





Afghan Litigation & Updates on Available Routes to Safety

31 October 2023



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Afghan Citizens Resettlement Scheme

‘ACRS’

Maria Moodie, Garden Court Chambers

31 October 2023



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Purpose and process

- Part of the government's safe and legal routes to the UK for those in need of protection under the New Plan for Immigration .
- Was first announced on 18 August 2021 – over 2 years ago.
- Intention to resettle more than 5,000 people in the first year and up to 20,000 over the coming years (*in addition to ARAP*).
- If eligible under ACRS – granted ILR and ability to apply for British citizenship after 5 years in the UK.
- Scheme intended for Afghans but other nationals (i.e., in mixed nationality families) will be eligible. A spouse or partner and dependent minor children of an eligible individual will be resettled under the scheme. Additional family members may be resettled in exceptional circumstances.
- There is no “application process” – difficult to access.
- Resettlement is subject to security checks and biometric enrolment and contingent on the individual securing suitable accommodation in the UK in advance of arrival.



Prioritisation

- *The scheme will prioritise:*
 - *those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights, freedom of speech, and rule of law*
 - *vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT+)*
- *The focus of the ACRS will be on those people who remain in Afghanistan or the region.*
- **Prioritisation and eligibility criteria is set out in 3 'Pathways'.**
 - **ACRS (Pathway 1 only) formally opened on 6 January 2022 – almost 2 years ago.**
 - **Pathways 2 and 3 commenced in June 2022.**



Pathway 1 ACRS

*“Under Pathway 1, vulnerable and at-risk individuals **who arrived in the UK under the evacuation programme have been the first to be settled under the ACRS. Eligible people who were notified by the UK government that they had been called forward with assurance of evacuation, but were not able to board flights, and do not hold leave in a country considered safe by the UK are also eligible under Pathway 1”.***

- Primarily intended for those who were *already* safely in the UK and had been evacuated during Operation Pitting.
- Or for those who were “called forward” during Op Pitting but couldn’t board a flight – new exclusionary condition related to already having leave in a safe third country.



Pathway 2 ACRS

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

- Available for Afghan refugees – i.e., those who have already managed to flee Afghanistan.
- Individuals cannot apply to be resettled and cannot register with UNHCR for resettlement.
- UNHCR’s resettlement submission categories apply (see, Chapter 3 Resettlement Handbook):
 - Legal and/or physical protection needs
 - Women and girls at risk
 - Children and adolescents at risk
 - Survivors of violence and/or torture
 - Medical needs
 - Restoring family unity
 - Lack of foreseeable alternative durable solutions
- In 2022 UNHCR made 100,903 resettlement submissions globally. There were 53,362 departures for resettlement.
- In 2022, the **UK resettled nearly 1,200 individuals under UNHCR resettlement schemes** (all nationalities)



Pathway 3 ACRS

*Originally ([at 27 of ARIP 13.9.21]): “Third, the government will work with international partners and NGOs in the region to implement **a referral process for those inside Afghanistan**, (where safe passage can be arranged,) and for those who have recently fled to countries in the region. **This element will seek to ensure we provide protection for members of Afghan civil society who supported the UK and international community effort in Afghanistan. This category may include human and women’s rights activists, prosecutors and others at risk.** We will need some time to work through the details of this process, which depends on the situation in Afghanistan.*

*From 6 January 2022: “Pathway 3 was designed to offer a route to resettlement for **those at risk who supported the UK and international community effort in Afghanistan**, as well as those who are **particularly vulnerable**, such as **women and girls at risk and members of minority groups**. **In the first stage** of this pathway, the government is considering eligible, at-risk people for resettlement from 3 groups: **British Council contractors, GardaWorld contractors and Chevening alumni**. We will consider for resettlement all eligible principals who submitted an expression of interest and their eligible family members, subject to security and other checks. This means we will exceed the **original allocation of 1,500 places** for this first stage of Pathway 3.”*

- Expression of Interest window 20 June – 15 August 2022. Now closed.
- No further updates on how Pathway 3 will operate and who will be eligible *after* the first year (i.e., from June 2023))- originally stated that “*Beyond the first year, the government will work with international partners and NGOs to welcome wider groups of Afghans at risk.*”- now termed “*In the first stage...*”



ACRS Statistics

According to HO operational data (as of 30 June 2023):

ILR has been granted to a total of 12,788 individuals across ARAP and ACRS, of which:

- total ARAP grants: 6,353
- total **ACRS Pathway 1 grants: 6,435**

Disaggregated as follows:

- ARAP: 11,474
- **ACRS Pathway 1: 9,676**
- **ACRS Pathway 2: 66**
- **ACRS Pathway 3: 41**
(total: 9,783)



R (GA) v SSHD, FCDA, SSD [2023] EWHC 871 (Admin) (19 April 2023)

GA – female Afghan with significant legal and political career committed to women’s rights. Has received written threat letters from Taliban. Remains in hiding in Afghanistan.

Falls squarely within the overarching prioritisation statement for those who are now at risk for having stood up for democracy, rule of law, women’s rights and freedom of speech, especially women, and those who remain in Afghanistan.

Pathway 3 was only route available (*still in Afghanistan so P2 N/A, wasn’t ‘called forward’ so P1 N/A*)

Challenge to Ds’ operation and implementation of ACRS:

- Unlawful / irrational for frustrating the purpose and intent of the policy regarding prioritisation, regional focus and time sensitivity related to risk.
- Breach of GA’s legitimate expectation of being able *to access and be considered for* eligibility and prioritisation under the ACRS within a reasonable timescale reflective of risk.
- Dismissing the claim, Mr Justice Bourne held that the framing of the parameters of ACRS did not depart from published policy, when reading ACRS as a whole the selection of the 3 groups for Pathway 3 was objectively justified and the policy statements did not meet the threshold to establish a legitimate expectation.



R (GA) continued...

GA's case classic example of ineffectiveness of Afghan-specific routes:

Has documentary evidence of active targeting, proof of career in women's rights / rule of law and democracy, compelling evidence from senior Afghan officials and British Ambassador re: contribution to HMG's objectives and body of objective evidence of contribution and risk.

- ACRS: Submitted Expression of Interest under Pathway 3 of ACRS – refused. Difficult to challenge.
- ARAP: Applied under ARAP – refused. On-going delay with reconsideration.
- LOTR: Submitted a Family Reunion VAF for consideration for LOTR following *S & AZ v SSHD* – facing on-going barriers related to deferral of biometric enrolment (currently subject to 3rd judicial review)



Chronology

- 18 August 2021 – Government first announced ACRS.
- 13 September 2021 – Government first published its “Afghanistan Resettlement and Immigration Policy Statement” (‘ARIP’).
- 6 January 2022 - ACRS formally opened (Pathway 1) and announced further details of Pathways 2 and 3.
- 13 and 20 June 2022 – Commencement of Pathways 2 and 3.
- 13 June 2022 – FCDO published guidance “Afghan citizens’ resettlement scheme Pathway 3: eligibility for British Council and GardaWorld contractors and Chevening Alumni”.
- 20 June 2022 – Expression of Interest portal for Pathway 3 opened.
- 15 August 2022 – Expression of Interest portal for Pathway 3 closed.
- 24 July 2023 – updated policy guidance on ACRS published.



Links to guidance and statistics

- HO published statistics on ACRS: <https://www.gov.uk/government/publications/afghan-resettlement-programme-operational-data/afghan-resettlement-programme-operational-data>
- HO Guidance on ACRS: <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme>
- HO ACRS Factsheet: <https://homeofficemedia.blog.gov.uk/2021/09/13/acrs-other-routes/>
- HO ARIP Policy: <https://www.gov.uk/government/publications/afghanistan-resettlement-and-immigration-policy-statement>
- FCDO ACRS guidance on Pathway 3 Eligibility: <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme-pathway-3-eligibility-for-british-council-and-gardaworld-contractors-and-chevening-alumni>
- UNHCR guidance on ACRS: <https://help.unhcr.org/uk/afghanistan/>



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Afghan Relocation Assistance Policy (ARAP): Policy, background, and purpose

Sonali Naik KC, Garden Court Chambers

31 October 2023



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Garden Court Chambers



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Background (1)

- The UK had been at war in Afghanistan for 20 years. The war followed a UN mandate, was delivered through a comprehensive approach under a NATO mission but required a combined military-civilian strategy.
- According to the Cost of War Project at Brown University, the number of people killed directly in the violence of the post-9/11 war in Afghanistan to date is estimated to be 176,000. Several times as many more have been killed as a reverberating effect of war. An estimated 3 million Afghan children are said to have died due to the indirect effects of the conflict: <https://watson.brown.edu/costsofwar/>
- Dedicated resettlement schemes are therefore plainly justified by the fact Afghans helped deliver the UK mission and in doing so put themselves and their families at risk of death or injury at a huge cost to the country as a whole and the Afghan people.



Background (2)

- Following the announcement of withdrawal of international troops in Afghanistan from 1 April 2021, the UK launched the Afghan Relocations and Assistance Policy ('ARAP'), following the former intimidation policy (in place from 2010 to 2013), and ex-gratia scheme (in place between 2013 and 30 November 2022).
- If eligible under ACRS – granted ILR and ability to apply for British citizenship after 5 years in the UK.



Operation Pitting (1)

When the Taliban regained power in Afghanistan in August 2021, the Gov evacuated British nationals and certain groups of Afghans and brought them to the UK, including some who were eligible under ARAP: Operation Pitting (13-28 August 2021).

During that operation, there was an identified need to assist others at risk and an additional cohort of Afghans have since been granted leave outside the immigration rules (“LOTR”).

In a letter from Home Secretary Priti Patel, the Foreign Secretary Dominic Raab, and Defence Secretary Ben Wallace on the Afghan Relocation and Assistance Policy (ARAP), speech delivered 3 August 2021:

- The “ARAP scheme is not time limited”.
- The Gov “will continue to use every lever at our disposal to secure the safe passage of those who wish to leave Afghanistan...”
- The Gov’s “efforts will turn to doing all we can to help any remaining British nationals and Afghans who have supported us and who we were not able to evacuate”.



Operation Pitting (2)

In August 2021, the then Prime Minister made it clear that the UK government had a duty to help “those to whom we have direct obligations, by evacuating UK nationals together with those Afghans who have assisted our efforts over the past twenty years”.



Application (1)

The 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.

- Those who believe they are eligible under the ARAP must apply using the online ARAP application form.
- The application can be made from any country.
- The ARAP form is not an immigration application.
- It is designed for an individual to seek confirmation from the Ministry of Defence that they meet the requirements to be eligible for assistance or relocation under the ARAP, as a principal applicant or a dependent family member of an eligible Afghan citizen



Application (2)

When an ARAP application is made by an Afghan citizen:

- Eligibility is initially considered by the Ministry of Defence, followed by a request for information about, and an eligibility decision on, their family members who are included in their application.
- From 11 April 2023 applicants have 42 days to respond to requests for information sent by the Ministry of Defence. Failure to respond will result in a rejection of an application.
- Where an Afghan citizen and their family members are eligible for relocation to the UK, an application is made to the Home Office on their behalf, under the [Immigration Rules: Appendix ARAP](#).
- An application under the ARAP will not be considered as an application for entry clearance, permission to stay or settlement on any other basis, including outside the Immigration Rules.



Family Members (1)

To be eligible for consideration for relocation under the ARAP, family members must be included in the principal applicant's original ARAP application for eligibility made to the Ministry of Defence.

- Individuals relocated to the UK under the ARAP do not have refugee status and therefore are not eligible to sponsor family members under the Refugee Family Reunion Rules.
- Where an eligible Afghan citizen or their partner relocate to the UK under the ARAP, family members who were not included in the ARAP application who wish to join them in the UK later cannot apply under the ARAP.
- They must instead make an application directly to the Home Office to join family in the UK. Further information on joining family in the UK can be found on GOV.UK: [Family visas: apply, extend or switch](#).
- For example, for example under Appendix FM to the Immigration Rules a partner, dependent children and adult dependent relatives to join, or stay with, a settled person in the UK.



Family Members (2)

To be eligible for consideration for relocation under the ARAP, family members must be included in the principal applicant's original ARAP application for eligibility made to the Ministry of Defence.

- Where a valid immigration application is made under Appendix FM, but the requirements of those rules are not met, consideration will be given to whether to grant entry clearance or permission to stay on the basis of exceptional circumstances under the Rules, or on the basis of compelling, compassionate grounds outside the Rules.
- Upon receipt of an Additional Family Members (AFM) application, the Ministry of Defence will make a request for information. Applicants have 14 days to respond to requests for information. Failure to respond to any request for information will likely result in a rejection of an application.



Review (1)

Applicants deemed ineligible may seek a review of the decision within 90 days, save where there are compelling circumstances which have prevented them from meeting this deadline.

Review may be sought where:

- They believe the decision was not made in accordance with the policy; and/or
- They supply new evidence to support your case that was not available when the decision was made.



Review (2)

A request for a review can be made using a [request a review form](#).

- Upon receipt of a review application, the Ministry of Defence will make a request for information.
- Applicants have 14 days to respond to requests for information.
- Failure to respond to this request for information within this timeframe will result in the application being assessed using only the information already held.

Eligible Principal applicants whose Additional Family Members (AFM) have been found not eligible for relocation can request a review of their ARAP AFM application using the [request a review form](#).



Pitfalls

Many consider that the Gov has either forgotten its partners, or it has been told to forget those who helped deliver the UK mission.

Key arising from ARAP applications include:

- Inconsistent treatment within and across different similarly placed groups.
- The Immigration Rules, Policy Guidance, and/or Statements of Process say different things at different times: which applies and when? (Check the rules and policy in force at the date of decision).
- The relationship between the ARAP requirements and LOTR.
- Delayed decision making and extreme prejudice to applicants and their families in Afghanistan under Taliban rule or in neighbouring countries at risk of repatriation.



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Afghan Relocation Assistance Policy (ARAP): Legal Issues and Case Law

Duran Seddon KC, Garden Court Chambers

31 October 2023



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Garden Court Chambers



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Category 4 of ARAP ('Special Cases')

Condition 1: “(a) [Directly employed by HMG] *or* (b) [provided goods or services under contract to HMG] *or* (c) worked in Afghanistan alongside a UK government department in partnership with or closely supporting and assisting that department”

Condition 2: “Substantive and positive contribution” towards HMG military or national security objectives with respect to Afghanistan

R (CXI & Others) v SSD & SSHD [2023] EWHC 284 (Admin) (journalists).

- ‘Working alongside’ does not mean working *for* HMG - the fact that the journalists worked for the BBC, which is independent of HMG, is not decisive: §§91-95
- Significant activities that are “closely aligned” with “democracy-building activities” may be sufficient: §86
- Significant contributions to the building of democratic, open and transparent systems (and informing Afghan population of e.g. corruption) may be sufficient (*CXI*, §87)



Category 4 of ARAP: Not a Pre-Condition

Not a pre-condition that there are specific links to an HMG department / need to consider conditions 1 and 2 together

LND1 v SSHD & SSD [2023] EWHC 1795 (Admin) (§§11, 19-22):

- C1 cannot be reduced to specific linkages between work and HMG department
- Need to consider Conditions 1 and 2 *together*
- The *substance* of the work and its quality and contribution to HMG's objectives are key



Decision in *R (S) v FCO, SSHD, SSD* [2022] 1402 (Admin)

- The issue: was the difference in treatment between the claimant Judges irrational (they had been refused under ARAP) as inconsistent with 13 comparator Judges who had been found eligible under ARAP?
- The claimants were unsuccessful: see at §§106-117
- The case went to the CA ([2022] EWCA Civ 1093) on LOTR / biometric issues (to be picked up in later presentations).
- Does this cut across *LND1* and *CX1* (above)?



Decision in *JZ v SSHD, FCO, SSD* [2023] EWCA Civ 178

- As with *R (S) v FCO, SSHD, SSD* [2022] 1402 (Admin) (above), it concerned a Judge
- Does this cut across *LND1* and *CX1* (above)?
- The Court of Appeal decision is not citable (see [2023] EWCA Civ at §38)
- But does the decision of Hill J below ([2022] EWHC 2156 (Admin)) clash with *LND1* and *CX1*?
- Alternative: facts of a case close to satisfying ARAP might still be relevant and central to an LOTR application: see the separate decision of the UT in *R (JZ) v SSHD* JR-2022-LON-001012, 12 June 2023, §98



Making Your Case

Did the applicant's work substantively and qualitatively advance the following HMG mission objectives:

- Bringing security and stability to Afghanistan by combatting the Taliban and constructing a capable self-sustaining Afghan government system [core military objective]
- Preventing Afghanistan becoming a base for international terrorists and stifling terror activity within Afghanistan [core national security objectives]
- Countering the narcotics trade
- Countering corruption
- Critical to the above are:
 - eliminating the Taliban – and its system of governance, justice and security
 - winning “hearts and minds” to state institutions and structures



Does Category 4 of ARAP Require Holistic of Condition 3 as well?

Condition 3. Applicant is or was: at elevated risk of targeted attacks; at high risk of death or serious injury.

- *LND1 v SSHD & SSD* [2023] EWHC 1795 (Admin) (§20): Conditions 1 and 2 are “clearly distinct” from C3 and C4
- *S & AZ* [2022] EWCA Civ 1092: “essential concern” of Category 4 criteria is “applicant’s degree of vulnerability”: §15
- See also *MKA* [2023] EWHC 1164 (Admin), §53



Reasons Required for ARAP Decisions

Is there a legal duty to give more than generic reasons (see *R (Help Refugees Ltd)* [2018] 4 WLR 168 at §122)?

- *R (CX1 & Others) v SSD & SSHD* [2023] EWHC 284 (Admin) at §§65-76: no reasons needed due to need for speed; translation; vast numbers of applications.
- *LND1 v SSHD & SSD* [2023] EWHC 1795 (Admin) (*obiter*) at §§29-30: as a matter of fairness, reasons, albeit they can be brief, should be provided so that the applicant can understand why the case put forward has not met the criteria.
- See also *R (MKA) v SSHD* [2023] EWHC 1164 (Admin) at §§52, 54.
- See also *ALO v SSHD* [2002] EWHC 2380 at §§33-36
- Requirements of fairness (as regards reasons) are shaped by context: *CX1* at §65, *LND1* at §29.



Reasons in National Security Cases

Where national security is at issue, the approach to reasons is different: *ALO v SSHD* [2022] EWHC 2380 (Admin); *FMA v SSHD* [2023] EWHC 1579 (Admin).

- The normal common law approach that the duty of fairness requires reasons yields to competing overriding public policy requirements which may include the need to keep reasons confidential (national security): *ALO* at §§39-41
- ARAP decisions on entry clearance relate to immigration and therefore do not engage article 6(1) ECHR (see *Maaouia v France* (2001) 33 EHRR 42) – thus there is no entitlement to the gist: *ALO* at §§13-20; *FMA* at §§33-41
- However, on a challenge by judicial review, the closed material procedure under part 2 of the Justice and Security Act 2013 may be instituted thus enabling disclosure at least to special advocates: *ALO* at §11; *FMA* at §20



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Challenges faced by Afghan legal professionals in the UK

Jemma Withers, Legal Afghan Working Group (LAW-G)

31 October 2023



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RE-ESTABLISHING THE LEGAL CAREERS OF AFGHAN
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Leave Outside the Rules (LOTR)

Emma Fitzsimons, Garden Court Chambers

31 October 2023



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Overview

- What is LOTR?
- Why and how is it relevant to the Afghan context?
- How can LOTR be used as a remedy for Afghans seeking to relocate to the UK post-Taliban takeover?



Leave outside the Rules

- The SSHD has a discretion to grant leave to enter or remain, outside of the Immigration Rules
- Source of the discretion - section 3 of the Immigration Act 1971, as confirmed in *R (Munir) v SSHD* [2012] UKSC 32, Lord Dyson at [44]:
 - “In my view, it is the 1971 Act itself which is the source of the Secretary of State’s power to grant leave to enter or remain outside the immigration rules. The Secretary of State is given a wide discretion under sections 3, 3A, 3B and 3C to control the grant and refusal of leave to enter or to remain: see paras 4 to 6 above. The language of these provisions, especially section 3(1)(b) and (c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules.”
- SSHD also has published caseworker guidance, ‘Leave Outside the Immigration Rules,’ current version is 3.0.



LOTR Policy (v 3.0, August 2023)

- **Individualised assessment:** “Not all LOTR is granted for the same reason and discretion is applied in different ways depending on the circumstances of the claim and the applicant’s circumstances.”
- **LOTR should rare:** “Discretion should be used sparingly where there are factors that warrant a grant of leave despite the requirements of the Immigration Rules or specific policies having not been met.”
- **Reasons to grant:** “Compelling compassionate factors are, broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, refugee convention or obligations. An example might be where an applicant or relevant family member has experienced personal tragedy and there is a specific event to take place or action to be taken in the UK as a result, but which does not in itself render refusal an ECHR breach. [...] Such factors may include – emergency or unexpected events - a crisis, disaster, accident that could not be anticipated.”
- **ARAP form cannot be used for the LOTR application:** “An ARAP form cannot be used to apply for LOTR” - see *S and AZ*, [2022] EWCA Civ 1092.



Relevance of LOTR in the evacuation of Kabul

- Evidence from HMG disclosed in the *S & AZ* [2022] EWHC 1402 litigation confirms:
 - LOTR was used to relocate certain Afghan individuals during the Operation Pitting evacuation of Kabul in August 2021, beyond the British citizen and ARAP cohorts
 - Officials would propose and Ministers agree cohorts eligible for evacuation, included Judges, Prosecutors, National Defence of Security Officers, Journalists and others.
 - Understood as clearly distinct from ARAP.
 - Described as ‘PITTING LOTR’.
 - Not by application – no process for applicants to put forward express representations.



‘Pitting LOTR’

- *S and AZ* [2022] EWHC 1402 per Lang J:
 - [11] – Three selection criteria applied by HMG during evacuation:
 - Contribution to HMG objectives in Afghanistan
 - Vulnerability due to proximity and high degree of exposure of working with HMG
 - Sensitivity of the individual’s role
 - Contribution + either Vulnerability or Sensitivity had to be met in each case
 - [124]-[126] – Lang J considered that:
 - No rational distinction between Judges evacuated under Pitting LOTR (Judges X, Y, A, B and C) and the Claimants, S and AZ
 - Lobbying and arbitrariness in the process, instead of application of fair and objective criteria – had S and AZ been known to HMG, they would have been eligible.
 - Pitting LOTR policy had now ended but not irrelevant - factors such as their role in promoting the rule of law, and the risks to their safety arising from their work as judges, will still be relevant in any assessment of their cases.



JZ [2023] UKAITUR JR2022LON001012

- Successful LOTR judicial review challenge in UT, to two LOTR refusal decisions made by SSHD.
- Decisions were result of a successful interim relief application before Lieven J requesting “an in principle” decision absent enrolment of biometrics at that time [2022] EWHC 771 (Admin).
- Importance of disclosure:
 - Learned that JZ had in fact been considered for evacuation at the time of August 2021 – was to be put forward for a panel; but it was never convened due to the events on the ground in Kabul.
 - Learned that other judges from the same court in which JZ had worked (Counter-terrorism Court in Kabul) were, in fact, granted ARAP and evacuated during Operation Pitting.
- Decision of UT Panel of UTJ McWilliam and Sheridan quashed the decisions.



UT judgment in *JZ* at [96]

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



UT judgment in *JZ* at [98]

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



UT judgment in *JZ* [99]

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

Strategy for cases

- Build the case on both Policy and Discretion from the outset – including reference to expert and supporting evidence.
- Disclosure requests – actively consider candour and other disclosure applications (Part 18 CPR)
- Relevant considerations for compassionate / compelling?
 - Mapping position under ARAP onto the Discretion
 - Contribution to UK/Allied Mission in Afghanistan
 - Vulnerability to risk now as a result of interaction with UK/other UK allies?
 - Sensitivity of role – working with UK/other UK allies?
 - Current circumstances – in hiding, at risk, humanitarian concerns?
 - Anticipate the Biometrics point – why do you need a LOTR decision now?
 - Dependent family members to the application – e.g. Women? Children? Elderly/Disabled Relatives?
 - Family members / avenues of support in the UK?



Thank you

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Enrolment of biometrics

David Sellwood, Garden Court Chambers

31 October 2023



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Introduction to biometrics (1 of 2)

- **Immigration (Biometric Registration) Regulations 2008:**
- Regulation 3A:

“Requirement to apply for a biometric immigration document

*(1) A person who is subject to immigration control and satisfies the conditions in paragraph (2) **must apply for the issue of a biometric immigration document.***

(2) The conditions are—

(a) that the person makes an application—

(i) for entry clearance, which, by virtue of provision made under section 3A(3) of the Immigration Act 1971, has effect as leave to enter the United Kingdom for a limited period which exceeds 6 months; or

(ii) for entry clearance, which, by virtue of provision made under section 3A(3) of the Immigration Act 1971, has effect as indefinite leave to enter the United Kingdom; or

(iii) as the dependant of a person who is making an application in accordance with paragraph (i) or (ii); and

(b) the person specifies in that application that they will enrol their biometric information outside the United Kingdom

*(3) Where a person is required to apply for a biometric immigration document, **that application must be made on the form or in the manner specified** for that purpose (if one is specified) in the immigration rules.”*



Introduction to Biometrics (2 of 2)

- Immigration (Biometric Registration) Regulations 2008:
- Regulation 5:

“Power for an authorised person to require a person to provide biometric information

*(1) Subject to regulation 7, where a person makes an application for the issue of a biometric immigration document in accordance with regulation 3 , or regulation 3A, an authorised person **may require him to provide a record of his fingerprints and a photograph of his face***

(2) Where an authorised person requires a person to provide biometric information in accordance with paragraph (1), the person must provide it.”

- See also Regulations 7 and 8.



Afghan context

- Biometric enrolment particularly challenging, to say the least...
- No VAC in Afghanistan since August 2021
- Particularly vulnerable cohort of individuals
- Options?



Case law on biometrics

- *R (SGW) v SSHD (Biometrics, family reunion policy)* [2022] UKUT 15 (IAC) (26 November 2021)
- *R (JZ) v SSFCDA & Anor* [2022] EWHC 771 (Admin)
- *R (MRS & FS) v ECO (Biometrics – entry clearance – Article 8)* [2023] UKUT 85 (IAC) (20 June 2022)
- *R (KA) v SSHD & Another* [2022] EWHC 2473 (Admin) (6 October 2022)
- *R (AB) v SSHD & Anor* [2023] EWHC 287 (10 February 2023)
- *R (S & AZ) v SSHD & Anor* [2022] EWHC 1402 (Admin) (9 June 2022)



Unsafe Journey policy (1 of 3)

- Home Office, ‘Unable to travel to a Visa Application Centre to enrol in biometrics (overseas applications) (version 1) (3 May 2023)
- Outlines the purpose of obtaining biometrics (at [6]), namely because they:
- *“...underpin the current UK immigration system to support identity assurance and suitability checks on foreign nationals who are subject to immigration control. They enable comprehensive checks to be made against immigration and criminality records to identify those who pose a threat to our national security, public safety, immigration controls or are likely to breach our laws if they are allowed to come to the UK”*
- Outlines preliminary steps that applicants need to take
- Outlines the four key criteria used when determining whether to pre-determine or excuse VAC attendance...



Unsafe Journey policy (2 of 3)

- Four key criteria:

*“(1) Individuals **must** satisfy a decision maker about their identity to a reasonable degree of certainty before coming to the UK.*

*(2) They **must** provide evidence they need to make an urgent journey to a VAC that would be particularly **unsafe** for them based on the current situation within the area they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics, and they cannot delay their journey until later or use alternative routes.*

*(3) They **must** demonstrate their **circumstances are so compelling as to make them exceptional**, which go beyond simply joining relatives who are living in the UK, for example, their UK based sponsor requires full-time care and there are no other viable alternatives to meet the sponsor’s or their young childrens needs.*

*(4) They **must** confirm they are able to travel to any VAC if they want their application to be **predetermined**, or where they are requesting decision makers to **excuse them from the requirement to attend a VAC** to enrol their biometrics, they need to explain why they cannot attend any VAC, but are able to travel to the UK.”*



Unsafe Journey policy (3 of 3)

- Potential problems with the policy...

Thank you

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GARDEN COURT CHAMBERS



Challenging Delay in Afghan Cases

Rebecca Chapman, Garden Court Chambers

31 October 2023



GARDEN COURT CHAMBERS



Garden Court Chambers



@gardencourtlaw

Systemic delay in Afghan cases

ARAP cases:

- delay in reaching a decision
- delay in deciding review

LOTR



Delay in reaching a decision on an ARAP application

On 15 May 2023, the Minister for the Armed Forces, James Heapey, stated the following in Parliament:

The Ministry of Defence continues to process ARAP applications at pace, thanks to the recruitment of more caseworkers and improved systems and processes. In the first four months of 2023 we issued more than 12,200 eligibility decisions. We aim to process all outstanding initial applications by August 2023.

If you have a client with an outstanding ARAP decision then consider JR of the delay, also seeking reasons for why the application remains outstanding.



Case example

In a case concerning an interpreter who had been employed alongside the British armed forces in Afghanistan, we challenged the 9 month delay in reaching a decision on his ARAP application and were granted permission by UTJ Sheridan on the basis that it was arguable that there had been an excessive and unreasonable delay given our client's circumstances in Afghanistan and the country evidence about the risk faced by Afghan nationals who had worked as interpreters for Western militaries [JR-2022-LON-001559].

The government responded (immediately) by refusing his ARAP application and the client is now awaiting the outcome of a review.



Judicial Review of ARAP refusal

The current process provides for a review of a negative ARAP decision. These decisions, made by the MoJ, are generally unparticularized, refuse in respect of each eligibility category rather than focus on the one(s) applicable and give no meaningful indication as to why the application has been refused.

However, in practice the review process is proving extremely slow and beset by further unacceptable delay. RLS are preparing a challenge whereby judicial review proceedings will be brought in respect of the negative ARAP decision arguing that the review is not an alternative remedy due to the excessive delays.



Risk of deportation from Pakistan

Pakistan's Interior Ministry announced on October 3, 2023 that all migrants living without legal status in Pakistan had 28 days to leave voluntarily or face deportation. So the deadline to leave is 31 October 2023 (today).

If you have clients who are among the 700,000 who fled to Pakistan following the Taliban takeover on 15 August 2021, unless they have a valid residence permit, which is unlikely due to UNHCR's limited ability to process and register refugees, they are and remain at risk of immediate deportation. This must justify expedition in a judicial review application.



Delay in facilitating entry

Current ongoing judicial review in respect of the policy change by the UK government in November 2022 refusing to relocate ARAP individuals to the UK unless suitable, non-hotel accommodation in the UK had been secured.

The government also stopped issuing visas to ARAP eligible persons where suitable accommodation had not been secured.

This was a “secret” policy as no announcement was made at the time: K ota ZR v SSHD AC-2023-LON-001992; K ota T v SS for Defence AC-2023-003064; K ota MN v SSHD AC-2023-LON 001989; K ota AZ v ECO AC-2023-LON-001995; K ota MC v SS for Defence AC-2023-LON- 003104; K ota X1 v SS for FCDA AC-2023-LON-003110; K ota YZ v SS for Defence AC-2023-LON-003114; K v CX v SS for FCDA AC-2023-LON-003178; K ota LC v SS for FCDA AC-2023-LON-003174; K ota SB v SS for FCDA AC-2023-LON-003179 (hearing on 27.10.23)



LOTR Applications

- An alternative route is for applicants to make a LOTR application on the form that most closely resembles their case, since there is no LOTR application form and the Courts have upheld the SSHD's position that an ARAP application does not constitute an application for LOTR.
- These applications are also subject to excessive delay.
- In a recent case the application made (for family reunion) was declared invalid after 240 days due to the failure by the applicants to register their biometrics, in circumstances where it had been made perfectly clear to the SSHD that they were unable to register their biometrics due to being in Afghanistan and that the "Unsafe Journeys" guidance applied yet the SSHD refused to defer or waive the requirement to register biometrics.
- A judicial review has now been lodged of this decision and the delay: JR-2023-LON-002255.





Afghan Pro Bono Initiative & APBI Project Services

Shamim Sarabi, Refugee Legal Support (RLS)

31 October 2023



GARDEN COURT CHAMBERS



Garden Court Chambers



@gardencourtlaw

Afghan Pro Bono Initiative

Hosted by **Refugee Legal Support**
and **Safe Passage International**

APBI Project Services

31 Oct, 2023

Afghan Pro Bono Initiative

Hosted by **Refugee Legal Support**
and **Safe Passage International**

- Launched on March 2022 as a collaborative effort between Refugee Legal Support, Safe Passage International, and 14 law firms
- Offers pro bono legal representation and information services to Afghans
- The APBI team consists of a project coordinator, two supervising lawyers and research and community leader

Services

- 1,300+ individuals received answers to their inquiries
- 100+ individuals, Legal Advice and Representation
- 500+ individuals, online and secure Information Session
- 40+ families, In-person Drop-in Advice Session for Afghans in the UK
- 100+ volunteered and donated their times

-
- Provides a step-by-step guide covering the full ARAP process
 - Designed to be used by anyone from a non-legal background to prepare and submit an ARAP application, review request or additional family member application
 - Is available in Dari, Pashto, and English.
 - APBI provides FAQs and other informative materials.



Afghan
Pro Bono
Initiative

Hosted by Refugee Legal Support
and Safe Passage International



Afghan Relocations and Assistance Policy (ARAP) Self-help Guide



- Highlights the challenges faced by Afghans seeking safe routes to the UK via resettlement schemes, and family reunion rules
- Based on casework, in-depth interviews, and focus group discussions
- Makes urgent recommendations for the UK government
- Fed into the Westminster Hall debate “Safe asylum routes for Afghan refugees” on 13 Oct.

Two Years of Empty Promises: The UK Leaves Afghans Stranded and At Risk

August 2023

A man and woman are walking across
the Jalalabad-Kabul highway in Dranto.
Photo Credit: ©Kayhan



Refugee
Legal
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