JR-2022-LON-001012

In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review

In the matter of an application for Judicial Review

The King on the application of
JZ
(ANONYMITY DIRECTION MADE) Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge McWilliam and Upper Tribunal Judge Sheridan

AND UPON the applicant withdrawing ground 5 at the hearing, but applying to stay grounds 3 and 4 which was opposed by the respondent;

AND UPON the parties agreeing that the applicant be at liberty to submit any further representations and evidence in support of a decision 'in principle' by the respondent in respect of his outstanding application for a Leave Outside the Rules ("LOTR") within 14 days of this order.

HAVING considered all documents lodged and having heard from Ms S Naik KC, Ms Irena Sabic KC and Emma Fitzsimons, instructed by Wilsons Solicitors, for the applicant and Ms Hafsah Masood, instructed by GLD, for the respondent at a hearing on 15 and 16 March 2023.

IT IS ORDERED THAT:

1. The application for judicial review is granted for the reasons given in the attached judgment.

2. The decisions of the ECO dated 06.04.2022 and ECM dated, 25.04.2022 are quashed.

3. The respondent do make an 'in principle' decision on LOTR within 35 days of receipt of the further representations and evidence described in the recital.

4. The respondent do pay 50% the applicant's costs to be assessed on the standard basis, if not agreed.

5. We do not consider that it is appropriate to make a costs order against the applicant; however, we consider that the percentage cost order properly reflects the applicant's lack of success on grounds 3-4, the last minute withdrawal of ground 5 and the unsuccessful interlocutory applications.

6. There be detailed assessment of the applicant's publicly funded costs.

7. Permission to appeal is refused. There is no point of law against which the applicant may appeal.

Signed: Joanna McWilliam

Upper Tribunal Judge McWilliam

Dated: **13 June 2023**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *13 June 2023*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IAC-AH-SAR-V2

IN THE UPPER TRIBUNAL

JUDGMENT GIVEN FOLLOWING HEARING

JR-2022-LON-001012

Field House,
Breams Buildings
London
EC4A 1WR

15 and 16 March 2023

THE KING
(ON THE APPLICATION OF JZ)
(ANONYMITY DIRECTION MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE McWILLIAM
UPPER TRIBUNAL JUDGE SHERIDAN

- - - - - - - -

Ms S Naik KC, Ms I Sabic and Ms Emma Fitzsimons instructed by Wilsons Solicitors appeared on behalf of the Applicant.

Ms H Masood, Counsel instructed by Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

- - - - - - - - - - - - - -

JUDGE McWILLIAM: We heard this case at a face to face hearing on 15 March 2023. As a result of industrial action effecting rail services we decided that it would be appropriate to conclude the hearing on 16 March by way of a remote hearing. The parties agreed to this.

2. The applicant is an Afghan national and former Judge who is seeking leave to enter the United Kingdom. It is common ground that he is at risk of persecution in Afghanistan from the Taliban. He challenges the decision of the Entry Clearance Officer ("ECO") on 6 April 2022, maintained by the Entry Clearance Manager ("ECM") on 25 April 2022 refusing him leave to enter the United Kingdom outside the Immigration Rules ("LOTR").

3. It is necessary to briefly summarise details of the various schemes set up by the United Kingdom government available to individuals like the applicant, who worked as a judge in Afghanistan, on the fall of Afghanistan to the Taliban.

Operation Pitting ("OP")

4. OP was the UK military operation to evacuate British nationals and other individuals from Afghanistan which began on 13 August 2021. On 25 August 2021, in the light of a terrorist threat, HMG advised against travel to Kabul airport. OP ended on 28 August 2021, when the final British military personnel withdrew from Afghanistan.

5. OP had been planned to implement the HMG's decision to evacuate British nationals and Afghan nationals qualifying under the Afghan Relocation and Assistance Policy ("ARAP") and their family members. In August 2021, ministers indicated their willingness to evacuate certain other groups of Afghan nationals provided there was capacity on UK evacuation flights and it did not hinder the priority evacuation of

British nationals and those qualifying under ARAP. A number of cohorts were identified and agreed by ministers. Those who were "called forward" for evacuation (this being the process by which individuals were informed that they would be evacuated by HMG from Afghanistan to the UK) and were successfully evacuated were granted LOTR on their arrival in the UK. This evacuation route became known as "OP LOTR" or "Pitting LOTR" in order to distinguish it from ARAP and because LOTR was the type of leave granted to those evacuated under this route. The UK's last evacuation flight left Afghanistan just before midnight on 28 August 2021.

Immigration Policy following the end of OP

6. Following the end of OP on 28 August 2021, the normal policy and process for relocation and resettlement resumed, as formalised in the Home Office's Afghanistan Resettlement and Immigration Policy Statement ("ARIP")published on 13 September 2021. The ARAP Policy launched in April 2021 and remains open indefinitely. There are four categories of persons eligible for support under ARAP. At the time of the ARAP decision in this applicant's case category 4 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 or unconventional contexts, and whose responsible HMG unit builds a credible case for consideration under the scheme (in some cases this includes people employed via contractors to support HMG defence outcomes)".

7. In order to be eligible under category 4, an applicant must not only have worked "alongside HMG" but also have done so in "meaningful enabling roles" defined as "roles that made a material difference to the delivery of the UK mission in

Afghanistan, without which operations would have been adversely affected".

8. The application process begins with the submission of an online ARAP application to the Ministry of Defence ("MOD"). If the applicant is assessed as eligible for relocation, a Visa Application Form is completed for consideration by the SSHD (since those eligible for relocation under ARAP require entry clearance). The SSHD will then consider the application for entry clearance under the Immigration Rules (IR). Successful ARAP applicants are granted settlement.

9. Afghan Citizens Resettlement Scheme ("ACRS") was announced on 18 August 2021 and formally opened on 6 January 2022. There is no application process. Rather, eligible individuals are prioritised and referred for resettlement under one of three pathways. The first referral pathway (which opened on 6 January 2022) is for individuals who arrived in the UK having been evacuated under OP. Those who were notified by HMG that they had been called forward or specifically authorised for evacuation but were not able to board evacuation flights, are also offered a place under this pathway if they subsequently came to the UK. Under the second referral pathway (opened on 13 June 2022), UNHCR will refer refugees in need of settlement who have fled Afghanistan. Under the third referral pathway (also opened on 13 June 2022) HMG will offer places to eligible at risk British Council contractors, GardaWorld contractors, and Chevening alumni year 1.

10. ARIP made clear that there was "no change" to the Home Office's "longstanding policy that a person can only claim asylum from within the UK". The policy stated that "We will not accept asylum claims at our Embassies, High Commissions or VACS overseas or otherwise; whether by online application or through other correspondence". This position is reflected

in the IR which require an asylum application to be made at a designated place of asylum.

LOTR

11. The SSHD has a discretion to grant leave to enter or remain outside the IR. Such power derives from s.3 of the Immigration Act 1971.

The applicant

12. From 20 July 2008 to 30 May 2011 the applicant, a Primary Court (first instance) Judge, was assigned to the "Public Security" bench hearing terrorism cases. He sat at the Justice Centre in Parwan ("JCIP") at Bagram Air Force Base and at Pol-e-Charkhi prison in Kabul. Most of the cases he has heard involved insurgents and Taliban fighters who had been arrested by the International Security Assistance Force ("ISAF".) From May 2011 he sat as an Appeal Court judge in Kabul. He was still in that post in August 2021.

13. The applicant and his family are currently in hiding, separately, in Afghanistan. His evidence is that most of the Taliban fighters sentenced by him have been released from prison and have rejoined the Taliban and actively fight for them. He is being actively sought by the Taliban and has received threats, including death threats, since August 2014. Some of the death threats have said that he and his children will meet the same fate as that of his cousin, Judge Rafieddin, who was assassinated by the Taliban on 22 January 2020 while a sitting judge in the Appeal Court in Nangarhar. Several statements provided by the applicant's brother, SQ, indicate that the threats against applicant and his family continue. The SSHD does not dispute that the applicant's life is at risk due to his judicial service.

The background

14. On 14 August 2021 the applicant applied under ARAP. He provided evidence in support including a letter dated 13 August 2021 from Colonel Thomas English, a retired US army officer who had been assigned the mission of overseeing the investigation and prosecution of detainees captured on the battlefield in Afghanistan, including those captured by the UK.

15. On 25 August 2021 the applicant's name was included on a list of six "high profile cases not successfully processed" with reference to OP. At 5.27 a.m. on 26 August 2021, Philip Hall who was leading the team within the Foreign and Commonwealth and Development Office ("FCDO") implementing ARAP, emailed Sharon Wardle (a "Silver" leader in the Afghanistan Crisis Centre at the material time) indicating that the applications on the list "looked very credible" and asking her to convene a panel when further information was received. By this point the travel advice had changed due to the rapidly deteriorating security situation. Realising this, and that no further call forward instructions would be issued, Ms Wardle did not convene a further panel. Accordingly, the applicant's case like that of several others, was not considered by a panel for a call forward instruction and he remained in Afghanistan during OP.

16. His application was rejected under ARAP on 18 October 2021. We will say more about the substance of this decision later. The application for judicial review against the ARAP decision was refused by Hill J: R (on the application of JZ v (1) SSHD & Ors [2022] EWHC 2157 (Admin) ("JZ 2") following a hearing on 8 and 9 June 2022 and 25 July 2022. The applicant applied for permission to appeal against the dismissal of his claim. This was considered at an oral hearing on 23 February 2023 and dismissed: JZ v SSHD & Ors [2023] EWCA Civ 178 ("JZ 3").

There has been a further ARAP decision on 31 May 2022 which has not been challenged by the applicant.

17. In the same proceedings Lieven J granted the applicant interim relief on 1 April 2022: JZ v SSHD & Ors [2022] EWHC 771("JZ 1") ordering the Respondent to make an "in principle" decision in relation to the Claimant's request for LOTR, pending the provision of biometrics.

18. Proceedings in the UT were issued on 6 July 2022. There have been various applications and decisions culminating in the proceedings being stayed pending R (on the application of SQ) v SSHD (CO/1072/2022)in the High Court.

The ARAP decision - 18 October 2021

19. The decision was communicated by way of a letter to the applicant from the Foreign Commonwealth and Development Affairs (FCDA) head of Counterterrorism, Afghanistan Task Force for ARAP category 4 applications. That letter stated that the following test applied:-

> "Individuals who (1) had worked in a role that made a material contribution to HMG's mission in Afghanistan, and (2) without whose work the UK's operations would have been adversely affected, and (3) who were now at risk because of their work given the changing situation in Afghanistan".

20. The decision continued:-

> "2. On the evidence provided to me, I have concluded that [JZ] was indeed a judge within Afghanistan and sat as a judge at the Justice Centre in Parwan (referred to in the evidence bundle as Bagram Air Force Base) and at Pol-e-Charki prison. I note the threats the applicant claims are against him. I am personally

aware of threats made against other members of the Afghan Justice System that considered issues of Afghanistan's national security.

3. I note that the US Marshals Service provided support and training whilst [JZ] worked at the Justice Centre in Parwan demonstrating the high threat he faced in 2008-11. [JZ's] own statement (para 15, page 11 of the evidence bundle) references that some of those he convicted would have been released by now. In addition, I am aware that many other prisoners have now been released either as a consequence of the US Taliban peace deal (referred to in the statement) or the thousands of detainees let out of prison by the Taliban following the collapse of the Afghan Government.

4. The translated threat document (pages 25 to 27 of the evidence bundle) does make reference to [JZ] having 'imprisoned many of our members/personnel', whilst this might well be a consequence of his time at the Justice Centre in Parwan, there is no mention of his involvement with international forces or foreign governments.

5. In light of these considerations, whilst I accept that [JZ] is at risk, I am not satisfied that the threat to [JZ] is heightened as a consequence of engagement with the United Kingdom.

My decision not to sponsor this application are further based on the following factors:

6. I have no evidence to lead me to believe that [JZ] 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.

7. Based on the evidence reviewed, it does not appear to me that [JZ] 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 focussed in Kabul – that was also the focus of HMG's counter terrorism mission in Afghanistan. As [JZ] 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. Based on my limited knowledge of military operations in Afghanistan and the limited detail about [JZ's] involvement with HMG provided in the evidence bundle, I cannot come to an alternative view.

8. In view of the above, it is not apparent that the UK's operations would have been adversely affected without [JZ's] work. As stated in paragraph 7, the UK's counter-terrorism mission was focussed in Kabul. As [JZ] did not work there, his contribution to the UK's counter terrorism mission was minimal. Mr English's letter of support highlights [JZ's] role in hearing cases to determine if detainees should continue to be detained under Afghan law and how this facilitated the exit of ISAF. However, from my position in determining whether the FCDO Counter-Terrorism team within the Afghanistan Task Force should sponsor [JZ] the case does not provide clear evidence on how [JZ's] work supported counter terrorism operations".

JZ 2

21. Hill J found that there was no unlawful inconsistency in decision-making, since there were distinguishing features between the applicant and the judges of the Anti-terrorism Court in Kabul which explained and justified the decision to grant them leave under ARAP, but to refuse it to the applicant. These judges had all served after 2015, which was when HMG became involved in supporting the Anti-terrorism Court in Kabul and building partnerships with the judges there. They were therefore found to have met the "worked alongside" criterion in ARAP category 4 whereas the applicant did not. She found that the evidence showing JZ's inclusion in a list of 'high profile' individuals during OP was not sufficient to show that the applicant should have been found to have met the 'worked alongside' criterion.

22. Hill LJ rejected the applicant's argument that the overall operation of the ARAP scheme was incoherent and unfair.

The hearing

30. At the hearing before us the parties relied on a trial bundle which comprised 909 pages. Included in that bundle are documents that were before the decision-maker including witness statements from the applicant and his brother, the expert report of Tom Foxley MBE, and the witness statements of Colonel T English. There is a joint letter from Lord Anderson QC of Ipswich and Lord Carlile QC of Berriew which was before the ECM.

31. There was a supplementary bundle which comprised 88 pages and which includes the applicant's representations in support of his application for LOTR on 4 April 2022 and 14 April 2022. There is also a letter from GLD to the applicant's solicitors

of 25 April 2022 which is the covering letter to the decision of the ECM.

32. We will set out the relevant guidance Leave outside the Immigration Rules, Version 2.0 ("LOTR policy"). We will then set out salient parts of the applications and decisions made before reaching our conclusions.

33. The LOTR policy

> "**About this guidance**
>
> This guidance tells you about when it may be appropriate to exercise discretion to grant leave outside the Immigration Rules (LOTR) on the basis of compelling compassionate grounds (other than family and private life, medical, asylum or protection grounds)".
>
> "**Background**
>
> The Immigration Rules are designed to provide for the vast majority of those wishing to enter or remain in the UK however, the Secretary of State has the power to grant leave on a discretionary basis outside the Immigration Rules from the residual discretion under the Immigration Act 1971.
>
> ...
>
> On 9 July 2012 and 10 August 2017, legislation was changed to bring the majority of family and private life cases under part 7 paragraph 276ADE(1) and Appendix FM of the Immigration Rules. In relation to family and private life cases, there will be a consideration of any exceptional circumstances that apply – for family life cases this is built into Appendix FM of the Immigration Rules and for private life cases this consideration is done outside of the Immigration Rules.
>
> In all family and private life cases, the decision maker will consider whether the Immigration Rules are otherwise met and if not, will go on to consider whether there are exceptional circumstances which would render refusal a breach of ECHR Article 8 because it would result in unjustifiably harsh consequences for the applicant or their family. Each application is considered on its merits and

on a case-by-case basis taking into account the individual circumstances.

LOTR on compelling compassionate grounds may be granted where the decision maker decides that the specific circumstances of the case includes exceptional circumstances. These circumstances will mean that a refusal would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, Article 3, refugee convention or other obligations.

Not all LOTR is granted for the same reason and discretion is applied in different ways depending on the circumstances of the claim and the applicant's circumstances.

...

Important principles

A grant of LOTR should be rare. Discretion should be used sparingly where there are factors that warrant a grant of leave despite the requirements of the Immigration Rules or specific policies have not been met. Factors raised in their application must mean that it would not be proportionate to expect the person to remain outside the UK or to leave the UK.

The Immigration Rules have been written with clear objectives and applicants are expected to make an application for leave to enter or remain in the UK on an appropriate route under the Immigration Rules and meet the requirements of the category under which they are applying – including paying any fees due. Considerations of whether to grant LOTR should not undermine the objectives of the rules or create a parallel regime for those who do not meet them.

...

The period of LOTR granted should be of a duration that is suitable to accommodate or overcome the compassionate compelling grounds raised and no more than necessary based on the individual facts of a case. Most successful applicants would require leave for a specific, often short, one-off period. Indefinite leave to enter or remain can be granted outside the rules where the grounds are so exceptional that they warrant it. Such cases are likely to be

extremely rare. The length of leave will depend on the circumstances of the case. Applicants who are granted LOTR are not considered to be on a route to settlement (indefinite leave to remain) unless leave is granted in a specific concessionary route to settlement".

In family life cases, involving an application by an adult dependent relative, the Family Policy: Adult dependent relatives, Version 3.0 ("ADR Family Policy"), provides as follows:-

"**Exceptional circumstances and ECHR Article 8**

Where the Applicant does not meet the requirements of the adult dependent relative Rules, the decision-maker must go on to consider:

- Firstly, whether, in the particular circumstances of the case, the ECHR Article 8 right to respect for private and family life is engaged.

- Secondly, whether there are exceptional circumstances which would render refusal a breach of Article 8 because it would result in unjustifiably harsh consequences for the applicant or their family.

Article 8 protects the right to respect for private and family life. However, the 'family life' element of Article 8 is not normally engaged by the relationship between adult family members who are not partners. Neither blood ties nor the bonds of concern and affection that ordinarily go with them are, by themselves or together, enough to constitute family life for the purposes of Article 8. Accordingly, in order to establish that family life exists between adults who are not partners, there must be something more than such normal emotional ties. Whether such family life exists will depend on all of the facts of the case.

...

'Exceptional circumstances' means circumstances which would render refusal of the application a breach of Article 8, because it would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from the application would be affected.

> ‘Exceptional’ does not mean ‘unusual’ or ‘unique’. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in the Immigration Rules have been missed by a small margin.
>
> Instead, ‘exceptional’ means circumstances in which refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8”.

Letter from Wilsons Solicitors dated 4 April 2023

34. The letter from the applicant’s solicitors seeks to set out why the applicant meets the compelling compassionate test for the purposes of LOTR. It lists a number of documents that it is stated should be before the respondent. These include letters from Mishcon de Reya (solicitors formerly instructed by the applicant), an expert report from Mr Tom Foxley MBE dated 10 November 2021, the applicant’s witness statement and that of his brother, a statement from Colonel T English of 27 October 2021, and a further witness statement from Colonel T English of 15 January 2022. The submissions at paragraphs 15 to 37 relate to the applicant’s family life and the risk to him from the Taliban. It is asserted that the applicant remains at “serious, imminent risk from the Taliban as a result of his work as a judge. This is sufficiently serious and urgent to meet the compassionate/compelling threshold for a grant of leave”.

35. In the same letter at paragraph 38 under the heading “Our Client’s contribution to the rule of law in Afghanistan” the following is stated:

> “38. In considering our client’s case, we remind the ECO that our client is at risk as a result of his work as a high profile Afghan judge, who was responsible for prosecuting and sentencing terrorist

> combatants, who were captured by ISAF fighters during the conflict in Afghanistan. We refer you here to JZ's evidence, the statement of support from retired US Colonel, Colonel English (15 January 2022, 27_October 2021, 13 August 2021) and the first report of Tim Foxley, 10 November 2021. The fact that our client is being actively hunted down by Taliban because of his work, supporting the rule of law in Afghanistan, which in turn contributed to the prosecution and sentencing of serious terrorists who pose a threat to the UK, is a highly material matter for the purposes of exercising discretion. Our client's interests and commitments align with those of the UK, having been directly working in cooperation with ISAF partners, to prevent and punish terrorist combatants".

Under the heading "The Significance of being 'almost called forward'. The applicant stated:-

> "The defendants' position in this litigation is they accept our client did make an in time application for evacuation at the time of Operation Pitting, and that this was not resolved due to the events on the ground. On the defendants' case the failure to convene a panel and resolve our client's case. This context is highly relevant to the compelling/compassionate test. It is not the fault of the claimant that his application was not resolved. Given the profile and risks to our client – which is accepted by the defendants – it is highly (sic) he would have qualified for evacuation. We rely on the evidence of other similarly situated judges to show that other judges, with similar profiles were relocated. There is no compelling justification to deny our client entry now to the UK".

The letter went on to address life for women and girls under the Taliban regime and the deteriorating humanitarian situation in Afghanistan.

The decision of the ECO - 6 April 2022

36. The decision reads as follows:-

> "3. [JZ] was refused under the Afghan Relocations and Assistance Policy (ARAP) on 20 October 2021. A Judicial Review of that decision was requested and permission was refused against the ARAP decision in turn by the Honourable Justice Lane on 8 December 2021, by the Honourable Justice Kerr on 15 December 2021, and finally by Lord Justice Lewis of the Court of Appeal on 1 March 2022. An ARAP application cannot be used to apply for a Leave Outside the Rules (LOTR) application".

37. The decision-maker went on to consider the application as an application for visitor entry clearance and decided that the applicant and his family would not meet the IR for visitors. The decision-maker then went on to consider the application with reference to the IR relating to adult dependent relatives "as the closest applicable for consideration". However, the decision-maker concluded that the applicant and his family members had not demonstrated or shown any disability or illness that would require them to have long term personal care in order to perform everyday tasks.

38. The decision-maker went on to consider the application with reference to the IR relating to protection claims. They were not satisfied the IR were met as the applicant and his family were not at a designated place of asylum claim. The decision-maker went on to conclude that the applicant did not

meet the requirements of the Rules relating to family reunion.

39. Article 8 ECHR was also considered by the decision-maker.

40. The decision identified that the LOTR guidance requires compelling and compassionate grounds other than asylum, protection, medical, family and private life.

41. The decision maker stated as follows:-

> "(a) I acknowledge that [JZ] may have received threats, as a result of the upheaval that occurred both before and during the period of regime transition. Whether these threats may have originated only due to his work for more than ten years ago as one of a number of judicial and legal personnel at the Bagram complex, or on a generalised basis from the more recent period of his work in the Traffic division and other areas, or even due to other outside factors such as financial, property and other examples is not clear. Moreover, the evidence in totality suggests that the threats to [JZ] are capable of mitigation by steps taken by himself to enhance his personal safety.
>
> (b) [JZ] and his family have all held valid Pakistani family visit visas since October 2021, which they can use to legally enter Pakistan. This means that [JZ] and his family could have legally travelled to Pakistan at any time since October 2021, but have chosen not to do so. Had [JZ] and his family considered their position in Afghanistan to be excessively dangerous and hazardous as is claimed, they would have been at liberty to remove themselves from the situation well before now. Upon

entering Pakistan legally, [JZ] and his family could attempt to regularise their position from that point.

(c) I note that [JZ] is able to arrange security for any journey to Pakistan so as to reduce any personal risk in crossing the border.

(d) While concerns are flagged that [JZ] will be at risk from the Taliban in Pakistan, the reported Upper Tribunal case of *AW (sufficiency of protection) Pakistan* [2011] UKUT 31 (IAC)sets out that there is a systemic sufficiency of state protection in Pakistan. [JZ] has not set out why he would not be protected by the Pakistani authorities.

(e) [JZ] and his family can utilise third countries (the example given being Pakistan but equally applicable to other countries) to enjoy family life, by visits, with their other family members indicated as being elsewhere, if required. I note that [JZ] and his family members have not seen their UK family members since 2015".

42. The decision maker concluded that [JZ] had not demonstrated that his "own situation and circumstances warrant an exceptional consideration" or that [JZ] and his family "have demonstrated sufficient compassionate grounds in any of their circumstances so as to further warrant any other consideration for leave outside the Rules."

<u>The letter from Wilsons Solicitors dated 14 April 2022</u>

43. In this letter to the GLD the applicant's solicitors request that certain evidence, which they list at paragraph 3, be

taken into account by the ECM. Further submissions are made at paragraphs 4–7. At paragraph 7 the following is stated:-

> "... The correspondence exhibits a high profile support for JZ's case including three members of the House of Lords (including the former Minister for Justice, Lord Wolfson) and a High Court Judge. This support clearly illustrates the exceptional and compelling nature of [JZ's] case on the facts which must be taken into consideration by the defendants in their response to our pre-action letter".

The decision of the Entry Clearance Manager (ECM)- 25 April 2021

44. The ECM set out the documents that were taken into account. They are the same as those recorded by the ECO and are recorded as follows: the judgment, the agreed hearing bundle, the claim bundles 1 and 3 (this was corrected by Ms Masood as 1, 2 and 3), the core bundle and additional representations from Wilsons LLP on 4 April 2022.

45. The ECM states as follows:-

> "6. Your client has been treated as if his efforts to submit an online visa form for the visitor route had been successful, and an online application form for entry clearance had been submitted, seeking LOTR. An 'in principle' decision has been taken on whether discretion should be exercised, and he should be granted LOTR. As a result I am not satisfied that the question of whether or not an ARAP form can be used to apply for LOTR is relevant to this case.
>
> 7. You state that your client 'almost qualified under ARAP' and 'was almost called forward' and that these are matters relevant in respect of your client's visit visa application with grounds for LOTR. As

stated in the ‘in principle’ decision, your client’s ARAP application has been refused and permission to apply for judicial review to challenge that decision was refused by the Administrative Court and Court of Appeal. Similarly, the salient factor is that your client was not called forward which means he falls for consideration under the LOTR guidance in place at the time of decision.

…

10. LOTR on compelling compassionate grounds may be granted where the decision maker decides that the specific circumstances of the case includes exceptional circumstances. These circumstances will mean that a refusal would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, Article 3, refugee convention or other obligations. The LOTR Guidance states: ‘Considerations of whether to grant LOTR should not undermine the objectives of the rules or create a parallel regime for those who do not meet them’. The reasons stated in sub-paragraphs 11a–11d below relate to elements of threat and danger faced by [JZ] and there is an implication that he should be granted LOTR on this basis. I am satisfied however that these reasons would be covered by the refugee convention and to grant LOTR on this basis would undermine the Immigration Rules (see in particular, paras 327 to 327C of the Immigration Rules, which require an asylum claim to be made from a designated place of asylum claim).

11. In any event, as set out in the 'in principle' decision, there are steps that [JZ] can take to mitigate the risks to himself and his family:

    a. It was acknowledged that [JZ] may have received threats as a result of the upheaval that occurred both before and during the period of regime transition. The evidence in totality suggests that the threats to [JZ] are capable of mitigation by steps taken by himself to enhance his personal safety.

    b. [JZ] and his family have all held valid Pakistani family visit visas ([JZ] since October 2021; his family since January/February 2022), which they can use to legally enter Pakistan. This means that [JZ] and his family could have legally travelled to Pakistan at any time since October 2021/Jan/Feb 2022, but have chosen not to do so. Had [JZ] and his family considered their position in Afghanistan to be excessively dangerous and hazardous as is claimed, they would have been at liberty to remove themselves from the situation well before now. Upon entering Pakistan legally, [JZ] and his family could attempt to regularise their position from that point.

    c. [JZ] is able to arrange security for any journey to Pakistan so as to reduce any personal risk in crossing the border.

    d. While concerns are flagged that [JZ] will be at risk from the Taliban in Pakistan, the reported Upper Tribunal case of *AW (sufficiency of protection) Pakistan* [2011] UKUT 31 (IAC) sets out that there is a systemic sufficiency of state

protection in Pakistan. [JZ] has not set out why he would not be protected by the Pakistani authorities.

e. [JZ] and his family can utilise third countries (the example given being Pakistan but equally applicable to other countries) to enjoy visits, with their other family members indicated as being elsewhere, if required. I note that [JZ] and his family members have not seen their UK family members since 2015.

12. Having taken account of all of the circumstances including the additional reasons outlined above, I am not satisfied that [JZ] has demonstrated that his own situation and circumstances warrant an exceptional consideration. Furthermore, I am not satisfied that [JZ] and his family have demonstrated sufficient compassionate grounds in any of their circumstances so as to further warrant any other consideration for leave outside the Rules".

46. It is not necessary for us to set out in any detail all of the evidence that was before the ECO/ECM. However, we will deal with what we consider to be the most important pieces of evidence.

The evidence of Colonel Thomas English

47. In correspondence of 13 August 2021 Colonel English indicates that he served in Afghanistan between March 2010 to May 2011. During this time he came to know the applicant "who provided valuable and faithful service to the governments of the United States and the United Kingdom and other member states of ISAF at the Justice Centre in Parwan located at Bagram Air Force Base". Colonel English indicates that he was assigned

the mission of overseeing the investigation and prosecution of detainees captured on the battlefield in Afghanistan, including those captured by the United Kingdom as part of ISAF. He was Director of the Legal Operations Directorate and directly responsible for supervising all personnel in his Directorate including the applicant. He opines that:

> "The Afghan Judges, including [JZ] were a critical part in converting ISAF detainees into Afghan prisoners that was essential to our strategy for exiting Afghanistan.
>
> In assisting the ISAF mission, [JZ] and the other Judges, faced serious death threats to themselves and their families. These threats were so serious I requested the assistance of the US Marshal's Service for judicial security. The Marshal's Service provided a Deputy Marshal experienced in judicial security who verified the dangers and provided security training to the Judges.
>
> It is my opinion that [JZ] does not pose a threat to the national security or safety of the United Kingdom. The Afghan Judges made it possible to fulfil our rule of law mission. The conditions under which they served were dire and dangerous. Even knowing the dangers they faced they did not waiver in performing their duties. [JZ] is deserving of your consideration for a visa to allow him and his family to enter the United Kingdom".

48. There is a second statement/letter from Colonel English of 15 January 2022 in which he states as follows:-

> "JCIP made a material contribution to the UK's and other ISAF member states mission in Afghanistan. Insurgents including Al Qaeda, Taliban and ISIS members were brought to justice. [JZ] made this possible and put his life, and the lives of his family, at serious risk by being

part of the process which convicted those insurgents. It is my belief that the work of [JZ] prevented further attacks and maintained stability through the rule of law, thus allowing international forces, including the UK, the ability to implement change and rebuild Afghanistan".

Task Force 435, which oversaw the JCIP, instructed and implemented prosecution of battlefield captured throughout Afghanistan, including insurgents captured by UK Special Forces. As a Task Force we relied on the JCIP Judges, including [JZ] to hear cases involving insurgents captured by ISAF units. Without the work of Judges including [JZ] in the Anti-terrorist Court at JCIP we could not move detainees to Afghanistan custody, freeing up critical detention space.

It is my belief that the JCIP played a significant role in and made a material contribution to the UK's mission as a leading ISAF partner in Afghanistan. British troops in particular British Special Forces captured hundreds of Taliban, ISIS and Al Qaeda fighters in the battlefield, and HMG whilst dependent on JCIP to try, convict, sentence and imprison the terrorists among them. [JZ] therefore clearly 'worked in enabling roles alongside the UK Government, in extraordinary and unconventional contexts', namely, bringing terrorists captured by British forces to justice".

The applicant's evidence

49. The applicant has made a number of witness statements which were before the decision-maker. In his statement of 7 March 2022 he states that as a Public Security Court Judge, also known as a Counter-terrorism/Anti-terrorism Court, he participated in many seminars which were organised or sponsored by the UK Government as part of their counter-

terrorism mission in Afghanistan and those organised by other International Security Assistance Forces (ISAF) member states. He sat in the Public Security Courts between 2008 and 2011 in Parwan and Kabul which were Anti-terrorist Courts and which made a material contribution to HMG's mission in Afghanistan. Terrorists including those from Al Qaeda, Taliban and other organisations were brought to justice having been captured by the UK and other ISAF members and Afghan forces in Afghanistan. They were convicted by judges like him. As a result of his work he and his family are the targets of Taliban aggression.

50. Between 2008 and 2011 he worked as a Judge of the Public Rights Bench at the Justice Centre in Parwan (JCIP), which was an ISAF-led and operated Anti-terrorism Court at Bagram Air Base in presiding over cases including those involving Taliban fighters. The Taliban fighters were imprisoned but have since been released and are now seeking retribution.

51. Terrorists that he convicted in JCIP were captured by UK forces and other members of ISAF. JCIP played a significant role in, and made a material contribution to, the UK's mission as a leading ISAF/RS and NATO partner in Afghanistan. British troops in particular British Special Forces captured hundreds of Taliban, ISIS and Al Qaeda fighters in battlefields, and HMG was dependent on JCIP to try, convict, sentence and imprison the terrorists among them. He therefore "worked in enabling roles alongside the UK Government, in extraordinary and unconventional contexts", namely, bringing terrorists captured by British forces to justice.

52. The applicant states that a journey to Pakistan would be treacherous and require intricate planning which may take many weeks to safely and securely organise. He fears

complications that could arise when crossing the border. In any event, the Taliban continue to operate in Pakistan and many of those prisoners he previously sentenced have now travelled there as some were Pakistani nationals.

The Letter from Lord Carlile and Lord Anderson

53. The authors of the letter identify themselves as reviewers of Terrorism legislation having formed that role during the periods of 2001 and 2017. They indicate that they used their security-cleared status to observe all aspects of UK counter-terrorism work and intelligence-gathering in the UK and abroad. They engaged with military personnel, judges, police and intelligence operatives in the UK and allied countries, and focused in particular on US-UK cooperation on counter-terrorism in all its aspects.

54. They do not claim to have first-hand knowledge of the conflict in Afghanistan that was in progress during their tenure. However, they say that they have been fully briefed on a number of Afghan operations. Lord Carlile indicates that he travelled to Pakistan and to the Gulf, and in his professional life is closely informed about events in Afghanistan.

55. They indicate that the purpose of their letter is to support the applicant’s application to relocate to the UK. They confirm that he is an Afghan judge who served at the Justice Centre in Parwan (JCIP), an ISAF-led Anti-terrorism Court at Bagram Air Base between 2008 and 2011 and subsequently on the Appellate Court in Kabul. They state that after being approached by JZ, they asked his legal team for briefing and have read with particular care the statements of Colonel Thomas English of 13 August 2021 and 15 January 2022. They indicate that they have read the judgment of Lieven J. In response to the ARAP decision of 20 October 2021 they state:-

> "Our own experience of counter-terrorism work both in the UK and abroad causes us firmly to question both those propositions, which appear to be based on wholly artificial separations between the purposes of the US and UK missions in Afghanistan, and between counter-terrorism in Kabul and elsewhere".

56. They state that the opinions expressed by Colonel English as to the value of the work performed by JZ for the UK's mission in Afghanistan "conform completely with our own understanding of US-UK partnership in the field of Afghan counter-terrorism". They go on to state:-

> "By removing terrorists from the battlefield, whether locally or in Kabul, the work of the JCIP was of direct benefit (indeed essential) not only to the US but to those who fought with it as part of ISAF. In particular, we regard it as incontestable that the trial, conviction and sentencing of insurgents captured on the battlefield by UK forces made a material contribution to the UK's mission in Afghanistan, and that the UK's operations would have been adversely affected without that work. The courageous acceptance by judges of the responsibility for incorruptible trial of terrorists, wherever in the country such trials took place, made an important contribution to the lives of Afghans, and to international counter-terrorism efforts".

The Grounds of Appeal

57. There are five grounds of appeal. We will engage initially with grounds one and two. The applicant's first ground is that there was a failure by the decision-maker to have regard to the "proximity" under (a) ARAP and/or (b) Pitting LOTR when assessing the applicant's individual case. Ground 2 is

that it was irrational to not accept that there were compassionate or compelling circumstances.

58. We heard extensive oral submissions from representatives and we had the benefit of skeleton arguments from both.

59. In respect of ground 1, it is the applicant's case that the evidence of Lord Carlile, Anderson and General McColl were not considered in the LOTR assessment. It is submitted that the applicant's outstanding application at the time of OP is plainly relevant in the assessment of LOTR, but was not taken into account.

60. It was not taken into account that JZ had made an application under ARAP during OP and that on the respondent's evidence (see Philip Hall's first witness statement) he came close to being called forward under the criteria. The applicant's position is supported by the judgment of Lang J in R (S and AZ) v SSHD & Ors [2022] EWHC 1402 (Admin).

61. The respondent's LOTR policy confirms that each case is to be considered on its merits. At the time of OP the respondent's position was that an Afghan national would have compassionate compelling grounds if they met the Pitting LOTR criteria set out in Philip Hall's evidence, namely contribution to HMG objectives in Afghanistan and either vulnerability due to proximity and high degree of exposure of working with HMG or sensitivity of the individual's role in support of HMG objectives. Pitting LOTR is simply the shorthand name given to the assessment of what met compelling compassionate criteria in August 2021. The circumstances have deteriorated since then.

62. It is the applicant's case that the existence of OP criteria, the applicant's outstanding application under those criteria

and his proximity to meeting those criteria at the time it was in existence are relevant considerations.

63. The applicant accepts and acknowledges his application under ARAP and subsequent judicial review has failed. However, the reasons his application failed under ARAP and his proximity to ARAP remain highly relevant material considerations in the assessment of LOTR as does the evidence submitted in support of the ARAP claim, in particular the evidence of Lords Carlile and Anderson and General McColl. General McColl was formerly the NATO Supreme Commander in Afghanistan.

64. The decision-maker treats the ARAP decision as the start and the end point of the ARAP relevancy to LOTR. The applicant submits that he plainly came close to qualifying under ARAP. The respondent's exclusion of the evidence from the LOTR assessment is unlawful.

65. Evidence of Lords Carlile and Anderson was that the applicant had made a positive contribution to the UK's efforts in counter-terrorism. The Respondent has not provided an answer to this ground of challenge. The evidence was not only relevant to the ARAP decision, it was also plainly relevant to the LOTR decision and yet it was not taken into account.

66. Ground 2 argues that the respondent's conclusion that there were no compassionate or compelling circumstances is irrational. While the respondent is concerned that the power to grant LOTR should be used sparingly, the unusual facts in this case show that but for the intervening security events the applicant would have had the benefit of the decision at the time of OP. Moreover, applying the analysis endorsed by Lang J in R(S and AZ) v SSHD & Ors at 125 and 126, that the Judges S and AZ would have qualified for Pitting LOTR, there can be no doubt that JZ would have qualified too.

The respondent's case

67. The respondent's case in respect of grounds 1 and 2 is in summary as follows:-

68. It is not correct to say the sole reason that the applicant did not qualify under ARAP was the timing of his work in the relevant Anti-Terrorism Court. This was rejected by Underhill LJ when refusing the application for permission to appeal. It is not correct or helpful to describe the applicant as having come "close to qualifying" under ARAP or "exceptionally and unusually close to the ARAP criteria". An assessment of eligibility under ARAP category 4 involves an evaluative judgment rather than the application of hard edged criteria. This was recognised by the Court of Appeal in JZ 3.

69. The ECM did consider the applicant's claimed "proximity" to ARAP and Pitting LOTR at paragraph 7 of the decision.

70. The ECO/ECM's approach to the applicant's claimed proximity to ARAP/Operation Pitting LOTR was undoubtedly correct and rational. The ARAP application had been refused and evacuation under OP had ceased.

71. The ECM was right to say that any application for LOTR made thereafter fell to be considered on the basis of the policies and criteria applicable at the time of the decision (Odelola v SSHD [2009] UKHL 25; [2009] 1 WLR 1230.

72. Lang J did not say otherwise in R (S and AZ). Indeed, in R (KBL) v SSHD & Ors [2023] EWHC 87 (Admin), also a case concerning an Afghan citizen seeking relocation to the UK) Lang J affirmed that:-

> "The general principle that a person's case falls to be considered according to the policy and criteria

applicable as at the time of the decision (*Odelola v SSHD*) [2009] UKHL 25; [2009] 1 WLR 1230) applies in the claimant's case. As I held in S and AZ at [126], the Operation Pitting criteria ceased to be in operation once Operation Pitting came to an end. The Home Office's Afghanistan Resettlement and Immigration Policy Statement, dated 13 September 2021, confirmed the policies that would apply thereafter".

73. Pitting LOTR is not the shorthand name given to the assessment of what met compelling compassionate criteria in August 2021. It was a policy adopted for a specific, highly exceptional crisis event which enabled spare capacity on evacuation flights to be utilised. It was never intended or envisaged that the policy and evacuation criteria would continue to be applied in an ongoing and open-ended fashion to those remaining in Afghanistan after the departure of UK forces.

74. The statement from General John McColl postdates the LOTR decisions and was not before either the ECO or the ECM. The joint letter from Lord Anderson and Lord Carlile sought to challenge the conclusions in relation to the ARAP decision of 18 October 2021, particularly the conclusion that the applicant did not "make a material contribution to HMG's mission in Afghanistan" and "it is not apparent that the UK's operations would have been adversely affected without JZ's work". It essentially sought to establish JZ's eligibility for ARAP category 4 anew. The ECO and the ECM considered a large volume of material and did have regard to the applicant's judicial work and the claimed risks to his safety and that of his family.

75. In relation to ground 2 it was entirely rational to refuse the application. The LOTR policy states "A grant of LOTR

should be rare". Discretion should be used "sparingly" and "Considerations of whether to grant LOTR should not undermine the objectives of the Rules or create a parallel regime for those who do not meet them" (see Alvi [2012] UKSC 33 paragraph 31).

76. There is a specific policy for relocating those who worked for or alongside HMG in Afghanistan and contributed to HMG's mission in Afghanistan (ARAP) and a specific concessionary scheme to resettle others at risk (ACRS).

77. The applicant has been assessed as ineligible for relocation under ARAP by specialist decision-makers at FCDO who decided that he had not worked alongside HMG or made a material contribution to HMG's mission in Afghanistan. This decision withstood legal challenge.

Conclusions

78. Grounds 1 and 2 can be considered together. They are in effect a *Wednesbury* rationality challenge. We find that the decision of the respondent is irrational because it did not take into account material matters.

79. There was no dispute between the parties about the applicant's evidence concerning what he did in Afghanistan (save that he does not agree that he has ever worked as a traffic judge, but nothing turns on this).

80. We agree that an application for LOTR falls to be considered under the Rules/policies at the time of the decision (Odelola v SSHD [2009] UKHL 25; [2009] 1 WLR 1230); however we do not understand this position is challenged by the applicant. He

has not claimed in this application that LOTR Pitting should be applied. We agree that LOTR Pitting is not a shorthand name given to the assessment of what met compelling compassionate criteria in August 2021. We accept that this was a policy adopted for a specific and highly exceptional crisis event which enabled spare capacity on evacuation flights to be utilised.

81. We are satisfied the ECO (and ECM) were aware of the applicant's case and the challenges to the ARAP decision. They appreciated the factual matrix. They list the material before them which supports an understanding of the background.

82. We make the observation that although the applicant failed to meet the specific category 4 requirements it was still accepted that he is a judge who considered issues of national security, that he was at risk in Afghanistan, and that he faced a high threat in 2008-2011. It was also accepted that those he convicted would have been released by the Taliban.

83. The letter from Wilsons solicitors of 4 April 2022 in support of the application for LOTR seeks to set out why the applicant meets the compelling compassionate grounds test for the purposes of LOTR. There were a number of documents accompanying the 4 April letter which supported the applicant's case including the witness statements/letters from Colonel English. While much is made by the solicitors in the 4 April letter of the risk to the applicant, at [38] under the heading of "contribution to the rule of law in Afghanistan", the applicant made submissions. We have set these out in full earlier in our decision. We summarise these as follows:-

    i. The applicant was responsible for prosecuting and sentencing terrorist combatants who were captured by

ISAF fighters during the conflict in Afghanistan and who pose a threat to the United Kingdom.

ii. The applicant has supported the rule of law in Afghanistan.

iii. The applicant's interests and commitments align with those of the United Kingdom having been directly working in cooperation with ISAF to prevent and punish terrorist combatants.

We conclude that these factors were relied on by the applicant in support of the application for LOTR. We find that they were material factors which the respondent did not take into account. While we accept that the weight to attach to evidence is a matter for the decision maker, we find that the decision maker's approach was that these matters were not to be considered in the context of the application for LOTR and this approach in our view is irrational. We will refer to factors (1)–(iii) more broadly as the applicant's "contribution to the rule of law".

84. Under the heading "almost being called forward" at [39]-[41] the representations engage with the applicant having been identified in an email setting out a list of high profile cases not successfully processed. It is not challenged by the respondent that the applicant's name was included on a list of six high profile cases not successfully processed with reference to OP and that his case was deemed to have "looked very credible" according to Philip Hall who was leading the team within the FCDO, but he was not considered by a panel for a call forward instruction. Although a recommendation was made to convene a panel to consider the applicant, a panel was not convened because of the security situation. This is said by the applicant's solicitors to be "highly relevant to the compelling/compassionate test". It is submitted that

given the profile and risks to the applicant it is highly likely that he would have qualified for evacuation". We find that this factor ("almost having been called forward") was a matter on which the applicant relied in his application for LOTR. A proper reading of para 7 of the decision of the ECM discloses that the applicant not having been called forward was taken into account and described as a "salient factor". There is nothing in the decisions of the ECO or ECM that the circumstances surrounding this were considered despite the applicant's representations.

85. We have set out paragraph 3 of the ECO decision above. For ease, we set it out again:-

> "3. [JZ] was refused under the Afghan Relocations and Assistance Policy (ARAP) on 20 October 2021. A Judicial Review of that decision was requested and permission was refused against the ARAP decision in turn by the Honourable Justice Lane on 8 December 2021, by the Honourable Justice Kerr on 15 December 2021, and finally by Lord Justice Lewis of the Court of Appeal on 1 March 2022. An ARAP application cannot be used to apply for a Leave Outside the Rules (LOTR) application" (our emphasis).

86. In R (S and AZ), the Court of Appeal dismissed the appeal of the Secretaries of State for the Home Department and Defence of a successful judicial review claim bought by two Afghan judges heard by Lang J. The appeal was partially successful. Underhill LJ found that "the entire ARAP relocation procedure is *sui generis* and is quite inapt for the determination of the issues raised by a LOTR application". The Court did not accept that the online ARAP application form amounted to a visa application. In this case the applicant was not seeking to use the ARAP application to apply for LOTR. It may be that

the ECO considered it necessary to set this out to explain why she then considered the application under various parts of the IR which did not have any relevance to the application. The LOTR guidance requires overseas applicants to apply *on the application form for the route which most closely matches their circumstances.* The routes considered by the ECO bear no resemblance to what the applicant was asking for. While this is not a challenge to application process, the relevance of our observation in this context is that it may support that the decision makers failed to consider relevant material.

87. The applicant had been given by the respondent an online option to ask for the provision of biometrics to be waived or deferred. The respondent made an "in principle" decision following an order for interim relief by Lieven J. Having found that the applicant cannot meet the IR, which he did not claim to, the ECO went on to consider Article 8 "outside the requirements of the Rules". The decision maker considered factors (a) to (e) which we have set out above and concluded that:

> "*I am not satisfied that [JZ] has demonstrated that his own situation and circumstances warrant an exceptional consideration. Furthermore I am not satisfied that [JZ] and his family have demonstrated sufficient compassionate grounds in any of their circumstances so as to further warrant any other consideration for leave outside the Rules*".

88. The matters that the ECO took into account included failure to meet the IR, risk from the Taliban and the applicant's ability to minimise risk. The ECO did not engage with the applicant's contribution to the rule of law or the almost being called forward issue.

89. Following the decision of the ECO, on 14 April 2022 the applicant's solicitors made further submissions relying on evidence including support from members of the House of Lords. We have set out a summary of the supporting letter from Lord Carlile of Berriew CBE QC and Lord Anderson of Ipswich KBE QC.[1] They agree with Colonel English, whose evidence was before the ECO, about the value of the work performed by JZ for the United Kingdom's mission in Afghanistan and the role played by JCIP to the United Kingdom's. The solicitors stated that "this support clearly illustrates the exceptional and compelling nature of [JZ's] case .."

90. We agree with the respondent that the evidence from Lord Anderson and Lord Carlile is a direct challenge to the ARAP decision that the applicant "did not make a material contribution to HMG's mission in Afghanistan" and that "it was not apparent that the United Kingdom's operations would have been adversely affected without JZ's work". We accept that the evidence was sought primarily to establish the applicant's eligibility for category 4. However, the applicant relied on this evidence which was before the ECM to support that he contributed to the rule of law. We find that this evidence is at least capable of assisting the applicant's case as set out in the correspondence from his solicitors. We observe that the material disagreement between the parties concerning ARAP was not about what the applicant did in Afghanistan but whether what he did met the requirements of category 4.

91. On 15 April 2022 the solicitors sent an email to the respondent referring to the letter from Lord Carlile and Lord Anderson, stating as follows:-

[1] The evidence from General McColl post dates the decisions of the respondent and is not material to this application.

> "We ask that this be taken into account within the pre-action response which is due by 25 April 2022. It is our position that this provides further, significant support for the application under ARAP and/or LOTR"(our emphasis).

92. The respondent's approach to this evidence is illustrated in the letter from the GLD to the applicant's solicitors of 25 April 2022 (this is a covering letter to the decision of the ECM). It states as follows:-

> "Having reviewed the matter, our client's consider that the additional representations of 20 April 2022, seek to address and go to your client's eligibility for ARAP. As such, consideration of these additional representations correctly falls to be considered within the ARAP scheme. Your client has the option to request a review of his ARAP decision. Applicants who are deemed ineligible and receive an outcome letter advising them of this may seek a review of the decision within 90 days of receipt or, for those whose application was refused prior to 05 December 2021, 90 days from 16 February 2022, save for where there are compelling circumstances which have prevented them from meeting the deadline"(our emphasis).

93. We have set out the decision of the ECM above. We set out para 7 again because it is indicative of how the decision maker approached the application.

> "7. You state that your client 'almost qualified under ARAP' and 'was almost called forward' and that these are matters relevant in respect of your client's visit visa application with grounds for LOTR. As stated in the 'in principle' decision, your client's ARAP application has been refused and permission to apply for judicial review to challenge that decision

was refused by the Administrative Court and Court of Appeal. Similarly, the salient factor is that your client was not called forward which means he falls for consideration under the LOTR guidance in place at the time of decision".

94. Ms Masood drew our attention to para 7 to support her submission that the decision maker considered factors raised by the applicant. We find that para 7 supports that the decision maker not only rejected the narrow "proximity argument" as not relevant to the application for LOTR, but also the wider submissions relating to the applicant's contribution to the rule of law and the circumstances concerning Pitting LOTR including the evidence of Philip Hall. The starting point for the decision maker was that the applicant did not qualify under ARAP and he was not called forward so could not qualify for Pitting LOTR. As the starting point, this is not problematic. We agree that there is no support for the proposition that the applicant "almost" qualified under ARAP. It is difficult to understand this argument in the context of the ARAP decision. However, the basis of the application was much wider than an assertion that the applicant nearly met ARAP and Pitting LOTR (a "near-miss" argument). The applicant relied on material factors which the respondent did not consider outside of the proximity argument.

95. While we accept that, in respect of Pitting LOTR, the applicant's case was that he almost came within the criterion, there was an additional factor which the applicant relied on which was not considered by the respondent, which was the evidence of Philip Hall that he had indicated that the applications on the list including that of the applicant "looked very credible".

96. Having considered the decision of the respondent and correspondence, we find that the approach by the decision maker was to compartmentalise the evidence in such a way as to exclude from their consideration of LOTR the applicant's contribution to the rule of law and the evidence of Philip Hall. The reasons for taking this position are firstly; an ARAP application cannot be used to apply for LOTR. While this is correct, the applicant was not seeking to use an ARAP application to apply for LOTR and, in any event, it does not explain why consideration of the applicant's claim to have contributed to the rule of law (and/or the circumstances leading to him not being considered for evacuation when assessing his application for LOTR) should not be taken into account when they are matters that form the basis of his application for LOTR. The second reason given for excluding this evidence from consideration we find is contained in the letter from the GLD to the applicant's solicitors of 25 April 2022 set out above. The "additional representations" concerned matters including the applicant's contribution to the rule of law. It is clearly stated by the respondent that the representations fall to be considered within the ARAP scheme and therefore they were not considered in the assessment of LOTR.

97. We do not accept that the decision maker attached little weight to the applicant's representations (relating to his contribution to the rule of law or circumstances of not having been called forward), as submitted by Ms Masood. We find that the decision maker did not consider this evidence at all because the view was taken that it was evidence which was material to the ARAP application which had been refused and LOTR Pitting which had come to an end and thus immaterial to the application for LOTR.

98. The decision maker was entitled to consider the ARAP decision as the starting point and not to go behind it. We also accept that the proximity argument in a narrow "near miss" sense is of little assistance to the applicant. However, we accept the applicant's argument that these matters were treated not only as the starting point but the end point. The applicant made an application outside of ARAP, without the straight jacket of category 4 and the narrow criteria that apply. He specifically relied on matters which went beyond the conclusions reached by the decision maker in ARAP which he said amounted to compassionate and compelling circumstances, including his work as a judge in the JCIP convicting terrorists captured by ISAF including British troops. His application was not based on Article 8; it was an application that he should be granted LOTR on compelling compassionate grounds because of the specific circumstances of his case. Those circumstances were not limited to the risk to the applicant and his family and a narrow "near miss" argument. He raised matters that were relevant to the consideration of LOTR; however, the respondent excluded them from consideration. This was, in our view, irrational.

99. In R (S and AZ) the claimants, who were judges in Afghanistan prior to the defeat of the Afghanistan Government by the Taliban in August 2021, sought judicial review of the defendants' decisions refusing their application for leave to enter the United Kingdom. Lang J identified the issues at paragraph 2, namely was the difference in treatment between the claimant and comparator judges irrational or otherwise unlawful. The comparator judges had been relocated to the UK during and after OP under ARAP or granted LOTR. The Court of Appeal upheld the High Court's decision that the SSHD's refusal to consider the LOTR applications was irrational on the two bases found by Lang J. While the following paragraphs

of Lang J's decision are obiter, we find them to be persuasive:-

> "124. In my judgment, there was no rational distinction between the comparator judges and the Claimants which could justify a grant of Pitting LOTR to the comparator judges but not to the Claimants. They were all judges who were implementing the rule of law in Afghanistan, consistently with the UK's mission, but none of them had any direct or indirect connection with the UK Government. Their membership of the IAWJ and their participation in the mentoring scheme, neither of which are UK Government schemes, could not rationally justify the grant of LOTR to them, but refuse it to the Claimants. In any event, S was also a member of the IAWJ and its affiliated association, the AWJA. They were all at risk from the Taliban because of their occupation. As female judges they were at greater risk than AZ. On the other hand, AZ's anti-terrorist work had made him a Taliban target to a much greater extent than some of the comparator judges, particularly those sitting in civil jurisdictions. The sole reason why the comparator judges were selected was because they had contacts in the UK who were able to lobby the FCDO on their behalf. This illustrates the inconsistency and arbitrariness of Operation Pitting, and the extent to which lobbying and connections influenced the selections made, instead of the application of fair and objective criteria.
>
> 125. In my view, both S and AZ could have been eligible under Pitting LOTR criteria, if their names had been put forward. In their work as judges, hearing

counter-terrorism and national security cases, they contributed to the UK Government's objectives in Afghanistan to promote the rule of law, and to combat terrorism (albeit not working for or alongside the UK Government, so as to meet the ARAP criteria). In doing so, they placed themselves and their families at considerable personal risk. That risk has heightened since the Taliban seized power. They and their families are in hiding, but realistically they will be found by the Taliban at some point. There is verified evidence that other judges have been summarily executed by the Taliban.

126. However, the Pitting LOTR criteria are no longer in operation as they were only introduced for the purposes of Operation Pitting, which has now concluded. The Claimants' applications had to be considered in accordance with LOTR policy as at the date of the decisions made in their cases in October and November 2021 respectively. However, I consider that factors such as their role in promoting the rule of law, and the risks to their safety arising from their work as judges, will still be relevant in any assessment of their cases. In my view, the factors set out at paragraphs 124 and 125 above are also relevant considerations to take into account in the Claimants' favour, in any substantive consideration of their applications for LOTR".

100. We did not agree with Ms Masood's oral submission that we should "infer" from the decision that the decision maker took into account the applicant's contribution to the rule of law and his indirect contribution to the United Kingdom mission. She accepted in oral submissions that they did not make it

explicit that they did so. We agree that the decision makers were aware of the applicant's circumstances; however, there is no basis for us to draw an inference that the matters were considered and little weight attached to them. The evidence in our view points in the opposite direction namely that the decision maker took the view that these factors were not relevant factors to be taken into account in any substantive consideration of the application for LOTR.

101. Ms Masood submitted that following the ARAP decision all that the applicant is left with is his "general contribution to the rule of law and ISAF". Notwithstanding the "important principles" set out in the guidance, these are matters that we find cannot be properly characterised as insignificant.

102. The respondent's primary submission is that these matters were considered by the decision makers who decided to attach little weight to them. We have rejected this argument for the reasons we have explained and there is no support for us to draw an inference. We do not find that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

103. We shall now turn briefly to the remaining grounds of appeal.

104. Ground 3 is a challenge to the decision under Article 8.

105. Ground 4 claims that there is a breach of Article 14 ECHR. The applicant states that there is an unjustified difference in treatment between an Afghan resident in Afghanistan during or immediately before the events of August 2021 and Ukrainian nationals resident in Ukraine on or immediately before January 2022. The difference in treatment is said to arise because Ukrainian nationals benefit from the Ukrainian Family Scheme ("UFS").

106. Ground 5 claims that there has been a failure by the respondent to give the applicant a right of appeal following a determination of his claim on Article 8 grounds.

107. Ms Naik applied to withdraw ground 5. The applicant was pursuing an appeal in the First-tier Tribunal. She asked for grounds 3 and 4 to be stayed pending the alternative remedy decision. Ms Masood opposed the stay application and urged us to consider and dismiss ground 4 on the basis that the Upper Tribunal was better suited to decide a discrimination point.

108. On the basis that this application is granted on grounds 1 and 2, there is no basis in our view to stay grounds 3 or 4. We refuse a stay and dismiss grounds 3 and 4 in the light of the applicant having an alternative remedy. We do not accept that the Upper Tribunal is better placed then the First-tier Tribunal to consider the discrimination point. Ground 5 is withdrawn.

Joanna McWilliam

Upper Tribunal Judge

12 June 2023