Neutral Citation Number: [2024] EWHC 3197 (Admin)

Case No: AC-2023-LON-001643

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2024

**Before** :

**MRS JUSTICE YIP**

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**Between :**

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| **THE KING**<br>**on the application of**<br>**HS**<br>**ZN** | **Claimants** |
| **- and -** | |
| **Secretary of State for Foreign, Commonwealth & Development Affairs** | **Defendant** |

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**David Jones & Emma Fitzsimons** (instructed by **Bhatt Murphy Solicitors**) for the **Claimants**
**Samantha Broadfoot KC & Julie Anderson** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 13 November 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 11 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE YIP

**Mrs Justice Yip :**

## Introduction

1. This claim for judicial review concerns the policy for eligibility for resettlement of additional family members of Afghan citizens who qualify under the Afghan Relocations and Assistance Policy ("ARAP"). The central issue raised is whether the defendant acted lawfully in rejecting an application on the ground that an ex-wife was not eligible under the policy.

2. The ARAP scheme supports those who worked with or for the British Government in Afghanistan. Such support may include an offer of relocation to the United Kingdom. Since the inception of the scheme, the Immigration Rules have allowed a person who qualifies under the scheme (an ARAP principal) to apply for leave to enter the UK, and to include his or her partner and minor dependent children in the application. Guidance ("the ARAP-AFM policy") was issued to explain the eligibility criteria for additional family members to be considered for relocation outside the rules. This claim involves consideration of that policy.

3. Since the decision which is challenged was made, the Immigration Rules have been amended and there is now a new appendix containing the Afghan Relocations and Assistance Policy (Appendix ARAP). The eligibility of principals, immediate family members and additional family members is now covered by Appendix ARAP.

4. The claimants seek judicial review of the refusal to endorse the second claimant's application under the ARAP-AFM policy. That refusal was confirmed on 14 October 2022, following a request for reconsideration of a prior decision of 4 May 2022. Permission was granted on one ground only, namely the interpretation and application of the term "additional family member" in the context of the policy.

## The factual background

5. The claimants, who have been granted anonymity, are Afghan nationals. Both are of Hazara ethnicity and are Shia Muslims. They married in 2007, while living outside Afghanistan, and moved back to Afghanistan in 2009. They have a son (D) who is now a young teenager. HS worked at the British Embassy in Kabul. ZN had a media career. HS and ZN divorced in 2018. HS remarried and had another child with his new wife.

6. Following the divorce, the claimants co-parented D under a shared custody arrangement. Due to strong disapproval of divorce in Afghanistan and the associated risks to a divorced woman, they concealed their divorce from all but their closest friends and family. ZN had no other male relatives in Afghanistan. ZN and HS lived close to one another, allowing D to go between their homes. They worked hard to make the arrangement work for the benefit of D.

7. HS's employment placed him at significant risk and meant that he was eligible for relocation under ARAP. In April 2021, he made an ARAP application for himself, his current wife, D and his other child. This application was granted in May 2021. He did not include ZN in the application. He understood that he could only include his current wife but that once evacuated, he could apply for ZN to come also. ZN initially refused to allow D (who was then aged 10) to be evacuated without her but following the

deterioration of the security situation in Afghanistan, she agreed. The Taliban took full control of Kabul on 15 August 2021. Five days later, HS, his current wife, D and HS's other child were evacuated to the UK. Since May 2022, D has enjoyed settled status in the UK. HS was granted settled status in June 2022.

8. The decision to allow D to travel to the UK without her was undoubtedly a heartbreaking one for ZN. She enjoyed an extremely close relationship with D and had no other family relationships in Afghanistan. She acted selflessly and in D's best interests in allowing him to travel with his father to secure his safety. The separation of D from his mother was devastating for each of them. HS's evidence reveals that he found it painful to witness their distress. HS was sufficiently concerned about ZN remaining in Afghanistan as to give her all his savings before he left.

9. In August 2021, HS applied under ARAP-AFM for leave outside the Immigration Rules ("LOTR") on behalf of ZN. The application relied on the impact of the separation on D and on evidence of increasing risk to ZN. HS explained that he had not included ZN in the application he made in April 2021 "because no one thought that the Taliban will capture the capital and [ZN's] life would come under imminent and direct threat."

10. After HS had left Afghanistan, ZN received threatening telephone calls from someone she believed to be connected to the Taliban. The application stated that the calls had referred to ZN being single. In her later statement, ZN said that in the first call, the caller spoke her name and described her as HS's wife. Subsequent calls referred to her being single and divorced and described her as a prostitute because she worked outside the home. ZN was terrified. She fled her apartment, desperate to escape from Afghanistan. ZN knew that HS had applied for her to relocate to the UK. She made additional applications to the United States of America, Canada and Germany. In September 2021, the USA evacuated her to the United Arab Emirates. She remained in a camp in Abu Dhabi until August 2022 when she was transferred to the USA. She has since been granted a "Green Card", permitting her to stay in the USA.

11. During the school summer holidays this year, D went to visit ZN on a visitor's visa. He was due to return on 26 September 2024 but D did not want to be separated from his mother again. HS and ZN agreed he could remain in the USA for a little longer. It appears his visitor's visa could be extended although for how long is not clear. At the date of the hearing, D remained in the USA, separated from HS, his stepmother and his half-siblings (another child having been born in this country). There was no agreement that this should be a permanent arrangement and no evidence as to whether D would be granted permanent residence in the USA.

## Evidence

12. I have seen and considered the statements of HS and ZN, dated 1 August 2022, which were submitted in support of their application for reconsideration. The statements were accompanied by enclosures including documentation relating to the marriage and divorce, ZN's education and employment history, together with information from D's school. The statements confirm the family circumstances; the profound impact separation had on D and ZN and the threats ZN was subject to after HS left Afghanistan.

13. I have also read a report on D from an independent social worker and a psychiatric report on ZN. These professional opinions were submitted to the defendant on 3

October 2022 and demonstrate that ZN and D suffered significantly due to the separation. D is said to crave the presence of both his parents. I accept that his best interests would be served by HS and ZN living close together and sharing parenting, as they did in Afghanistan. I also accept that the separation had a profound impact on ZN causing psychiatric harm. Given the issues I must determine, it is unnecessary for me to say more about this evidence.

14. I have also considered the witness statement of Christine Ferguson, Head of the Resettlement Department within the FCDO's Afghanistan and Pakistan Directorate.

## The ARAP scheme

15. ARAP originated as a way of recognising support provided to the UK Government by Afghan nationals. Announcements about the scheme made by Ministers in 2020 focused on the courage of Afghans who worked alongside the UK Government or Armed Forces and the need to recognise their dedication by allowing them to come to the UK and build a new life. In December 2020, the then Secretary of State for Defence said:

> "Nobody's life should be put at risk because they supported the UK Government to bring peace and stability to Afghanistan."

16. ARAP was implemented into the Immigration Rules with effect from 1 April 2021. The rules allowed locally employed staff to relocate to the UK with their partner and minor dependent children. Under the rules, only one partner could be included. Children were admissible only if the other parent was the principal applicant's partner or was deceased or if the principal had sole responsibility for the child.

17. Guidance (Afghan Locally Employed Staff – relocation schemes Version 2.0) published on 1 April 2021 explained that it was the intention of the policy to honour the service of those who were eligible and:

> "to ensure that those who choose to relocate to the UK can do so with their immediate families and can settle permanently so that they can build their lives and their future in the UK."

The guidance reminded decision makers that they must take account of the circumstances of each case and the impact on children, or those with children, in the UK (referencing the duty under section 55 of the Borders, Citizenship and Immigration Act 2009).

18. The original guidance stated that in the case of additional family members who did not qualify under the "Family Migration: Appendix FM" policy guidance, careful consideration should be given to whether there were exceptional circumstances or compelling compassionate reasons to justify granting leave outside the Immigration Rules ("LOTR").

## The ARAP-AFM policy

19. Additional guidance on the eligibility of additional family members (ARAP-AFM) was issued on 4 June 2021. The guidance applied to applications outside the Immigration

Rules, that is for family members who did not fall into one of the categories covered by the rules. Version 2 was published on 11 April 2022 and applied at the time of the decision which is challenged. The guidance explained "the eligibility criteria for additional family members seeking to relocate to the UK outside of the Immigration Rules as a dependant of a relevant Afghan citizen who is eligible for relocation to the UK under [ARAP]". The policy intention of this guidance is crisply stated: "to ensure consistency of decision-making in additional family member cases." The guidance contains a reminder to decision makers to "consider the best interests of a child in the UK in decisions that have an impact on that child", and to ensure that decisions "demonstrate that the child's best interests have been considered as a primary, but not necessarily the only, consideration".

20. The April 2022 guidance required that all family wishing to relocate must be included in the relevant Afghan citizen's application. That represented a change of process from the 2021 guidance, when there was no requirement to include all family members on the principal's application. It is accepted that as ZN's application was initiated under the previous guidance, this requirement does not apply. The April 2022 guidance stated:

> "An application for entry clearance, or for LOTR cannot be made on an ARAP application form except where that application is from an additional family member of a relevant Afghan citizen who is eligible for relocation under the ARAP."

21. Under the heading "Assessment of additional family members: relationships and risk", the guidance provided that:

> "Key factors when assessing a grant of leave for additional family members include the proximity of the family relationship, the family circumstances of the individuals (including the nature and extent of any dependency) and the way in which the employment [of] the relevant Afghan citizen has led to any risk to the family member and what those risks are judged to be."

The guidance then stated:

> "LOTR should only be considered where either there are genuine, verifiable compelling reasons relating to the family member's safety and security, or vulnerabilities. It is not intended to provide for all additional family members."

22. Under the heading *"*Security concerns*"* the ARAP-AFM guidance specified:

> "There may be compelling reasons where the work of the relevant Afghan citizen has led to specific threats or intimidation of members of their family who would not normally qualify for relocation under the Immigration Rules.
>
> …
> The assessment must confirm that the risk is specific to the additional family member(s) and related to the work undertaken

> by the relevant Afghan citizen in order for relocation to be considered."

23. With regard to "Additional vulnerabilities" it stated:

> There may be instances where the relevant Afghan citizen asks for individual family members to be relocated because of specific vulnerabilities faced by that family member which have led to an exceptional level of family dependence, and that the family member would be unable, even with the practical and financial help of the sponsor, to obtain the required level of care or protection in Afghanistan because it is not available and there is no person there who can reasonably provide it, or because it is not affordable.
>
> The expectation is that the normal rules on dependency will apply in all but the most exceptional and unusual circumstances which the relevant Afghan citizen must be able to demonstrate."

24. Internal (unpublished) guidance was issued to FCDO caseworkers in August 2021, and has subsequently been updated. That guidance outlined common categories for applications by additional family members and provided guidance on principles for determining eligibility under the policy. It did not suggest that the categories were exhaustive.

**Developments since the date of the challenged decision – Appendix ARAP**

25. On 30 November 2022, changes to the Immigration Rules were implemented. Appendix ARAP came into existence and brought additional family members within the scope of the Rules. In conjunction with these rule changes, the previous ARAP-AFM guidance was withdrawn and ARAP Guidance version 5 was published.

26. Within Appendix ARAP, the principal applicant is now referred to as an "eligible Afghan citizen". ARAP 13.1 states that an additional family member applicant must be "an additional family member of an eligible Afghan citizen or their partner." As was the case at the time of the decision, only one partner may qualify as a partner. The rules in relation to additional family members explicitly state (ARAP 13.2):

> "The additional family member cannot be an additional partner where one partner has applied for entry clearance or settlement under these Rules."

ARAP 13.3 sets out the requirements relating to security risks and vulnerabilities leading to exceptional dependence, at least one of which must be met.

27. Internal guidance issued to caseworkers on 14 May 2024 now includes express reference to divorced spouses, stating:

> "Applications from divorced spouses (either a divorced spouse of the Principal or the Principal's AFM) would not meet the

> criteria for ARAP AFM as they are no longer considered a family member."

## The defendant's decision-making

28. The defendant is responsible for assessing relevant ARAP applications for eligibility and making recommendations to the Secretary of State for Defence. If an application is considered to be eligible, it is endorsed as such. The final decision on whether an applicant will be granted entry clearance rests with the Secretary of State for the Home Department. The defendant's assessment at the eligibility stage is an important part of the overall process.

29. In this case, the Foreign, Commonwealth and Development Office considered that ZN's application was "a complex case that goes beyond the usual FCDO assessment". There were concerns that D had been allowed to be evacuated despite having a parent remaining in Afghanistan, and about the implications for other cases, the best interests of D and the possibility of polygamous marriage. The FCDO accordingly took advice from the Home Office before making the assessment. An assessment was made by a FCDO panel on 22 October 2021. The panel agreed with the advice received from the Home Office, concluding that there were alternative routes for ZN and that ARAP-AFM did not allow them to make a determination in her case. This decision was not communicated to the claimants at the time.

30. On 30 March 2022, HS was advised by email that the defendant had considered the case and had been advised by the Home Office that:

> "… your ex-wife is not eligible under ARAP/LOTR but she can apply as a parent of a settled child under the Afghan Citizens Resettlement Scheme (ACRS)."

The claimants' legal advisers requested a reasoned decision on the application, following which the matter was again referred to a panel. The panel met on 22 April 2022. They agreed with the advice previously provided by the Home Office that ZN was not eligible for consideration under ARAP-AFM and that there were other standard immigration routes which could be explored to allow her to be reunited with her son.

31. On 4 May 2022, the defendant wrote to HS communicating the decision not to endorse the application on the ground that ZN was not eligible for consideration under ARAP-AFM. The letter relied on the fact that HS had separated from ZN and had remarried and relocated with his current wife. HS was informed that the rules did not apply to his ex-wife. Noting the concerns about the separation of ZN and D, it was suggested that ZN may be eligible to apply as a family member under Appendix FM of the Immigration Rules.

32. In a letter dated 6 May 2022, the Government Legal Department (GLD) said:

> "The ARAP-AFM arrangement is not a means for individuals to apply for leave to remain under the Immigration Rules or outside the Immigration Rules ("LOTR") in their own right, but rather

> for the ARAP Principal to apply for their additional family members to join them in the UK relying on an eligible familial relationship. As set out in the ARAP Decision Letter, given your client has separated from his ex-wife and remarried (with the current wife relocated with him), the ARAP-AFM rules do not apply to his ex-wife."

33. The claimants' advisers contended that the defendant had not provided a sufficiently reasoned decision. That resulted in a further letter from the GLD dated 10 June 2022, in which it was said that this was not a discretionary decision requiring reasons for exercising the discretion. Rather, ZN's application fell outside the scope of the scheme. It was said:

> "The scheme does not cover ex-spouses who do not form part of the household of the applicant …"

34. The claimants sought a reconsideration and submitted the further evidence outlined above. A panel met on 13 October 2022 and upheld the original decision not to endorse the application on the ground that ZN was not eligible for consideration under ARAP-AFM as the principal's ex-wife. The panel noted the "sad and difficult circumstances of the case" but considered that ZN was now safely located in the USA, that she had given her "full consent" for D to leave Afghanistan with his father and that there are other safe and legal routes that she could pursue to be reunited with her son. That decision was communicated to HS in the letter dated 14 October 2022 which is the subject of this claim.

**The key issues**

35. By their skeleton argument, the claimants contended that an ex-spouse could be considered as an additional family member within the meaning of the policy. The claimants argued that, in order to achieve the object and purpose of the policy, the defendant was required to adopt an approach which "assessed eligibility by reference to pre-existing ties between a Principal and/or their settled dependants and the AFM applicant". This led to the defendant suggesting that the dispute between the parties could be narrowed down to a question of whether the policy required a qualifying relationship to the principal ARAP applicant (HS) or whether it applied to a sufficiently strong relationship to any family member.

36. During his oral submissions, Mr Jones moved away from the position stated in writing, acknowledging that the policy required a family relationship between the principal ARAP applicant and the AFM applicant. The claimants therefore do not now contend that a relationship to another family member would suffice. There is no doubt that a family relationship existed between the child D and each of his parents, ZN and HS. However, Mr Jones accepted on the claimants' behalf that this was not enough to bring ZN within the scope of the policy. The claimants' case (consistent with how it was advanced in the Grounds for Judicial Review) is that it was impermissible to exclude ZN from consideration under the policy as an additional family member of HS simply on the ground that she was his ex-wife. The policy contained no definition of "additional family member" and it was wrong to construe it narrowly as applying only to ties of blood or current marriage. ZN's application was instead to be assessed by

reference to the key factors identified in the policy including proximity of the relationship, family circumstances and risk.

37. The real question then is whether the policy excluded ZN from consideration as an additional family member (the position adopted in the defendant's decision-making) or whether the defendant was required to determine ZN's application by assessing the factual ties between ZN and HS and addressing questions of risk and exceptional dependency (as the claimants contend).

**Interpretation of the policy – legal framework**

38. There is no dispute as to the legal principles to be applied in interpreting the relevant policy. The interpretation of a policy is a matter of law for the court. The policy should be construed "sensibly according to the natural and ordinary meaning of the words used" (*Mahad v Entry Clearance Officer* [2009] UKSC 16 [10]). The test is what a reasonable person's understanding of the words of the policy would be and not whether the meaning ascribed to the words by the defendant was a reasonable one (*R(Raissi) v Home Secretary* [2008] QB 836). This requires the court to look at the words used, taking the policy as a whole and in light of its context and purpose (*R(CX1) v Secretary of State for the Home Department* [2024] EWHC 94 (Admin)). Unpublished, internal guidance does not assist in the construction of the policy (see *Mahad*).

**The parties' submissions**

39. Mr Jones argued that the policy had to be given a broad purposive interpretation, recognising the need to embrace a wider category of persons than the immediate family members who were included within the rules. He contended that the focus of the policy was on risk and protection and that such focus should inform the approach to eligibility. Rather than determining an application by reference to the designation of relationships to categories, Mr Jones argued that the defendant should have given consideration to the strength of the connection between HS and ZN. He also suggested that the policy was broadly worded, such that more remote connections could be considered where the evidence of risk to the applicant was stronger.

40. On the facts, Mr Jones argued that there was a close affiliation between HS, ZN and D. There was strong evidence of the detrimental effect of separation on both D and ZN. D's best interests had to be considered in making decisions which would affect him, as the guidance acknowledged. His best interests would be served by having both parents living nearby. Further, there was specific evidence of real risk to ZN as a result of her connection to HS (including the threat that referenced her being HS's wife). Therefore, he argued, had the defendant considered the application on its facts rather than mischaracterising the fact that ZN was HS's wife as a bar, the defendant would have been bound to endorse the application.

41. In reply, Ms Broadfoot KC argued that the purpose of the ARAP-AFM scheme was to expand the types of dependant who could accompany Afghan citizens who were eligible under ARAP. The rules allowed only for a partner and minor children. The guidance allowed consideration of, for example, adult children living in the principal's household or children who had been adopted informally. It did not extend the scheme to cover all those who may have been placed at risk by connection with the principal.

42. Ms Broadfoot contended that on an ordinary reading of the policy, an ex-spouse was not to be treated as an additional family member. As the application made on behalf of ZN demonstrated, this case was really all about her relationship with her son and the impact of their separation. No family life existed between ZN and HS; the relevant family relationships were between ZN and D and HS and D. A route existed for ZN to seek leave to come to the UK for the purpose of reunification with her son, on the ground that she was the parent of a child with settled status. That route involved a different process with different requirements, including payment of a fee. It was the proper route for consideration of the issues in this case, allowing for appropriately trained Home Office staff to consider all relevant considerations. The "mental gymnastics" involved in seeking to bring the circumstances within the ARAP-AFM scheme was simply not appropriate.

**Analysis of the policy at the time the challenged decision was made**

43. The April 2022 guidance made it clear that an application could only be made on an ARAP application form where it was from "an additional family member of a relevant Afghan citizen who is eligible under the ARAP".

44. The requirement for the applicant to be a "family member" of the ARAP principal was accordingly distinct from the requirement for compelling reasons linked to security concerns as a result of the principal's employment and/or additional vulnerabilities. Being an additional "family member" was a precondition for making an application under the policy.

45. The policy did not contain any definition of "family member". The term does not have any fixed meaning in law or in common usage. Indeed, the word "family" may mean different things to different people and in different contexts. There may be cultural considerations. It is accordingly necessary to construe what is meant by "family member" by considering the policy as a whole, in light of its context and purpose.

46. The context includes the following:

    i) The ARAP-AFM policy supplemented the main ARAP scheme contained in the Immigration Rules;

    ii) The rules provided for an ARAP principal to be accompanied by a partner and minor children subject to specific relationship requirements;

    iii) If the ARAP principal was in a polygamous marriage, only one partner could be included in an application under the rules;

    iv) The relationship requirements for children envisaged that where the care of a child was shared with another parent who was not the principal applicant's partner, that child would remain in Afghanistan with the other parent;

    v) As set out in the section headed "Background", the ARAP-AFM guidance represented an expansion to provide for additional family members to join the ARAP principal in exceptional cases;

vi) The first paragraph of the guidance stated that it explained the eligibility criteria for additional family members seeking to relocate to the UK outside the rules "as a dependant of a relevant Afghan citizen";

vii) The guidance clearly stated that evidence must be provided to confirm both the relationship and the link to risk;

viii) There was no attempt within the guidance to define categories of relationship that could be considered by reference to blood, marriage or adoption (or anything else).

47. The domestic and European courts have considered the definition of "family life" in the context of claims under Article 8 ECHR on multiple occasions. Mr Jones relied upon *Lama v SSHD* [2017] UKUT 16 (IAC) and *Lebbink v The Netherlands* [2005] 40 EHRR 18 in support of a broad interpretation of "family member". He acknowledged that Article 8 had a limited role to play in applications under ARAP and that there was no requirement to embark on a detailed evaluation of Article 8 rights. However, he contended that reference to Article 8 could assist in interpretation of the term "family member".

48. In *Mobeen v The Secretary of State for the Home Department* [2021] EWCA Civ 886, Carr LJ (as she then was) said [45]:

> "Whether or not family life exists is a fact-sensitive enquiry which requires a careful assessment of all the relevant facts in the round."

She continued [46]:

> "The formal relationship(s) between the relevant parties will be relevant, although ultimately it is the substance and not the form of the relationship(s) that matters. The existence of effective, real or committed support is an indicator of family life. Co-habitation is generally a strong pointer towards the existence of family life. The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions."

49. I would accept Mr Jones's submission that there is no requirement for a blood or legal connection. However, the requirement for "family membership" cannot be ignored. While there must be a focus on the substance not the form of the relationship, the policy does not extend the scheme to connections between the applicant and the principal outside a family relationship.

50. The first paragraph of the guidance makes it clear that the policy applies to those seeking to relocate as a dependant of the ARAP principal. The background section refers to expanding the scheme to provide for others "asking to join" the relevant Afghan citizen. It is in that context that the term "additional family member" must be considered. The relevant relationship is that between the principal and the applicant.

51. Mr Jones argued that reference in the policy to "documents to confirm the primary care of a child" as an acceptable form of evidence of the relationship demonstrated that what mattered was the practical arrangements between the parties rather than any classification of the relationship. That is a misinterpretation of that section of the policy. The wording would cover adoption or equivalent relationships but does not alter the position that it is the relationship between the principal and the applicant that matters.

**Did ZN fall within the scope of the policy?**

52. Given that it is not the label that is attached to the relationship but the substance of it that is important, the fact that ZN was HS's ex-wife did not in itself operate as a bar to her application. Equally, the relationship between ex-spouses is not one that, without more, qualifies as a family relationship. A historic marriage does not establish an everlasting family relationship between ex-spouses. The dissolution of a marriage brings the partnership to an end. Very often, that will be the end of any family relationship between the parties. However, circumstances may exist where an ex-spouse continues to be treated as a family member despite the breakdown of the marital partnership. Ms Broadfoot was prepared to accept that factual circumstances might allow an ex-spouse to continue to be treated as a partner even after the formal dissolution of a marriage, although she argued that could not be so once a relationship had been formed with a new partner.

53. There was nothing within the policy that applied at the time of the relevant decisions to expressly exclude an ex-spouse or indeed an additional partner. ARAP applications within the Immigration Rules could only include one partner but this policy concerned applications outside the rules. Unlike the position today (under the Immigration Rules as amended), there was nothing stating that an additional partner could not be an additional family member. Therefore, the fact that ZN was HS's ex-spouse was not decisive.

54. The advice given by the Home Office to the defendant in October 2021 did not amount to a blanket refusal on the ground that ZN was an ex-wife. It did though note that the policy was intended to provide for family of the eligible Afghan citizen rather than family of their dependent child. It also noted that HS was not saying he would support ZN as a dependant and that "it is about reuniting her with the child in the UK". Concern was expressed about setting a precedent when it was likely that a lot of children were separated from their parents, having come to the UK with other adults.

55. In the decision letter of 4 May 2022, the defendant highlighted the fact that the parties were separated and HS was remarried and his current wife had relocated with him. It explained that ARAP-AFM was the process by which those eligible for ARAP could seek to have non-eligible family members endorsed as their dependants. It concluded that the ARAP-AFM rules did not apply to ZN.

56. The decision letter of 14 October 2022 took the same stance. It recognised the impact separation was having on ZN and D and reiterated that ZN may be eligible to apply to the Home Office for relocation once D was settled in the UK (which he was by that time). However, the defendant maintained that ZN was not eligible for consideration under ARAP-AFM.

57. The application for ZN to be granted leave outside the rules under the ARAP-AFM policy focused on (i) the impact of separation from his mother on D; and (ii) the evidence of increasing risk and threat to ZN. It made it clear that HS and ZN had lived separately since 2018 and referred to the shared custody / parenting arrangement and their collaboration over D's wellbeing. The extent of any ongoing relationship between HS and ZN as set out in the application was their co-parenting of D. The application also referred to the risks to ZN by reference to her own work for the Ministry of Interior and as a journalist, her ethnic and religious background and the fact that she was a single woman with no family in Afghanistan. It was said that she had received telephone calls from the Taliban, referring to her being single.

58. In her statement of 1 August 2022, ZN set out details of her life and career. She described her relationship with D and the impact of her separation from D. She outlined the risks she faced in Afghanistan and the threats she had received, before describing how she had fled from Afghanistan and was then living in a camp in Abu Dhabi. HS also described the close relationship between ZN and D and the impact the separation had on them. He explained that he (HS) found the memory of D saying goodbye to his mother very painful. HS's statement also set out that he and ZN had concealed their divorce from all but their closest friends because divorced women are vulnerable in Afghanistan.

59. It is clear from both statements that HS and ZN lived entirely separate lives after their divorce with D going between them. They had a good co-parenting relationship but spent no time together and HS did not maintain ZN financially or provide other support to her. All the communication between them related to D and his upbringing. Although it is suggested that they continued to present as married, the evidence indicates that this was limited to not publicising the fact of the divorce. ZN was an independent woman with her own life and career.

60. In the circumstances, the information provided did not establish that ZN was treated as HS's family member within the meaning of the scheme. The evidence did not support a continuing family relationship between HS and ZN and it would have been stretching reality to describe ZN as HS's family member after the dissolution of their marriage.

61. As ZN did not qualify as an additional family member of HS, her application did not fall to be assessed under the ARAP-AFM policy. It follows that the defendant was entitled to treat ZN's application as not eligible for consideration and was not required to assess the security concerns and/or whether there was an exceptional level of dependence.

**The position had ZN been a "family member" of HS**

62. Had ZN been able to bring herself within the "additional family member" definition, it is by no means certain that she would have qualified for relocation either on the basis of "security concerns" or as a result of "additional vulnerabilities".

63. In relation to security concerns, the guidance stated that the assessment "must confirm that the risk is specific to the additional family member(s) and related to the work undertaken by the relevant Afghan citizen in order for relocation to be considered." That was not the thrust of the application, which linked the risk to ZN to factors other than her past marriage to HS. Although ZN's evidence contained in her statement of 1

August 2022 referred to a telephone call in which she was described as HS's wife, the evidence of risk still primarily related to other factors. By the time ZN made that statement (which was the first time evidence had been advanced that might suggest a link between HS's work and the risk to her), ZN had left Afghanistan. She was transferred from Abu Dhabi to the USA that same month. Therefore, by the time the decision on reconsideration was made, she was in a safe country.

64. As to additional vulnerabilities, ZN could not point to any exceptional level of dependency. She had not in fact been dependent on HS financially or at all, after their divorce.

**Issues relating to reunification of ZN and D**

65. The reality is that the application was made for the purpose of reunification of ZN with her son. I have considerable sympathy with ZN, D and HS in their desire to achieve that outcome and to re-establish the successful co-parenting arrangement that existed before HS and D left Afghanistan. Further, I make it clear that I do not accept the defendant's argument that the separation of ZN and D represented parental "choice". As loving and concerned parents, HS and ZN had no real choice when faced with the option to evacuate D or to leave him in Afghanistan. However, the ARAP scheme always envisaged that children could be separated from parents. The starting point under the Immigration Rules at the time of the application was that a child would not be considered for leave inside the rules if he had a parent in Afghanistan who was not the ARAP principal's partner.

66. The ARAP-AFM scheme was designed to allow an ARAP principal to bring other dependants, who did not meet the eligibility criteria under the rules. It did not exist to address the rights of those who qualified as immediate family members to continue their family life with others. The relationship between the principal and the applicant was the key. As the defendant repeatedly advised, an application for leave could be made to the Home Office on the basis of ZN's relationship with her son.

**Section 55 of the Borders, Citizenship and Immigration Act 2009**

67. The evidence does support the notion that it would be in D's best interests to have both his parents living nearby, allowing each to play an active and committed role in his life as they did before. However, the reference to section 55 of the Borders, Citizenship and Immigration Act 2009 in the policy does not assist the claimants. The best interests of D (and any other child living in the UK, potentially including his half-siblings) would have had to be taken into account in assessing an application falling within the policy. However, D's best interests could not require the defendant to process an application that fell outside the scope of the policy as though it fell within it. The need to consider section 55 did not arise because ZN was not eligible to be considered under this scheme.

**Article 8**

68. The same considerations apply to the claimants' argument that Article 8 ECHR has a part to play in considering the application. The ARAP-AFM scheme does not constitute the only route through which the Article 8 rights of the claimants and D may be recognised. It remains open to ZN to apply for leave under Appendix FM to the Immigration Rules, relying on her relationship with her son, who now has settled status

in the UK. Such an application would fall to be considered by the Home Office, rather than the defendant. It must be made in proper form and is subject to different requirements. The ARAP application form used here did not provide a procedural gateway for consideration of LOTR on a different basis (see *S, AZ v SSHD* [2022] EWCA Civ 1092 [25-26]).

69. Of course, had ZN qualified for consideration under the ARAP-AFM policy, it would not have been open to the defendant to refuse to consider her application because alternative routes to entry existed. That is not what the defendant did. Rather, the defendant concluded that ZN was not eligible to make an ARAP-AFM application but highlighted the possibility of an application through a different route.

**Conclusion on the claim for judicial review**

70. For the reasons set out above, the defendant was entitled to treat ZN's application as falling outside the ARAP-AFM policy and accordingly to refuse it without going on to assess the security risk to her and/or her dependency. That is sufficient to dispose of the challenge on Ground 1, which is the sole basis on which permission was granted.

**Issues relating to relief had Ground 1 succeeded**

71. Had I concluded that the defendant acted unlawfully in refusing to consider ZN's application under the policy, it would have been necessary to go on to consider whether relief should be granted. The defendant argued that it would serve no useful purpose to quash the decision as the application would fall to be refused on any fresh consideration in light of current policy and the circumstances which now exist. The claimants contended that ZN could qualify under the requirements of the amended Immigration Rules Appendix ARAP. Alternatively, the doctrine of corrective relief should apply such that the defendant would be required to consider the need to correct an historic injustice.

72. Ms Fitzsimons developed the arguments on this point on behalf of the claimants. She argued that although ARAP 13.2 now expressly states that an additional partner cannot be an additional family member where one partner has applied for clearance of settlement under the Rules, ZN would not be applying as a partner. Further, the updated internal guidance which states that divorced spouses cannot be considered does not cut across the rules or published policy. Ms Fitzsimons relied upon *R(GE (Eritrea)) v Home Secretary* [2015] 1 WLR 4139 (at [54]) for the proposition that the application would now fall to be considered on the basis of present circumstances but that those circumstances might include the need to remedy an injustice caused by past illegality. She acknowledged that the decision of the Supreme Court in *R(TN (Afghanistan)) v Home Secretary* [2015] UKSC 40; [2015] 1 WLR 3083 cast doubt on the notion of corrective justice but contended that *Moussaoui v SSHD* [2016] EWCA Civ 50 (at [27]), which postdated *TN*, demonstrated a continuing role for considering historical injustice in exercising discretion.

73. It is my view that ZN could not bring herself within the scope of the current rules. I accept the defendant's argument that it would be illogical to accept an application from an ex-partner in the face of an express prohibition on considering an application from a second partner, who may also have shared the parenting of a child. While it could be argued that the policy intent behind the exclusion of second partners is that polygamous

marriages should not be supported as a matter of public policy, the provision goes wider than that (in contrast to the previous reference to polygamous marriage in the earlier version of the rules).

74. Further, ZN is now settled in a safe country so that the security risks have fallen away. She has lived independently of HS since 2018 and it is not proposed that he would support her in the UK.

75. In light of my finding that the defendant did not act unlawfully in concluding that ZN did not fall within the scope of the ARAP-AFM policy, it would be wholly artificial for me to consider the impact of the arguments about corrective relief had I reached a different decision. Such arguments could only be considered properly with reference to the nature of any unlawfulness. It would not be helpful for me to attempt to say how *TN* and *Moussaoui* might apply to some theoretical finding of illegality. I conclude that there is no injustice to correct in this case. The defendant was entitled to refuse the application as falling outside the scheme that existed at the time the application was made just as an application made today on the same factual basis would be refused.

## Conclusion

76. The claimants' claim for judicial review is accordingly dismissed.

## Costs

77. Having circulated my judgment in draft, I received the parties' submissions on costs. There is no dispute that there should be an order that the claimants pay the defendant's reasonable costs, to be assessed on a standard basis if not agreed.

78. The sole issue is whether the claimants should be jointly and severally liable for the defendant's costs or whether there should be an apportionment of the liability. This is of significance because HS has had the benefit of legal aid and associated cost protection throughout the proceedings, but ZN had a legal aid certificate only until 8 May 2024 and so lost her cost protection from that date. I am informed that Law for Change have agreed to indemnify ZN for her share of the costs thereafter.

79. The claimants invite me to apportion the liability for costs after 8 May 2024 and to order that ZN's liability for costs after that date shall be limited to 50% of the total amount reasonably incurred by the defendant. The defendant says that there is no proper basis for apportioning the costs in that way.

80. I agree with the defendant. This claim was brought jointly by the claimants. Ms Fitzsimons submits that there was a clear shared benefit and that both had an equal interest in bringing the claim. That does not provide a foundation for dividing the costs. The reality is that the claim was concerned with a single application to secure a route to entry clearance for ZN. HS had made the application and ZN was the intended beneficiary. No part of the defendant's costs can be isolated as being referrable to HS alone.

81. The usual order where two claimants have jointly pursued an unsuccessful claim is that the claimants shall pay the defendant's costs. It is then open to the defendant to enforce the order against either or both claimants. There is no reason to depart from the usual

course here. The submission I should do so, in the exercise of my discretion under CPR 44.2, is not based on any principled reason to divide the costs up between the two claimants. Rather, it represents an attempt to prevent the defendant enforcing his costs to the extent he is entitled to in accordance with the statutory regime. I shall therefore not include the clause proposed by the claimants to restrict ZN's liability for the defendant's costs after 8 May 2024 to 50%. Instead, I will order that the claimants pay the defendant's costs, subject to the appropriate protection while each was in receipt of legal aid.

82. There will be a detailed assessment of the claimants' publicly funded costs.

83. I am grateful to both sides' representatives for the efficiency they have shown in dealing with this issue of costs, and indeed in relation to the claim generally.