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Case No: CO/2061/2023
AC-2023-LON-001736

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2024

Before :

LORD JUSTICE DINGEMANS
Vice-President of the King's Bench Division
and
MR JUSTICE JOHNSON

Between :

THE KING
(on the application of CX1, CX2, CX4, CX6 and
CX7) ("CX1 No.2")

Claimants

-v-

(1) SECRETARY OF STATE FOR DEFENCE
- and -

(2) SECRETARY OF STATE FOR FOREIGN,
COMMONWEALTH AND DEVELOPMENT
AFFAIRS

Defendants

Adam Straw KC and Catherine Meredith (instructed by Leigh Day) for the Claimants
David Blundell KC, Nicholas Chapman and Natasha Jackson (instructed by Government
Legal Dept) for the Defendants

Hearing date: 15 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 24.1.24 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Dingemans:

Introduction

1. This claim for judicial review raises issues about the application of the Afghan Relocations and Assistance Policy (ARAP) which was set out, at the material times, in the Immigration Rules. The claimants, who have been granted anonymity and are known as CX1, CX2, CX4, CX6 and CX7, are all outside the United Kingdom and are Afghan nationals who were journalists who worked in Afghanistan for the BBC or the BBC World Service at the time that UK armed forces were deployed to Afghanistan.
2. In broad terms, the Afghan Relocations and Assistance Policy (ARAP) governs the circumstances in which His Majesty's Government (HMG) will grant leave to relocate to the UK persons who worked for or alongside HMG departments in Afghanistan.
3. The claimants claim that they satisfy Category 4 of ARAP because they satisfied the material part of the policy. The material part of the policy required that each of the claimants "were directly employed in Afghanistan by an HMG department; provided goods or services in Afghanistan under contract to an HMG department; or worked in Afghanistan alongside an HMG department, in partnership with or closely supporting that department; and in the course of that employment or work or provision of services they contributed to the UK's military objectives or national security objectives (which includes counter-terrorism, counter-narcotics and anti-corruption objectives) with respect to Afghanistan". The defendants do not accept that any of the claimants qualify for relocation under ARAP.

Previous proceedings

4. CX1, CX4, CX5, and CX7, together with CX2, CX3, CX6 and CX8 were all parties to a first claim for judicial review of delays in the decision making on their claims under ARAP. This first claim for judicial review was compromised by the first defendant Secretary of State for Defence (MOD) and the second defendant Secretary of State for Foreign and Commonwealth Development Affairs (FCDO), on the basis that decisions would be made within a set timescale.
5. Decisions were then made by the MOD and FCDO within the timescale, rejecting the claimants' claims under ARAP. A second claim for judicial review of those decisions was brought, and it was heard by Lane J. In a judgment dated 13 February 2023 *CX1 and others v MOD and another* [2023] EWHC 284 (Admin) (*CX1 and others (No 1)*), Lane J held that the MOD and FCDO had misapplied ARAP when making those decisions. The decisions were quashed and the MOD and FCDO remade the decisions.
6. In the first judicial review claim, the claimants had originally claimed that the BBC was a Government Department for the purposes of ARAP. It is common ground that the BBC is not a Government Department, and the independence of the BBC from Government is a core principle of BBC journalism. That said, the evidence shows that persons now in power in Afghanistan do not draw the principled distinction between the UK Government on the one hand and the BBC on the other.
7. It is also common ground that it is for the UK Government to decide on which foreign nationals may be granted leave to enter the UK. The UK Government may adopt

policies such as ARAP to apply when making the choice about who to relocate. The UK Government has not chosen to include in ARAP all of those who worked alongside the BBC or the BBC World Service in Afghanistan at the time when UK armed forces were deployed to Afghanistan.

8. The fact, however, that those who worked alongside the BBC do not automatically qualify under ARAP, does not mean that they might not qualify under the provisions of ARAP if the claimants can satisfy the relevant provisions of ARAP. That was established by the judgment of Lane J in *CX1 and others (No 1)*.
9. Following the judgment of Lane J on 13 February 2023 in *CX1 and others (No 1)*, Leigh Day, the solicitors for the claimants, wrote by letter dated 20 February 2023 to the ARAP Casework Team.
10. By decisions dated 6 March 2023 the defendants found that the claimants were not eligible for relocation under Category 4 of ARAP. The claimants CX1 and CX6 were found to satisfy condition 1 of category 4 of ARAP but the claimants CX2, CX4 and CX7 were found not to satisfy condition 1 of category 4 of ARAP, so that their claims failed. The claimants CX1 and CX6 were found not to satisfy condition 2 of category 4 of ARAP, so that their claims also failed, meaning that none of the claimants qualified for relocation under ARAP. There was originally a “reasons challenge” to the decisions made on 6 March 2023, but this was because no reasons had been provided to the claimants for the decision made. The defendants did then disclose the caseworker notes, and the reasons challenge part of the claim was not pursued.
11. The claimant CX2 has, since the commencement of these proceedings, been granted leave to relocate to Canada. CX2 therefore seeks permission to withdraw his claim, and that is agreed by the parties. I grant claimant CX2 permission to withdraw his claim and say nothing more about his claim for judicial review.

ARAP and the Immigration Rules

12. The evidence shows that ARAP originated as a means of showing commitment and paying a debt of gratitude to those who worked for HMG and supported the UK armed forces’ mission in Afghanistan.
13. There are four categories for assistance under ARAP, against which ARAP applications are assessed. As at 4 June 2021, category 4 was limited to “those who work in meaningful enabling roles for HMG”. On 26 August 2021, this was altered to “those who have been employed by HMG, in meaningful enabling roles”.
14. The version of ARAP which was in force at the date of the challenged decisions was that of 27 April 2022. This defined category 4 as follows:

“The cohort eligible for assistance on a case-by-case basis are those who:

- on or after 1 October 2001 were directly employed in Afghanistan by an HMG department; provided goods or services in Afghanistan under contract to an HMG department; or worked

in Afghanistan alongside an HMG department, in partnership with or closely supporting that department; and

- in the course of that employment or work or provision of services they contributed to the UK's military objectives or national security objectives (which includes counter-terrorism, counter-narcotics and anti-corruption objectives) with respect to Afghanistan; and

- because of that employment or work or provision of services, the person is or was at an elevated risk of targeted attacks and is or was at a high risk of death or serious injury; or

- hold information the disclosure of which would give rise to or aggravate a specific threat to HMG or its interests.

Checks will be made with the HMG department or unit by whom the applicant was employed, contracted to or worked alongside, in partnership with or closely supported or assisted.”

15. The rules giving effect to ARAP were paragraphs 276BA1 to 276BB5 of the Immigration Rules. **Category 4** of ARAP was given effect by paragraph 276BB5. This provided:

“276BB5. A person falls within this paragraph if the person meets conditions 1 and 2 and one or both of conditions 3 and 4. For the purposes of this paragraph: (i) **condition 1** is that at any time on or after 1 October 2001, the person:

(a) was directly employed in Afghanistan by a UK government department; or (b) provided goods or services in Afghanistan under contract to a UK government department (whether as, or on behalf of a party to the contract); or (c) worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department;

(ii) **condition 2** is that the person, in the course of that employment or work or the provision of those services, made a substantive and positive contribution towards the achievement of:

(a) the UK government's military objectives with respect to Afghanistan; or

(b) the UK government's national security objectives with respect to Afghanistan (and for these purposes, the UK government's national security objectives include counterterrorism, counter-narcotics and anti-corruption objectives);

(iii) **condition 3** is that because of that employment, that work or those services, the person:

(a) is or was at an elevated risk of targeted attacks: and

(b) is or was at high risk of death or serious injury;

(iv) **condition 4** is that the person holds information the disclosure of which would give rise to or aggravate a specific threat to the UK government or its interests.” (emphasis added).

Some procedural matters

16. Although the parties had filed helpful Skeleton Arguments before the hearing, they had not filed an agreed list of issues pursuant to paragraph 14.7 of PD54A. This was relevant because in the amended statement of facts and grounds at paragraph 1 it was stated that “the claimants are Afghan nationals who worked in high-profile roles for the BBC and other media agencies in Afghanistan. They worked alongside the UK Government (HMG), including alongside British troops and for organisations funded by HMG” (emphasis added). In the detailed grounds of defence at paragraph 2 it was said “the claimants are Afghan journalists who claim to have worked for the BBC and other agencies in Afghanistan in the past” (emphasis added). The difference in wording in the two Skeleton Arguments suggested that there might be factual issues about what the claimants did in Afghanistan to be resolved between the parties. There was an issue of Parliamentary privilege that had been raised in relation to materials quoted in the third witness statement of Erin Alcock, a chartered legal executive employed by Leigh Day, solicitors acting for the claimants. It also appeared that there was a dispute of fact about whether CX4 had been embedded with UK armed forces at any relevant time.
17. The Court therefore asked for an agreed list of issues. An agreed list of issues was produced. This agreed list of issues did not disclose any factual issues which required to be resolved between the parties, and this was confirmed at the start of the hearing. The parties had agreed that CX4 had not been embedded with UK armed forces. The parties had agreed that paragraph 5 of the third witness statement of Erin Alcock which had engaged issues of Parliamentary privilege should be deleted.
18. The agreed issues were:

“1. Whether the Defendants’ decisions dated 6 March 2023 that the Claimants were not eligible for relocation under category 3 of [ARAP] were unlawful for one or more of the following reasons:

Ground 1: a. The First and/or Second Defendant misinterpreted the relevant part of condition 1 of ARAP Category 4. They wrongly considered that, to work “alongside a UK Government department, closely supporting and assisting that department”, there had to be a sufficiently close formal relationship between the applicant or the organisation for which they worked, and a UK government department; and that the substance of the applicant’s work and the extent to which the substance of the

work itself closely supported and assisted the UK Government could not, taken alone, satisfy that criterion. b. Further, or alternatively, the First and/or Second Defendant failed to consider whether the substance of each Claimant's work itself demonstrated they met this criterion. **Ground 2:** c. In finding that CX1 and CX6 did not meet condition 2 of ARAP Category 4, the Second Defendant failed to ask whether each Claimant made a substantive and positive contribution to the UK's military objectives or national security objectives, as specified in condition 2. This was a misinterpretation of that policy, and/or a material error of objectively verifiable fact. d. Further or alternatively, the Second Defendant failed to consider whether certain aspects of each Claimant's work made a substantive and positive contribution to those objectives.

Relief

2. Whether to grant the following relief, set out in the N461: a. An order quashing those decisions. b. An order requiring the Defendant to reconsider those decisions. c. Other relief that the court considers appropriate. d. Costs."

19. In the course of the hearing, however, it became apparent that there was a dispute of fact between the claimants and defendants about what were the "military objectives" or "national security objectives (which includes counter-terrorism, counter-narcotics and anti-corruption objectives)" with respect to Afghanistan for the purposes of ARAP. This had been the subject of evidence in witness statements from Nicholas Gurr, Director of International Security at the MOD since 2020, and Christine Ferguson, Head of the Resettlement Department within FCDO's Afghanistan and Pakistan Directorate since March 2022. The issue was also the subject of the third witness statement of Erin Alcock.
20. This factual issue is addressed later in the judgment, but it was unfortunate that the parties did not liaise and co-operate in the run up to the hearing to determine what was, and was not, in issue between them. It appeared from the submissions to the court that the legal representatives on behalf of the claimants were so sure that the defendants should agree to relocate the claimants to the UK, and that the legal representatives on behalf of the defendants were so sure that the claimants did not qualify for relocation under ARAP, that the parties had not spent as much time as they might have done identifying what issues divided them. That said I am grateful to Mr Straw KC and Ms Meredith on behalf of the claimants, and Mr Blundell KC, Mr Chapman and Ms Jackson on behalf of the defendants, and their respective legal teams, for the helpful written and oral submissions that were made.

Issues

21. By the conclusion of the oral submissions it became apparent that the issues raised by this application for judicial review were: (1) whether the defendants had construed condition 1(c) of category 4 of ARAP too narrowly by not accepting that the substance of the claimants' work that closely supported and assisted the UK Government could, taken alone, satisfy and had satisfied condition 1(c). This meant that CX1 and CX6 had

met condition 1(c) as well as condition 1(b) of category 4 of ARAP, and CX4 and CX7 satisfied condition 1(c); (2) whether in finding that CX1 and CX6 did not meet condition 2 of category 4 of ARAP, the FCDO had misinterpreted condition 2 of category 4 of ARAP; (3) whether in finding that CX1 and CX6 did not meet condition 2 of category 4 of ARAP the MOD and FCDO had made a material error of fact in applying the criteria by failing to address the correct military or national security objectives; (4) what, if any, relief ought to be granted to the claimants.

The relevant factual background

22. As appears above, there was by the end of the hearing no material dispute of fact about the work which had been carried out by the claimants. There was also no material dispute about conditions 3 and 4 of category 4 of ARAP so far as it applied to the claimants.
23. The work carried out by the claimants is set out in the bundles. Given the fact that the claimants are not in the UK and the evidence shows that they are exposed to risks in their respective locations, and following discussions in the course of the hearing, I have set out the relevant background and decisions, but it is expressed more cryptically than might otherwise have been the case in an attempt to avoid identification of the claimants in this public judgment. I can confirm that the court has had regard to all the relevant material. For completeness I should also record that there are separate closed proceedings concerning some of the claimants.

The letter dated 20 February 2023

24. The letter dated 20 February 2023 was sent on behalf of the claimants after the decision in *CX1 and others (No 1)*. The letter said it would set out “a summary of reasons why CX1-CX8 satisfy the criteria of ARAP Category 4”. It was a three page letter, with attached annexes. The letter was written in very broad terms and involved assertions but little by way of detail, for example in paragraph 2 it was said “In the course of their work CX1-CX8 made significant contributions to the UK’s military or national security objectives. This included, in summary, building of democratic, open and transparent systems, as well as informing the Afghan population of such things as the corruption and brutality of the Taliban, for the reasons given above. See further, skeleton argument at paragraphs 26 and 31 and documents referred to therein, and the report of Mr Foxley dated 15 September 2022, e.g., paragraphs 25- 35, 40 and 47.” Reference was then made to annex 1 where it was said that there would be an example of how the work contributed vital information about developments on the ground including military operations. The letter went on to report risks faced by CX1-8.
25. Annex 1 to the letter had a heading with CX1’s name. There was a section set out headed “further information on work”. This referred to his work with various shows. It also contained a sentence at the end stating “[CX1] also embedded with UK troops visiting Camp Bastion and worked alongside major operations”, but no further details were given. There were similar annexes dealing with the other claimants.
26. Although the letter referred to documents, including witness statements, which had been prepared for *CX1 and others (No 1)*, the way in which the letter dated 20 February 2023 was set out did not assist the reader to work out the factual basis on which it was said that CX1, CX2, CX4, CX6 and CX7 satisfied category 4 of ARAP.

27. The reference to the report from Mr Foxley in the letter dated 20 February 2023 was a reference to a report from Tim Foxley MBE dated 1 August 2022, which was updated on 15 September 2022, which was in evidence before this Court. Mr Foxley worked as an intelligence analyst for the MOD from 1992 to 2012. He dealt with the current situation in Afghanistan, the Taliban view of journalists and media, the activities and objectives of the UK Government in Afghanistan, and the risks to the claimants.

CX1 and the decision dated 6 March 2023

28. CX1 made a witness statement dated 16 June 2023, which exhibited his first and second witness statements made on 13 May 2022 and 3 August 2022 in *CX1 and others (No.1)* with the exhibits to those proceedings, which had been referred to by Leigh Day in the letter dated 20 February 2023. The exhibits included links to articles with translations and links to recordings of programmes with which he had been involved, although there were no translated transcripts of the programmes. There were also letters of recommendation and support.
29. CX1 worked for media organisations and carried out training. He then worked for the BBC World Service, and for part of the time was a senior producer of various radio programmes. He spent some time in London, before working again for a media organisation in Afghanistan. He worked for BBC Media Action on a particular programme and for the United Nations Assistance Mission in Afghanistan (UNAMA).
30. The witness statements from CX1 showed that he had at one time travelled with and worked as a journalist with British troops in Helmand and the frontline. He stated that “my reporting supported the British military, and their campaign against narcotics. I publicised statements by and interviews with the British and international military, and publicised positive aspects of their military operations and counter-narcotics efforts.”
31. The Court did ask for assistance at the hearing to identify what the evidence showed in respect of CX1, for example showing when CX1 had worked as a journalist alongside British troops and the articles that had been written from that time, and although the Court was provided with a helpful note of “facts from the case notes, witness statements and exhibits for the claimants relating to the substance of their work” at the hearing, it remained unclear what articles had been written from CX1’s time with the MOD. Notwithstanding a careful review of the witness statements and exhibits after the hearing it is still not clear what articles were written by CX1 when he was working with British troops. For example, the article exhibited at AMA 1 (g) does refer to operations between Afghan and coalition forces, but refers in fact to “the Italian operation in Helmand”.
32. CX1 made the case that as the presenter of a particular programme in Afghanistan, he satisfied category 4 of ARAP and relied on a website description about the media and the programme: “Afghanistan's media plays a critical role in the cultural and political life of the nation... The show gives panellists and audience members a platform to discuss issues of national importance during the country’s crucial period of transition towards parliamentary rule ... topics of discussion have included; the role of women in public life, the rise in extremism, peace process negotiations and mass migration. Panellists have included politicians, sportspeople, activists and presidents.”

33. CX1's application for relocation under ARAP was considered against category 4 by the MOD. It was concluded that there was no evidence provided that CX1 was, on or after 1 October 2001, directly employed in Afghanistan by a department of HMG. There was no evidence from an MOD perspective that the applicant provided goods or services in Afghanistan under contract to the MOD. The MOD formally referred CX1's case to the FCDO. This was because of the funding for the BBC World Service and the FCDO's role in this. There was consideration, however, from the FCDO as to whether CX1 met condition 1 of category 4.
34. The FCDO considered CX1's work for the BBC World Service, which is an international broadcaster providing impartial news reports and analysis, including to Afghanistan, and is operated by the BBC. The decision maker noted that before 2014-15, the BBC, including BBC World Service, received a parliamentary grant-in-aid which was administered by the former FCO. In 2014-15, funding moved to the licence fee. HMG's relationship with the BBC was then governed by the Framework Agreement between the Secretary of State for Digital, Culture, Media and Sport and the BBC. The BBC World Service continued to receive some core annual funding from the FCDO, but the FCDO did not directly fund specific projects or work in Afghanistan. The BBC remained operationally and editorially independent of HMG and so the work with BBC World Service did not qualify under condition 1 of category 4 of ARAP.
35. The FCDO then assessed CX1's work for BBC Media Action in his role for the relevant programme. It was noted that BBC Media Action was not funded by the licence fee and was an independent charity, legally and financially distinct from the BBC. The former DFID (now FCDO) had a particular interest in social media in Afghanistan. This appeared from the fact that the FCDO twitter accounts featured the programme which gave Afghans an opportunity to question politicians. DFID alone funded the programme.
36. In relation to his work on the programme for BBC Media Action, the FCDO considered that CX1 met condition 1(b) given his role on a programme funded solely by DFID. It was assessed that CX1 did not meet condition 1(a) as he was not directly employed by a UK government department. He did not meet condition 1(c) as he did not work alongside a UK government department.
37. In relation to condition 2 of category 4 CX1 was assessed against condition 2 in relation to the programme because it was in relation to that work that condition 1 was met. The decision maker concluded that "I do not consider that [CX1] made a substantive and positive contribution to HMG's national security objectives in his role ... for the ... Programme. The aim of the ... programme was to increase accountability between citizens and the former Afghan Government and provided a platform to discuss issues of national importance during the country's transition towards parliamentary rule. The topics included the role of women in public life, peace process negotiations and migration. The objective was to give ordinary people a voice and an opportunity to question officials. UK national security objectives were not a goal of the ... Programme, therefore, based on the information available, [CX1] does not meet condition 2." (underlining added).
38. The decision maker for the MOD agreed with the assessment that CX1 met condition 1 (b) in respect of his role on the programme but did not meet condition 2 "as he did not,

in this role, make a substantive and positive contribution to the achievement of the UK Government's national security objectives".

CX4 and the decision dated 6 March 2023

39. CX4 made a witness statement dated 15 June 2023 exhibiting his witness statements made in *CX1 and others (No 1)* dated 13 May and 16 September 2022. In his witness statement dated 13 May 2022 CX4 referred to his reports on military operations in four different provinces, which he named.
40. CX4 worked as a freelance journalist supplying material to the BBC before becoming a BBC journalist for the BBC World Service for some 12 years. After leaving the BBC the applicant held a variety of academic posts.
41. The MOD considered CX4's case and concluded that although CX4 had spent some time with British armed forces he had not been embedded with them so that he was in partnership or closely supporting the armed forces, and the MOD caseworker found that CX4 did not satisfy condition 1 of category 4.
42. CX4's case was referred to the FCDO. The FCDO noted that CX4 had worked for the BBC World Service but that the BBC was independent from HMG. It was considered that CX4 had not established through the evidence provided that he: a) was directly employed in Afghanistan by the FCDO; or b) provided goods or services in Afghanistan under contract to the FCDO; or c) worked in Afghanistan alongside, in partnership with closely supporting and assisting the FCDO. Therefore condition 1 (a, b or c) is not met for the FCDO."
43. There had been no consideration of the second condition under Category 4, because CX4 did not meet the first condition which is a prerequisite to be eligible for ARAP. That meant that the final decision on CX4 was that he did not meet the qualifying criteria for category 4 of ARAP.

CX6 and the decision dated 6 March 2023

44. CX6 made a witness statement dated 16 June 2023 which exhibited witness statements dated 12 May 2022 and 15 September 2022 made in *CX1 and others (No 1)*. He referred to his work in 2010 when based in Kabul talking directly to officers to report on the military progress of the British and international forces.
45. CX6 had worked for the BBC World Service and after leaving had held a variety of academic and journalistic posts. CX6 had stated that he 'frequently worked alongside British military', but the MOD decision maker found that this was in his capacity as a journalist and there was no evidence of him being embedded in the sense of being "in partnership with or closely supporting and assisting that department". The final MOD decision was that CX6 did not meet condition 1 of category 4. The matter was referred to the FCDO.
46. The FCDO considered CX6's work for the BBC World Service, but recorded that the BBC was, and continues to be, independent from HMG. CX6's work for the local branch of the BBC World Service Trust (now BBC Media Action) was considered. This was the BBC's international development charity and works to a distinct mission

underpinned by BBC values. CX6 worked on a popular radio programme which dealt with important and controversial societal and political issues such as gender, forced marriage, health, vaccination, education, law and order, narcotics, and mine awareness. The programme was funded by DFID. The FCDO considered that CX6 met condition 1(b) because he provided goods or services in Afghanistan under contract to DFID. It was considered that he did not meet condition 1(a) as he was not directly employed by a UK government department and did not meet condition 1(c) as he did not work alongside a UK government department.

47. The FCDO then considered condition 2 of category 4, but the caseworker did not consider that CX6 made a substantive and positive contribution to national security objectives in this role. This was because “the aim of the ... programme was educational and designed to reflect on real-life situations in listener’s lives and provide information to help them improve their own lives. UK national security objectives were not a goal of the ... radio programme, therefore, based on the information available, [CX6] does not meet condition 2” (underlining added).
48. For these reasons CX6 was assessed as not being eligible for category 4 of ARAP. The decision was agreed by the MOD.

CX7 and the decision dated 6 March 2023

49. CX7 made a witness statement dated 15 June 2023 in which he exhibited his witness statements dated 11 May 2022 and 15 September 2022 made in *CX1 and others (No 1)*. He referred to reporting he had done when travelling to the field by helicopter to attend NATO press conferences, which occurred after the fighting had concluded. CX7 referred to his interview of a particular figure and the report that he had filed, and the risks to which he had been exposed as a result of that report.
50. CX7 worked for the BBC World Service as a radio correspondent before later working for Reuters. He also worked for the Independent Directorate for local Government in Afghanistan and the Independent Journalist Association as a media specialist. He had spent some time alongside the British armed forces.
51. The MOD assessed that there was no evidence provided that CX7: was directly employed in Afghanistan by a UK Government department; provided goods or services in Afghanistan under contract to a UK Government department; or worked in Afghanistan alongside the MOD, either in partnership with or closely supporting and assisting the MOD. It was accepted that CX7 spent some time alongside the British military, but it had not been shown that he was “in partnership with or closely supporting and assisting that department”. The MOD assessed that CX7 did not meet condition 1 of category 4.
52. The case was referred to the FCDO. The caseworker for the FCDO noted his work as a radio correspondent for the BBC World Service in Afghanistan and that the BBC was independent from HMG. The FCDO recorded that “the applicant has not established through the evidence provided that they: a) were directly employed in Afghanistan by the FCDO; or b) provided goods or services in Afghanistan under contract to the FCDO; or c) worked in Afghanistan alongside, in partnership with closely supporting and assisting the FCDO. Therefore condition 1 (a, b or c) is not met for the FCDO.”

53. It was therefore decided that CX7 did not meet condition 1 of category 4 of ARAP, and there was therefore no consideration of the second condition.

The claimants' request for reviews

54. Requests for reviews were made by all of the claimants, but they were rejected by the defendants.

Some relevant authorities on the interpretation of policies and ARAP

55. It is common ground that if there is a dispute about the interpretation of a policy such as ARAP, this is an objective question for the Court whose task is to decide what a reasonable person's understanding of the policy would be. This requires looking at the words used in the policy, taking the policy as a whole and in the light of its context and purpose, see *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48 at paragraph 10; *R(O) v Secretary of State for the Home Department* [2016] UKSC 19; [2016] 1 WLR 1717 at paragraph 28; and *R(KA) v Secretary of State for the Home Department* [2022] EWHC 2473 (Admin); [2023] 1 WLR 896 at paragraph 151.
56. The background to the introduction of ARAP was analysed by Lang J in *R(S/ v Secretary of State for Foreign and Commonwealth and Development Affairs and others* [2022] EWHC 1402 (Admin). In *R(JZ) v The Secretary of State for the Home Department and others* [2022] EWHC 2156 (Admin) Hill J addressed the claim of a judge who had been refused leave under ARAP and leave outside the rules. In the materials before the Court in that case was evidence that HMG had developed a partnership with some judges where judges had been resettled because of their role in presiding over terrorism trials.
57. In *CX1 and others (No 1)* Lane J referred to changes to the wording of category 4 of ARAP and held that condition 1 of category 4 could be satisfied if the substance of the journalist's work closely supported and assisted HMG's military or national security objectives, for example through "significant activities which were closely aligned with the "democracy-building" activities of an HMG department". Lane J suggested that the provision of intelligence might satisfy condition 2 and consideration should be given as to whether the claimants worked alongside a UK department to provide key insights in that way. At paragraph 86 of the judgment Lane J suggested that sharing a ride with a military unit was unlikely to be sufficient to satisfy condition 1 of category 4, but a pattern of travelling or living (or being embedded) with a unit might be. Lane J also contemplated that broader national security objectives such as the building of democratic systems and transparent information could be achieved by an independent journalist working for the BBC.
58. In *R (LND) v (1) Secretary of State for the Home Department (2) Secretary of State for Defence* [2023] EWHC 1795 (Admin) ("LND"), Swift J considered the judgment by Lane J in *CX1 (No 1)* and the proper approach to condition 1 and the phrase "worked alongside". Swift J noted that they were a distinct and additional group to those who were directly employed or working under contract. Swift J said, in paragraph 20 of his judgment, that "Conditions 1 and 2 must be considered together ... in particular when the applicant was ... in the third, close support and assistance, category ... Conditions 1 and 2 are, obviously, interdependent. Condition 2 is the more important because it identifies the substantive activity that the applicant must have undertaken to meet the

eligibility requirement. By contrast, Condition 1 operates as a filter by requiring that activity to have been performed either in consequence of a contractual obligation (the first and second categories) or in consequence of some other sufficiently close connection (the third category) ... In this case the decision-maker ought also to have taken account of the substance of the work the First Claimant undertook, the nature of the institutions in which he worked, the nature of the connection between those institutions and the relevant United Kingdom government departments, and the contribution made by the work of those institutions to the United Kingdom's military and national security objectives in Afghanistan during the period the First Claimant worked in them."

59. The Court was told that there is an outstanding appeal to the Court of Appeal by the MOD and FCDO from the judgment of Swift J in *LND*.

Whether the claimants satisfied condition 1(c) of category 4 of ARAP (issue one)

60. It was common ground that CX1 and CX6 satisfied condition 1(b) of category 4 of ARAP, but they both claimed that they, together with CX4 and CX7, satisfied condition 1(c) of category 4 of ARAP.
61. Mr Straw on behalf of the claimants submitted that the defendants had construed the first part of category 4 of ARAP work "alongside a UK Government department, closely supporting and assisting that department" too narrowly by not accepting that the substance of the applicant's work closely supported and assisted the UK Government could, taken alone, satisfy the first part. In that respect the defendants had mirrored the error identified by Lane J in *CX1 and others (No 1)*. It was submitted that all of the claimants satisfied condition 1(c) of category 4 of ARAP.
62. Mr Blundell on behalf of the defendants emphasised that the claimants had not brought a rationality challenge to the decision made, and that there was no error in approach by the caseworkers to ARAP. The caseworkers had fairly applied condition 1 of category 4 and made proper findings about whether it was satisfied.
63. In circumstances where: it was apparent that the decisions dated 6 March 2023 in respect of CX4 and CX7 had considered the first condition only of category 4; and Swift J had stated in *LND* that the position of an applicant under ARAP should be considered in the round in respect of the first and second conditions of category 4; the Court did ask whether Mr Straw was suggesting that the decisions in respect of CX4 and CX7 were flawed on that basis alone. Mr Straw confirmed that he was not taking that distinct point, but maintained that the defendants were wrong to find that both CX4 and CX7 had not satisfied the first and second conditions of category 4.
64. The previous judgments on ARAP are judgments giving reasons for the findings that were made in the respective particular cases, although some of the judgments provide helpful guidance on circumstances in which an applicant might show that they satisfy category 4 of ARAP. The wording of category 4 of ARAP has not been altered by any of those judgments, and it is the duty of this court to look at the words of the policy, taken as a whole and in the light of its context and purpose. As to the need to consider conditions 1 and 2 of category 4 of ARAP together, as suggested in *LND*, I agree that although there may be an overlap of the factual matters reviewed by a court when considering the lawfulness of decisions about whether a claimant has satisfied

conditions 1 and 2 of category 4 of ARAP, the scheme of the policy means that a claimant must satisfy condition 1(a), 1(b) or 1(c) of ARAP (adopting the numbering from paragraph 276BB5 of the Immigration Rules) before it becomes necessary to consider condition 2 of ARAP. This means that Mr Straw was right not to take the point that conditions 1 and 2 had not been considered together for CX4 and CX7 as a distinct point. I should record that the phrase “HMG department” in ARAP was changed to “UK Government department” in the Immigration Rules, but it was common ground that this did not affect its meaning.

65. The wording of condition 1(c) of category 4 of ARAP (“working in Afghanistan alongside a UK Government department, in partnership with or closely supporting and assisting that department”) means that the relevant claimant will need to show that they “worked alongside” a UK Government Department in some capacity. It might be expected that there would be some proximity between the applicant and the UK Government Department but everything will depend on the facts. That means that it would be helpful, when an application under ARAP is made, if the UK Government Department was identified. As it was both the MOD and FCDO considered the claimants’ applications. It would also be useful to identify what the work was, and when the claimant worked alongside the relevant UK Government Department. The applications made on behalf of the claimants covered periods lasting many years but did not condescend to particular circumstances identifying the work, the UK Government department, and why that was “working alongside” in the particular circumstances and was “in partnership with or closely supporting and assisting that department”.
66. As already indicated when referring to the letter dated 20 August 2023, the way in which the letter was written would not have helped the caseworker to identify why condition 1 of category 4 of ARAP was satisfied. Although it is understandable that there was reference back to materials which had been prepared in relation to the claim made in *CX1 and others (No 1)*, the failure to link those materials with the working alongside, and why that work was “in partnership with or closely supporting and assisting that department”, was unhelpful. Lane J identified possible ways in which category 4 might be satisfied in paragraphs 85 and 86 of the judgment in *CX1 and others (No 1)*, and it would assist the decision maker to identify the way in which the condition was satisfied.
67. I reject the general submission made on behalf of the claimants that because the work of an individual journalist might have exposed narcotic dealing by the Taliban, or that the work of an individual journalist held politicians to account in a programme, that would of itself satisfy condition 1 of ARAP. I accept that the UK Government might have worded category 4 of ARAP to include journalists who had written articles supporting UK national security objectives, which include counter-narcotics, or journalists who held politicians to account on television programmes, or journalists who had worked for the BBC World Service, but that was not the policy adopted.
68. I accept that it might be possible to satisfy condition 1(c) of ARAP by showing, by way of example, that a journalist travelled with the UK armed forces on a particular date, and that closely supported or assisted the MOD to tackle misinformation about the work of UK armed forces. That would not require the journalist to have been embedded (although the journalist may have been) but it would require particularisation of the time when the journalist travelled with the UK armed forces and identification of the

article and the way that closely supported or assisted the MOD. As indicated above, when examining the case of CX1, it was not possible to identify when he had worked alongside the MOD or any work that he had done which closely supported or assisted the MOD.

69. I have, however, reviewed carefully the materials in the Core bundle (contained in two separate lever arch folders) and the supplementary bundle (again contained in two separate lever arch folders) which were before the caseworkers, but there is nothing to show any justiciable failure on the part of the caseworkers for either the MOD or the FCDO to apply condition 1 of category 4 of ARAP to the claimants.
70. It was agreed that CX1 and CX6 satisfy condition 1(b) of category 4 of ARAP for the reasons given by the caseworkers. I agree that a claimant who satisfies condition 1(b) might also satisfy condition 1(c), but this was not shown on the materials for CX1 and CX6 in this case. CX4 and CX7 have not shown any legal failure by the defendants to apply condition 1 of category 4 in their cases.
71. I record, however, that this decision relates to the materials sent to the defendants in the letter dated 20 February 2023. I have already found that the letter did not assist the defendants in identifying why the claimants had satisfied condition 1(c) in the particular circumstances. Nothing prevents CX4 and CX7 from identifying, in a new application supported by relevant materials, why they, as a matter of fact, satisfy condition 1(c) of category 4 of ARAP.

The proper interpretation of condition 2 of ARAP Category 4 (issue two)

72. It was submitted on behalf of the claimants that the defendants had taken too narrow an approach to condition 2 of category 4 of ARAP. For CX1 and CX6 the defendants had asked whether UK national security objectives were the goal of the work carried out by those claimants, rather than considering whether the claimants had made a contribution to the UK national security objectives.
73. It was submitted on behalf of the defendants that it was for their caseworkers to make the assessment whether there was compliance with the objectives because they were the core functions of the relevant departments. There was no rationality challenge to the decisions made by the defendants, meaning that it was simply a matter of the proper interpretation and application of the policy. The use of the term goal did not mean that the policy had not been properly applied.
74. It is clear that condition 2 does link the “employment”, “work” or “the provision of those services” to the substantive and positive contribution to the achievement of the relevant objectives. This is because the policy refers to “that employment or work” and “those services”, and not some other employment or work or services. Condition 2 required that the claimant “in the course of that employment or work or the provision of those services” to have “made a substantive and positive contribution to” the achievement of the relevant objectives. Condition 2 does not require however, the achievement of the relevant objectives to be the “goal” of the “employment”, “work” or “the provision of those services”.
75. In my judgment it is clear, from the wording used when finding that neither CX1 nor CX6 satisfied condition 2 of category 4 of ARAP, that the caseworkers did not apply

condition 2 in accordance with its wording. The caseworkers asked whether UK national security objectives were a “goal” of the relevant programme or work carried out, which was not the test set out in ARAP.

76. I accept that the MOD caseworker did, after the FCDO had found that the CX1 and CX6 did not satisfy condition 2 of category 4 of ARAP, purport to apply the right wording of the policy. However, the FCDO was in the best place to assess the respective contributions to the achievement of UK Government military or national security objectives because CX1 and CX6 were providing relevant services to the FCDO and this was not done.
77. It is apparent that there has not been a proper consideration of their applications because the wrong test has been applied. I do not accept that the absence of a rationality challenge in this case prevents the court from finding that there was a relevant, and unlawful, failure to apply the policy.
78. I am unable to say, pursuant to section 31(2A) of the Senior Courts Act 1981, that if the correct test for condition 2 of category 4 of ARAP had been applied by the FCDO, it is highly likely that the outcome for CX1 or CX6 would not have been substantially different. This is because the FCDO was in the best place to assess whether the work of CX1 and CX6 had made a substantive and positive contribution towards the achievement of the UK Government’s national security objectives with respect to Afghanistan. It is apparent that some programmes with which CX1 was involved did deal, for example, with issues of counter-narcotics. That said both CX1 and CX6 could assist the relevant caseworker by explaining how any particular programme or broadcast had made a substantive and positive achievement to an identified objective.

The military or national security objectives (issue three)

79. Condition 2 of category 4 requires the applicant to have contributed to the UK’s military objectives or national security objectives (which includes counter-terrorism, counter-narcotics and anti-corruption objectives) with respect to Afghanistan. As appears from paragraphs 19 and 20 above, a factual dispute arose between the parties at the hearing as to what were the UK’s military or national security objectives in relation to Afghanistan. The claimants rely on evidence from Ms Erin Alcock, and parts of the evidence in the witness statement of Mr Nicholas Gurr. The defendants rely on evidence from Mr Nicholas Gurr and Ms Christine Ferguson.
80. The evidence set out in the witness statement of Ms Alcock included extracts from various UK Government documents on which she had commented. Ms Alcock stated that: “the UK Government's military and national security objectives included: a. Developing an accountable and democratic government. b. Gaining the support of the Afghan population for the coalition, and for political reconciliation. By the same token, undermining popular support for the Taliban. c. Counterterrorism, counter-narcotics, and anti-corruption objectives.”
81. Mr Gurr had joined the MOD in 1983 and was MOD Director Media and Communications from November 2007 to 2011 and so was Director of Communications for much of the UK’s commitment to Iraq and Afghanistan. Mr Gurr recorded that the MOD was the lead department for HMG’s military objectives in Afghanistan. Mr Gurr referred to statements made in 2010 by the Right Honourable

Dr. Liam Fox MP, Secretary of State for Defence, who had referred to US General McChrystal's analysis of objectives and said the UK had the following three main challenges in Afghanistan: "i. Security: it is important to break the link between the insurgency and the population from which it recruits. ii. Afghan Capacity: successful training of the Afghan National Army has led to Afghan soldiers playing an increasing role in the planning & conducted operations. Developing committed, competent & capable Afghan Forces is essential for long term security & stability. iii. Governance: our challenge is a shortage of educated, capable Afghans willing to take on a role within the Afghan Government." Mr Gurr also referred to the termination of combat operations and further objectives.

82. Ms Ferguson explained the decision making process within the FCDO. Ms Ferguson turned to the national security objectives, noting that the FCDO had funded a wide range of programmes the majority of which had nothing to do with national security objectives. Ms Ferguson stated that: "For the purposes of FCDO ARAP decision making, UK national security objectives primarily relate to individuals who supported counter-terrorism, counter narcotics (before 2011, after which the Serious Organised Crime Agency (SOCA) and then the National Crime Agency (NCA) were the lead departments) and anti-corruption work in Afghanistan". Ms Ferguson referred to the work of judges in the counter terrorism courts and Afghan officials whose activities were predominantly focused on direct counter narcotics interventions and others who focussed on counter terrorism. Ms Ferguson stated that the parameters of "UK national security objectives" were narrow.
83. Although some of the evidence before the court contained instructions to caseworkers we were told there was no express guidance for the caseworkers on the meaning of the UK's military and national security objectives with respect to Afghanistan.
84. Mr Straw made submissions that the military and national security objectives were wide, and to the effect that any support for democracy in Afghanistan would satisfy the relevant objectives. Mr Blundell made submissions to the effect that the military objectives were restricted to tactical objectives, such as for the relevant military unit with which the journalist was working alongside. Mr Blundell submitted that strategic military objectives, such as winning hearts and minds, were not covered. The national security objectives were also narrow and restricted to the identified categories of counter-terrorism, counter-narcotics and anti-corruption objectives. Mr Blundell also submitted that the caseworkers were best placed to assess what were the military or national security objectives.
85. In the light of the conclusion in relation to condition 2 and CX1 and CX6 set out above, it is not necessary to resolve the dispute about what were the military or national security objectives. I have, however, set out some of the materials relevant to this dispute to identify that it would assist the court in any future case, to have clear evidence about what the MOD said were the relevant military objectives at any particular time, and what the FCDO said were the relevant national security objectives. Although I agree that there is much helpful evidence in the witness statements of Mr Gurr and Ms Ferguson, there is some force in the submission made by Mr Straw to the effect that Mr Gurr did not himself identify in terms what were the UK's military objectives in respect of Afghanistan at any one particular time.

86. The provision of clear objectives might also assist the caseworkers to determine fairly the relevant applications working for the MOD or FCDO. I accept Mr Blundell's proposition that such caseworkers will have a much better understanding about what were the relevant objectives, but it is not apparent that a caseworker in 2024 would immediately know what were the UK's military objectives in 2010 when assessing the effect of an article written in 2010.

Relief (issue four)

87. The issue of relief for CX4 and CX7 does not arise, because their claims have failed. CX1 and CX6 have succeeded in their claims in showing that condition 2 of category 4 of ARAP was not lawfully applied to their claims. I have found that section 31(2A) of the Senior Courts Act 1981 does not apply to their claims.
88. It was common ground that in the event that the claims of CX1 and CX6 succeeded, the decisions in relation to CX1 and CX6 should be quashed, and the matter remitted to the defendants for a decision in accordance with the terms of ARAP.

Conclusion

89. For the detailed reasons set out above: I would grant CX2 permission to withdraw his claim; I would dismiss the claims made by CX4 and CX7; and I would quash the decisions dated 6 March 2023 in relation to CX1 and CX6, and remit their applications for relocation under ARAP to the defendants to be redetermined.

Mr Justice Johnson

90. I agree.