Neutral Citation Number: [2026] EWCA Civ 3

Case No: CA-2024-000313, CA-2024-000317 & CA-2024-002581

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Swift
AC-2023-LON-002498, AC-2023-LON-003138 & AC-2023-LON-003184

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 January 2026

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE JEREMY BAKER

- -

Between :

THE KING (on the application of RA and AA)	**Respondents/ Claimants**
- and -	
SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	**Appellants/ Defendants**

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- -

Cathryn McGahey KC and John Bethell (instructed by the **Treasury Solicitor**) for the **Appellants**
Helen Foot, Ella Gunn and Emma Fitzsimons (instructed by **Bhatt Murphy Solicitors**) for the **Respondent**

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Between :

THE KING (on the application of MZZ)	**Respondent/ Claimant**
- and -	
(1) SECRETARY OF STATE FOR DEFENCE **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Appellants/ Defendants**

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- -

Cathryn McGahey KC and John Bethell (instructed by the **Treasury Solicitor**) for the **Appellants**
Ramby de Mello and Edward Nicholson (instructed by **Luke & Bridger Law**) for the **Respondent**

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And:

IN THE MATTER OF THE SECRETARY OF STATE FOR DEFENCE

- -
- -

Cathryn McGahey KC, Richard Evans and John Bethell (instructed by the **Treasury Solicitor**) for the **Appellant**
Emma Sutton KC, as Advocate to the Court (instructed by the **Special Advocates' Support Office**)

Hearing date : 6 November 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson handed down the judgment of the court:

The appeals and their context

1. These appeals arise from orders made in the context of two policies that were operated by the UK Government in connection with the UK's operations in Afghanistan:

    1) The Afghan Relocations and Assistance Policy ('ARAP') was launched on 1 April 2021 and closed to new applications on 1 July 2025. It was for Afghan citizens who worked for or with the UK Government in Afghanistan in exposed or meaningful roles. It might include an offer of relocation to the UK for those deemed eligible by the Ministry of Defence ('MoD') and deemed suitable for relocation by the Home Office. The scheme extended to their family members, and the Foreign, Commonwealth and Development Office might become involved in determining whether an individual should be admitted as an Additional Family Member ('AFM') of an eligible Afghan citizen.

    2) The Afghanistan Response Route ('ARR') was established in April 2024 in response to a data breach in February 2022. It provided for certain individuals impacted by the data breach to be considered for relocation to the UK. It was discontinued on 4 July 2025.

2. The data breach compromised an MoD dataset containing personal information and contact details of persons who had applied for relocation to the UK from Afghanistan under ARAP. The fact of the breach became known to the MoD in August 2023. On 1 September 2023, it obtained a super-injunction preventing disclosure of (a) the data breach and (b) the existence of the injunction itself. The super-injunction remained in effect until 15 July 2025, when it was discharged: *Ministry of Defence v Global Media and Entertainment Limited and others* [2025] EWHC 1806 (Admin).

3. When the super-injunction was granted, the expectation was that it might be necessary for about four months. In the event, it remained in force for almost two years. This extraordinary departure from the principle of open justice was considered to be necessary to protect individuals named in the data breach and their families from the risk of ill-treatment or death at the hands of the Taliban.

4. The operation of the ARAP scheme itself placed considerable demands on government departments, who were seeking to secure the safety of eligible applicants. Those demands increased following the data breach, which had a knock-on impact on ARAP-related litigation in the Administrative Court. The Government Legal Department was thus concerned with a series of cases which included a CLOSED procedure, so that Special Advocates could represent the interests of applicants who could not be informed of the breach and the increased risk that it might have created for them.

5. The data breach also placed exceptional demands on the court. The Government, and the MoD in particular, was uniquely sighted in respect of its internal processes and the daily risks that might exist for individuals. The continuing super-injunction prevented all public scrutiny of the proceedings. It followed that the duty of candour owed by the public authorities towards the court and the other parties was of exceptional importance;

moreover, that the court had to be especially vigilant to ensure that there were no further encroachments on the fair hearing rights of the other parties.

6. The three orders from which the appellant ministers now appeal were made against this unprecedented background. The first two orders were made in judicial review proceedings brought by Afghan nationals following adverse decisions under ARAP in respect of the relocation of AFMs to the UK. The third order, which was not made in any subsisting proceedings, concerned the terms of the ARR policy.

The underlying proceedings

The first two orders: (1) 'MZZ' and (2) 'RA and AA'

7. These cases were managed together by Swift J ('the judge'), as Judge in Charge of the Administrative Court at that time.

8. In *MZZ*, the application for judicial review had been issued on 23 October 2023 and permission to proceed had been refused on the papers. The claimant had renewed his application and an oral permission hearing was listed to take place on 27 February 2024.

9. In *RA and AA*, the application for judicial review had been issued on 24 August 2023 and permission to proceed had been granted on 7 November 2023. A two-day substantive hearing was originally listed to take place on 31 January 2024.

10. In both cases the Secretaries of State applied for a closed material procedure under section 8 of the Justice and Security Act 2013, and this was granted on 7 December 2023. Special Advocates for the claimants were appointed through the Special Advocates' Support Office ('SASO').

11. At a hearing on 5 December 2023, the appellants had informed the judge that they could serve further CLOSED material by 14 December 2023, and he accordingly made an order requiring them to do so. The application for and grant of an extension were not made known to the OPEN representatives. The trial date in *RA and AA* was vacated and relisted for 28 February 2024.

12. On 14 December 2023, the appellants sought and were granted a further extension of time until 15 January 2024 to serve the further CLOSED material. The Special Advocates agreed to this on the basis that the listing at the end of February could be maintained. The application for and grant of an extension were not made known to the claimants' OPEN representatives.

13. On 15 January 2024, the appellants sought another extension of time, requesting a further four weeks. The Special Advocates objected, and requested a hearing.

14. That hearing took place before the judge on 19 and 22 January 2024. On 19 January, the court was not given a satisfactory explanation for the requests for the applications for extensions of time and the judge required the appellants to provide sworn affidavit evidence.

15. On 22 January 2024, OPEN and CLOSED affidavits were provided to the court and the Special Advocates. The OPEN affidavits were provided to the claimants' OPEN representatives.

16. In the course of her CLOSED affidavit, Bryony Hamilton (Deputy Director, Policy and Legal, within the Defence Afghan Relocation and Resettlement directorate of the Ministry of Defence) stated that officials at the Ministry of Defence had not realised that it would be impossible to comply with the revised timetables they were proposing, and accepted that the court had been misled:

> "While preparing this witness statement it has become apparent that this has given rise to serious breakdowns in communications which meant that those who have been instructing the Government Legal Department ("GLD") and Counsel in this case were unaware of certain material facts. This meant that those giving instructions in relation both to the 5 December hearing and to the subsequent applications for an Extension of Time have proceeded in the genuine but mistaken belief that they had a proper understanding of the AFM policy work when in fact they were not fully aware of the increasing complexity and significance of the decisions required and work being undertaken. Had they understood this, they would have realised that the 14 December 2023 deadline was unachievable, and that the four week extensions requested on 14 December 2023 and on 15 January 2024 were insufficient to take decisions on these cases based on agreed policy."

In the same CLOSED affidavit she gave substantial information about the processes that were taking place within the Ministry of Defence. She sought an extension of time until 12 February 2024 to file the CLOSED material. She concluded:

> "I deeply regret both the continued delays in making the decision required... and the shortcomings in the two Extension of Time applications. The Defendants intended no disrespect to the Court, nor do they wish to give the impression that they do not attach the utmost importance to Orders and Directions made by the Court... I apologise for the errors in these proceedings."

17. In *MZZ*, the Defendants were the Secretary of State for Defence and the Secretary of State for the Home Department. In *RA and AA*, the only Defendant was the Secretary of State for Foreign, Commonwealth and Development Affairs. However, the appellants accept that in each case the fault lay with the Ministry of Defence. It held primary responsibility for ARAP, and it was its delays that had led to the requests for extensions of time.

18. At the resumed hearing on 22 January 2024, the judge made orders that appear in an order sealed on 31 January 2024. He extended the time for the service of the further CLOSED material until 5 February 2024. He gave fresh directions in order to maintain the hearings at the end of February and he ordered the appellants to pay the costs of the applications for an extension of time made on 5 December 2023, 14 December 2023 and 15 January 2024 on the indemnity basis. There is no appeal from those orders.

19. The appeal concerns the judge's further order, which was in these terms in *RA and AA*:

> "**(d) general direction**
>
> 14. Any application to vary any direction made in any ARAP-related High Court case involving a closed material procedure, made by the Secretary of State for Defence or by another Secretary of State for the benefit of the Secretary of State for Defence shall be supported by a witness statement made by a civil servant of appropriate seniority. The statement shall (as a minimum)… explain (a) what has happened since the direction to be varied was made such that compliance with it is no longer possible; and (b) the reasons for the extension of time requested; and (c) the reasons why it is believed that the Secretary of State will be able to comply with the proposed amended direction."

An order to the same effect was made in *MZZ*, except that it was directed only to applications made by the Secretary of State for Defence.

20. During the course of the hearing, the judge observed that Ms Hamilton's affidavit said nothing about how the repeated failings that had occurred would be avoided in future. He noted that these were not isolated claims, but were part of a group of similar claims passing through the Administrative Court, and he expressed real concern at the likelihood that similar failings were occurring in other cases. He indicated his intention to give the general directions. He was urged by Ms McGahey KC not to do so. She stated that no one had knowingly misled the court, and she emphasised the administrative burden of swearing affidavits, particularly in CLOSED proceedings and the difficulties of ensuring that the right people, and only they, were informed of the obligations contained in such an order. The judge considered that it should be relatively simple to convey the order to those who needed to know about it.

21. At several points, Ms McGahey observed, somewhat faintly, that she did not know how the judge could make an order that affected other litigation, to which the judge replied that he could. He asked whether all the other litigation was before the court and was told that it was. The Special Advocate for the claimants supported the making of a general direction.

22. The judge gave a CLOSED ruling, of which this was the central passage:

> "The gist of the explanation in CLOSED is that within the Ministry of Defence there was a failure on the part of those who knew the true reasons why timetables needed to be varied to pass that information on to those colleagues within the Ministry of Defence who were responsible for the management of the litigation and responsible for giving instructions to the solicitors and counsel instructed in the case. This happened repeatedly, with the consequence that those who appeared in court, solicitors and counsel, had incorrect information, incorrect because it had been overtaken by events and, in consequence, they could do no more than give a misleading picture to the court.

What is apparent from the CLOSED witness statement is that the civil servants who were aware of the true state of affairs at each point in time did not appear to consider that providing the court with a full and candid explanation of those matters was itself a matter of a particular importance. As it was, when the application was made on 14 December to vary the directions I had given earlier that month, the Secretary of State gave a misleading explanation of the position to the Special Advocates when the application was made and provided the court with the same explanation. On that occasion, the court placed significant weight on the consent that the Special Advocates gave to the application and so it was itself in turn misled by the way in which the Secretary of State had presented the application.

The same lack of candour occurred when the 15 January application for an extension of time was made, and it is now apparent that the same lack of candour occurred again on Friday last week when counsel representing the Secretary of State at the hearing was again not given accurate information. She was put in a position where she misled the court. It was not her fault. It was entirely the fault of those who instruct her within the Ministry of Defence.

What the CLOSED witness statement presents is a picture of civil servants who were apparently entirely reckless as to whether the applications to the court presented a complete and accurate picture of the reasons why the applications were made. This is a failure of the most grievous order. It is simply shocking that it has happened serially on each of the three occasions I have mentioned in these two cases and beggars belief.

There is nothing in the CLOSED witness statement made for today by Ms Bryony Hamilton that gives me confidence that any steps have been taken to ensure that instructions given to lawyers which are then used for the purposes of applications to the court will in future be accurate. Given the number of claims before the court that arise out of applications made under the ARAP scheme which have been affected by the data breach that unfortunately occurred last year, that is an entirely unacceptable position. There is no reason why I should infer that the approach that was taken in these two cases on a series of occasions is not the same approach that has been taken in all these cases.

Obviously, it is not for me to dictate to the Secretary of State the arrangements that should be in place within its department to make sure that when applications are made to the court they are supported by information that is accurate and complete and that, in that regard, the Secretary of State when making such an application complies with his obligation of candour. How the Secretary of State goes about that and the arrangements he puts in place is entirely a matter for him.

> However, I do think that I should take steps to ensure that future applications to vary timetables set in these cases – and by "these cases" I mean the class of challenges to decisions made by ARAP applicants which have been affected by the data breach – I should take steps to ensure that applications in those cases are in future supported by explanations that are entirely candid. By that, I mean that they are complete and accurate. I propose to do two things towards that objective."

And the judge then went on to make the orders for costs and the general directions.

23. Following that hearing, the litigation was compromised and in each case the AFM was granted Leave Outside the Rules. Consent orders were filed and the hearings at the end of February were vacated.

24. In the meantime, on 13 February 2024 the appellants had issued Appellant's Notices in respect of the two general directions, and on 23 May 2024 permission to appeal was granted by Singh LJ on the basis that the appeals had a real prospect of success, and that they raised important issues of principle and practice, so that there was also a compelling reason for the appeals to be heard. The appeal hearing was deferred while the super-injunction remained in effect and because of the joint listing with the other appeal. However, the appellants did not at any stage apply for a stay of the general directions and we were told that they have continued to comply with them to the best of their abilities. As a very rough estimate, there is said to have been a CLOSED procedure in some 35 ARAP cases in the High Court, SIAC and the Court of Appeal, and we were told that the judge's order had led to the production of some 40 affidavits by the MoD alone.

The third order: 'In the matter of the Secretary of State for Defence'

25. This order was made on 25 October 2024 in the context of the development of a policy response to the data breach.

26. On 19 December 2023, Ministers agreed that access to apply for a new route to the UK should be offered to a targeted cohort of high profile individuals and their dependants who held existing and confirmed links to the UK Government but would not be likely to be eligible under ARAP. This group (cohort 1) was defined as being at highest risk by reference to a specified list of roles.

27. On 25 March 2024, Ministers agreed to offer access to further individuals at highest risk to apply for relocation to the UK. This group (cohort 2) was again defined by reference to a wider specified list of roles.

28. On 19 April 2024, the Divisional Court (Dingemans LJ, Johnson J and Chamberlain J) gave its CLOSED judgment in *R (CX1 and MP1) v Secretary of State for Defence* [2024] EWHC (Admin) 892 ('*CX1*'). The judgment was published in an OPEN version on 8 August 2025 after the lifting of the super-injunction. The court held that the scope of the policy adopted on 25 March 2024 in relation to individuals who were excluded from the policy, although they were at equivalent risk to those within cohorts 1 and 2, was unlawful. The Secretary of State for Defence was directed to reconsider the

approach taken to identifying those within the highest risk group and to inform the court of the outcome.

29. On 26 April 2024, the first version of the ARR policy statement was produced. It had been drafted before the order in *CX1* was made and it did not reflect that decision. It concerned what were described as non-complex cases, being those relating to individuals within cohorts 1 and 2, who could be identified by role.

30. On 14 June 2024, the Secretary of State for Defence wrote a letter to the court to say that individuals who held a different role which put them at equivalent risk to those in the identified roles would be included in the ARR policy statement. These were known as complex cases.

31. In July 2024, the revised approach in respect of complex cases was approved and applied in two CLOSED judgments of the Administrative Court. One of these was *R (QP1) v Secretary of State for Defence* [2024] EWHC 1905, a decision upheld by this court at [2025] EWCA Civ 825.

32. On 2 August 2024, an amended ARR policy statement was produced for non-complex cases only. There was as yet no formal policy statement in respect of complex cases, which still fell to be considered under the letter of 14 June 2024. The policies were for internal use, as they could not safely be published.

33. On 4 October 2024, the judge (who was by then no longer the Judge in Charge of the Administrative Court) held a CLOSED permission hearing in relation to two linked judicial review claims brought by HR, an unsuccessful ARAP applicant. The claims were dismissed for reasons unconnected to the terms of the ARR policy, but reference was made to the policy during the hearing. As part of his order disposing of HR's case, the judge ordered the Secretary of State for Defence to provide a note explaining what steps had been taken to amend the policy statement following the decision in *CX1*.

34. On 16 October 2024, a note drafted by leading counsel for the Secretary of State for Defence was provided to the judge. It explained that on 7 October 2024 the Home and Economic Affairs Committee had approved the approach to complex cases that had been set out in the letter of 14 June 2024. Formal written guidance was being drafted and was awaiting Ministerial approval. It was anticipated that a further version of the ARR policy statement would shortly be published internally.

35. The judge was not satisfied by this explanation. He listed a CLOSED hearing on the court's own initiative on 25 October 2024 under the title *'In the matter of the Secretary of State for Defence, Listed by the Court of its own motion'*. He required counsel for the Secretary of State for Defence and instructing officials to attend. He ordered that the hearing should be on notice to SASO, and it was attended by HR's Special Advocate.

36. During the hearing, the judge expressed concern that there was no mention of complex cases in the ARR policy statement of 2 August 2024 and that case workers may therefore mistakenly consider that this was the only document that needed to be considered, overlooking the letter to the court of 14 June 2024. In response to the Secretary of State's submissions, he noted:

> "This is a situation where, for reasons that… we all well know, all of this happens in conditions of secrecy and by order of the court has to happen in conditions of secrecy… There is no possibility of any public scrutiny of what goes on. There is no possibility of any claimant being able to raise an issue as to whether the policy is being properly applied. In those circumstances, the importance of making sure that internal documents do properly reflect orders of the court is particularly heightened… I am very concerned that by August, so that is four months after the judgment in *CXI*, this is the internal policy statement that is being circulated and you tell me now it is only going to be at some point in November that a further internal policy statement will be circulated that might actually refer to the obligation on the Secretary of State arising from the court's order in *CXI*."

37. The judge went on to say that he was "entirely unimpressed" by the extensive delay in amending the ARR policy in line with *CX1* and that something needed to be done "straightaway". He gave a judgment which concluded in this way:

> "In these circumstances, I consider it necessary for the court to make further orders. In ordinary circumstances the court relies on the parties to proceedings to bring to its attention any difficulties concerning compliance with court orders. The present situation is very different. There is, for the present at least, no possibility that the relevant part of the judgment of the Divisional Court in *CXI* will be made public. The events described in this judgment, give rise to real concern as to the Secretaries of State's compliance to date with the steps the 14 June 2024 letter to the court suggested had been taken to comply with the Divisional Court's judgment and order. The orders I will now make seek to address this concern and, in particular, will enable the Special Advocates to draw any matters of concern to the court's attention."

38. The judge then made the following orders under the title *'In the matter of the Secretary of State for Defence'* and using the case number, but not the parties' names, from the HR proceedings:

> "1) The Secretaries of State for Defence and the Home Department (the "Secretaries of State") will forthwith prepare a revised version of the ARR policy statement. In that version the following sentence shall be added at the end of para 30 of v2.1 "these cases (i.e. those concerning equivalent risk) shall be referred to the Secretary of State for Defence for further consideration".
>
> 2) The ARR policy so revised shall, forthwith, be used in substitution for the present version 2.1 of the ARR policy statement.

> 3) A copy of the ARR policy statement, as so revised shall, by 4pm on 31.10.24, be served on the Special Advocates' Support Office.
>
> 4) Until further order, in the event that the Secretaries of State, adopt any revised version of the ARR policy statement or any new policy concerning "affected persons" as defined in v2.1 of the ARR, the Secretaries of State shall no later than 48 hours before the policy comes into force, serve a copy of that policy on SASO, together with a document summarising the effect of the revised or new policy.
>
> 5) Copies of the revised ARR policy statement referred to at para 1 above and/or any new policy falling within scope of para 4 shall at the same time as they are served on SASO also be filed with the Court marked for the attention of the Judge in Charge of the Administrative Court."

This was therefore a mandatory order requiring the Ministers to update and operate policy in line with the decision in *CX1*, and to require that change and any future policy changes to be reported to SASO and the Judge in Charge. For some reason, the order was not signed by the judge or sealed by the Administrative Court until 13 January 2025.

39. Meantime, on 15 November 2024, the appellants filed Appellant's Notices. On 18 December 2024, permission to appeal was granted by Elisabeth Laing LJ. She required an Advocate to the Court to be appointed, and the role has been expertly performed by Ms Emma Sutton KC.

The appeals

The appeals in 'MZZ' and 'RA and AA'

40. The grounds of appeal are very similar (the words in italics appear in *RA and AA* only, reflecting the slightly different order in their cases):

> 1) The judge had no power to make an order that purported to impose an obligation on the Secretary of State for Defence in all proceedings of the specified type, including proceedings that were not before the court and proceedings that had not even yet commenced *and proceedings in which the Secretary of State for Defence was not a party*.
>
> 2) It was unjustifiably wide and onerous to require the Secretary of State for Defence *(or another Secretary of State on his behalf)* to provide a witness statement from a senior official to justify any application for an extension of time, even when the extension sought was for a matter of hours and/or was agreed between the parties and/or was required for procedural reasons arising without fault (or even involvement) of the Secretary of State for Defence.

41. The appellant Ministers accept that caseworkers at the MoD had become overwhelmed and that the court had been misled when applications for extensions had been sought. Nevertheless, they argue that the judge's powers extended only to making orders in the cases before him, and not to other cases or to cases that did not yet exist. Further, they contend that the orders were unjustifiably wide and onerous in cases where extensions would be limited and uncontroversial. As CLOSED orders, they also create difficulties of compliance. Many lawyers, officials and ministers are involved in litigation of this kind, and there is no way of ensuring that the orders will be drawn to the attention of all persons who are bound by them. It is further said that the effect of the order in *RA and AA* is uncertain, as it is difficult to define whether an application is being made by another minister "for the benefit of" the Secretary of State for Defence.

42. In *MZZ*, the claimant has now been granted entry clearance and the outcome of the appeal therefore does not directly affect him. It is argued on his behalf that the judge had the power to make the general direction. CPR 23.6 provides that an application notice must be verified by a statement of truth if the applicant wishes to rely on matters set out within it, and CPR 3.1(2)(p) empowers the court to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. Similarly, CPR 1.4 requires the court to actively manage 'cases' to further the overriding objective in CPR 1.1.

43. In addition to the powers under the CPR, reliance is placed on the court's inherent jurisdiction, and in particular *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401; [1964] 2 WLR 1145, where Lord Morris of Borth-y-Gest stated at 1301:

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers inherent within such jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its processes."

We interpose that *Connolly* concerned the propriety of a later trial for robbery of a man who had been acquitted on appeal of murder on the same occasion. Lord Morris explained that the court had the power to prevent an abuse of the process of the court *in that case*, but in fact the occasion did not arise, as his next words show:

> "The preferment in this case of the second indictment could not, however, in my view, be characterised as an abuse of the process of the court."

44. On behalf of *RA and AA*, a neutral position is taken in respect of the judge's powers. Attention is drawn to (1) *Raja v Van Hoogstraten (No 9); Tombstone v Raja and Another* [2008] EWCA Civ 1444; [2009] 1 WLR 1143, where this court held that the High Court has an inherent power to supplement the CPR but that the power cannot be used to cut across the scheme of the Rules and to make orders inconsistent with it; and (2) *Serious Fraud Office v Litigation Capital Ltd* [2020] EWHC 1280 (Comm), where Foxton J held *obiter* that the High Court had the power to make notification and barring orders affecting non-parties and future litigation in a case where the court was concerned with the distribution of assets that had been acquired by fraud.

45. It is further argued that the judge's order was not unduly wide. If a short or uncontroversial extension is being sought, all that would be required is a witness statement from an official of appropriate seniority: this need not be a very senior person. It was also open to the appellants to seek other directions in individual cases.

The appeal in 'In the matter of the Secretary of State for Defence'

46. There are fully eight grounds of appeal:

1) The learned judge, in requiring counsel for the Secretary of State for Defence (and instructing officials) and a Special Advocate to attend a hearing before the High Court, when there was no existing litigation before the High Court in which the hearing could be held, exceeded the jurisdiction of the High Court and so erred in law.

2) The learned judge, in ordering the Secretaries of State for Defence and for the Home Department:

   i. to prepare, forthwith, a revised version of the ARR policy statement;

   ii. to add to that revised version a sentence in the following terms:

   "These cases (i.e. those concerning equivalent risk) shall be referred to the Secretary of State for Defence for further consideration";

   iii. to use, forthwith, the policy amended in accordance with the Court's order in substitution for the existing policy

   erred in law, in that the learned judge exceeded the jurisdiction of the High Court by:

   i. purporting to exercise functions that are properly the functions of the Executive; and

   ii. making an order binding a person who was not before the Court at all.

3) In ordering the Secretaries of State for Defence and for the Home Department to add a requirement to the policy that equivalent risk cases "shall be referred to the Secretary of State for Defence" for further consideration, the learned judge erred in law in that he imposed a requirement that was meaningless and/or confusing, since the learned judge made clear that he did not mean that such references should be to the Secretary of State for Defence personally.

4) The learned judge, in ordering the Secretary of Defence to serve a copy of the revised policy on the Special Advocates' Support Office, erred in law in that:

   i. there was no existing litigation in which such an order could be made; and

   ii. the Special Advocates' Support Office exists only to support Special Advocates, who are themselves appointed to represent in CLOSED proceedings a party who is not entitled to attend such proceedings, and no such party existed.

5) The learned judge, in ordering that the Secretaries of State for Defence and the Home Department should, until further order, serve upon SASO:

   i. any revised ARR policy statement or any new ARR policy relating to "affected persons", and

   ii. a document summarising the effect of the revised or new policy, such service to take place no later than 48 hours before the policy came into force

   erred in law in that he:

   i. purported to exercise functions that are properly the functions of the Executive;

   ii. made an Order against a person who was not before the Court;

   iii. made an order requiring service of material on SASO, when there was no party whom a Special Advocate could represent, and therefore no role for SASO and so exceeded the jurisdiction of the High Court.

6) In ordering that a copy of the revised ARR policy statement and any new ARR policy, or any new policy concerning "affected persons", be filed with the Court, for the attention of the Judge in Charge of the Administrative Court, at the same time that any such policy was served on SASO, the learned judge erred in law in that he:

   i. purported to exercise functions that are properly those of the Executive;

   ii. failed to state the purpose for which the Judge in Charge of the Administrative Court was to be sent the policies;

iii. made an order outside any proceedings in which the proper interpretation by the Administrative Court of the policy or any revised policy was relevant and so exceeded the jurisdiction of the High Court.

7) In the alternative, the learned judge erred in law in that he made an order that was irrational.

8) The hearing was procedurally unfair. The SSD was given little to no opportunity to address the issues leading to the terms of the order imposed.

47. Our principal focus will be on four of these grounds.

48. Under Ground 2, the appellant submits that the judge strayed beyond his powers by literally dictating government policy.

49. Under Grounds 4 and 5, the appellant submits that Special Advocates are appointed to act in individual cases and that SASO exists to support them in doing so. Challenges to policy can properly be brought by a Special Advocate who has been appointed in an individual case. SASO itself has no institutional role in disclosing information to other Special Advocates. It could not supply a revised or new policy to them, as most Special Advocates would have no legitimate reason to have the policy, and to do so would in any event have been a breach of the super-injunction, or of the terms of appointment in individual cases.

50. Under Ground 8, it is said that the judge did not invite submissions on the individual orders that he was intending to make in relation to adding wording to the ARR policy or directing service on SASO and on the Judge in Charge.

51. As to the other grounds, Ms McGahey acknowledged that the judge could conceivably have extended the HR proceedings as a vehicle for any proper engagement with the issues that arose in that case, though she drew attention to the normal position, as described by Chamberlain J in *R (ECPAT UK) v Kent County Council and others* [2023] EWHC 2199 (Admin) at [11]:

> "The normal position in judicial review is that the court determines the issues before it and then decides what relief to give on one occasion, at which point it is *functus officio*."

Ground 3 (reference to the Secretary of State) is similarly a somewhat formal point. Ground 6 is no more than an extension of the complaint in Ground 2 about the limits of judicial competence in matters of policy. Ground 7 was described as a 'catch-all'.

52. The Advocate to the Court submits that the judge's decision was wrong overall, and that if Ground 2 is made out, a number of the other grounds follow. She proposes that:

1) Even though it did not go further than the decision in *CX1* required, the judge's order ostensibly blurred the boundary between the role of the executive and the role of the judiciary.

2) In any case, the judge was informed by leading counsel that the relevant members of the teams in the MoD and Home Office had been provided with the letter of 14 June 2024 and that they were applying the policy it contained. He was further informed that steps were being taken to update the internally published policy document at an early date. Although the MoD could reasonably be criticised for not amending the ARR policy more speedily, it is unclear why the judge thought it necessary to proceed in this way, in the absence of any evidence that problems were arising for claimants or caseworkers.

3) Grounds 4 and 5 are compelling to the extent that the judge treated SASO as a separate entity, rather than an organisation that exists to provide assistance to individual Special Advocates in individual cases. It is not a hub for information-sharing. As can be seen from the description of its structure and purpose in *Home Office v Tariq* [2011] UKSC 35; [2011] IRLR 843; [2012] 1 AC 452; [2012] 1 All ER 58 at [42-59], the opposite is the case.

4) To the extent that the judge did not give the appellant the opportunity to address the orders he was intending to make, the hearing was unfair.

Legal Principles

53. These appeals engage two fundamental legal principles. The first concerns the extent of judges' powers and the second concerns the constitutional position of the judiciary in relation to the executive.

54. As to the first issue, judges in our system, whatever their roles, decide the cases that are listed before them. That is true, even though there are circumstances in which the impact of a decision in an individual case will extend beyond the parties themselves. The outcome of judicial review proceedings may identify an unlawful administrative practice affecting other citizens. Orders made under the inherent jurisdiction of the High Court, for example imposing reporting restrictions, may bind the world at large. Group litigation orders provide for the case management of claims which give rise to common or related issues of fact or law (e.g. *Society of Lloyd's v Jaffray* [2002] EWCA Civ 1101; *Serious Fraud Office & Ors vs Litigation Capital Limited & Ors* [2021] EWHC 1272 (Comm)). Non-parties may be made subject to orders for disclosure or costs under the CPR, or to traveller injunctions against newcomers (*Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47; [2024] AC 983; [2024] 2 WLR 45; [2024] 2 All ER 431).

55. Then there is the wider operation of our common law system. To supplement the framework contained in statutes and statutory instruments, judges nominated by the Lady Chief Justice may make Practice Directions with the agreement of the Lord Chancellor. Decisions at High Court level and above may become legal precedents, binding or persuasive as the case may be. Judgments of the higher courts may contain guidance where that is appropriate. Senior leadership judges may issue formal Practice Guidance. General guidance in relation to particular courts, such as the Administrative Court Guide, prepared under the guidance of the Judge in Charge, or the Guides to the civil and criminal divisions of the Court of Appeal, are produced for the assistance of litigants. All of these initiatives create a web of instruction and guidance, arising from a perception that this would be of value.

56. It is clear to us, both as a matter of common understanding and from the language of CPR Part 1, that the duties and powers contained in the CPR relate to the management of individual cases. References to managing 'cases' justly, proportionately and actively (1.1(1) and 1.4(1)) and enforcing compliance with rules, practice directions and orders (1.1.(2)(g)) concern the application of general objectives to individual cases, and do not indicate any wider power. Likewise, the reference in 3.1.2(p) to the court's ability to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective" is firmly part of a scheme that governs the court's management of the case before it.

57. In all this, we make no attempt to be exhaustive, but rather seek to illustrate that there is no established procedure by which a judge presiding over one case can make an order that is intended to have direct effect in another case. However, as seen below, the court in the present cases undoubtedly had powers that might have been used to achieve a similar effect in the particular circumstances that existed.

58. Turning to the constitutional question, under our system of separation of powers, judges do not make policy. That is the responsibility of the executive, acting under powers conferred by Parliament. Where the court is called upon to identify whether a policy is lawful, it may do so, but it does not write policy itself because the task of formulating policy belongs to the executive and not to the court. Accordingly, making a quashing order (as occurred in *CX1*) crosses no constitutional boundary, but making a mandatory order in this context almost certainly does.

59. Furthermore, even where the court has an undoubted competence to make a mandatory order in an individual case, it is obliged to have regard to a range of considerations when considering the choice of remedy. These were identified by Lord Sales in *R (Imam) (Respondent) v London Borough of Croydon* [2023] UKSC 45; [2025] AC 335; [2023] 3 WLR 1178; [2024] 2 All ER 93, at [44]:

> " Different remedies have different degrees of impact on the capacity of a public authority to carry out its functions. A quashing order is the usual remedy in public law, which obliges the authority to re-take a decision in a lawful way. Such an order allows the authority to exercise its own judgment in re-taking a decision, having regard to all relevant interests affected thereby. **On the other hand, a mandatory order takes a matter out of the hands of the authority and, to that extent, makes the court the primary actor**. Accordingly, when deciding in the exercise of its discretion to grant a mandatory order to require the authority to do a particular thing, the court has to have regard to the way in which an order of that character might undermine to an unjustified degree the ability of the authority to fulfil functions conferred on it by Parliament and act in the public interest. **The proper separation of powers may be in issue as well as enforcement of the law.** The effect of this is that the ambit of the court's discretion whether to grant a mandatory order as opposed to a quashing order may be somewhat greater. If the court makes a quashing order or issues a declaration, but declines to grant a mandatory order,

> the matter remains in the hands of the public authority which may be best placed to take account of all interests with full relevant information about them. Having said that, the nature of a breach of a legal duty on the authority may be such as to call for the grant of mandatory relief in order to compel the authority to do what it has a clear legal duty to do."
>
> (Emphasis added)

Imam concerned an unlawful decision in a housing case, yet a mandatory order was not made. With even stronger reason, where a national policy has been found to be unlawful, the making of a mandatory order means that the court becomes 'the primary actor' and respect for the separation of powers is of particular importance.

60. We finally recall the observation of Lord Scarman in *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240; [1986] 2 WLR 1; [1986] 1 All ER 199, at 250:

> "Judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power."

Application to these appeals

61. It bears repeating that the situation created by the data breach and the super-injunction was wholly abnormal. The court played a crucial role in ensuring that justice could still be done to the group of individuals who were affected. As Judge in Charge of the Administrative Court, the judge was centrally concerned with this endeavour and we strongly endorse his commitment to upholding the overriding objective of dealing justly with these extremely sensitive cases. We are nevertheless clear that the orders in these cases, though made with the best of motives, went beyond the court's powers.

'MZZ' and 'RA and AA'

62. The appellants' first contention is jurisdictional. They submit that a judge, even a High Court Judge, does not have the power to make (a) an order in a case that is not being conducted by them, or (b) an order in a case that does not yet exist, or (c) an order that concerns the conduct of a non-party.

63. We do not find the authorities to which we have been referred to be of particular assistance. We have noted circumstances in which orders might be made against a non-party, and submissions about the extent of powers under the CPR. We find it more telling that no precedent has been shown for the making of orders intended to have direct effect in other cases, and especially in cases being conducted by other judges; similarly that (outside specific frameworks, such as group litigation orders) there are no instances of orders being made prospectively in relation to claims that had not yet been issued.

64. We appreciate of course that the judge was concerned with a defined cohort of cases which were being, or would be, managed either by him or by a small number of other

judges of the Administrative Court, of which he was the Judge in Charge. However, this was not group litigation in front of one judge. Although the judge was clearly aware that he was making a most unusual form of order, he did not attempt to identify the power that he was exercising. We have therefore had to seek justification and we have not found it in the respondents' arguments. Even in the abnormal circumstances that then prevailed, the imposition of a general direction went beyond the proper use of the court's case management powers. We allow the appeals on Ground 1.

65. Ground 2 argues that the order was too onerous. In the light of our conclusion about jurisdiction, this ground is inessential. However, in a hypothetical world where general directions of this kind could properly be made, we doubt whether the appeals would also have succeeded on this ground. The circumstances of the data breach and the court being misled were so troubling that the court would enjoy maximum latitude in managing cases, even if its orders might have some unintended consequences. The compliance issues raised by the appellants were significant, but not necessarily decisive, and it appears that the orders have in fact been broadly complied with.

66. Before leaving these two appeals, we would suggest an alternative way of resolving the issue that faced the judge. It was open to him to make a discrete order (separate from his other orders) that required affidavit evidence or witness statements in these cases and to give a CLOSED judgment stating that he would expect all the responsible Ministers to draw the court's attention to that discrete order whenever any of them sought an extension of time in any other ARAP data breach case. That would have been likely to ensure that, under the self-policing duty of candour, the court's concerns were carried over into other cases, and it would alert other judges and allow them to make whatever orders seemed appropriate on the facts of their cases.

67. As it is, we set aside the general direction given in these two appeals.

'In the matter of the Secretary of State for Defence'

68. It follows from what we have said in relation to the legal principles that this appeal is bound to succeed, centrally on Ground 2. It is true that the intention was only to reflect the effect of *CX1*, but a mandatory order requiring a minister to adopt a policy nevertheless transgressed a fundamental boundary between the role of the court and the role of the executive. We also consider the strictures addressed to the circulation of the order to SASO to be well-founded. Finally, the transcript of the hearing establishes that the Secretary of State had no advance notice of the orders that the judge was intending to make. Considering that the order was unusual, if not unprecedented, that rendered the process less than fair. The appeal therefore succeeds on Grounds 2, 4, 5 and 8. The order is now historic, but as a matter of principle we set it aside.

69. Again, we would observe that the judge's legitimate objective might have been achieved in a different way. Because of the super-injunction, the court was unable to give an OPEN judgment. But that did not prevent it from directing the appellant to draw its CLOSED judgment to the personal attention of the responsible Ministers as a means of communicating the strength of the court's concern about the delays in updating the ARR policy.

Outcome

70. Each appeal is allowed.
