Neutral Citation Number: [2025] EWHC 2472 (Admin)

Case No: AC-2025-LON-001440

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 October 2025

Before :

HON SIR PETER LANE

- -

Between :

THE KING **(ON THE APPLICATION OF)** **ACG**	**Claimant**
- and –	
SECRETARY OF STATE FOR DEFENCE	**Defendant**
(1) BRS; (2) ACG1; (3) ACG2; (4) ACG3; **(5) ACG4; (6) ACG5; (7) ACG6; (8) ACG7**	**Interested Parties**

- -
- -

Mr. G. Ó Ceallaigh KC and Mr T. Lay (instructed by Cooley (UK) LLP) for the claimant
Lord Murray of Blidworth (instructed by the Government Legal Department) for the defendant

Hearing date: 14 August 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 1 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

SIR PETER LANE

Sir Peter Lane :

1. The claimant challenges the decision of the defendant on 14 February 2025 to refuse his application for relocation to the UK under the Afghan Relocation and Assistance Policy (ARAP). Permission to bring judicial review was granted on all grounds by MacDonald J on 25 June 2025. He also ordered expedition of the hearing.

2. The claimant was a judge in Afghanistan for over 20 years, until the Taliban took control of that country in 2021. Between 2011 and 2016, he was a judge in the Anti-Terrorism Court (ACT) in Kabul. At the time of the Taliban takeover, the claimant had become Director of a District Court, where he continued to hear criminal cases. The claimant says that a significant number of the criminal cases he tried concerned Taliban members and persons related to such members. He estimates that he acted as director of the panel of judges (which involved leading the decision making, signing off on the judgment and sentencing) in approximately 360 cases that concerned Taliban members or other terrorist activity.

3. Amongst the cases with which the claimant states he was involved was the trial of Mohammed Khan, a Taliban member who organised a suicide bombing attack in 2010 at a supermarket in Kabul used by many foreign nationals, including members of the UK government and Armed Forces. Mohammed Khan was tried in 2014 and the claimant sentenced him to death. The claimant also was one of the judges who tried Maulawi Qudratullah, a prominent Taliban member who was involved in terrorist activity. Sentenced to a lengthy term of imprisonment, Maulawi Qudratullah was released when the Taliban took power and is said to have become Governor of Panjshir Province. Several of the death sentences pronounced by the claimant had not been carried out when the Taliban took power and those condemned have been released by the Taliban. The claimant says he also made decisions against individuals who engaged in money laundering transfers and exchange to and from Pakistan, with a view to funding Taliban activity.

4. The claimant has filed two witness statements. As well as deposing to the matters mentioned above, these statements describe the claimant receiving training on equipment and security from HMG officials, whilst in the ATC; representatives of HMG sitting on occasion with the judges of the ATC; HMG assisting with moving the ATC to more secure premises and providing computers, databases and other office equipment for the court's use; refurbishing the new compound so that judges could be separated from prisoners; the ATC judges producing reports on their work for presentation to British officials, such officials coming to the claimant's office to collect such reports; and the claimant attending seminars and conferences, including those organised by HMG. Amongst the training sessions the claimant attended was a "Public Security Judicial Forensic Awareness" course held in June/July 2013. The course certificate is signed by Ms Terri Carpenter, who is described on the certificate as the Rule of Law Counsellor in the British Embassy, Kabul. In August 2021, the claimant emailed Gemma Paolucci, then the Head of the Counter-terrorism team in Kabul, attaching photos of himself pictured with other judges of the ATC.

5. The claimant says he was the victim of a roadside bomb attack in 2008, which left him bed ridden for six months and permanently disabled.

6. A witness who is referred to as NAR has filed a witness statement in support of the claimant. NAR started work as a judge of the ATC a few days before the claimant in 2011. They served together there for five years. NAR and the claimant sat together on Taliban cases, hearing four or five cases together each week. In particular, NAR sat with the claimant on the trial of the supermarket bomber, Mohammed Khan. NAR also says that the ATC "received and was provided with a lot of assistance from the British Government from when the Court was established whilst I and [the claimant] served as Judges". According to NAR, "the judges were more focussed on dealing with the actual cases, therefore a lot of the contact between the British and the Anti-Terrorism Court went through the Directors (who were the managers in the court focussed more on administrative duties, they would decide which judges were appointed to each case)".

7. NAR describes the assistance given by the British authorities to help the ATC to move premises, so it could be better protected. The claimant's first witness statement describes the move as taking place in 2016. NAR says at paragraph 10 of his statement that "as an incentive to encourage judges to attend the British Government paid us approximately $50 to $100 at the end of each session. I attended several of these with [the claimant], however, due to the case load of the Anti-Terrorism Court it was not possible for all judges to attend all sessions. Therefore, we took it in turn to attend." So far as concerns reports for HMG, NAR recalls "in particular a man called David from the Ministry of Foreign Affairs" who "would come to our offices to take verbal reports about our cases, the step by step process that we took in hearing the cases, and the ultimate decisions that we made. The British officials would come to our offices almost every month, or every other month at the latest."

8. NAR's evidence is that he and the claimant "carried out the same work... in the Anti-Terrorism Court ... He received similar training sessions and guidance". NAR was serving at the ATC at the time of the Taliban's takeover and was brought to the UK as part of the evacuation exercise known as Operation Pitting.

ARAP CATEGORY 4

9. The claimant's application was made pursuant to the defendant's Afghan Relocations and Assistance Policy (ARAP). According to the defendant's information document updated on 12 April 2024, ARAP is "for Afghan citizens who worked for or with the UK Government in Afghanistan in exposed or meaningful roles and may include an offer of relocation to the UK for those deemed eligible by the Ministry of Defence and who are deemed suitable for relocation by the Home Office." ARAP has found expression in the Immigration Rules.

10. 10 For present purposes, the relevant provision of ARAP is that found in Category 4. In particular, the defendant's decision turned on the first of three requirements that have to be met by an applicant for assistance; namely, that "on or after 1 October 2001" they "were 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 a UK Government department, in partnership with or closely supporting and assisting that department**." (my emphasis). This case is concerned with the words in bold type. Satisfying them is a necessary but not sufficient requirement of succeeding under ARAP. In the course of the work, the person concerned must have "made a substantive and positive contribution 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 work must also either have placed the person concerned at elevated risk of targeted attacks and high risk of death or serious injury; or they must hold information the disclosure of which would give rise to or aggravate a specific threat to the UK Government or its interests.

THE DEFENDANT'S DECISION

11. The procedural backdrop to the present proceedings is materially irrelevant. The decision challenged by the claimant in this judicial review is the ARAP Eligibility Decision (Second Review Decision) dated 14 February 2025. The relevant part of the decision reads as follows:

> "You claim to have worked in Afghanistan alongside a UK government department (the UK Armed Forces), in partnership with or closely supporting it and received money from British Officials but have not provided any evidence in support of these claims. You have also claimed that you had a relationship with individuals at the British Embassy, Kabul and the Counter-Terrorist Team but have not provided evidence in support of this. In assessing your case, the relevant government department found no record of you, including no evidence of payment schedules or any such partnership in any event.
>
> Further, your claims of receiving training and equipment from UK government officials and military personnel does not, to the satisfaction of the decision maker, constitute working in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department. Therefore, you do not satisfy Condition 1.
>
> Conditions 2, 3 and 4 cannot be met where there is no evidence Condition 1 has been satisfied. Therefore, you are not eligible under this category."

12. It is common ground that the challenged decision was informed by an assessment concluded by the FCDO on 6 February 2025 and passed to the defendant. The writer of the assessment said:

> "A small number of judges who worked at the Anti-Terrorism Courts in Kabul have been found eligible for ARAP due to their roles presiding over certain trials between 2020 and 2021. These individuals were known to the FCDO CT team and were offered resettlement under ARAP on that basis. It is unlikely that someone working in this court who was not known to the FCDO CT Team could be considered to have been working alongside the FCDO in partnership or closely supporting the FCDO. However, whether an applicant meets condition 1c depends on an assessment of their specific role."

13. Noting that the claimant "appears to admit he did not have a relationship with UK government officials", the writer nevertheless investigated whether there could be such a link. "From searching FCDO records for information about the applicant, we found documentation dating from September 2021 which was used by the CT Team to consider potential ARAP candidates. The entry for [the claimant] shows that the BEK CT Team did not know of him." The writer states that "Further checks were made with former team members of the BEK CT Team, who confirmed that at the time the applicant was working at the Kabul Anti-Terrorism court (up until April 2016), they would not have had reason to work with him."

14. The FCDO assessment noted the evidence of NAR, mentioned above, that the contact with HMG officials concerned the Directors of the ATC, rather than its judges. The writer opines that "This part of his statement suggests that CT judges worked at a remove from HMG Personnel, as there was closer working between HMG and court managers." As to NAR's evidence generally, the assessment concluded that NAR's case and that of the claimant "have distinct factual differences due to the dates each applicant worked at the Anti-Terrorism Court in Kabul… as well as the fact that [NAR] was known to the BEK CT Team, who supported endorsement of his relocation under the ARAP scheme."

15. The assessment noted that the claimant had attended a number of training events, some of which were run under British auspices, including United Kingdom Rule of Law Training on public security judicial forensic awareness in 2013 and a two week course on Legal Skills for Judges of Courts Combatting Crimes Against Domestic and External Security in 2014. There was also a photograph, apparently taken in 2013 in connection with the Rule of Law Training of the claimant being presented with a training certificate by Carolyn Robson, who was the CT Senior Legal Advisor.. The writer of the assessment considered it significant, however, that it was the "Kabul Appeal Court" (sic) which was "responsible for allocating and sending judges to these training courses, not BEK nor any part of the FCDO. Considering that the training was only facilitated rather than provided by HMG and that some of the courses significantly pre-date [the claimant's] appointment at the Kabul Anti- Terrorism Court., attendance at training courses lasting a short duration do not support Condition 1 being met." The writer concluded that "I do not consider that there is anything in the applicant's evidence to demonstrate he was working in Afghanistan alongside the FCDO, in partnership with or closely supporting and assisting the FCDO. Therefore, I do not consider that the applicant meets condition 1c for the FCDO in relation to his work in the Anti-Terrorism court in Kabul."

16. The second review decision was informed by the FCDO assessment. The caseworker notes in respect of the second review decision have been disclosed by the defendant. Towards the beginning, there is a page setting out the additional information from the claimant on the "request for review" form. Amongst other matters, this records the submission on behalf of the claimant by his solicitors that "we cannot see any basis upon which the UK Government can properly distinguish [NAR's] case from our client's. Our client's work at the ATC alone trying cases of terrorism clearly satisfies Conditions 1 and 2 of ARAP." The submissions went on to say that the claimant had moved on to be Director of a District Court, where he continued efforts to uphold the rule of law.

17. The caseworker's analysis was as follows:

"Any claim that the Applicant's work as Judge was carried out alongside and/or in partnership with and/or closely supporting and assisting a UK Government department does not go beyond mere assertions which do not expressly detail the nature of any such support. The assertion that the Applicant tried cases where criminals had been arrested by the 'Armed Forces' is unsubstantiated and there is no supporting evidence or any arrest reports that provide corroborating detail as to which of the coalition forces did the alleged arresting. Whilst the UK had a presence in that area, it does not automatically qualify UK military forces as being the engaging party in these arrests. As there is no corroborating evidence seen, the claim is without merit and in any event the link would be a somewhat tenuous one as it is expected that all arrests, by any mandated organisation, unit or military force, would end up in court but this does not explicitly or exclusively constitute a UK military relationship.

In mentioning those individuals/officials with whom the Applicant alleges that he worked in partnership with or was closely supporting and assisting, the evidence shows that the association was an uncertain one where those individuals specified were only a signatory on a course completion certificate or a non-specific non-personal response to a general e-mail inquiry made by the Applicant to the British Embassy. Furthermore, the e-mail in question did not address anyone in particular in the main body of the e-mail, nor did it personally address anyone by way of salutation. In seeking an enrichment to this assessment, a re-referral was made to the FCDO. In consideration of a re-referral to the NCA, no new evidence has been provided and it was noted that the NCA had previously been unable to trace the Applicant based on the evidence provided.

Those assertions of working with the UK government and armed forces, along with receiving money from British officials, are unsubstantiated with no corroborating evidence and this directly contradicts (sic) the negative response from the Applicant when he states "*No, I did not have a direct relationship with the British government and its armed forces*'. It is accepted that the Applicant may well have come into contact with British Officials or personnel from the 'Ministry of Foreign Affairs' during his employment, but this would more likely than not, have been courtesy visits or invites by way of an extension to diplomatic relationship building.

It is the Applicant's assertion that he received equipment and security training from UK government officials and military personnel whilst in the Anti-Terrorism court. It is noted that this equipment is office hardware and not military assets. The Applicant further asserts that he received security training on how

to dismantle unexploded bombs by members of UK military-controlled camps.

It is considered that whilst the Applicant may have received some advice on security planning pertaining to his role and the threat to judges at that time, this does not constitute specialist training which would align him to any operational UK activities, nor does it seem credible to the satisfaction of the caseworker that a Supreme Court Judge would be required to dismantle unexploded. bombs in the course of his judicial role or daily activities. Without any documents or completion certificates to attest to such training, the assumption is that he may well have received, from unspecified coalition forces, some general advice as to the possibility of being targeted with Improvised Explosive Devices. It is not envisaged that there would be any requirement for a judge to dismantle an explosive device; the dismantling of unexploded bombs is a specialist function carried out by highly skilled professionals and there is no scenario foreseen that would require a civilian Judge to undertake such a highly dangerous task. The FCDO confirmed that they did not provide any such training to judges either.

The witness statement of [NAR], who states that the applicant worked with the British Government, is uncorroborated and does not support this claim.

In seeking an enrichment from the FCDO, a response was received which stated that it was unlikely that someone working in the Anti-Terrorism Courts in Kabul, who was not known to the FCDO Counter Terrorism team, could be considered to have been working alongside, in partnership with or closely supporting and assisting that UK Government department.

The Applicant admits to not having a relationship with the UK government and alludes to a general link to the British Embassy, Kabul (BEK). The Counter-Terrorism (CT) Team records show that the Applicant was not known to them. It was further confirmed that the BEK CT team would have had no reason to work with the Applicant during the period of time specified for his employment there.

Gemma Paolucci, whom the Applicant refers to in his witness statement, confirms that she did not join the CT Team until 2018, some two years post the Applicant's employment at the Kabul Anti-Terrorism court (up to April 2016). Discussions with Gemma Paolucci confirmed that it was plausible that her name was well known to members of the judiciary and her contact details could well have been shared amongst them.

The assertion that the Applicant received some funds from the UK government is without any evidence in support. Searches of

> internal records for payments made to the Applicant resulted in a negative outcome.
>
> The FCDO concluded that there was insufficient evidence to support the claim of the Applicant working in partnership with or closely supporting and assisting that UK government department in relation to his work in the Anti Terrorism Court in Kabul.
>
> In respect of those course (sic) attended by the Applicant, it is recognised that the UK and other international partners funded certain courses for judges and prosecutors but it was the Kabul Appeal Court who was responsible for allocating judges to attend these training courses and not any part of the FCDO or the British Embassy."

POST-DECISION MATTERS

18. Following service of the defendant's summary grounds of defence and further disclosure, the claimant's solicitors sought details of other judges in the ATC. On 29 May 2025, the GLD wrote as follows:

> "... In relation to your request for details of individuals who were also judges in the Anti-Terrorism Court in Kabul, our client clearly cannot disclose confidential details in relation to other ARAP applicants. However, a similar request was made in the matter of *R (otao JZ) v SSD, SSFCDA and SSHD* [2022] EWHC 1708 (Admin), in relation to which the court ordered some limited disclosure to enable comparison of the claimant's case with other 'judges' cases. We set out below relevant extracts of the disclosure provided in that case, which was deemed sufficient to provide comparative evidence in that case:
>
> "*With respect to the judges relocated to the UK under ARAP other than Judge W, what level/branch/division of Court within the Afghan judicial system did these Judges work in?*
>
> Of the 13 judges relocated to the UK under ARAP prior to 4 February 2022:
>
> (i) 1 judge served on the Counter Narcotics Justice Centre (CNJC) Appeal Court and was sponsored for resettlement under ARAP category 4. The CNJC evolved from the Criminal Justice Task Force (CJTF), which was established in 2005 with the support of HMG, to investigate and prosecute those involved in serious drug related offences within Afghanistan.
>
> (ii) 11 judges (including Judge W), were counter terrorism judges sponsored for resettlement under ARAP category 4 and worked in Kabul in either the anti-terrorism primary or appeal tribunals. These courts were also known as the courts for internal and external security.

(iii) The position of the remaining judge is addressed under question 4 below.

Where, geographically, did they serve?

As above.

The UK's support to counter terrorism courts was limited to Kabul and decisions on eligibility were made based on the applicants' work there, with those courts the UK supported. The CNJC Appeal Court was located in, and limited to, Kabul.

If any of them served in the Anti-Terrorism Court in Kabul, when was their service?

The 11 judges that were approved for ARAP in summer 2021, due to their role in presiding over terrorism trials were serving in the Anti-Terrorism Courts in Kabul between 2020 and 2021. Since the GLD letter of 4 February 2022, which disclosed these 11 judges (including Judge W), a small number of other judges have been granted resettlement to the UK under ARAP category 4. All judges who were approved for ARAP by FCDO's Counter Terrorism team served in the Anti-Terrorism Court in Kabul from 2015 onwards.

With respect to the above group please describe in brief terms what evidence there was that each judge "worked alongside" HMG.

From 2015 onwards, HMG developed a partnership with some judges serving in the Anti-Terrorism Court in Kabul. All 11 judges that were resettled due to their role in presiding over terrorism trials were involved in this partnership, although the full circumstances of this partnership may not have been known to the judges involved. They were invited to attend a series of events run by HMG (colloquia to discuss matters of continuous professional development and debate interpretation on points of law and some of the technical aspects of considering different forms of evidence in complex trials), and, at times, HMG officials attended hearings they presided over, where the cases were of interest to the UK.

Key staff within the CNJC were mentored by the NCA. NCA mentored Investigators, Prosecutors and Judges in the CNJC who were directly responsible for prosecuting specific cases based on evidence from the Counter Narcotics Police of Afghanistan (CNPA)."..."

19. Christine Ferguson is Head of the Afghan Resettlement and Relocations Department in the FCDO. On 14 July 2025, she signed a witness statement in order to "address the FCDO's relationship with judges in the Anti-Terrorism Court of Kabul, the role of the

FCDO in informing the decisions on ARAP applications, which are taken by officials at the MoD, and the FCDO's ARAP review assessment carried out for" the claimant.

20. Ms Ferguson deals first with the "history of HMG's relationship" with the ATC:

> "5. HMG began providing assistance to the Anti-Terrorism Court of Kabul, also known as the "Courts for Internal and External Security", after the introduction of Annex 1 to the Criminal Procedural Code in September 2015; however relationships with judges were limited prior to the appointment in May 2018 of the Criminal Justice Advisor to the British Embassy Kabul (BEK) Counter Terrorism team. In investigating the nature of the links between HMG and the Court, the FCDO assessor contacted a number of former members of the BEK Counter Terrorism team, who had knowledge of the Court and the role of the Criminal Justice Advisor.
>
> 6. Between 2015 and 2021, HMG supported the Court with IT programmes and equipment and other office supplies to aid its day-to-day running. It also developed substantial links with a small number of specific partner judges through the Counter Terrorism team in particular from 2018 onwards. These judges were invited to attend events run by HMG (for example colloquia to discuss matters of continuous professional development, interpretation of points of law and some of the technical aspects of considering different forms of evidence in complex trials), and, at times, HMG officials attended hearings they presided over, where the cases were of interest to the UK.
>
> 7. A small number of judges from this Court have been offered resettlement under ARAP. 11 individuals approved for ARAP in Summer 2021 tried cases in 2020 and 2021, and all of the approved judges served in the Court from 2015 onwards. Judge N, who provided a witness statement in this case, was one of those individuals."

21. Ms Ferguson then addresses the evidence of NAR. She says that merely being a judge in Afghanistan is not sufficient to establish eligibility under ARAP. Each case depends on its particular facts. "Afghan judges have been granted leave under ARAP where they have worked in partnership with the UK and/or have been involved in sensitive cases of interest to the UK thereby making a substantive contribution towards the achievement of UK national security objectives. Although the Claimant states that he has tried cases related to counter-terrorism, he did so through his regular work as an Afghan judge in the Anti-Terrorism Court. This was not on behalf of HMG nor was it in partnership with or closely supporting and assisting the FCDO." She continues:

> "12. The assessment does not reject Judge N's evidence that he worked alongside the Claimant between 2011 and 2016.
>
> 13. Rather, the assessment makes the pertinent distinction between the individuals that led to differing eligibility

> assessments. Namely, that Judge N continued to work in the Court until 2021 (and for several years after the FCDO started working with the Court in September 2015 and, pertinently, after May 2018 when the BEK Criminal Justice Advisor was appointed), was known to the BEK Counter Terrorism Team, and was one of the specific partner judges with whom the FCDO had a relationship."

22. Ms Ferguson's statement then addresses what she sees as the claimant's role in the ATC:

> "14. As established, HMG had institutional links with the Anti-Terrorism Court from September 2015. The Claimant served at this Court from 2011 until April 2016. His tenure therefore overlapped HMG's involvement by approximately 6-7 months, and pre-dated the period from May 2018 when the Criminal Justice Advisor was appointed and HMG became closely involved with specific partner judges. The Claimant has provided an abridged list of cases over which he presided during his tenure on the Court. The last date (05/05/1394, translated as 27/07/2015) precedes HMG's involvement with the Court by more than a month, and does not therefore indicate any link with HMG. Further, the evidence provided of attending UK-linked training courses covers only the years 2007- 2014 - this also pre-dates HMG's involvement with the Court.
>
> 15. In carrying out its assessment, the FCDO thoroughly considered all evidence provided by the applicant and carried out checks on our own systems, including consulting members of the former BEK Counter Terrorism Team. FCDO records and additional checks indicate the claimant was not known to the FCDO.
>
> 16. The FCDO caseworker considered the evidence provided by the Claimant that he attended training courses for Continuing Professional Development. When assessing evidence around training courses, caseworkers consider whether these constituted "working alongside" the FCDO or whether the applicant instead is a participant or beneficiary of those training or other courses. HMG regularly facilitates training and other courses for participants from NGOs, governments, universities and other organisations, in many countries globally and in the UK. None of these many participants would be considered to "work alongside" the FCDO simply by virtue of attending a course run by the FCDO. Where training courses may be relevant to an ARAP assessment of "working alongside a UK Government department, in partnership with or closely supporting or assisting that department" may be in circumstances where the applicant worked on the preparation and/or delivery of those training courses alongside the FCDO or its predecessor departments; in such instances, the nature of the work, its time period, the exact

> role of the applicant and other factors would be taken into account to determine whether the applicant in fact did meet the ARAP condition 1c. Likewise, a financial contribution for attendance, such as to cover travel costs, does not represent any employment or contractual relationship.
>
> 17. The claimant's attendance at the aforementioned training courses, even if considered separately from his employment in the Anti-Terrorism Court during the time in which HMG was connected with it, would not be sufficient to meet condition 1 of Category 4 for the FCDO. A person who attended these events in Afghanistan as a participant was not directly employed by the FCDO, did not provide goods or services under contract to the FCDO, nor worked alongside the FCDO, in partnership with or closely supporting and assisting the FCDO."

23. Ms Ferguson states she was not involved in producing the assessment of the claimant, which resulted in the second review decision. She has, however, reviewed it and discussed its contents and relevant materials with those involved in the case. Ms Ferguson quotes from the caseworker's notes, where documentation from September 2021 was found, "which was used by the CT Team to consider potential ARAP candidates ... Further checks were made with former team members of the BFK CT Team ...".

24. Defending the caseworker's handling of NAR's witness statement, Ms Ferguson says that the statement "is referenced multiple times. The assessor did not discount [NAR's] statement, but noted the differing circumstances between the two individuals, which were material to the assessment."

25. Ms Ferguson addresses the issue of reports made by ATC judges to the FCDO, as follows:

> "24. The Claimant also alleges the assessment "does not at any stage engage with the Claimant's account of giving reports to HMG officials". The FCDO review assessment notes in this case refer to the Claimant's statement he "[recalled] that British agents came to [his] office to collect reports" within the context of the wider institutional relationship between HMG and the Court. While the assessor does not address the claim explicitly, it is implicit in their overall conclusions regarding the nature of the relationship between HMG and the Court and HMG and the Claimant. The assessor considered the statement that reports were collected from an office and that the claimant did not claim to have written those reports within the context of the wider information available and concluded that this did not suggest he was working alongside, "closely supporting and assisting" HMG, absent any evidence to the contrary."

AFGHAN JUDGE CASES

26. There is now a sizeable body of cases concerning applications under ARAP by former Afghan judges. The following featured in submissions at the hearing.

27. In *R (S and others) v Secretary of State for Foreign, Commonwealth and Development Affairs and Others* [2022] EWHC 1402 (Admin), Lang J heard the judicial review brought by a number of former judges of Afghanistan. One issue was whether there existed an irrational or otherwise unlawful difference in treatment between the judges and those who had succeeded under ARAP or by means of a grant of leave outside the Immigration Rules. Lang J addressed the relevant law at paragraphs 81 and 82 of her judgment:

> "81. In *R (Patel) v Secretary of State for the Home Department* [2012] EWHC 2100 (Admin), Mr John Howell QC (sitting as a Deputy High Court Judge) found unlawfulness by reason of failing to provide a 'rational reason' for treating the Claimant less favourably than others (at [141]). He said, at [114]:
>
> > "The "principle of equality" thus simply means that distinctions between different groups or individuals must be drawn on a rational basis. It is thus no more than an example of the application of Wednesbury rationality …."
>
> 82. *In R (Hussain) v Secretary of State for the Home Department* [2012] EWHC 1952 (Admin), Mr James Dingemans QC (then sitting as a Deputy High Court Judge) said, at [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."
>
> 83. 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'*: *R v Department of Health, ex p Misra* [1996] 1 FLR 128 at 133 and see also *R (Gurung) v Ministry of Defence* [2002] EWHC 2463 (Admin), a successful challenge on rationality grounds by Nepalese nationals and survivors of Japanese prison camps from their exclusion in the ex-gratia compensation scheme, having served in a Gurkha brigade."

28. Lang J considered the case of Judge W, who had been a judge of the ATC and who had secured entry to the UK:

> "101. Judge W was granted leave to enter the UK under ARAP during Operation Pitting. He has since been granted indefinite leave to remain in the UK. He explains in his witness statement that he was a judge in the Anti-Terrorism Court in Kabul, hearing cases of detainees who had been arrested under terrorism law. His identity was well-known. Like all judges in Afghanistan, he was employed by the Supreme Court. He did not work directly or indirectly for the UK Government or military. He and his fellow judges were invited to the British Embassy and elsewhere to attend events and training seminars, and they met British officials on those occasions. The UK Government also provided logistical and operational support for the Anti-terrorism Court in Kabul.
>
> 102. When the Taliban came to power, Judge W felt very vulnerable and feared for his life. He and his fellow judges in the Anti-Terrorism Court telephoned the Counter-Terrorism team at the British Embassy, who they knew, and asked them for help. They were invited to complete the ARAP application form, and all of them were called forward for evacuation. They were told by the Counter-Terrorism team at the British Embassy that their work had helped the UK mission in Afghanistan. Upon arrival in the UK, he and his fellow judges were taken to meet the Foreign Secretary, and they were informed by the British officials they had previously met in Kabul that they were granted visas because they worked in the Anti-Terrorist Court.
>
> ...
>
> 107. In my judgment, Mr Hall is correct in saying that an Afghan judge may be eligible for ARAP, under the terms of the scheme, but that the status of being an Afghan judge is not of itself sufficient to establish eligibility. Eligibility will depend on a case-specific evaluation of the individual facts to see whether the criteria are met.
>
> 108. In the case of Judge W, and his fellow judges at the Anti-Terrorism Court in Kabul, the Defendants appear to have been satisfied that they met the criteria in Category 4 in the ARAP policy because of their role in presiding over the Anti-Terrorism Court, which benefited the UK Government. The judges had a working relationship with UK officials in Kabul, in particular, the Counter-Terrorism Unit which arranged for their sponsorship under ARAP. The UK Government provided the Anti-Terrorism Court with logistical and operational support, and organised training and meetings for the judges. Their roles were public and high profile and they were at risk from the Taliban.

> 109. I was referred by Ms Giovannetti QC to the judgment of Lieven J. in R (JZ) v Secretary of State for the Home Department & Ors [2022] EWHC 771 (Admin), at [11], where she quoted from the decision letter, written by the former head of the Counter-Terrorism team at the British Embassy in Kabul who said:
>
> > "I have no evidence to lead me to believe that [JZ] was an employee of Her Majesty's Government, not does it refer to work alongside or in cooperation with HMG units. The Justice Centre in Parwan was not a UK or HMG led intervention and from June 2010 was indeed an Afghan institution - albeit one that benefitted from extensive donor support.
> >
> > ….The UK's capacity building effort around justice and the rule of law over the last nine years was focussed in Kabul – that was also the focus of HMG's counter terrorism mission in Afghanistan. As [JZ] does not claim to have worked in the anti- terrorism courts within Kabul he did not make a material contribution to HMG's mission there….
> >
> > ….the UK's counter-terrorism mission was focussed in Kabul. As [JZ] did not work there, his contribution to the UK's counter- terrorism mission was minimal…."".

29. At paragraph 113 of her judgment, Lang J contrasted the position of judges of the ATC with AZ, one of the claimants before her. She noted that JZ's case had been examined by "the FCDO Head of Counter-Terrorism Afghanistan Task Force which would be the unit responsible for sponsoring Counter-Terrorism judges under Category 4 of ARAP, and so would be able to identify them. AZ had not been involved in cases of special UK interest. AZ had not received training or other support from the UK Government....". At paragraph 116, Lang J considered the case of a female judge, S, who had "investigated ... national security cases, including cases involving the Taliban and Daesh/ISKP". S, however, had not worked with the the UK Government in any capacity or had any connection with UK Government officials...". All of this led Lang J to conclude at paragraph 117, that there were "distinguishing factors between S and the judges of the Anti-Terrorism Court in Kabul which explained and justified the decision to grant leave to them under the terms of the ARAP policy, but to refuse it to S."

30. In *R (JZ) v Secretary of State for the Home Department and Others* [2022] EWHC 2156 (Admin), the claimant had been a judge at the Justice centre in Parwan and at Pol-e-Charki Prison. At paragraph 20 of her judgment, Hill J set out passages from the decision challenged by JZ. The decision-maker explained that the "UK's capacity building effort around justice and the rule of law over the last nine years was focussed in Kabul – that was also the focus HMG's counter terrorism mission in Afghanistan. As [JZ] does not claim to have worked in the anti-terrorism courts within Kabul he did not make a material contribution to HMG's mission there.". The existence of that focus was emphasised by the decision-maker in the next paragraph cited by Hill J.

31. At paragraph 35 of the judgment, Hill J observed that there was "no statement or principle that the status of being an Afghan judge is sufficient to establish eligibility under ARAP". Each case was fact-specific. Hill J then proceeded to consider the circumstances of the judges who had been admitted under ARAP Category 4:

> "37. As at 4 February 2022 13 members of the Afghan judiciary had been relocated to the UK under ARAP. The lives of all 13 were regarded as being at risk. They were sponsored by either the FCDO or MoD.
>
> 38. At least 12 of the 13 worked directly alongside HMG and made a material contribution to the UK's national security objectives in Afghanistan.
>
> 39. 11 of this group had been approved under ARAP in summer 2021, due to their role in the Primary or Appeal level of the Anti-Terrorism Court in Kabul between 2020 and 2021. The UK Government provided logistical and operational support for this court: S and AZ [101].
>
> 40. The Part 18 response indicated that the UK's support to counter-terrorism courts was limited to Kabul and decisions on eligibility made based on the applicants' work there, with those courts the UK supported. Their cases had been primarily assessed by FCDO, with input from other HMG units. Further, these judges were considered to have "worked alongside" HMG for the following reasons: "From 2015 onwards, HMG developed a partnership with some judges serving in the Anti-Terrorism Court in Kabul. All 11 judges that were resettled due to their role in presiding over terrorism trials were involved in this partnership, although the full circumstances of this partnership may not have been known to the judges involved. They were invited to attend a series of events run by HMG (colloquia to discuss matters of continuous professional development and debate interpretation on points of law and some of the technical aspects of considering different forms of evidence in complex trials), and, at times, HMG officials attended hearings they presided over, where the cases were of interest to the UK".
>
> 41. **Judge W** was in this group. He had provided a witness statement which was relied on by the Claimants in S and AZ. His identity was well-known. He did not work directly or indirectly for the UK Government or military. He and his fellow judges were invited to the British Embassy and elsewhere to attend events and training seminars, and they met British officials on those occasions: S and AZ [101].
>
> 42. A second witness statement from Judge W was provided at the outset of the hearing before me. Alexander Pinfield, who had been Deputy Ambassador to Afghanistan from 5 April 2021 to 26 August 2021 and the line manager of the Head of the Counter-Terrorism Team in the British Embassy in Kabul, provided a statement in response to the second statement from Judge W. He explained that from the UK Government's perspective, it was incorrect to say that Judge W did not

have links to the Government as he had asserted: for example, he had met the Head of the Counter- Terrorism Team in Kabul several times between February and April 2021 and was one of the judges dealing with terrorism issues in Kabul with whom the Government had developed substantial links, through the Counter-Terrorism Team in particular.

43. The twelfth of the ARAP judges had served on the Appeal Court of the Counter Narcotics Justice Centre ("CNJC"). The CNJC evolved from the Criminal Justice Task Force which was established in 2005 with the support of HMG to investigate and prosecute those involved in serious drug related offences within Afghanistan. The CNJC Appeal Court was located in, and limited to, Kabul. This judge was sponsored for resettlement under ARAP Category 4.

44. In relation to the thirteenth judge, the GLD accepted that it had not seen evidence that the judge had worked directly alongside HMG. However, the judge had worked at a court which received support from the UK Government, namely the Primary Court in the Serious Corruption Crime division, in the Anti-Corruption Justice Centre ("ACJC"). The UK had been instrumental in the creation of the ACJC in 2011, and offered seminars, provided mentoring and established a courtroom for their public hearings. The UK also led international support for the development of an Office of Asset Recovery to support the ACJC in confiscating illegally held and obtained assets, including from corruption. The Part 18 response continued:

> "The judge was assessed to be at risk, including in relation to her work at the ACJC. She was in hiding with judges who were approved for ARAP Category 4. When these judges were called forward for their flights under ARAP this left her exposed and alone. Given her exceptional circumstances, the gendered dynamic of her case and the particular risks faced by women in this context, it was exceptionally decided that she should be included alongside the Category 4 judges that had been called forward. It is important to emphasise that the decision was made under the exceptional pressures of the evacuation detailed in Philip Hall's evidence"

45. A letter from the GLD dated 4 February 2022 referred to one further judge (not in fact relocated to the UK at that date) who was approved under ARAP Category 4 where they had not seen evidence that they worked directly alongside HMG.

46. Since the GLD letter of 4 February 2022, a small number of other judges have been granted resettlement to the UK under ARAP Category 4. All of those who were approved for ARAP by FCDO's Counter Terrorism team had served in the Anti- Terrorism Court in Kabul from 2015 onwards.

> 47. In his second witness statement, Judge W set out his understanding that all the judges working at the Primary and Appeal Anti-Terrorism Courts (7 at Primary Court level and 13 at Appeal Court level) and the administrative staff were given leave under ARAP, apart from one who he understood to be in Pakistan, waiting for a visa to the UK."

32. At paragraph 90 of her judgment, Hill J recorded the submission made to her by the defendants that "all judges who were approved for ARAP by FCDO's Counter-Terrorism Team served in the Anti-Terrorism Court from 2015 onwards. Further, as explained in Mr Pinfield's evidence and the Part 18 response, from 2015 onwards, HMG developed a partnership with some judges serving in the Anti-Terrorism Court in Kabul, as described at [40] above. This did not apply to the Claimant."

33. In her analysis, Hill J, at paragraph 98, held it was "now clear that being a judge who has presided over terrorism cases in Afghanistan is not, in itself, sufficient to bring a judge within ARAP Category 4:

> "99. Rather, the focus is whether the judge in question has a sufficient link with HMG in accordance with the extant wording of the ARAP policy. As of September 2021 ARAP, Category 4 applied to those who had "worked in meaningful enabling roles alongside HMG, in extraordinary and unconventional contexts" and who received the appropriate support from an HMG unit: [8] above.
>
> 100. The evidence now available in relation to those judges who have satisfied ARAP Category set out at [35]-[47] above suggests a broadly consistent pattern to the extent that all had worked at courts which HMG had directly supported and worked closely with, either the Anti-Terrorism Court in Kabul after 2015, the CNJC or the ACJC. This fact had no doubt assisted those judges in meeting the "worked alongside" HMG criterion (save in respect of the ACJC judge where it was accepted that there was no such evidence).
>
> ...
>
> 107. JZ's work in hearing terrorism cases at Pol-e-Charki prison ended in 2011. In contrast, Judge W had served at the Anti-Terrorism Court in Kabul from 2015 until he was evacuated in August 2021. Further, the Part 18 response showed that all of the judges from the Anti-Terrorism Court in Kabul who had succeeded under ARAP served in that role after 2015. All of the 11 judges who had been successful under ARAP by 4 February 2022 were serving at the Anti-Terrorism Court in Kabul in 2020-2021.
>
> 108. In challenging the rationality of the Defendants' reliance on the dates of JZ's service as a justification for his different treatment, Ms Naik QC understandably highlighted that

ARAP has no time limit, that from 2008-2011 the UK mission was active in Afghanistan and that JZ experienced threats as long ago as 2014 as a result of his service from 2008-2011.

109. However, these factors do not bear directly on the central question for the ARAP decision-makers, namely whether there was sufficient evidence of JZ having "worked alongside" HMG at the material time.

110. Rather, the dates of JZ's service on anti-terrorism cases help explain why the decision-makers considered he did not meet the "worked alongside" criterion, unlike his comparator judges, because HMG only became involved in supporting the Anti- Terrorism Court in Kabul and building partnerships with the judges there after 2015.

111. The extract of the 20 October 2021 letter quoted at [36] above, read together with the Part 18 response summarised at [40] above, suggests that evidence of partnership, or perhaps the "worked alongside" criterion more generally, was made out by factors such as (i) the extent to which a judge was publicly known to have co-operated with the UK; (ii) whether the judge had been involved in highly sensitive cases of particular UK interest; (iii) whether HMG representatives had attended their hearings; and (iv) whether they had been involved in colloquia of the sort described at [40] above. These were not discrete requirements, but the sort of factors that enabled the "worked alongside" criterion to be satisfied.

...

115. I recognise that the "2015 partnership" evidence has been provided late in the chronology of this claim, but I do not consider that it undermines the analysis above. Reasons for the decision in JZ's case were given contemporaneously. These made clear that it was the lack of evidence of work alongside HMG which was the reason why his application had not succeeded. The 2015 partnership evidence essentially provides further detail about how decisions were reached in other cases.

116. It is a slightly unusual feature of the case that the Defendants accept that the judges granted ARAP may not have appreciated that they were considered to be in partnership with the Defendants. There is plainly an element of subjectivity in the Defendants' assessment of whether the "partnership" existed. However, this is perhaps no more than a further aspect of the evaluative exercise of whether the "worked alongside" criterion was satisfied. This does not in itself show that the scheme was operated in an irrational way.

...

> 119. The Claimant argues that the treatment of the "outliers" (the two judges within the ARAP cohort where it was accepted that GLD had not seen evidence that they had "worked alongside" HMG: see [44]-[45] above) is further evidence of an inconsistently applied policy. In my view it is not: one of these judges had worked in a court supported by HMG, consistently with other judges in the ARAP cohort, and there were exceptional reasons which justified the ARAP grant to that judge: see [44] above. This decision, and the decision in respect of the other such judge, was apparently an exercise of the residual discretion under ARAP which the Claimant accepted existed. Its exercise in a small number of cases, even within a small cohort, does not show that the overall scheme was incoherent or inconsistent.
>
> 120. For these reasons I consider that there were distinguishing factors between JZ and the judges of the Anti-Terrorism Court in Kabul who served after 2015, which explained and justified the decision to grant leave to them, under the terms of the ARAP policy, but to refuse it to him. There was no other inconsistency as a species of rationality between JZ and the other judges who succeeded under ARAP."

34. The claimant in *R (MP1) v Secretary of State for Defence* [2024] EWHC 410 (Admin) succeeded before Julian Knowles J. The claimant had been a criminal defence lawyer working for an NGO, and a judge in Helmand Province from 2015 to 2021. The facts of MP1 as found by the judge are not closely analogous to those of the present case. Furthermore, some of the reasoning needs to be approached with caution, in the light of the judgment of the Court of Appeal in *R (LND1 and Others) v Secretary of State for the Home Department and another* [2024] 1 WLR 4433, which was handed down a few days after Julian Knowles J had delivered his judgment. Nevertheless, his judgment is relevant for present purposes in two ways.

35. First, as in the present case (with the witness statement of Ms Ferguson), the judge was faced with evidence from the defendant that was generated only after the impugned decision had been taken; and which sought to justify that decision. The judge had this to say:

> "144. Ms Kalunga's statement was made three months after the Decision; and also after the SGD had been filed and served; after permission had been granted; and after the DGD had been filed and served. In that time she would no doubt have dealt with many cases. Whether she could remember specifically what had been discussed in the Claimant's case must be doubtful – especially as Mr Foxley no doubt will have provided statements in many of them, as Mr Seddon observed. Ms Kalunga did not produce - or even refer to - any contemporaneous notes of her own. Mr Brown therefore candidly conceded there was always the possibility that she could be wrong. I therefore approach this part of Ms Kalunga's evidence with the dangers identified by Pill LJ in Young, [20], firmly in mind. He referred to the: "… dangers in

> permitting a planning authority, whether by its committee chairman or a planning officer, providing an explanatory statement. The danger is that, even acting in good faith, the witness may attempt to rationalise a decision in such a way as to meet a question which has arisen upon the effect of the decision. Moreover, it will usually be impossible to assess the reasoning process of individual members and there are obvious dangers in speculating about them. It is therefore important that the decision-making process is made clear in the recorded decisions of the committee, together with the officers' report to committee and any record of the committee's decisions. Decisions recorded in the minutes should speak for themselves.
>
> 145. I also bear in mind what was said about ex post facto reasoning in *R (United Trade Action Group Ltd) v Transport for London* [2022] RTR 2, [125], and especially at [125(2)-(3), (5)]:
>
> > "2. … A claim for judicial review must focus on the reasons given at the time of the decision. Subsequent second attempts at the reasoning are 'inherently likely to be viewed as self-serving.'
> >
> > 3. Evidence directly in conflict with the contemporaneous record of the decision-making will not generally be admitted
> >
> > … …
> >
> > 5. It is not likely to be appropriate for the court to admit evidence that would fill a vacuum or near-vacuum of explanatory reasoning in the decision-making process itself, expanding at length on the original reasons given. Such evidence may serve only to demonstrate the legal deficiencies for which the claimant contends …""

36. Secondly, Julian Knowles J was critical of the decision-making in MP1's case, as regards the defendant's treatment of the evidence advanced by MP1:

> "172. ... I find the Panel's treatment of the Claimant's evidence about his work to be flawed. Mr Brown was quite clear in response to a direct question from me: 'There is no dispute he acted as a judge'. The Panel therefore did not in terms disbelieve his evidence, but equally said in effect that it had not been corroborated. The Panel therefore seems to have adopted a kind of half-way house approach, whereby it did not disbelieve the Claimant, but it did not entirely believe him either. Mr Brown accepted that the Panel had to act fairly and said that was 'uncontroversial'. The approach the Panel adopted was an unfair and unreasonable approach which undermines its reasons and conclusion. It should either have said, fairly and squarely, that it tended to disbelieve the Claimant's account of his work (and

> given reasons for that conclusion, having put its concerns to him for his response), or it should have said it accepted it, and then weighed it properly against the conditions. If it required further details of precisely what cases he worked on including, for example, the names of Taliban defendants, then it should have sought them.
>
> ...
>
> 174. Because the panel did not ask directly for further evidence, the only rational conclusion open to it was to accept the Claimant's account in full..."

37. In *LND 1,* the Court of Appeal allowed the appeal of a former Afghan judge who had held various judicial posts in that country. The trial judge was found to have erred in eliding the requirements of Conditions 1 and 2 of Category 4 of ARAP. Whether the claimant had "worked alongside ... in partnership" with a UK Government Department was a separate question from whether he had made a significant contribution towards the achievement of the UK Government's military or national security objectives. The Court nevertheless held that the decision under challenge was flawed because the defendant had failed to consider certain matters that were material to its consideration of the "worked alongside ... in partnership" issue.

38. Lewis LJ gave the leading judgment. At paragraph 28, he noted the decision-maker as stating that LND1's "asserted counter terrorism work pre-dates the FCDO's partnership with the Kabul counter-terrorism courts in 2015".

39. At paragraph 39, Lewis LJ considered the principles governing provisions of the Immigration Rules, such as the ARAP provisions, to be well-established. As held by the Supreme Court in *Mahad v Entry Clearance Officer* [2010] 1 WLR 48, the rules fall to be construed sensibly, according to the ordinary and natural meaning of the words used.

40. Beginning at paragraph 46, Lewis LJ said that the trial judge:

> "... touched on it in part at the end of paragraph 20 of his judgment where he indicated that the decision-maker would have to consider, amongst other matters, (1) the substance of the work the individual undertook in Afghanistan (2) the nature of the institutions in which he worked and (3) the nature of the connections if any between those institutions and the relevant United Kingdom government department or departments. I agree that those are three matters that are likely to be relevant to determining whether an individual worked alongside a UK government department (there may be other relevant factors, depending on the circumstances). I understand that Mr Blundell accepted that those factors would be relevant. I do not consider that the fourth factor identified by the judge, namely, the contribution made by the institutions where the individual worked to the United Kingdom's military and national security

> objectives, is likely to be relevant to whether condition 1(iii) is satisfied...".

41. At paragraphs 51 to 53, Lewis LJ held that the defendant had not considered relevant matters concerning LND1's work in support of judges at the Counter Narcotics Justice Centre and his work as a member of the committee drafting the penal law and the anti-narcotics law. Lewis LJ was, however, also concerned that there had been a failure to consider LND1's work as chairman of the court for internal and external security:

> "54. Thirdly, LND also relied upon his work as a judge at the court for internal and external security between 2008 and 2010 and his role as chairman of that court from 2010 to 2012. It is clear from the material that the FCDO was asked about this and indicated that its, the FCDO's, role working with that court began in 2015 after LND had ceased to be a judge there. I can see how it might be said that the material indicated that until 2015 there was no involvement by a United Kingdom government department. However, I do not consider that the evidence before this court does establish that. The issue is whether other UK government departments, and in particular the British armed forces, had any links with the court for internal and external security in Kabul such that judges who worked there might be said to be working alongside in partnership with or closely supporting and assisting the British armed forces. That issue was not considered by the FCDO (who, in fact, suggested in their response to the MoD that the MoD might wish to consider any relationship they had with LND, although noting that none appeared evident from the documentation).The MoD did not consider the question of whether or not there were links between it and the court in Kabul prior to 2015. Mr Blundell fairly accepted that that was the case. It is right to note that there is evidence of the United Kingdom funding the work of the court (although the 9 December 2022 e-mail indicated that that would not normally be considered sufficient to satisfy the requirements for condition 1(iii)). Further, other case law indicates that the British armed forces provided logistical and operational support to the terrorism court and, on one occasion, a judge, referred to as Judge W, working there was found to meet the eligibility requirements of ARAP requirements (see paragraph 101 of the judgment of Lang J. in *R (S) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2022] EWHC 1402 (Admin)). That latter fact may, however, reflect the fact that that decision was taken as Afghanistan was about to fall to the Taliban and may reflect the urgency of the situation rather than a considered decision that there were sufficient links between the British armed forces and judges at the court to satisfy the requirements of condition 1(iii). In any event, the possibility of LND satisfying condition 1(iii) because of his role at the court in Kabul between 2008 and 2012 has not been specifically considered by the MoD.

> ...
>
> 56. In summary, therefore, the judge's finding that LND satisfied conditions 1 and 2 is flawed. Nevertheless, the decision of 9 December 2022 is itself flawed by reason of the MoD's failure to consider whether or not the work LND did in connection with the drafting of the penal law and the anti-narcotics law, and the work done as a judge, and then chairman, of the court for internal and external security in Kabul, was done alongside in partnership with or closely supporting and assisting a United Kingdom government department or the British armed forces.
>
> ...
>
> 62. In the present case, matters have moved on as this court has decided that ARAP 3.6 is to be interpreted differently from the way that the judge below interpreted it. This court has, however, found that the 9 December 2022 decision of the Secretary of State for Defence is unlawful as it fails to consider two material matters in its consideration of whether or not LND meets the requirement of condition 1(iii). The appropriate remedy is to vary the order of the judge and to provide that the decision of 9 December 2022 is quashed and to remit the matter to the Secretary of State for reconsideration. That reconsideration will need to address first whether there are any institutional links between the FCDO and the committee or committees relating to reform of the penal law and the anti-narcotics law of which LND says he was a member. Essentially, the MoD will be considering if there is evidence of any institutional link, or structural support, between the FCDO and the committees concerned and, in particular whether any FCDO officials were involved in the work of that committee or committees. That will be part of the process of considering whether or not LND worked alongside in partnership with or closely supporting and assisting the work of the FCDO. Secondly, it will need to consider if there were any institutional links between the British military and the court for internal and external security in Kabul between 2008 and 2012 as part of the process of considering whether or not LND worked alongside in partnership with or closely supporting and assisting the work of the British armed forces or the MoD during that period."

42. In a short concurring judgment, Underhill LJ had this to say about LND1's security judge role in Kabul:

> "72. ...I turn to his role between 2008 and 2012 at the Kabul court for internal and external security. For myself, I would accept the MoD's position that the fact (if established) that it provided some UK funding for the court would not in itself be enough to satisfy Condition 1, and that some more specific relationship between

> him and the UK government would be required (such as was apparently later developed with a particular group of judges as noted by Hill J in *R (JZ) v Secretary of State for the Home Department* [2022] EWHC 2156 (Admin)); and I am not satisfied that the case of Judge W, referred to in both JZ and the case of S to which Lewis LJ refers, suggests to the contrary. I am, however, narrowly persuaded that the FCDO's suggestion that the MoD should consider whether LND's role at the court might have involved him working alongside it, which on the evidence was not pursued, is sufficient evidence that a relevant consideration was not addressed by the decision-taker."

43. Peter Jackson LJ agreed with both judgments.

44. The final case to be mentioned is *R (BYK) v Secretary of State for Defence* [2025] EWHC 235 (Admin). The claimant in that case had been the Head of a City Court Civil Cases Division, and, separately, the Head of a Court Combatting Usurpation of State Land and Properties covering seven provinces (paragraph 18 of the judgment).

45. At paragraph 13 of her judgment, Farbey J stressed the centrality of the Ministry of Defence officials in the ARAP process:

> "13. Responsibility for the assessment of eligibility for relocation lies with officials within the Ministry of Defence. These officials are "best placed, liaising where necessary with other Government agencies operating in Afghanistan, to…assess [a person's] eligibility for relocation" (*S v Secretary of State for the Home Department* [2022] EWCA Civ 1092, para 16). In relation to Category 4 cases, the defendant may refer the case to other Government departments and agencies in order that they may confirm whether or not an individual has worked alongside a Government department."

46. At paragraph 16 of her judgment, Farbey J explained the role of the Home Office and the immigration rules in the process:

> "16. If an applicant satisfies the ARAP criteria, responsibility passes to the Home Office. The Immigration Rules have specifically catered for relocation to the United Kingdom under ARAP since 1 April 2021. Provision for the grant of entry clearance to a person who "worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department" was introduced on 14 December 2021. The Home Office will ensure that all relevant aspects of the Immigration Rules are satisfied. This will include an assessment of whether there are grounds for refusal of entry clearance under one of the general grounds for refusal under Part 9 of the Rules, such as criminality."

47. At paragraph 41, Farbey J noted the holistic nature of the exercise in determining an ARAP application, referencing paragraph 47 of Lewis LJ's judgment in *LND1* that it

"will usually be necessary to consider the whole picture of the individual's work and activities in Afghanistan when assessing whether he worked alongside in partnership with or closely supporting and assisting a United Kingdom Government department."

48. Paragraphs 50 and 51 concern the issue of the prerogative in the context of ARAP:

> "50. Lord Murray emphasised that ARAP involves the exercise of a prerogative rather than a statutory power. As the claimant's application did not involve a power bestowed by the legislature, there could be no question of the executive being constrained to exercise the power in accordance with the legislative intention or in some particular way or manner (Sandiford, para 61). Although not immune from public law challenge, the court should be slow to interfere with a power that is intrinsic to the Crown such that it is for the Crown to determine whether and how to exercise it...
>
> 51. ARAP concerns a prerogative power that is exercised on humanitarian grounds in addition to legal powers and duties towards foreign nationals (whether those powers and duties are derived from international or domestic law). I did not hear full argument on whether a person who claims that he or she should have been selected for extra-statutory treatment can assert an entitlement to a more active approach to intervention by the court than the conventional approach to the judicial supervision of statutory powers and duties. I do not need to resolve the question and prefer not to do so. Nevertheless, in light of the gravity of the case, I have given close scrutiny to all the evidence and assured myself that the proceedings in this court have been fair. I have considered the whole picture (*LND1,* para 47, above)."

49. Farbey J accepted the defendant's submission that BYK's case to have worked alongside ... in partnership was lawfully regarded by the defendant as insufficiently evidenced and that the defendant had been entitled in effect to give weight to the fact that BYK had not been a criminal judge:

> "60. The court may take into consideration whether a claimant has given sufficient particulars of, and described particular circumstances in which, he or she may be regarded as having "worked alongside" a United Kingdom Government department (*R (CX1) v Secretary of State for Defence* [2024] EWHC 94 (Admin) DC, para 65, per Dingemans LJ). That has not happened in the present case. Other than the FCDO and the NCA, it was not suggested by either party that the claimant's case might have been referred to any other Government department or agency. In the absence of particulars of how the claimant may be said to have worked "alongside" a Government department, the defendant was entitled to treat the claimant as having advanced no more than "mere assertions."..."
>
> ...

> 62. In my judgment, Lord Murray is correct to say that the claimant's status as a civil judge was not decisive but was one aspect of the review decision overall. It cannot be said that the defendant was unreasonable to consider the nature of the claimant's work as a judge and the sort of cases with which the claimant was involved. The defendant was entitled to weigh the fact that the claimant was not a criminal judge trying terrorism cases, where Category 4 status may be easier to demonstrate. It cannot be said that the nature of the claimant's work as a civil judge was an irrelevant consideration. Nothing in the defendant's approach was flawed."

THE GROUNDS OF CHALLENGE

50. I can now turn to the grounds of challenge in the present case. Ground 1 contends that the defendant erred in the approach taken to the scope and meaning of "working alongside" and/or "in partnership with" and/or "assisting a UK Government Department" within Category 4 of ARAP. As a result, the claimant asserts that the defendant failed lawfully to consider his evidence in the light of the policy scheme. Ground 2 alleges that the defendant failed lawfully to consider the claimant's evidence cumulatively and/or failed to apply anxious scrutiny to that evidence. Ground 3 submits that there has been a failure to have rational regard to the "independent evidence" of NAR. Ground 4 alleges that the second review decision is tainted by what is said to be the defendant's failure to conduct an adequate review of material that was capable of corroborating the claimant's stated position.

DISCUSSION

Ground 1

51. I do not understand it to be disputed by the defendant that *Mahad* principles apply to the interpretation of the quoted phrases in Category 4 of ARAP. Those phrases are to be given their ordinary, objective meaning. It is not for the defendant to decide what "in partnership" or "working alongside" mean in any particular factual context.

52. It is a striking feature of the second review decision that neither it, nor the FCDO assessment which helped inform it, engage with what was the defendant's position in *JZ* (paragraphs 31 to 33 above). At paragraph 40 of her judgment, Hill J details a Part 18 response filed in the case before her, which speaks of HMG developing a partnership from 2015 with "some judges" of the ATC. 11 judges of the ATC found themselves resettled in the UK "due to their role in presiding over terrorism trials." These judges were "involved in this partnership, although the full circumstances of this partnership may not have been known to the judges involved." Only in the GLD's letter of 29 May 2025 do we find the same language used.

53. Hill J was understandably concerned about the assertion that the judges assessed by the defendant to be in partnership with the FCDO "may not have appreciated" they were in such a partnership and that there was "an element of subjectivity" in the defendants' assessment of whether a partnership existed. She considered, however, that "this is perhaps no more than a further aspect of the overall evaluative exercise that needs to be undertaken, given that it is now established that each case needs to be assessed on its

own particular facts". I also consider it noteworthy that, at paragraph 90 of her judgment, Hill J considered the primary point of distinction between the claimant and the ATC judges who were approved for ARAP to be that they "served in the Anti-Terrorism Court in Kabul from 2015 onwards. The claimant did not." The fact that "from 2015 onwards, HMG developed a partnership with some judges" in the ATC was a secondary factor.

54. The facts of present case are unlike those of the cases summarised above, in that the claimant was a judge of the ATC up to April 2016, and so was serving there for some seven months after "the FCDO started working with the Court..." (paragraph 13 of Ms Ferguson's witness statement) and after the FCDO began to have "institutional links" with the ATC (paragraph 14 of her statement). The defendant's basic position, as now advanced at the hearing, appears to be that the claimant was not "in partnership with" or "working alongside" the FCDO during that time because – despite these working arrangements and institutional links - he was not one of the "specific partnership judges". Indeed, it seems from paragraph 14 of Ms Ferguson's statement that the FCDO's "close involvement" with "specific partner judges" dates only "from May 2018 when the Criminal Justice Advisor was appointed ...". It is wholly unclear whether the defendant's position is that there were such partner judges before May 2018, or only afterwards. This is one aspect of a larger problem which I shall address.

55. It is noteworthy that the focus in the case of *S* was on the role of the ATC judges, like Judge W, "in presiding over the Anti-Terrorist Court, which benefited the UK Government ... their roles were public and high profile and they were at risk from the Taliban" (paragraph 108 of the judgment). The role appears to have been regarded as institutional in nature. The importance of institutional links is made plain in the judgment of Lewis LJ in *LND1*. At paragraph 28 of his judgment, Lewis LJ cited passages from the decision in the case of LND1. A reason for distinguishing LND1's case was that "The applicant's asserted counter terrorism work pre-dates the FCDO's partnership with the Kabul counter-terrorism courts in 2015." In any event, Lewis LJ, applying the objective interpretation mandated by *Mahad*, plainly considered the issue of institutional links to be significant, in deciding the relevant questions (see paragraph 39 above/paragraph 46 of his judgment). The "nature of the institutions" in which the judge worked and "the nature of the connections if any between those institutions and the relevant United Kingdom department or departments" would require consideration. Lewis LJ understood leading counsel for the defendants to "accept that those factors would be relevant."

56. That led Lewis LJ to find that the decision-making in LND1's case was flawed, in part because there had been no consideration of whether there was evidence of an institutional link, or structural support, between the FCDO and the committees concerned with reforming penal and anti-narcotics law and whether "there were any institutional links between the British military and the court for for internal and external security in Kabul between 2008 and 2012". All this would be "part of the process of considering whether or not LND worked alongside or in partnership with or closely supporting and assisting the work of the British armed forces or the MoD during that period." (paragraph 62).

57. I am very conscious that, in his concurring judgment, Underhill LJ made reference to the relationship identified by Hill J in *JZ* with "a particular group of judges"; and that he accepted that providing "some UK funding for the court would not in itself be

enough" to satisfy the relevant condition". There is, however, nothing in his judgment that constitutes disagreement with the emphasis placed by Lewis LJ on institutional links as a relevant factor in deciding if the relevant ARAP requirement is met.

58. In the case of a court doing a particular type of work, which HMG considered to be important to its policy objectives, any assistance and support is likely to be at institutional level for the simple reason that it is the collective endeavour of the judges doing the work which is being encouraged. Although FCDO officials may not come into personal contact with every judge, it is, at first sight, difficult to see any rational justification for adopting an approach whereby it is only those judges with whom a personal link has been established who are considered to be in partnership with or working alongside the Department to which those officials belong.

59. The present case requires the court to interrogate the defendant's apparent stance in respect of the so-called "partnership" judges of the ATC. In so doing, I am continuously mindful that Ground 1 is in essence a rationality challenge; and that this creates a high hurdle for the claimant to surmount. I also remind myself that alleged unlawfulness based upon what is said to be a disparity in treatment is not a free-standing basis of judicial review. The claimant needs to establish that, on proper analysis, the defendant has failed to provide a rational reason for the difference in treatment: *R (Patel*) at paragraph 114.

60. The claimant submits that, in carrying out the above, the court must apply "anxious scrutiny". I did not hear Lord Murray to demur, although he raised an issue regarding the alleged prerogative nature of ARAP, to which I shall return in due course. Given that the court is concerned with the claimant's fundamental human rights, I am in no doubt that the court must give anxious scrutiny to the materials before it, always remembering that anxious scrutiny does not change the public law principles in play, so as to lead the court into an inappropriate merits-based assessment.

61. The details of the post-decision evidence appear to have been unknown to the case worker who made the second review decision and the writer of the FCDO assessment. At all events, the FCDO assessment contends that the ATC judges found eligible under ARAP succeeded "due to their roles presiding over certain trials between 2020 and 2021" and, it seems, because the judges "were known to the FCDO team". They were "offered resettlement on that basis". The importance of being known to an FCDO official is then emphasised by the assertion that "It is unlikely that someone working in this court who was not known to the FCDO CT team could be considered to have been working alongside the FCDO in partnership or closely supporting the FCDO". Although the assessment then says that the assessment of eligibility will depend on the person's specific role, it is evident that the preceding passage was intended to be important. This is made pellucid by the subsequent passage, in which it is said that "The BEK CT Team did not know of" the claimant and that "former team members... confirmed that, at the time the applicant was working at the" ATC "(up to April 2016), they would not have had reason to work with him."

62. There is here an emphasis on being known to FCDO officials, which, on proper analysis, is not indicative of "working alongside... in partnership" but is, rather, the yardstick for finding such a relationship. Although the sentence which begins "It is unlikely that..." might suggest a distinction between being known and working alongside ... in partnership, no hint of what this might be is given. In any event, it is

entirely unclear what is meant by FCDO officials "working with" a judge of the ATC. The post-decision evidence refers to officials sitting in on cases of interest to HMG and organising colloquia and other meetings. It is unclear whether this is what is meant in the FCDO assessment by "working with". If it is, there are problems with it, as I shall explain when I address the post-decision evidence.

63. The FCDO assessment highlighted a passage in the evidence of NAR, who said that the ATC judges were focussed on hearing cases and that a lot of the contact between the ATC and the British involved the administrative Directors. They were the ones who decided which judge should sit on which case. The writer of the assessment seems to have regarded this as having a material bearing, as they said it "suggests the CT judges worked at a remove from HMG personnel." The role of the Directors, however, raises additional unanswered questions regarding the basis on which certain judges were known to the FCDO and what is meant by "working with" such judges. In particular, if the selection of judges to sit on cases was an administrative function, over which the judges had no control, no thought appears to have been given to whether the fact of an FCDO official knowing a particular judge as a result of happening to sit with them was, in reality, purely a matter of chance.

64. The case worker adopted the FCDO assessment, with all its flaws, as identified above.

65. It is now necessary to turn in detail to the post-decision evidence in the shape of the GLD letter of 29 May 2025 and Ms Ferguson's witness statement. The need for caution in approaching such evidence is well-established. As Julian Knowles J held at paragraph 105 of *MP1*, "there is a natural tendency to bolster a decision under challenge".

66. The letter of 29 May 2025 largely mirrors what is in the FCDO assessment, in that it describes the 11 judges as being approved "due to their role in presiding over terrorism trials". They were "serving in the [ATC] in 2020 and 2021". Taken at face value, the reason for approval was the role in hearing terrorism trials, rather than being in post in 2021; although being in post at the fall of Afghanistan to the Taliban is likely to have resulted in these judges standing a greater chance of being known to the most recently serving FCDO officials, and thus likely to be evacuated at that point. Neither of those latter considerations is, however, in itself capable of constituting a rational reason under ARAP for relocation.

67. One then comes to the passage in the letter, which describes HMG developing a partnership with some ATC judges from 2015. The letter states that "All the 2015 judges that were resettled due to their role in presiding over terrorism trials were involved in this partnership." On its face, therefore, this suggests that being a "partnership judge" was not the reason for resettlement. But the matter is thrown into doubt by the fact that the information about the partnership comes under the heading "*With respect to the above group please describe in brief terms what evidence there was that each judge "worked alongside" HMG."* The fact that, according to the letter, and the evidence that was before Hill J in *JZ*, an ATC judge might not know that they were, in fact, a partnership judge or, at least, "the full circumstances" of that partnership, understandably troubled her; although at paragraph 116 of her judgment, she regarded it as "a further aspect of the evaluative exercise" needed to establish whether the "working alongside" requirement was met.

68. The fact that the present claimant was working as a judge in the ATC after 2015 means there is an intense focus (not required in the other cases involving Afghan judges) on how a judge became (seemingly unknown to themselves) a "specific partnership judge" of the ATC. Ms Ferguson's evidence suggests that the emergence of such partnership judges was linked with the appointment in 2018 of the Criminal Justice Advisor. Lord Murray described the institutional relationship as being intensified in September 2015 and further intensified in 2018, with the arrival of the Criminal Justice Advisor. He told me on instruction at the hearing that the Criminal Justice Advisor's function was to provide legal and policy advice on criminal justice matters to the British Embassy in Kabul and that they engaged with stakeholders, including identifying professional development opportunities for police, prosecutors and judges, as well as mentoring.

69. It is impossible to discern from the evidence the nature of the relationship between the partnership judges and the Criminal Justice Advisor. The GLD letter suggests that a judge was a partner before being invited to attend "colloquia", discuss matters of "professional development" and debate "points of law"; and that it was partner judges whose cases would on occasion be observed by HMG officials. If so, that leaves begging the question of how the partner judges were selected. If, on the other hand, one became a partner judge by being invited to such events and discussions, the criteria for invitation are unexplained. If attendance at a hearing had a bearing on the judge becoming a partner judge, the defendant has not explained why this was rational, given that it seems to depend on the chance of whether the judge happened to be hearing a case that was of interest to HMG.

70. There is in short no coherent evidence before this court to explain the defendant's designation of certain judges as specific partner judges. The position might have been different, had there been evidence from an official who had served in Kabul as a Criminal Justice Advisor or who could otherwise speak from direct knowledge. The defendant cannot be heard to say that being such a partnership judge was only one element in the overall evaluative exercise. On the contrary, Ms Ferguson's statement puts it beyond doubt that being a partnership judge was regarded by the defendant as at least a highly relevant factor.

71. The difficulty in which the defendant finds himself on this issue underscores the importance placed by Lewis LJ in *LND1* on institutional, as opposed to personal, links between HMG and a court or other body. This is not to say that such links will always be sufficient. It would, for example, be possible to envisage a partnership existing between the FCDO and, say, only a cohort of leadership judges within a court. That, however, is very far from being the position on the current evidence. The partnership judges are not said to have been leadership judges or to have held a higher (or otherwise different) position in the judicial hierarchy than their fellow judges in the ATC.

72. The approach adopted by the defendant, concentrating on alleged personal relationships which, on analysis, lack any intelligible basis, has had the additional effect of leading the defendant to afford no material weight to the institutional relationship between the FCDO and the ATC, which existed at the time the claimant was a serving judge at that court. This is most graphically demonstrated in the passage in Ms Ferguson's statement where she addresses the evidence of the claimant and NAR concerning reports that were produced by the judges for HMG and collected by British officials from judges' offices. Paragraph 24 of her statement appears to downplay this evidence, on the basis that the reports were produced and collected "within the wider institutional relationship

between HMG and the Court." That institutional relationship was, however, plainly relevant to the overall assessment of the claimant's case. Ms Ferguson alights on the wording used by the claimant in his statement, that the reports were "collected" from an office and that he did not claim to have written the reports. That is, with respect, to descend to inappropriate nit-picking. Both NAR and the claimant attest to the institutional practice of the judges of the ATC producing reports for HMG. Like much else of the claimant's case, that point has merely been brushed aside. It also ignores the evidence of NAR, who at paragraph 11 of his statement, refers the British official he knew as "David" coming to the judges' offices "to take *verbal* reports about our cases" (my emphasis). In conclusion, the emphasis placed by the defendant on what, given the state of the evidence before the court, is an unintelligible concept of partnership judges means that the defendant has erred in his approach to the wording of the policy in ARAP.

73. The claim accordingly succeeds on Ground 1.

Ground 2

74. Ground 2 asserts that the defendant failed lawfully to consider the claimant's evidence cumulatively and/or failed to apply anxious scrutiny to that evidence. Although anxious scrutiny is (rightly) invoked by the claimant, one does not need to deploy that tool in order to discover serious defects in the defendant's decision-making. It is a basic principle of public law that relevant considerations have to be taken into account. In the present context, this involves engaging meaningfully with the evidence as a whole and having due regard to matters which might tend to support the application. This in no sense, of course, requires the defendant to reach an overall conclusion that is in favour of an applicant. It does, however, mean the applicant being given a fair crack of the whip by a decision-maker who has not closed their mind in advance.

75. With this observation, it is necessary to return to the case worker's reasons for refusing the application. The relevant section begins with the case worker considering that the evidence of the claimant in support of his claim to have worked alongside and/or in partnership with and/or closely supporting and assisting a UK Government department "does not go beyond mere assertions". Given the level of detail provided by the claimant about his work in the ATC between 2011 and 2016, this categorisation is problematic. The case worker then proceeds to discount the evidence that the claimant tried cases involving those who had been arrested by the Armed Forces on the basis that it is uncorroborated. It is unclear whether this is an aspect of the wider uncertainty of what, if anything, of the claimant's case was accepted by the case worker (see paragraph 82 below). If the lack of corroboration related to the issue of whether the suspect was arrested by British or other coalition forces, the question arises why the case worker considered this to be relevant. Any requirement on the claimant to show that the forces arresting an alleged terrorist for trial before the ATC must be British is, in the context of the present claim, simply irrational. There is no assertion in the evidence that the interest shown in the ATC by the FCDO was limited to those cases where British forces had been responsible for arresting the alleged perpetrator. Any such suggestion would in any event require to be properly reasoned, in order to avoid its own charge of irrationality. It is difficult to avoid the conclusion that the case worker was unaware of a key matter; namely, the understandable interest taken by HMG in the ATC, including the period 2011 to September 2015, but particularly from the latter date

to the point when the claimant left the ATC to take up other duties, during which time a form of institutional partnership was being developed.

76. In what can only be characterised as an attempt to meet this difficulty, Ms Ferguson, at paragraph 14 of her statement, now seeks to suggest that, during the period September 2015-April 2016, the claimant has not adduced evidence of hearing any cases in the ATC. She observes that his "abridged list of cases" ends with one on 27 July 2015, which "precedes HMG's involvement with the Court by more than a month, and does not therefore indicate any link with HMG."

77. The *ex post facto* nature of this evidence means it needs to be approached with considerable circumspection. Even taken on its own terms, however, it is seriously troubling. As Ms Ferguson herself notes, the list of cases provided by the claimant is "abridged". No account seems to have been taken of the obviously salient fact that the claimant is currently in hiding from the Taliban, with no apparent access to the records of the ATC. Paragraph 22 of the claimant's first witness statement says it is impossible for him to access the "courts, judicial buildings and systems, which are now under the control of the Taliban." In all the circumstances, this aspect of the evidence cannot rationally be doubted. Mr Ó Ceallaigh submitted that the defendant is likely to have records of cases tried in the ATC and I did not hear Lord Murray to take issue with the submission. In any event, there does not appear to have been any attempt by the defendant to put this newly emerged concern to the claimant, before Ms Ferguson's statement was filed. Quite irrespective of the issue of records, it cannot now be seriously disputed that the claimant was a judge of the ATC during the relevant period, in which case the strong inference must be that he was acting in that capacity during that time and would therefore be expected to be hearing cases within the court's jurisdictional remit. But even if, for some reason, he was engaged on other duties during that time, the claimant was still a judge of the ATC and therefore institutionally connected with it and, so, with the FCDO's developing partnership with the ATC. None of these points appears to have been considered by the defendant.

78. The case worker's reasons take as a point against the claimant that he expressly said he did not have a direct relationship with the British Government and its armed forces. However, that was also true of Judge W: see paragraph 31 above; paragraph 41 of *JZ*. The case worker considered that any contact between British officials and the claimant during his employment "would more likely than not have been courtesy visits or invites by way of an extension to diplomatic relationship building." This displays a lack of awareness of the defendant's stance vis a vis the ATC from September 2015. In similar vein, the case worker disregarded the significance of any of the training courses evidenced by the claimant because "it was the Kabul Appeal Court who was responsible for allocating judges to attend these training courses and not part of the FCDO or the British Embassy". That is not a rational reason. It would naturally be for the ATC to decide which judges to send for training. It also ignores the evidence of NAR that the judges would take it in turns to attend training. The case worker could find no evidence of payments being made to the claimant in respect of his attendance at such courses, which appears to have led him to doubt the claimant's overall case. Significantly, at paragraph 16 of her statement, Ms Ferguson does not appear to deny in terms that money may have been paid. Instead, she takes the narrow point that any such payment did not represent employment or a contractual relationship. That is, of course, true; but it ignores the fact that any such payments could be said to be indicative of a desire on

the part of HMG for the ATC judges to attend training and is thus a relevant aspect of the wider holistic picture.

79. I understand the parties to be in agreement that a holistic view needs to be taken, in order for there is to be a proper determination of whether a judge was working alongside... in partnership with ...a department of HMG; although there is no consensus on what this involves in the case of the claimant. In *LND1*, Lewis LJ considered at paragraph 54 that, in the case of a judge who had worked in the ATC in Kabul, it was necessary to consider "whether or not there were links between [MoD] and the court in Kabul prior to 2015." By the same token, it was necessary in the present case to consider the nature and extent of links between the ATC and the FCDO (and its predecessors) both before that point (when the claimant received training in 2013 under the apparent auspices of the FCDO's Rule of Law Officer and no less than two weeks' training in 2014 from the British Embassy/Adam Smith International; as well as his work trying and sentencing Taliban terrorists); and between 2015 and April 2016, when the claimant left the ATC. For the reasons given in respect of Ground 1, the defendant has failed to show on the evidence before this court a rational case for relying upon the "partnership judge" concept to any material extent, let alone as the determining factor. The defendant therefore cannot be heard to say that anything which may have happened earlier was necessarily irrelevant. In the claimant's case, it is of particular note that in 2014 he sentenced the perpetrator of the attack on a supermarket that he said was frequented by British Government officials.

80. Lord Murray submitted that paragraph 46 of the judgment of Lewis LJ assisted the defendant. There, Lewis LJ held that the contribution made by the institutions where the individual worked to the UK's military and national security objectives was not likely to be relevant to whether the individual was working alongside etc a Government department. Lewis LJ considered that this was likely to be relevant in answering the next question; (or condition in Category 4 of ARAP); namely, whether, in the course of their work for the institution concerned, the individual made such a contribution. That is also the approach recently taken by Garnham J in *R (AFA and others) v Secretary of State for the Home Department and another* [2025] EWHC 2143 (Admin): see paragraphs 64 and 65.

81. I do not consider that this assists the defendant. On the contrary, it assists the claimant. In a particular case, the nature of the relationship between an institution in Afghanistan and a department of HMG *might* be of such a nature as to amount to a partnership and thus be sufficient to show that an individual working for the institution in such a partnership, satisfies the first requirement or "condition" of ARAP Category 4. But the individual would *still* fail in their application if their own contribution within the institution for which they worked did not make the required substantive and positive contribution. In the present case, the defendant never proceeded to address that second question or condition.

82. There is a further problem for the defendant under Ground 2. The case worker's decision, read as a whole, leaves the reader unclear whether or to what extent the claimant's account was accepted by the defendant. This is apparent from the outset of the case worker's reasons, where it is said that the claimant's case "does not go beyond mere assertions." Later, the case worker speaks of "assertions of working with the UK government and Armed Forces, along with receiving money from British officials...". In short, it is unclear what, if anything, may have been believed. At best, the defendant

has, I find, adopted what Julian Knowles J described at paragraph 172 of *MP1* as "a kind of half way house approach" (see paragraph 36 above). Like Julian Knowles J, I consider this materially vitiates the present decision. An applicant faced with such a decision is left in doubt as to the case they need to meet in any judicial review. I do not consider that the post-decision evidence of Ms Ferguson can cure this problem. Her statement does not contain any explicit acceptance of any aspect of the claimant's account.

83. For each of the above reasons, Ground 2 accordingly succeeds.

Ground 3

84. Ground 3 asserts irrationality in the treatment of the evidence of NAR. I am in no doubt that this ground is made out. The case worker baldly asserts that "The witness statement of [NAR] who states that the Applicant worked with the British Government, is uncorroborated and does not support his claim."

85. Understandably, the grounds of claim describe this finding as "extraordinary". The case worker seems not to have understood that the statement of NAR was itself corroboration of the claimant's witness statements and other evidence. NAR's statement did not itself need to be corroborated. Plainly, NAR's statement did "support" the claimant's application. I refer to what I have said above. Lord Murray sought to rely upon an earlier passage of the case worker document, where the claimant's solicitors are recorded as saying they could not see any proper basis for distinguishing NAR's case from the claimant's. Lord Murray submitted that this shows the evidence of NAR was properly considered. I do not find it does anything of the kind. If anything, it aggravates the treatment of NAR's evidence in the body of the case worker's decision.

86. I accept that the FCDO assessment informed the defendant's decision and that that assessment addressed what were said to be factual differences between the respective positions of NAR and the claimant. Despite Ms Ferguson's assertion to the contrary (at paragraph 13 of her statement), those differences do not, however, find any expression in the case worker's reasoning. In any event, the differences identified relate to the dates when NAR was working as a judge of the ATC (up to 2021) and that NAR was known to the BEK Team. As I have sought to explain above, those are not, upon analysis of the evidence, rational points of difference.

87. Ground 3 accordingly succeeds.

Ground 4

88. Ground 4 asserts that the defendant failed to take reasonable steps to acquaint himself with the information necessary to reach a correct decision: *Secretary of State for Educaton and Science v Tameside MBC* [1977] AC 1014. A *Tameside* challenge is a species of rationality challenge. The bar for success is therefore set high.

89. The claimant submits that, since the defendant considered it relevant to know which arm of the coalition forces in Afghanistan had arrested an alleged terrorist, who was subsequently tried by the claimant in a panel of the ATC, it was for the defendant to make the necessary inquiries on this matter. The claimant could not be expected to provide such information. As I have explained, I do not consider that it was rational for

the defendant to require that British forces be the ones to make the arrest, before the claimant's judicial contribution to the trial and sentencing process could be taken into consideration. If, however, I am wrong about that, then I agree with the claimant that this is something that could and should have been investigated by the defendant. In the absence of such investigation, the point could not rationally be taken against the claimant.

90. Mr Ó Ceallaigh also submitted that the defendant had irrationally failed to investigate what the basis was for categorising certain ATC cases as being of special interest to the FCDO, thereby possibly putting the judges hearing these cases into what the defendant considered to be an actual or potential position of partnership with that department. As I have endeavoured to explain under Ground 1, I consider that this issue is more appropriately seen as part of the wider failure of the defendant to adduce evidence which shows there is a rational basis for the assertions regarding "partnership judges". This court can only procced on the evidence that the parties have seen fit to adduce.

91. It may be that an evidential case can hereafter be made by the defendant that: (a) there was never an institutional relationship between the FCDO and the ATC, of such a kind that a judge of the ATC would thereby be in partnership etc with the FCDO by reason of their work as such a judge; and (b) that the only judges who can objectively be said to have been in partnership were a properly identifiable cohort of "partnership judges." Any such evidential case would still have to be compatible with the holistic approach which the Court of Appeal implicitly endorsed in *LND1*.

92. Ground 4 succeeds to the extent explained in paragraph 89 above.

THE PREROGATIVE

93. I said I would return to the issue of the prerogative. At the hearing, Lord Murray drew attention to paragraphs 50 and 51 of the judgment of Farbey J in *BYK*: see paragraph 48 above. Paragraph 50 suggests that there may be a need for caution when considering challenges to decisions involving the exercise of the prerogative. Paragraph 51, however, envisages an argument that, in such cases, there might be "a more active approach to intervention by the court than the conventional approach to the judicial supervision of statutory powers and duties". I do not understand the present claimant to advocate such an approach, which seems antithetical to what Lord Murray was recorded in paragraph 50 as submitting and is inherently dubious. Since the relevant provisions of ARAP have been set out in the immigration rules made under the Immigration Acts, there is no scope for any different standard of review than applies in the case of those rules, as well as policies in the immigration field that are not contained in the immigration rules. In any event, Lord Murray did not develop before me the submission recorded in paragraph 50 of *BYK*.

OUTCOME

94. The second review decision falls to be quashed. A new one will need to be made, no doubt expeditiously. I invite counsel to agree, if possible, the terms of an order which gives effect to this judgment.