Case No: JR-2023-LON-002796

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

27th September 2024

Before:

THE HON. MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE KEITH

- -

Between:

THE KING
on the application of
Bam Bahadur Gurung

Applicant

- and -

The Secretary of State for the Home Department

Respondent

UPON hearing Ali Bandegani and Ella Gunn, Counsel, on behalf of the Applicant, and Carine Patry KC for the Respondent on 23rd July 2024;

AND UPON judgment being handed down on 27th September 2024;

IT IS ORDERED THAT:

(1) Grounds one and two of the application for judicial review are dismissed for the reasons in the attached judgment.

(2) Following renewal of ground three and consideration of this application on a 'rolled up' basis, ground three is refused permission, for the reasons in the attached judgment.

Costs

(3) The Applicant shall pay the Respondent's costs on the standard basis, to be the subject of detailed assessment, if not agreed, and not to be enforced save by order of the Court pursuant to s26, Legal Aid, Sentencing and Punishment of Offenders Act 2012.

(4) There to be a detailed assessment of the Applicant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013.

Permission to appeal to the Court of Appeal

(5) Neither party has applied for permission to appeal. In any event, we have considered, and refused permission to appeal to the Court of Appeal, as there is no arguable error of law in our decision.

Signed: ***J Keith***

Upper Tribunal Judge Keith

Dated: **27th September 2024**

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): 27/09/2024

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).

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Respondent

- -

Mr Ali Bandegani and Ella Gunn, Counsel, (instructed by Duncan Lewis Solicitors), for the Applicant

Carine Patry KC
(instructed by the Government Legal Department) for the Respondent

Hearing date 23rd July 2024

- -

J U D G M E N T

- -

Decision:

Background

1. None of the facts in this case are disputed. This case turns on the correct interpretation of the Respondent's policy, the 'Afghan Citizens Resettlement Scheme' (which we refer to as the 'ACRS').

2. The Applicant is the lead Applicant, with seven others whose applications have been stayed, pending determination of his application. None of the

Applicants are Afghan nationals. The Applicant does not have any family members who are Afghan or British nationals. The Applicants were evacuated from Afghanistan by UK Armed Forces on 18th August 2021, in anticipation of the Taliban's imminent return to power, under "Operation Pitting" (described in detail in R ('S' and Anor) v The Secretary of State for Foreign, Commonwealth and Development Affairs & Ors) [2022] EWHC 1402 (Admin)). They were granted entry clearance and limited leave to remain outside the Immigration Rules (or 'LOTR'). There is a general power to grant LOTR, and others who were later prioritised and granted entry and limited leave to remain became known informally as receiving "Pitting LOTR" (see §10 of S & Anor). The Respondent points out that she did not grant the Applicant Pitting LOTR, as he was evacuated before the Pitting LOTR 'cohorts' were agreed. Instead, he was granted entry and limited leave to remain, as an exceptional gesture of goodwill, initially for one month, then extended to six months. Other evacuees were eligible for, and were granted leave under an entirely separate policy, the Afghan Relocations and Assistance Policy ('ARAP'). ARAP is also discussed in detail in S & Anor. It is unnecessary for us to say more about ARAP. The parties also accept that not everyone who was evacuated was entitled to, or granted, indefinite leave to remain ('ILR').

3. The Applicants were referred for consideration for ILR under the ACRS. We use the word 'referred,' as potential beneficiaries of the ACRS cannot apply for it, in contrast to many other routes to settlement, including ARAP. Instead, the ACRS is 'invitation only.' Even an invitation does not provide an entitlement to ILR. This is because the number of grants of ACRS ILR is capped at 20,000, with 5,000 in the first year. Not all of those potentially eligible will be granted ILR, as the Respondent anticipates that the ACRS will be oversubscribed. Instead, the ACRS talks of prioritisation, about which we say more later.

4. Having been invited to apply, (and having had applications lodged on their behalf by the Respondent) all the Applicants were assessed as ineligible under the ACRS, and their cases were 'voided.' Five others who were evacuated at the time were granted ILR. The Respondent says that she did so in error. She says that she is not obliged to repeat her mistakes.

5. The Applicant is a Nepalese national. The other Applicants are either Nepalese or Indian nationals. They were private contractors working as security guards, guarding the UK and Canadian embassies in Kabul. In the Applicant's case, his employer was Hart International, which had a contract with the Canadian Government, albeit he provided services to both embassies. There is no suggestion of any contractual nexus between his employer and HM Government or the UK Armed Forces. The Applicant says that his nationality and the lack of any contractual nexus are irrelevant. He argues that he meets the criteria of one of three 'pathways,' about which we say more later.

6. The Applicant relies on 'Pathway 1' of the ACRS, as someone who was put at risk by [then] recent events in Afghanistan. The ACRS was intended to provide a 'route to safety,' which would prioritise those who had assisted the UK's efforts in Afghanistan and stood up for values such as democracy. The Applicant points out that the ACRS did not only apply to Afghan nationals and could, for example, apply to third country nationals, (or 'TCN's), for example those in mixed nationality families.

7. In contrast, the Respondent argues that the ACRS was never intended to apply to TCNs who were not at risk in their home countries. The Applicant does not claim to be at risk in Nepal. Indeed, he returned to visit his family while working in Afghanistan, and previously, when he worked as a security contractor in Iraq.

8. We have been provided with the following bundles: a joint bundle 'B'; and two authorities bundles, only the first of which we refer to, 'AB.' The parties have each provided a skeleton argument. The Applicant has also produced a note on relevant authorities as to the interpretation of policy, which has assisted us. Where we refer to page numbers in the bundles, we will do so in the following format: B/[x] or AB/[x].

The Respondent's initial rejection of the Applicant for ACRS

9. The Respondent invited the Applicant to make submissions on extending his leave to remain under the ACRS. At the time, he was in the UK. On 10th February 2022, the Applicant did so, and he attended a meeting with the Respondent on 17th February 2022. On 4th March 2022, the Respondent asked the Applicant to provide his biometric details.

10. On 14th June 2022, the Respondent reached a decision to void the Applicant's case, stating at B/[545] that:

> "As a Nepalese national you were evacuated from Afghanistan as a gesture of goodwill by the UK Government. This came with the understanding that once in the UK you would arrange and be offered support for onward travel to the country of your nationality. You are not eligible for relocation under this scheme as you do not meet the criteria set out in the Rules. You therefore do not hold current leave and should seek advice on alternative options or make arrangements to leave the United Kingdom."

11. The Applicant says that in the period between March and July 2022, he learned that five other evacuees in comparable circumstances had been granted ILR. In light of apparently unspecified assurances that he could remain in the UK, and the grant to others, he believed that the decision must have been made in error. He did not state this in his email response to the Respondent dated 15th June 2022. Instead, he stated that he could not go back to Nepal at the moment and was now working in the UK. He asked what alternative options there were for staying in the UK (B/[545]). He did not leave the UK, and continued to work until he was encountered

on 27th March 2023 and was detained under immigration powers, purportedly for overstaying his visa. The Applicant claims that his employer had conducted a 'right to work' check in November 2022, which confirmed that he had a right to work. We make no finding on whether he did or did not overstay his visa.

12. The Applicant was released from immigration detention on 9th May 2023, (B/[547]) during which time the Applicant was initially treated as having claimed asylum, but later confirmed that he was not. Following pre-action correspondence which had secured his release from detention, at the request of the Respondent, on 25th May 2023, the Applicant's representatives made further submissions (B/[240]).

The Respondent's decision under challenge

13. The Respondent responded to the Applicant's further submissions, in a letter dated 4th August 2023, (B/[257]) in which it maintained its original decision. It provided additional reasons, citing part of the Afghanistan resettlement and immigration policy statement ('ARIPS') of 26th July 2023 (AB/[114]).

14. While describing himself as a 'Gurkha,' the Applicant had never served in the UK Armed Forces and had worked under a private contract with the Canadian Government.

15. The Applicant was not an Afghan national, and so was not eligible within either of the two ACRS priorities, namely, to prioritise those who had assisted the UK's efforts and stood up for values such as democracy etc., and vulnerable people.

16. The Applicant did not fall within those granted Operation Pitting LOTR, as understood in S & Anor. The Applicant was evacuated on 18th August 2021, the day before Operation Pitting LOTR recommendations were made to ministers (see §12 of S & Anor). Instead, UK Armed Forces had evacuated the Applicant from Afghanistan during Operation Pitting in August 2021 as a gesture of goodwill.

17. The Respondent granted the Applicant entry and limited leave to remain in the UK on an exceptional basis outside the Immigration Rules, due to the prevailing circumstances at that time. This came with the understanding, communicated verbally to the Applicant, that once in the UK, the Applicant would arrange, and be offered support for, onward travel to Nepal. His later invitation for consideration under the ACRS did not give rise to any legitimate expectation of a positive outcome.

18. In relation to the Applicant's family and private life, there was no suggestion of any family members in, or ties to, the UK. There was no suggestion that the Applicant would be disadvantaged and no evidence of

his personal or financial circumstances, nor any circumstances relevant to Article 8 ECHR.

The relevant passages of the ACRS and ARIPS

19. There have been a number of versions of the ACRS and the ARIPS. The parties accept that the relevant versions are those applying at the date of the impugned decision, namely 4th August 2023, following the principles set out in Odelola v SSHD [2009] UKHL 25.

20. The ACRS Guidance begins at AB/[101]:

> "Guidance
> Afghan citizens resettlement scheme
>
> The Home Office has announced further details of the Afghan citizens resettlement scheme.
>
> Published 18 August 2021
> Last updated 24 July 2023
>
> The UK formally opened the Afghan Citizens Resettlement Scheme (ACRS) on 6 January 2022.
>
> The scheme will prioritise:
> - those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights, freedom of speech, and rule of law
> - vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT+)
>
> The government will resettle more than 5,000 people in the first year and up to 20,000 over the coming years.
>
> This is in addition to the [ARAP]…. The ARAP scheme is a separate scheme to the ACRS and offers Afghan nationals who have worked for or alongside the UK government, and meet the ARAP criteria, relocation to the UK.
>
> Anyone who is resettled through the ACRS will receive indefinite leave to remain (ILR) in the UK and will be able to apply for British citizenship after 5 years in the UK under existing rules.
>
> The scheme is not application-based. Instead, eligible people will be prioritised and referred for resettlement to the UK through one of three referral pathways:
>
> 1. Under Pathway 1, vulnerable and at-risk individuals who arrived in the UK under the evacuation programme have been the first to be settled under the ACRS. Eligible people who were notified by the UK government that they had been called forward with assurance of evacuation, but were not able to

board flights, and do not hold leave in a country considered safe by the UK are also eligible under Pathway 1.

2. Under Pathway 2, we are now able to receive referrals from the United Nations High Commissioner for Refugees (UNHCR) of vulnerable refugees who have fled Afghanistan for resettlement to the UK. UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. UNHCR will refer individuals in accordance with their standard resettlement submission criteria, which are based on an assessment of protection needs and vulnerabilities.

3. Pathway 3 was designed to offer a route to resettlement for those at risk who supported the UK and international community effort in Afghanistan, as well as those who are particularly vulnerable, such as women and girls at risk and members of minority groups. In the first stage of this pathway, the government is considering eligible, at-risk people for resettlement from 3 groups: British Council contractors, GardaWorld contractors and Chevening alumni. There are 1,500 places available in the first stage under Pathway 3. This number includes the principal applicants and their eligible family members.
……
The focus of the ACRS will be on those people who remain in Afghanistan or the region. While the majority of people resettled will be Afghan, nationals of other countries (for example, in mixed nationality families) will be eligible to be resettled through the scheme. A spouse or partner and dependent children under the age of 18 of eligible individuals will be resettled under the scheme.
Some additional family members may be resettled in exceptional circumstances."

21. The ARIPS (beginning at AB/[107]), states:

"Policy paper
Afghanistan resettlement and immigration policy statement
Updated 26 July 2023
….

6. For those evacuated here, we are determined to ensure they have the best possible start to life in the UK. Given the difficult, exceptional and unique circumstances in which many arrived in the UK, we will be offering indefinite leave to remain to those Afghan nationals and their family members who were evacuated, called forward or specifically authorised for evacuation, by the government during Operation PITTING. This will apply to those who have already arrived in the UK or arrive after the evacuation. This will give them certainty about their status and the right to work and contribute to society.

7. Given the speed with which decisions were necessarily taken, we need to ensure everyone has the correct status and there may be a small number of groups who do not fit into the category set out above. We will work to ensure their situation is resolved quickly.

8. We are also setting out here the details of the ACRS and the position of those relocated under ARAP; and the position of other groups, for example how the Immigration Rules apply in terms of Family Reunion, the Points-Based System and Asylum.
….
Afghan Citizens Resettlement Scheme

21. On 18 August 2021, the Prime Minister announced the ACRS. This scheme will resettle up to 20,000 people at risk, with 5,000 in the first year. This is in addition to those brought to the UK under ARAP and is in line with the New Plan for Immigration commitment to expand legal and safe routes to the UK for those in need of protection, whilst toughening our stance against illegal entry and the criminals that endanger life by enabling it.
….
Eligibility and referrals

23. The ACRS will provide those put at risk by recent events in Afghanistan with a route to safety. The scheme will prioritise:
a. those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights and freedom of speech, rule of law (for example, judges, women's rights activists, academics, journalists); and
b. vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT).

24. There will be many more people seeking to come to the UK under the scheme than there are places. It is right that we take a considered approach, working with partners to resettle people to the UK. There will not be a formal Home Office owned application process for the ACRS. Instead, eligible people will be prioritised and referred for resettlement to the UK in one of three ways.

25. First, some of those who arrived in the UK under the evacuation programme, which included individuals who were considered to be at particular risk – including women's rights activists, prosecutors, and journalists - will be resettled under the ACRS. People who were notified by the UK government that they had been called forward or specifically authorised for evacuation but were not able to board flights, and who do not hold leave in a country considered safe by the UK can be offered a place under the scheme.

26. Second, the government will work with the United Nations High Commissioner for Refugees (UNHCR) to identify and resettle refugees who have fled Afghanistan, replicating the approach the UK has taken in response to the conflict in Syria, and complementing the UK Resettlement Scheme which resettles refugees from across the world. UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. UNHCR has expertise in the field and will refer refugees based on assessments of protection need. We will work with UNHCR and partners in the region to prioritise those in need of protection, such as women and girls at risk, and ethnic, religious and LGBT minority groups at risk. We will start this process as soon as possible following consultations with UNHCR.

> 27. Third, the government will work with international partners and NGOs in the region to implement a referral process for those inside Afghanistan, (where safe passage can be arranged,) and for those who have recently fled to countries in the region. This element will seek to ensure we provide protection for members of Afghan civil society who supported the UK and international community effort in Afghanistan. This category may include human and women's rights activists, prosecutors and others at risk. We will need some time to work through the details of this process, which depends on the situation in Afghanistan.
>
> Further details on eligibility
> 28. The ACRS will be focused on people affected by events in Afghanistan, who are located in Afghanistan or in the region. While the majority of people resettled will be Afghan, nationals of other countries (for example, in mixed nationality families) will be eligible to be resettled through the scheme.
>
> 29. Spouses, partners and dependent children under the age of 18 of identified eligible individuals will be eligible for the scheme. Other family members may be resettled in exceptional circumstances.
> .....
> 32. Those resettled through the ACRS will receive fee-free indefinite leave to enter or remain in the UK, the right to work and immediate access to benefits if necessary. They will be able to apply for British citizenship after five years in the UK under existing rules and subject to the appropriate fee."

22. The ARIPS contains a 'Summary of the Immigration Routes' at AB/[122].

The Applicant's application for judicial review and the grant of permission

23. On 10th October 2023, the Applicant challenged the Respondent's decision on three grounds. On 14th February 2024, Judge L Smith granted permission on grounds (1) and (2), but refused permission on ground (3). The Applicant renewed permission on ground (3) on 23rd February 2024. The parties agreed that we consider ground (3) on a 'rolled up' basis, although the Respondent maintains that ground (3) is unarguable.

24. We deal with each ground in turn, setting out the parties' submissions, the law, and our conclusions. We do no more that summarise the gist of the submissions, which we have considered in full. We only discuss them to the extent that it is necessary to explain our reasons.

Ground (1) - Interpretation of the ACRS and whether the Respondent misapplied it

The Applicant's case

25. We detected some shift from the way that the Applicant put his case in the Amended Statement of Facts and Grounds (beginning at B/[24]), when compared to the skeleton argument and Mr Bandegani's submissions.

26. The grounds argued that there are two 'categories' and three 'pathways.' The categories corresponded to the two bullet points at the beginning of the ACRS Guidance: those who have assisted UK efforts and stood up for relevant values; and vulnerable people. The Applicant claimed to fall into the first category. The three pathways were those as numbered [1] to [3] in the ACRS Guidance and the Applicant claimed to fall into 'Pathway 1'. His lack of employment or engagement, directly or indirectly by HM Government, or UK Armed Forces, was irrelevant, as was the fact that he was not an Afghan national. Those were ARAP considerations.

27. The skeleton argument raised new points about previous versions of the ACRS and the ARIPS. The skeleton argument referred to unpublished recommendations made by the Civil Service on 24th July 2023 to Ministers about changes to the ACRS, 'clarifying' the eligibility of TCNs who are nationals of countries which are considered safe. Contrary to Civil Service recommendations, the ACRS and the ARIPS were only amended in part. The ACRS was amended, in the applicable version, to add "and do not hold leave in a country considered safe by the UK" in paragraph [1] of the ACRS, beginning, "[1] Under Pathway 1…". The ARIPS was also amended in §25, to add the phrase, "and do not hold leave in a country considered safe by the UK." In both cases, the additions were to those who had been 'called forward' for evacuation but were not able to board flights. This was important context when considering the two criteria of 'Pathway 1,' only one of which needed to be met.

28. The first criterion related to risk only as a 'past' risk, while only the second related to 'future' risk:

    a. either a vulnerable and 'at risk' individual who arrived in the UK under the evacuation programme; or
    b. those who were notified by the UK Government that they had been called forward with an assurance of evacuation, but were not able to board flights, and do not hold leave in a country considered safe by the UK.

29. The Applicant emphasised that the requirement not to hold leave in a safe country was only a requirement of the second criterion and had been the change in July 2023. The Applicant had 'arrived in the UK' and therefore fell within 'a.' The Respondent could have amended both criteria to include a requirement not to hold leave in a country considered safe by the UK but did not. This reflected the debt owed by the UK to those evacuated.

30. Future risk was irrelevant to the first criterion. If someone was vulnerable or at risk on evacuation, that was sufficient. Each of the Pathways served a different policy objective, without a single unifying principle.

31. To exclude the Applicant because he was not an Afghan national was contrary to the clear wording of the ACRS, which confirmed that "nationals of other countries…will be eligible." The ARIPS reiterated this at §28. There was no requirement that TCN family members needed to be at risk.

32. In submissions, it was argued that the ARIPS describes four categories of entitlement to ILR. The sufficient eligibility criterion for any category was evacuation under Operation Pitting. Category 1 was described in §6 – Afghan nationals and their family members, who were either evacuated, or called forward and who had not yet left. All people granted Pitting LOTR were eligible for consideration under the ACRS, as confirmed in the summary table of 'cohorts,' in the ARIPS at AB/[122].

33. Category 2 was the ACRS, described in §7 and the first part of §8 of the ARIPS. Category 3 was ARAP and Category 4 was "other groups." Categories 3 and 4 were also referred to in §8.

34. Next, 'Pathway 1' of the ACRS was divided into §§23a and b. Both were broader than Category 1, as they were not limited to Afghan nationals. Neither was a closed group, and both were merely statements of priority, not eligibility.

35. The Applicant met the eligibility criteria of the ACRS on the basis that he had been put at risk by events in Afghanistan and was evacuated on that basis. The Respondent had not cited the absence of a need for a "route to safety" in the impugned decision. The ACRS did not contain a provision excluding those who could return safely to their home country.

36. The Applicant also met both §§23a. and 23.b of ARIPS, as someone who had assisted the UK efforts in Afghanistan and who was vulnerable.

The Respondent's case

37. The unifying policy objective of the ACRS was 'resettlement,' in the sense envisaged by the UNHCR, which defined settlement as a process for offering refugees the possibility to rebuild their lives in a third country and to become fully participating members of a society in which they could settle permanently.

38. §§6 to 8 of the ARIPS did not define the eligibility for separate categories of the ACRS. These were introductory passages. The eligibility criteria began under the heading, "Eligibility and referrals." Under this heading, §23 of the ARIPS referred to providing those "put at risk" with a "route to safety." It was not a static assessment of past risk. Prioritisation under §23 was not

linked to having been evacuated under Operation Pitting, but to specific, future risk. The purpose of the ACRS was to resettle those in need of a route to safety. The Applicant did not need a route. He could return to his home, Nepal.

39. If the Respondent's argument on eligibility failed, the Applicant also failed to meet either "Pathway." While he may have assisted the UK efforts in Afghanistan, he had not "stood up for values such as democracy, women's rights and freedom of speech, rule of law." He was not a member of a vulnerable minority. Rather, the Applicant's case fell into one of the "other groups," introduced in §8 of the ARIPS, namely under other provisions of the Immigration Rules.

40. On the issue of nationality, the Respondent agreed that the Applicant did not need to be an Afghan national to benefit from the ACRS. That was clear from §28 of the ARIPS, under the heading, "further details on eligibility." It was equally clear that the class of eligible TCNs was narrow and limited to family members, as defined in §29. The Applicant was not the family member of an Afghan national. Other TCNs who were not family members of Afghan nationals and who were safe in their home countries did not need to resettle in the UK as a "route to safety." The Afghan Citizens Resettlement Scheme was just that – designed for Afghan citizens and certain TCN family members to resettle because they continued to face risk in Afghanistan. Even then, eligible people were only considered for prioritisation. They were not entitled to settlement.

41. Contrary to the Applicant's skeleton argument, the Civil Service submissions on clarification had been fully accepted and changes to the ACRS and ARIPS reflected this. The same submissions stated that it had "always been an underpinning principle of our resettlement schemes that we do not include nationals of countries considered safe by the UK" (B/[154]). The same submission noted that:

> "You (Minister for Immigration) and the Home Secretary recently agreed that Third Country Nationals (TCNs) who were evacuated as part of Op Pitting but able to safely return to their country of origin are not eligible for Pathway 1 of the ACRS."

42. The changes reflected no change to ACRS, as properly interpreted, at all. They were clarification for what the Respondent always believed the purpose of the ACRS to be. Any debt to the Applicant had been repaid many times over with his evacuation as a gesture of goodwill, a grant of limited leave and offers to pay for his repatriation to Nepal, to return to his family.

Legal principles - Interpretation of policy

43. We set out a summary of the principles on the interpretation of policy.

44. First, interpretation of a policy is a matter of law for this Tribunal, as confirmed in Kambadzi v SSHD [2011] UKSC 23, at §36. The Supreme Court has also confirmed that courts and tribunals expect government departments to honour their statements of policy. Policy is not law, so it may be departed from if a good reason can be shown.

45. Second, the correct approach to understanding the meaning of a policy is for the court or tribunal to decide the meaning for itself. It is wrong to limit the enquiry of the court or tribunal to the question of whether the meaning which the Respondent has attributed to it is one within the range of reasonable meanings only: (see R (O) v SSHD [2016] UKSC 19, §28).

46. Third, a policy must be interpreted objectively, in accordance with the language used, read as always in its proper context. A policy is not to be read as if it were a statute or contract. See, for example, Mandalia v SSHD [2015] UKSC 59, at §31.

47. Fourth, the views of a third party on the interpretation of a policy are irrelevant. In this case, the UNHCR had published a 'Handbook on Resettlement' in which it commented on how it interpreted the ACRS. Both representatives accepted that the UNHCR's view was not relevant.

48. Fifth, it is necessary to consider the primary intended readership of a policy. For example, see R (Cotter) v National Institute for Health and Care Excellence [2020] EWCA Civ 1037. Where the intended readership is a group of specialists or experts, words in a policy may be 'terms of art,' in the sense of having specific meanings understood by the primary readership of experts, with knowledge of specialist terminology and practice.

49. Alternatively, where the primary readership is the general public, then the interpretation should focus on the natural and ordinary meaning of a policy's words, as understood by a reasonable and literate person. The authority for that proposition is Mahad v ECO [2009] UKSC 16, at §10. That case involved interpreting the Immigration Rules. We accept that the principles for interpreting the Immigration Rules, which are closer to statute, may be slightly different to those which apply to the interpretation of a policy. Nevertheless, there can be no logical objection to applying some of the principles in the former, to the latter. This is one such principle, as confirmed in SSHD v JB (Ghana) [2022] EWCA Civ 1392, at §68.

50. In Mahad, the Supreme Court said, the "question of interpretation is what the Secretary of State intended his policy to be", so that the task of the Court was to discover from the words used, "what the Secretary of State must be taken to have intended….But that intention is to be discerned objectively from the language used…" That is consistent with considering 'context' alongside the purpose of a policy, as the Court of Appeal did in R

(MD (Angola) & Ors) v SSHD & Anor [2011] EWCA Civ 1238; and the Divisional Court considered in R (CX1) v Secretary of State for Defence [2024] EWHC 94 (Admin), §§55 to 56, when considering the interpretation of ARAP.

51. Sixth, material or evidence to which the intended readership of a policy does not have access cannot aid its interpretation. It cannot be right that a court or tribunal is in a better position to interpret a policy than its intended readership at the time a policy operated, merely because the tribunal has the later benefit of reading previously unpublished material.

52. Specifically, in this case, the Respondent distributed to its staff an internal "casework processes" document (B/[304]). Neither party relied on that internal guidance as aiding interpretation of the policy.

53. Seventh, there is a distinction between 'context,' in the sense of informing a proper understanding of the interpretation of a policy, and background facts.

54. Context is broad. It includes interpreting words and phrases within the context of the policy itself, taking the policy as a whole. It may include how a policy sits alongside other policies and statutory provisions, particularly if the words of a policy are ambiguous (discussed for example, by the Court of Appeal in Cotter, at §51). It is also closely linked to the purpose of a policy.

55. However, the scope of context has limits. In particular, the relevance of 'background facts' as an interpretative aid should be considered with caution. It is important to identify the proposition which the facts are said to support. Once that proposition is identified, the reader can then appreciate how that proposition aids interpretation of the policy. We say more about this later when we apply this principle in practice.

56. Eighth, the earlier versions of a written policy may aid the interpretation of a later version. In particular, the changes to a written policy may provide textual context, explain clarifications to ambiguities and shed light on the Respondent's intentions in a policy, when objectively understood.

57. Ninth, there is an important distinction to be borne in mind when considering cases of this sort between the proper interpretation of a policy and its application. As set out above, the interpretation of a policy is a matter for the court or tribunal; its application and the judgments which they may entail are a matter for the decision maker: this principle can be observed in a different context in Tesco Stores v Dundee City Council [2012] UKSC 13 at §§19 to 21, but is equally applicable here. In considering a challenge of the kind before us this is a principle which will guide the examination of whether there has been an error of law, or a

disagreement in relation to how the evaluations required by the policy have been exercised involving no misunderstanding of the policy.

Conclusions on Ground (1)

58. We start by saying that any reader might be perplexed by the use of jargon in the ARIPS guidance, which includes 'eligibility,' 'prioritisation,' 'pathways,' 'cohorts,' and 'categories;' and further sub-divisions within those headings. However, standing back, we note that at its heart, the scheme is simple. There is no 'entitlement' to leave. It is a capped scheme, which is by invitation only. Even if someone is 'eligible,' others may be prioritised over them. There are eligibility criteria and then prioritisation within each of three 'pathways.'

59. Also, at the heart of the ACRS, is the word, "resettlement." After all, it appears in the title of the policy and is undoubtedly its focus. We have considered how that term is used throughout the ACRS policy, including for those already in the UK.

60. Next, we have tested whether our initial view on the original and natural meaning of the word is undermined by the context and purpose of the ACRS. We have also considered whether there is any inconsistency in the drafting. We have considered the relevance of 'background facts.'

61. Finally, for completeness, we have considered the relevance of earlier versions of the ACRS and the ARIPS.

62. As set out above, to establish the meaning of the term "resettlement" in the ACRS we start with the ordinary meaning of that word, which is the re-establishment of a permanent home or way of life. 'Resettle' means something different from 'transfer,' as suggested by Mr Bandegani. 'Resettlement' assumes prior settlement, and then, by way of replacement, the establishment of a new way of life. Deploying the ordinary meaning of the word, there is no need for resettlement to be in a location different from the original settlement. It is perfectly feasible for those returning home to 'settle again,' after a period of absence.

63. Contrary to Ms Patry's submission, 'resettlement' does not imply a particular purpose of settling again, or imply whether it is out of need, or choice. It also does not necessarily imply risk. Indeed, by way of context, there are many examples in the Immigration Rules of permitted settlement unconnected with risk, including based on families with a UK connection, long residence in the UK, or other historical connections to the UK. There is also a significant difference between a grant of limited leave to remain outside the Immigration Rules and ILR.

64. Given that 'resettlement' does not imply a particular purpose, the reader of the ACRS must look for its meaning in the context of the wider drafting

of the policy. The word takes its colour from, and only makes sense, in the context of 'risk.' 'Risk' runs throughout the ACRS section of the ARIPS, and the ACRS Guidance. §21 of the ARIPS says that the "scheme will resettle up to 20,000 people at risk." §23 talks of those "put at risk." 'Pathway 1,' relied on by the Applicant and described in §25, talks of those "considered to be at particular risk." 'Pathway 2', described in §26, talks of those "in need of protection" and "at risk." 'Pathway 3' (§27) discusses "protection" and for "others "at risk." 'Cohort 2' (ACRS), in the summary table at AB/[122], refers to "referred vulnerable refugees from Afghanistan and those put at risk." In the ACRS Guidance, the section on "Pathway 1" refers to "vulnerable and at-risk individuals." There are other references which we do not need to set out.

65. The Applicant contends that the policy is to be understood as applying two different concepts when addressing the two bullet-pointed criteria at the outset of the text. The first criterion, it is submitted, is related solely to past risk and that demonstration of past risk is sufficient to bring a person within the policy. The second criterion is submitted to be related to future risk. These submissions raise the question of how should 'risk' be objectively understood in the ACRS policy? Is there one unifying meaning, or different meanings, for specific sub-categories within the policy? If the latter, is it the case that in §23a of the ARIPS and 'Pathway 1', is it correct that 'risk' means 'past' risk, whereas elsewhere in the policy it means future risk? By past risk, is the policy to be understood as applying to someone who was at risk and was, as a consequence, evacuated from Afghanistan, even if they will never face any future risk if removed or required to leave the UK? Alternatively, in all cases, must there be a future risk in the event of removal or if required to leave the UK, or required to remain outside it?

66. The answer to the Applicant's submissions is to be found by examining both ACRS and ARIPS as a whole and in the light of their purposes. On the one hand, the ARIPS and ACRS guidance do not expressly distinguish between past and future risk. However, equally, the policies do not expressly say that a person is entitled to settlement in the event that they face no future risk to themselves or a family member. Our conclusions in relation to the correct interpretation of the policy are as follows.

67. We are unable to accept the Applicant's submissions and we are satisfied that the criteria in the policy are both to be understood as applying to those at future risk, not simply those who were at risk in the past. Firstly, this approach is consistent with the purpose of the policy when it is read and understood as a whole. In particular, in relation to Pathway 1, the pathway under which the Applicant claims to be entitled, this interpretation is reinforced by the exclusion of those who "hold leave in a country considered safe by the UK". When one asks why such persons might be excluded, the answer is because they are not at future risk and have a safe country to return to. If past risk was sufficient for a person to

qualify, then this exclusion would make no sense. Moreover, in the context of ARIPS, an interpretation that past risk is relevant and sufficient for one sub-category, §23a. makes no sense, when the ARIPS is read as a whole. §21 of the ARIPS, which introduces the ACRS, begins by speaking of settling people "at risk" (with no distinction between past and future risk). It then goes on to explain that the ACRS is consistent with the commitment "to expand legal and safe routes to the UK for those in need of protection." If this related to past risk only, that would be inconsistent because those in the UK are clearly not in need of protection and resettlement. This is reinforced by the wording at the beginning of §23, which applies to both §§23.a and b., namely to give those "put at risk by recent events in Afghanistan" with "a route to safety".

68. The ACRS potentially applies to those within the UK, as well as those yet to reach the UK. It provides eligibility regardless of the fact of evacuation alone. Why then do those already in the UK still need a "route to safety," in the context of a resettlement scheme? On any view, they are already safe, if 'risk' only means past risk. The only answer is that the 'recent events in Afghanistan,' in §23 are not merely an historic footnote, but have enduring consequences, which continue to present a future risk: the resumption of a Taliban regime in Afghanistan. This is in marked contrast to settlement schemes which focus on historic criteria.

69. Risk, as understood in §23, can only be properly understood as meaning future risk. It is stated specifically under the heading, "Eligibility and referrals." Objectively, it is the eligibility criterion, from which the three prioritisation 'Pathways' flow. It is also consistent with the passages in the ARIPS and the ACRS Guidance which refer to risk, the passages of which we do not repeat again. Suffice it to say, those who assisted in the UK's efforts and stood up for specific values, and minority groups are discussed as being at risk, as are those who were 'called forward' but are not in a safe country. The other 'pathways' are refugees identified by the UNHCR; and those in Afghanistan or who have fled to other countries in the region, a pathway to which the respondent intended to add further detail. Risk as a concept meaning 'future risk' is consistent with all of this, whereas risk as 'past risk' for one sub-category, when it is not expressed as an exception, is inconsistent and makes no sense.

70. This interpretation is not undermined by the reference to the eligibility of TCNs. Firstly, it is important to appreciate that the policy carefully qualifies the eligibility of TCNs by means of the example of family members of mixed nationality, including reference to the spouses, partners and children of those eligible under the scheme because they are at future risk of ill-treatment in Afghanistan. How could such TCNs face a future risk? The answer is clear: eligible TCNs are close family members of a person at risk. The ACRS allows TCNs to be considered, in order to avoid splitting up mixed nationality families and also provide protection for the family members of those at future risk.

71. While it is true that TCNs who are close family members of those at risk are only an example, we interpret this to be an example of a class of those with the same or similar kind of personal circumstances. This explains why, at §29, the example is followed by the statement that "other family members may be resettled in exceptional circumstances." The TCN exception for close family members of those at risk does not mean that the concept of future risk ceases to apply at all.

72. The interpretation is also consistent with the purpose of the ACRS, which, to reiterate, provides resettlement in order to mitigate the risk to specified groups. Resettlement serves no purpose where a person is not the subject of future risk, unless it is to recognise that mixed-nationality families, one of whom might otherwise be at risk, would be separated. It would be contrary to the purpose of the ACRS to prioritise those who have no future risk for immediate settlement, where the ACRS is anticipated as being oversubscribed, and where people under Pathways 2 and 3, including UNCHR refugees and human rights activists, who continue to be at risk, have to compete for the same limited scheme. It would also be contrary to that purpose to prioritise those at no future risk for immediate ILR when Afghan family members of British citizens (belonging to so-called 'Cohort 4' in the ARIPS summary table at AB/[122]) need to wait for between 5 to 10 years to settle.

73. We had referred earlier, in our summary of legal principles, to whether 'background facts' could be context. The Respondent says that an aid to interpreting the ACRS is the context of her long-standing practice of not granting leave to remain to TCNs who could return safely to their home countries. However, this runs the risk of substituting an objective interpretation of a policy for the Respondent's interpretation. We have set out our view of the effect of the reference to TCNs in the policy having regard to the terms of the policy itself without regard to what the Respondent states is a long-standing practice.

74. The Respondent has also suggested that evidence on the nationality and other personal circumstances of those granted leave under the ACRS might be relevant. However, this again risks confusing objective interpretation of a published policy with the Respondent's practice. The two may not be the same.

75. We have also considered the changes in the ACRS and the ARIPS in the run up to the applicable versions of the policy and statement published in July 2023. While the addition of wording in the ACRS and the ARIPS prioritisation only refers to those who were 'called forward' but remain outside the UK, it does not follow that the change in the wording was intended to benefit the Applicants. The Applicant's case is that the changes in wording reflected a change in policy, to curtail prioritisation for

those still outside the UK, who had been called forward, while maintaining the Applicants, in order to fulfil a debt of honour to them.

76. It makes no sense that the Respondent would have a greater debt of honour to those who had been evacuated, compared to those who were called forward but who were not evacuated. Instead, it makes sense that the change in wording on prioritisation for those outside the UK was by way of clarification, to avoid fruitless future referrals and the need to void them. For the Applicants, whose cases had already been referred and voided, there was no need to amend the wording. Their cases had already been regarded as ineligible on the unchanged eligibility criteria, which the Respondent reconsidered, but maintained. The change in wording reflected a clarification for those outside the UK, not a change in the policy. In the circumstances, the Respondent changed no more than was necessary in the wording.

77. The effect of the analysis set out above can be summarised as follows. The ACRS can be interpreted by understanding the natural and ordinary meaning of ‘resettlement,’ when read in the context of ‘risk,’ and the purpose of the policy. ‘Risk,’ as properly understood, means future risk.

78. To be eligible for resettlement under the ACRS, a potential beneficiary must be put at future risk, by recent events in Afghanistan, such that they require a route to safety.

79. While the ACRS does not exclude TCNs, those who can safely return to their home countries of origin do not require resettlement as a route to safety. Past risk alone is not relevant. It is only relevant insofar as it creates or contributes to future risk.

80. The ACRS provides a clear exception for TCNs who are the immediate family members of those at risk. This is an example of a class of people of the same or similar kind, linked to a person at risk. The exception does not mean that the concept of future risk ceases to apply.

81. In the light of the above, the question which then arises is whether there is any substance in the Applicant’s submission that the Respondent misinterpreted the ACRS when reaching the decision under challenge, or took into account immaterial considerations when doing so. We have reached the clear conclusion that the policy was correctly understood and interpreted in the Respondent’s decision and that the factors which the Respondent took into account were relevant and appropriate.

82. The Respondent was unarguably entitled to conclude that the Applicant did not fall within ‘Pathway 1’, when read in the context of future risk. “Those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women’s rights, freedom of speech, and rule of law” (§23a.) is not a general dispensing provision whereby all of those who

helped the UK efforts are thereby prioritised. The "and" is conjunctive and identifies risk on the basis that beneficiaries have "stood up" for specific, identifiable values and thus have a profile which would place them at risk.

83. We do not accept that it was irrational for the Respondent to conclude that the Applicant did not fall within that 'pathway,' as someone who simply acted as a freelance security person, engaged by, or for, a number of non-UK companies or other countries at any one time. This was not the Respondent erring by imposing an 'ARAP' criterion of direct engagement by HM Government or service with the UK Armed Forces. What the Respondent was doing was rejecting any suggestion of eligibility under the ACRS because of past service on behalf of the UK. The Respondent was entitled to emphasise that the ACRS prioritisation relates not to past service or loyalty to the UK, in the absence of ongoing risk. Rather, it relates to past assistance in UK efforts and standing up for specific values, insofar as they are relevant to future risk.

84. The need for future risk informed the Respondent's conclusion that the Applicant did not fall into the group of "vulnerable people." The ACRS goes beyond the grant of entry and limited leave, to grant immediate settlement. There was no reason to grant the Applicant immediate resettlement, when he was already a TCN (and presumably settled, in a permanent sense), in Nepal. In that connection it was clearly relevant to the application of the policy that the Applicant was a citizen of a safe country to which he could have resort so as to obviate future risk. He was not granted "Pitting LOTR," in the sense of having been specifically identified in one of the cohorts described at §10 of S & Anor, as the recommendations for Pitting LOTR were not made until after the Applicant was evacuated. Whilst it may be that at the time when the Applicant benefitted from being brought to the UK, granted entry and temporary leave, the Respondent was entitled to take account of this as a gesture of goodwill given the circumstances prevailing at the time, but this does not amount to any basis to bring the Applicant within the scope of the policy.

Ground (2) – the adequacy of the reasons in the Respondent's decision

The Applicant's case

85. The Applicant says that the reasons given in the impugned decision were inadequate, because they focused on his not being an Afghan national; not having been directly employed or contracted by HM Government or UK Armed Forces; and not being "eligible within either of the two parameters noted above as the ACRS priorities." (B/[259]). The decision had cited the priorities of "those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy etc." and "vulnerable people," without explaining why the Applicant had not assisted the UK or was not vulnerable. The decision had made no reference to the principles set out in §23 of the ARIPS. The decision had not addressed the "principal

controversial issues," in the 'Porter' sense (South Buckinghamshire DC v Porter (No. 2) [2004] UKHL 33.

The Respondent's case

86. The Respondent says that the impugned decision made clear that the Applicant's nationality was not the sole basis of voiding his case. TCNs can be considered, but mainly only where they are the immediate family members of those at risk. The principal controversial issue was whether the Applicant was at particular risk, and the decision referred to those who had assisted the UK efforts, etc, or vulnerable groups, even if it did not mention §23 of the ARIPS specifically. The decision repeated (at B/[259]) that:

> "This [evacuation as a gesture of goodwill] came with the understanding, communicated verbally to your client, that once in the UK your client would arrange and be offered support for onward travel to the country of their nationality, in this case Nepal."

87. The clear implication of this was that the Applicant could return home without risk, and this was a context and part of the reason for his ineligibility. The priorities in 'Pathway 1' had to be read in that context.

Legal principles on sufficiency of decision-making reasons

88. We have considered Porter, specifically §§33 to 36. At §36, the House of Lords said:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration… A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Conclusions on Ground (2) and the adequacy of the reasons in the decision

89. Applying the 'Porter' principle, the Respondent's reasons in her decision were adequate, as explaining how she resolved the application of the ACRS and why she voided the Applicant's referral. She explained that the

Applicant was not a member of one of the 'Pitting LOTR' cohorts. In the light of the interpretation of the policy which has been set out above, the reasons which the Respondent provided engaged with the issues raised by the Applicant's case which were relevant to the policies and explained why the Applicant was not able to benefit from the policy.

90. In her decision, she recited that the Applicant was evacuated as a gesture of goodwill and was told that he was expected to make his way home to Nepal. The principal controversial issues were first, eligibility, and second, prioritisation. The stated explanation that the Respondent expected the Applicant to return home answered the Applicant's eligibility based on a lack of future risk, as did the rejection of any eligibility based on past loyalty to the UK.

91. The decision cited the two aspects of prioritisation under 'Pathway 1' and made clear that as a free-lancer, the Applicant did not fall within either aspect. These comments can only be read in the context of the lack of ineligibility because the Applicant was not at future risk.

Ground (3) – arguable perversity based on inconsistent decisions

The Applicant's case

92. Although not formally abandoned, Mr Bandegani did not make any additional oral submissions to us beyond the grounds and skeleton argument and he placed no emphasis on this ground. The Applicant relies on R (Hussain) v SSHD [2012] EWHC 1952 (Admin) and says that the Respondent's decision was irrational, because there was no rational basis for treating him differently from five of his colleagues who were granted ILR under the ACRS. The Respondent's contention that she had allowed others' applications in error was not a rational basis for distinguishing the Applicant's case.

The Respondent's case

93. The Respondent relies on KBL v SSHD & Ors [2023] EWHC 87 (Admin) and R (Begbie) v Department of Education and Employment [1999] EWCA Civ 2100 for the propositions that inconsistency in decision-making is not a free-standing ground for judicial review; and that we should be slow to fix the Respondent permanently with the consequences of five mistakes, which did not give rise to any legitimate expectation on the Applicant's part, in the context of a scheme requiring prioritisation of up to 20,000 beneficiaries.

Legal principles on irrationality because of inconsistency of treatment and legitimate expectations

94. We have considered the legal principles regarding consistency of treatment of those in comparable circumstances, within the context of irrationality. We have regard to what was said in R (Hussain) v SSHD [2012] EWHC 1952 (Admin), specifically §46:

> "There is an established principle of public law that "all persons in a similar position should be treated similarly", see Stanley Burnton J in R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales [2004] EWHC 144 at [74], quoting Lord Donaldson MR in R(Cheung) v Hertfordshire County Council, The Times 4 April 1998. Any discretionary public law power "must not be exercised arbitrarily or with partiality as between individuals or classes potentially affected by it," see Sedley J in R v MAFF, ex parte Hamble Fisheries [1995] 2 All ER 714 at 722a-b. One reason for that rule is that it provides consistency in decision making, and some certainty about the application of rules."

95. Lang J confirmed in KBL v SSHD & Ors [2023] EWHC 87 (Admin), at §87, that:

> "Inconsistency, unequal treatment, unfairness, or arbitrariness in public decision-making are contrary to good administration and may lead to a conclusion that a decision is irrational. However, such flaws are not to be treated as free-standing grounds for judicial review."

96. However, we also bear in mind her comment at §91 that:

> "Where there are divergent decisions in materially the same situations, the Court is required to "consider with the greatest care how such a result can be justified as a matter of law…"

97. Peter Gibson LJ also made clear in R (Begbie) v Department of Education and Employment [1999] EWCA Civ 2100, at §61 that:

> "Where the court is satisfied that a mistake was made by the minister or other person making the statement, the court should be slow to fix the public authority permanently with the consequences of that mistake. That is not to say that a promise made by mistake will never have legal consequences. It may be that a mistaken statement will, even if subsequently sought to be corrected, give rise to a legitimate expectation, whether in the person to whom the statement is made or in others who learnt of it, for example where there has been detrimental reliance on the statement before it was corrected. The court must be alive to the possibility of such unfairness to the individual by the public authority in its conduct as to amount to an abuse of power."

Conclusions on Ground (3) - arguable irrationality and legitimate expectations

98. Having considered whether to grant permission, we conclude that the Respondent did not even arguably err based on the inconsistent decisions in relation to five others. There is no evidence before us that the

Respondent granted ILR to any more than five people, whose situations were comparable to the Applicant. There is also no evidence that the grants in relation to those five were anything other than in error. That does not begin to show arguable partiality or a dysfunctional system, such that the Respondent's decision was irrational. The Respondent made errors in a small number of cases.

99. When the Applicant was referred to the ACRS, he had no legitimate expectation that he would be granted ILR, by virtue of those later errors. The Applicant was referred, interviewed, and swiftly informed why the referral was voided for reasons which were legally unimpeachable, and indeed actively encouraged to return home.

100. For the above reasons, the grounds of judicial review do not disclose public law errors in the Respondent's decision. The Applicant's application is refused.

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