court to entertain an academic appeal. He explained the appellants’ concern that the two first instance judgments of Swift J and Julian Knowles J might be viewed by those tasked with making decisions on eligibility under ARAP, or those deciding appeals or claims for judicial review in respect of such decisions, as creating some kind of precedent as to how the factors in the policy are to be applied to certain types of applicant. There are many such cases still being processed. There was a particular concern, he said, that the two first instance judgments might be taken as an indication that anyone who had acted as a judge in Afghanistan would be eligible under ARAP. The appellants were also concerned that both High Court judges had taken the inappropriate step of substituting their own decisions on the merits instead of remitting the matter to the MoD decision-takers.
16. Referring to the observations of Lord Neuberger MR in *Hutcheson v Popdog Ltd* (Practice Note) [2012] 1 WLR 782 and those of my Lady, Elisabeth Laing LJ in the more recent case of *R(SB) v Kensington and Chelsea RLBC* [2023] EWCA Civ 924, (Practice Note) [2024] 1 WLR 2613 at [79] to [80], Mr Brown submitted that both sides of the legal argument would be fully and properly ventilated, as each party had instructed leading and junior counsel. He confirmed that the respondents would be fully indemnified in costs by the appellants, and that no order for costs would be sought against them were the appeals to succeed. They would suffer no other prejudice in consequence of an appeal.
17. Both the respondents contended that the appeals raised no live issues of wider importance, particularly in the light of the decision of the Court of Appeal in *LND1*, which has determined the first ground of appeal, the only issue that could be so described. The other two grounds of appeal are nothing more than complaints about how the policy was to be applied to the facts and circumstances of these individual

cases, which cannot be carried over to other cases where the evidence and the facts will be different.

### Discussion

18. The first ground of appeal for which permission is sought in each case is that the lower court was wrong to conflate Conditions 1 and 2 of Category 4. In the light of the decision of the Court of Appeal in *LNDI* that argument is not just likely to, but bound to succeed. However, the issue of interpretation of the ARAP policy has been definitively determined by the Court of Appeal in *LNDI*, and that is the decision which lower courts, tribunals and decision-takers are bound to follow and apply. Insofar as there is any difference between judges in the lower courts and the Court of Appeal in the interpretation of those two conditions, Lewis LJ's interpretation is to be taken as the correct one.
19. The second ground of appeal is that the court below was wrong to conclude that Conditions 1 and 2 of ARAP were satisfied. The third, which is linked to the second, is that the court was wrong to conclude that the only rational and lawful outcome was that the applicant satisfied those conditions. Mr Brown contends that these are not simply complaints about the natural consequences of the error identified in Ground 1, and the application by the two judges of the misinterpreted policy to the evidence adduced in each case. It is a complaint that the judges overstepped the legitimate boundaries of judicial review. Although in the grounds this is articulated as a consequence of imposing the court's own (incorrect) interpretation of ARAP on the decision, in his oral submissions Mr Brown suggested that there is a real danger that the judges' reasons for finding that the eligibility criteria were satisfied, and (moreover) that it was irrational to conclude otherwise, will be seized upon in other cases which are argued to be sufficiently similar on the facts to qualify by analogy.
20. Ms Braganza KC made the powerful forensic point that despite the apparent plethora of ARAP claims in the pipeline, the Appellants had adduced no evidence that in the 9 months or so which had elapsed between the decision in *LNDI* and the hearing of this application, there had been any such misunderstanding or misapplication of the policy, or a failure by decision takers or by judges in the Administrative Court to apply the correct approach as set out in that case.
21. To the extent that Ground 2 and Ground 3, in particular, are facets of the same basic complaint that it was wrong in principle for the judge in each case to substitute his own decision, instead of quashing the decision and remitting it for reconsideration, it seems to me that what Lewis LJ said in *LNDI* about the inappropriateness of that approach should be a sufficient deterrent and does not require repetition. It is quite clear that despite the fact that LND was a former Supreme Court judge in Afghanistan, and had what appeared on its face to be a strong argument that he met the requirements of the policy, Lewis LJ considered that it was still open to the decision taker to conclude that he did not satisfy Condition 1(iii) or Condition 2. In the present cases it is most unfortunate that the judges took the course that they did, but there is no need to entertain an academic appeal at public expense merely in order to endorse Lewis LJ's observations about the approach they should have taken.
22. Given that Swift J's conclusions on the issue of eligibility and his consequential findings of irrationality depended on his erroneous interpretation of the policy by

conflating the applicable conditions, it is clear that they are as flawed in *MA* as his conclusions were in *LNDI*. In the light of that, the first instance decision in *MA* is highly unlikely to lead MoD caseworkers or panels astray (let alone judges tasked with reviewing their decisions).

23. Mr Brown protested that Lewis LJ refers to Swift J's decision in *MA* without criticism at [53] of his judgment in *LNDI*. However, in context that was a reference to evidence specifically adduced in *MA* that work done between 2013 and 2017 on drafting the new penal code in Afghanistan was done in a sub-committee of the criminal law working group, whose members included UK officials from the Foreign Commonwealth and Development Office ("FCDO") who played a full role in its work. Ms Braganza KC pointed out that none of the evidence adduced by *MA* was challenged. Lewis LJ held in *LNDI* that in *LND*'s case, the MoD did not appear to have invited the FCDO to address the issue of whether *LND* worked alongside in partnership with or closely supporting and assisting them in that context. That was obviously a material consideration. Unsurprisingly in the light of the views he expressed at [59] and [60] about the scope of the functions of a judge undertaking a judicial review, Lewis LJ did not make any finding that someone who did such work *would* satisfy Condition 1(iii). However, it can be inferred from his finding that this information was material, that he thought it would be open to the decision maker to find that they did. One thing that does emerge clearly from Lewis LJ's judgment at [59] and [60] is that this is quintessentially an evaluation which is for the decision-maker and not for the judge undertaking a judicial review.
24. I accept that the decision in *MPI* is distinguishable, as the error of interpretation identified in *LNDI* was neither as central nor as crucial to the decision as it was in *MA*. As I have said, the primary ground on which the applicant succeeded was a lack of consideration of the relevant evidence and inadequacy of reasoning, errors that were also found to have occurred in *LNDI*. Both those complaints are inherently case-specific, and to the extent that the boiler-plate reasoning was found inadequate, those taking such decisions in future will know from *LNDI* why that is so and hopefully will adjust their practices accordingly.
25. Unlike Swift J in *MA*, Julian Knowles J held at [162] that even if condition 1 was looked at in isolation, the applicant in that case clearly met it. Therefore success on Ground 1 of the appeal would not automatically mean success on Grounds 2 or 3. Moreover, as in *LNDI*, the underlying claim for judicial review would have succeeded in any event because of the failure by the decision maker to consider the evidence and give adequate reasons.
26. It is difficult to discern that Grounds 2 or 3 give rise to any wider issues of principle that might be applied in other cases, save possibly if and to the extent that there is a complaint that the judge misinterpreted condition 1(iii) (or 1(c)) taken in isolation by applying Lane J's test in *R (CXI) v Secretary of State for the Home Department* [2023] EWHC 284 (Admin) at [86]-[87] and [95] of "performing significant activities which were closely aligned with the 'democracy building' activities of the UK Government" (see the judgment in *MPI* at [158]).
27. However, that is not a ground of appeal, nor was there any complaint about the interpretation of condition 1(iii) in the appellant's skeleton argument or during the oral argument before us. Unlike the passage dealing with adequacy of reasons, that

aspect of *CXI* was not expressly disapproved in *LNDI*. Moreover the Divisional Court (Dingemans LJ and Johnson J) in a later application for judicial review in *CXI* [2024] EWHC 94 (Admin) appear to have positively endorsed Lane J's approach at [66] whilst rightly stressing at [65] that "everything will depend on the facts." If there are tensions between that approach and Lewis LJ's judgment the latter will clearly prevail.

28. I specifically reject the submission that it can be inferred from Julian Knowles J's judgment that simply being an Afghan judge would suffice to meet the criteria. On the contrary, at [136] he specifically endorsed Hill J's observations in *R (JZ) v Secretary of State for the Home Department* [2022] EWHC 2156 (Admin) at [35] that "Afghan judges may be eligible under ARAP, but whether they are in fact eligible depends on a case-specific evaluation of the individual facts." Mr Brown suggested that despite this, the judge's reasoning in a much later passage of his judgment, at [179], was to the contrary effect. However on a proper reading of that paragraph it is clear that his decision that MP1 met the eligibility criteria in Ground 1 depended on a close examination of the evidence and the specific roles that MP1 played at relevant times. Insofar as it depended on the conflation of Conditions 1 and 2 that Lewis LJ held to be flawed, it cannot be relied on. Insofar as it turned on the specific evidence in that case, it raises no wider issue of principle that would justify the exercise of the discretion to hear the appeal.
29. For those reasons I would refuse these applications.

**Elisabeth Laing LJ:**

30. I agree.