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Case No: AC-2023-LON-001336

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2024

Before

MR JUSTICE SWIFT

- -

Between

THE KING
on the application of

MA

Claimant

-and-

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

Defendants

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- -

Nicola Braganza KC, Maria Moodie (instructed by **Wilson Solicitors LLP**) for the **Claimant**
Edward Brown KC, Richard Evans (instructed by **GLD**) for the **Defendants**

Hearing, 16-17 January 2024

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Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. The Claimant challenges decisions made by the Secretary of State for Defence contained in letters dated 24 October 2022 and 30 January 2023 that he is not eligible for assistance under the Afghan Relocation and Assistance Policy ("the ARAP scheme"). The Claimant made his application under the scheme on 27 October 2021. Representations in support of his application were set out in a letter dated 16 November 2021, and various supporting documents were sent with that letter. The 24 October 2022 letter contained the Secretary of State's decision on the Claimant's application; the 30 January 2023 letter contained the decision in response to the Claimant's request (made on 4 November 2022), for a review of the October 2022 decision.

(1) The ARAP Scheme

2. Decisions made under the ARAP scheme have been the subject of a number of claims in this court and the provisions of the scheme are well-known. Both decisions on the Claimant's application were made on the basis of the terms of the ARAP scheme as in place in October 2022. At that time, the ARAP provisions were contained in the body of the Immigration Rules at Part 7, Paragraph 276BA1 – 276BS5. Assistance under the ARAP scheme was then (and is now), available to Afghan nationals, aged 18 or over who fall within any of a number of defined classes. One of these classes is described as "special cases". As at October 2022 the rules for the special cases class – the class relevant for the purposes of the Claimant's application – were at paragraph 276BB5 of the Immigration Rules.

> "276BB5. A person falls within this paragraph if the persons meets conditions 1 and 2 and one or both of conditions 3 and 4.
> For the purposes of this paragraph:
>
> (i) condition 1 is that at any time after 1 October 2001, the person:
>
> (a) was directly employed in Afghanistan by a UK government department; or
> (b) provided goods or services in Afghanistan under contract to a UK government department (whether as, or on behalf of, a party to the contract); or
> (c) worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department;
>
> (ii) condition 2 is that the person, in the course of that employment or work or in the provision of those services, made a substantive and positive contribution towards the achievement of:
>
> (a) the UK government's military objectives with respect to Afghanistan; or
> (b) the UK government's national security objectives with respect to Afghanistan (and for these purposes, the UK government's national security objectives include counter-terrorism, counter-narcotics and anti-corruption objectives).

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

(a) is or was at an elevated risk of targeted attacks; and
(b) is or was at high risk of death or serious injury;

(iv) condition 4 is that the person holds information the disclosure of which would give rise to or aggregate a specific threat to the UK government or its interests."

3. The decisions on the Claimant's application focused on Conditions 1 and 2. The conclusion reached was that by reference to those conditions the Claimant's application failed.

(2) The Claimant

4. The Claimant is a highly distinguished jurist and legal scholar. Prior to the establishment of the Taliban-led First Islamic Emirate of Afghanistan, he was a judge of the Afghan Supreme Court. On the establishment of the Emirate in 1996, the Claimant left Afghanistan. He had been targeted by the Taliban and was on their list of wanted persons; he left Afghanistan with his family to ensure their safety. He returned to Afghanistan in 2001 after the United States-led invasion. He was re-appointed a judge of the Afghan Supreme Court, sitting in that court until 2002. For six months in 2002 he also acted as the Head of the Public Security and Dangerous Drugs Court. That court investigated and heard criminal cases many of which concerned members of the Taliban. From 2002, the Claimant had leading roles, first in drafting the new Afghan constitution, and then in devising a new penal code for Afghanistan.

5. Following the ousting of the Taliban government there was a sustained effort by the United Kingdom and many other states and international organisations to reconstitute and re-establish the Afghan state. The first part of this programme (2001-2006) started with the "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions", also known as the Bonn Agreement, which was reached under arrangements convened by the United Nations. The second part of the programme was initiated by the "Afghan Compact" an agreement made at the London Conference on Afghanistan and signed in February 2006 by 66 States and 15 International Organisations. The United Kingdom was a signatory to the Compact and one of the co-chairs of the Conference. Reform of the justice system was one of the objectives specified in the Afghan Compact. The Claimant's work between 2001 and 2021 made a substantial contribution to realising objectives set, respectively, by these international agreements.

6. The Bonn Agreement mandated a process to devise a new Afghan constitution. In 2001 the Claimant was appointed to be a member of the Constitutional Drafting Commission. In 2002 he was a member of the Constitutional *Loya Jirga*, the body responsible for approving the adoption of the new constitution. In 2004 he was a member of the

Constitutional Review Commission which had responsibility for reviewing the final version of the new constitution. The constitution was adopted later in 2004.

7. From 2006 to 2021 the Claimant was Head of Legal Reform at the Afghan Ministry of Justice. Reform of the legal system was an objective specified in the Afghan Compact. In his role as Head of Legal Reform, the Claimant served as the Head of the Criminal Law Reform Working Group ("the CLRWG"), the group responsible for redrafting the Afghan penal code. The new penal code came into effect in 2018.

8. Further, from 2016, the Claimant acted as legal advisor to the Anti-Corruption Monitoring and Evaluation Committee ("the MEC"). The MEC was also a product of the objectives set by the Afghan Compact. That agreement had identified the rooting out of corruption as a key part of establishing good governance and the rule of law in Afghanistan. The MEC was a joint Afghan-international committee, comprising three anti-corruption experts appointed on the recommendation of the Afghan government and three appointed on the recommendation of the states who had signed the Compact. The MEC was part-funded by the United Kingdom. The MEC's terms of reference required it to monitor and evaluate and report on the effectiveness of the anti-corruption measures in Afghanistan. The MEC reported both to the Afghan government and the states who had signed the Compact.

9. The Claimant's application under the ARAP scheme relied on the work he had done in these three areas. He also relied on other matters. Of those matters the one that seems to me to be material is that between February 2018 and October 2019 the Claimant was involved in providing training on the provisions on the new penal code to Afghan prosecutors and judges. This training was provided as part of the "Security and Justice Programme in Afghanistan", a project funded by the then the Foreign and Commonwealth Office (now, the Foreign Commonwealth and Development Office – "the FCDO"). The Claimant was not contracted to work on the project directly by the FCDO; he was a sub-contractor engaged by the organisation the FCDO had contracted with to provide the programme of work. The information provided by the Claimant in support of his ARAP application showed that he had both helped devise the training on the provisions of the new penal code and been one of those who had provided the training. It is obvious given the Claimant's role in devising the new penal code, that his involvement and presence would make a significant contribution to the standing and authority of the training programme.

(3) The ARAP decisions

10. The Secretary of State's October 2022 decision to refuse the Claimant's ARAP application rested on an assessment made by civil servants in the FCDO. The assessment document is dated 20 July 2022 and it is common ground that this document evidences the reasons that lay behind the secretary of State's decision. The assessment document is in two parts. The first part was completed by an unnamed "Team Leader". The material parts of the reasons are as follows:

> "Condition 1a is not satisfied – the applicant was not directly employed by a UK government department;

> Condition 1b may be satisfied in respect of the services provided by the applicant in support of the Security and Justice Programme Afghanistan, the applicant has provided evidence that he provided services to a UK government department under contract;
>
> Condition 1c does not appear to be satisfied as it is not apparent that the applicant worked alongside, in partnership with, or closely supported a UK government department (other than is set out in condition 1b above). The evidence provided respect to the roles highlighted above at points a, b, d, e, f, g, and h does not satisfy the condition. Whilst the roles set out in those points were undoubtedly important in the establishment of the rule of law in Afghanistan, something which the UK no doubt supported, they do not provide evidence of working alongside, in partnership or closely supported a HMG department. For example, the MEC was an independent body supported financially by a number of international donors.
>
> …
>
> Condition 2b does not appear to be satisfied as it is not apparent that the applicant made a substantive and positive contribution to the UK's national security objectives (inc. counter-terrorism, counter narcotics and anti-corruption). While the applicant's overall contribution was undoubtedly in line with the UK's overall objectives in Afghanistan, I am not able to come to the view that the role which satisfies the criteria at 1b (delivering training through a contractor is part of the SJPA) made a substantive and positive contribution towards the achievement of UK's national security objectives.
>
> As the applicant has not satisfied condition 2 I have not considered conditions 3 or 4."

The references there to points "a, b, d, e, f, g, and h" were references to the various matters the Claimant relied on in support of his ARAP application, including the work he had undertaken in connection with the new Afghan constitution and the new penal code, his work as chairman of the CLRWG, his work for the MEC, and his previous role as a judge of the Supreme Court. The Team Leader's assessment was then considered by a "panel" but it appears members of that panel were unable to agree whether to allow or refuse the Claimant's ARAP application. The matter was then referred to a "more senior panel of [senior civil service] officers". That panel's reasons for refusing the Claimant's application were as follows.

> "The SCS panel carefully considered the evidence provided by [the Claimant] and his representatives. The panel acknowledged the role [the Claimant] had played in seeking to establish the rule of law in Afghanistan, noting that promoting and protection the

> rule of law in Afghanistan was a priority for many countries, including UK and [Afghan government itself]
>
> The panel considered those areas of work [the Claimant] highlighted in his witness statement as entitling him to eligibility under ARAP, and applied the relevant conditions under Category 4 of ARAP. The panel concluded that they agreed with the assessment made by the potential sponsoring unit (Afghanistan Resettlement Department …). They noted that the applicant's work with the Security and Justice Programme Afghanistan … may have satisfied condition 1b. However, they were not able to conclude work as a subcontractor … could be considered for satisfying condition 2b as they did not consider that work made a material and substantive contribution to the UK's national security objectives. Given the panel's conclusion that [the Claimant] did not satisfy condition 2 it was not relevant to consider conditions 3 or 4. The panel further noted that other relevant potential sponsoring units had also been presented with the application and had declined to sponsor.
>
> **The panel therefore concluded that [the Claimant] was not eligible for ARAP, and his application should be refused**."

11. The Claimant applied for a review of that decision. The review decision, which confirmed the decision to refuse the Claimant's ARAP application, is in a letter dated 30 January 2023.

> "A senior reconsideration panel met on 16 December 2022 to re-consider your application. The panel carefully considered the application and all the supporting information provided. The reason given for review was that the original decision to refuse the ARAP application was not made in accordance with policy. The panel applied the Immigration Rules as they applied at the time of the original decision. The panel concluded you did not satisfy CAT 4 Condition 1(a) as you were not directly employed by a UK government department. They noted that your work with the Security and Justice Programme Afghanistan, which was funded by the FCDO … satisfied CAT 4 Condition 1(b). However, they were not able to conclude that your work as a sub-contractor … satisfied Condition 2 as the work did not make a material or substantive and positive contribution to the UK's national security objectives, including counter-terrorism, counter-narcotics and anti-corruption. As Condition 2 was not met, the remaining Conditions were not assessed. The panel therefore concluded that you are not eligible for ARAP, and the original ARAP decision should be upheld".

The reconsideration panel also comprised civil servants from the FCDO. The note recording their reasons has been disclosed and again, it is accepted that the reasons in that note are the reasons why the Secretary of State refused the Claimant's ARAP application. The material part is as follows.

> "The panel considered those areas of work [the Claimant] highlighted in his witness statement as entitling him to eligibility under ARAP, and applied the relevant conditions under Category 4 of ARAP. They considered that [the Claimant] had made a significant contribution to Afghan society through his work on the 2004 constitution and the 2017 penal code. However, such a contribution is insufficient to establish eligibility for ARAP which requires a close association with HMG per se rather than delivery of a shared agenda. The panel was confident that [the Claimant] did not satisfy Condition 1 a as [he] was not directly employed by a UK government department. They concluded that the applicant's position as a sub-contractor on the Security and Justice Programme Afghanistan, which was an FCO programme … satisfied Condition 1b. However, they were not able to conclude that this work as a sub-contractor … satisfied Condition 2b, as they did not consider that this work made a substantive and positive contribution to the UK's national security objectives, including counter-terrorism, counter-narcotics and anti-corruption. The evidence provided shows that [the Claimant] attended training sessions as a mentor trainer for 11 days between February 2018 – September 2018. We do not consider this to be sufficient evidence to demonstrate that [the Claimant] made a material and substantive contribution to the UK's national security objectives. Condition 2 requires as a substantive and positive contribution to the UK's national security objectives must be made "in the course of" the work identified in Condition 1b. Therefore, [the Claimant's] other work in Afghanistan, beyond the specific Security and Justice Programme (such as his work for the Afghan Government, drafting the Constitution and the Penal Code, literary contributions) was not carried out as an HMG employee, contractor or partner, and therefore was not relevant to the ARAP decision.
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> Given the panel's conclusion that [the Claimant] did not satisfy condition 2 conditions 3 and 4 were not considered.
>
> **The panel therefore concluded that [the Claimant] was not eligible for ARAP, and his original ARAP decision should be upheld**."

B. Decision

12. It is self-evident that the application of the conditions in the ARAP scheme that are in issue in this case requires an exercise of judgement by the decision-maker. The role of the court when a decision is challenged must be informed by the nature of the conditions that the decision-maker has applied. In all instances, the court's function is only to consider the legality of the decision by reference to the well-established public law principles. The court is not the primary decision-maker. The way in which the court will go about its task must be informed by the substance of the criteria applied to take the decision. The ARAP criteria in play in this case provide good working examples. Criteria such as conditions 1a and 1b (whether the applicant worked under a contract of employment, or provided goods or services pursuant to a contract, respectively) call on the decision-maker to decide whether contractual arrangements existed. But because these conditions have been formulated by reference to well-established legal concepts (the contract of employment, the contract for the provision of goods or services) a court can and will properly permit decision-makers little room for latitude when it comes to deciding whether such arrangements exist. Decisions on criteria such as these require a decision-maker to determine matters of law – i.e., the existence of a contract and its terms. On a claim for judicial review those are matters the court can determine for itself. In so doing the court does not overstep its mark, rather it precisely meets the requirements of its judicial review function.

13. The position will be different for criteria such as conditions 1c and 2b which are not formulated by reference to any discrete legal concept. The application of criteria of this sort is a decision that a court must review giving appropriate weight to the decision-maker's view both on the overall conclusion on whether the condition is met, and on matters such as whether or not relevant matters were considered and irrelevant ones disregarded, and so on. That is the position in this case. The Claimant's grounds of challenge rely on well-established public law principles. Taken together the grounds contend that the decision to refuse his ARAP application rests on an incorrect understanding of the meaning and effect of condition 1c; and that conclusions reached on the application of condition 2b left relevant evidence out of the account and /or were conclusions not reasonably available to the decision-maker given the evidence available in support of the application.

14. For the reasons that follow I am satisfied that the Claimant's grounds of challenge are well-founded, that this claim for judicial review should succeed, and that on a proper application of the ARAP conditions in paragraph 276BB5 of the Immigration Rules the Defendant was required to conclude that the Claimant did meet the requirements of condition 1 and condition 2.

(1) The application of Condition 2b: provision of training on the new penal code to judges and prosecutors.

15. The Secretary of State accepted that the Claimant met condition 1b (providing services under a contract) through his involvement as a trainer for the Justice and Security Programme, a project funded by FCDO, but went on to conclude that that work did not make the "substantive and positive" contribution to the achievement of "the national security objectives" necessary to meet the requirement in condition 2b. The relevant national security objectives in this case are the anti-corruption objective and the

counter-terrorism objective. I am satisfied that the conclusion in the review decision on the substantive and positive contribution requirement rested on an obvious misunderstanding of the evidence provided by the Claimant in support of his application.

16. Notwithstanding the Secretary of State's submission to the contrary, the only plausible reading of the reasons in support of the review decision is that the panel's conclusion on condition 2b rested on the premise that the Claimant had provided training for only 11 days in the period between February and September 2018. The sentence that starts "the evidence provided shows …" refers only to that work. The sentence that follows states that "this" – i.e. the 11 days' work – comprised insufficient evidence of a "material and substantive contribution". Yet if the evidence provided in support of the application is considered in the round, the position is quite different. The Claimant's witness statement explains that he provided training to judges and prosecutors regularly over the period between February 2018 and October 2019, and that each session lasted a whole day. He explained he had only some, not all, of the timesheets provided for that work. It is possible that this is the source of the panel's "11 days" conclusion.

17. Further, the panel's reasoning on this point shows no appreciation at all of matters that evidence the importance of the training and of the Claimant's involvement in it. As to the penal code itself, the evidence I have seen, all public source information that ought to have been readily available to the senior civil servants who comprised the panel (if the same matters were not already obvious to them), is that the new penal code was a cornerstone of the anti-corruption objective. For example, a report of May 2018 by the United Nations Assistance Mission in Afghanistan ("UNAMA", established in March 2002, the United Nations body tasked with the provision of assistance in Afghanistan) describes the coming into force of the new penal code in February 2018 as a "key development" in the "anti-corruption reform agenda". The report went on to say the following.

> "The most notable achievement with respect to the prosecution of corruption offences is the adoption of a new Penal Code, a milestone in the country's criminal justice reform. It codifies all mandatory corruption offences in line with the United Nations Convention against Corruption (UNACAC). The institutional framework and legal basis of anti-corruption bodies should be codified in a comprehensive anti-corruption law and also clarifies how these bodies work together. The law, should, in particular, remedy remaining problems in the current asset declaration system, in particular strengthening a verification mechanism for asset declarations. Key anti-corruption institutions are currently based on executive decrees rather than on laws.
>
> …
>
> The codification of all mandatory UNCAC crimes in the new Penal Code will also facilitate the prosecution and trial of corruption cases."

Thus, the new penal code was important to one of the United Kingdom's stated national security objectives.

18. Moreover, the Claimant had played a key role in the formulation of the penal code because of his leading role on the CLRWG. That made his involvement in the training all the more significant. This was the point made in witness statements provided in support of the Claimant's ARAP application made by Anne-Marie Critchley and David Owen who had both worked with the Claimant to devise and deliver the training sessions. Ms Critchley refers to the Claimant's "prestige" as being key to the successful delivery of the training to the judges and prosecutors. The evidence provided in support of the ARAP application was not (and is not) disputed by the Secretary of State.

19. Considering the evidence on this issue in the round, I am satisfied the conclusion reached by the Secretary of State that the Claimant's involvement in the training did not "comprise a substantive and positive contribution" to the achievement of the United Kingdom's anti-corruption objectives in Afghanistan, was not a conclusion reasonably open to him. Even accounting for the latitude that must be allowed to the Secretary of State on an issue of this type, the conclusion reached is one that is demonstrably wrong: the evidence provided in support of this part of the application is obviously to the contrary effect.

20. Neither set of notes that support the two decisions made by the Secretary of State contains anything that places this part of the Claimant's application in a different light. Each set of notes, in its own way, goes no further than to assert that the "substantive and positive contribution" requirement was not met. Neither set of notes explains any qualitative evaluation of the evidence the Claimant provided and, as I have said already, the note that supports the review decision focuses on the "11 day" point to the exclusion of everything else. The mis-match between the evidence provided in support of the application and the conclusion reached is stark; the conclusion reached was *Wednesbury* unreasonable.

(2) Condition 1c

21. The Claimant's application relied on his leading role in drafting both the new Afghan constitution and the new penal code, and his work as legal advisor to the MEC. It is apparent that the Secretary of State's assessment of this work recognised the significant contribution that this work had made towards the achievement of the United Kingdom's objectives in Afghanistan. The notes that support each decision suggest that this contribution met the requirements of condition 2. That is hardly surprising. This work was integral to the objectives specified in condition 2, and the Claimant's leading role could only be characterised as having made "a substantive and positive contribution". However, this was not sufficient to make good the Claimant's application under the ARAP scheme because of the Secretary of State's further conclusion that the circumstances under which this work had been done did not meet the requirements of condition 1c.

22. Condition 1c requires that the work comprising the required contribution must be the consequence of the applicant having "worked in Afghanistan alongside a UK government department, in partnership with or closely supporting and assisting that department". The submission for the Claimant on this matter is that the conclusion reached by the Secretary of State either rests on a misunderstanding and therefore misapplication of the condition or, having regard to the evidence relied on in support of the ARAP application, is *Wednesbury* unreasonable, or both.

23. As to the meaning and effect of condition 1c, in my judgment in *R(LND1) v Secretary of State for the Home Department* [2023] EWHC 1795 (Admin). I stated as follows.

> "11. As to what is the proper approach to and meaning of the provision, context is important. The context is provided by the two preceding paragraphs in the Condition, each of which rests on some form of established contractual connection between the applicant and the United Kingdom government department. Set against those provisions, the notion of "working alongside" is intended to capture a further category of applicant whose connection with a United Kingdom government department is measured by some form of qualitative yardstick. That being so, considering the rubric in its totality seems better likely to capture all members of the intended category than an approach that rests on breaking it down into one or more constituent parts."

(The reference to "the rubric in its totality" is a reference to words "in partnership with or closely supporting and assisting" the UK government department.)

> "20. … An applicant must satisfy Conditions 1 and 2 and either Condition 3 or Condition 4. There is a clear distinction between Conditions 1 and 2 on the one hand, and on the other hand, Conditions 3 and 4. Put generally, the latter concern risk arising by reason of the work the applicant has undertaken, either risk to himself or risk to United Kingdom interests. Conditions 1 and 2 must be considered together, in particular when the applicant was not in either of the first two categories within Condition 1, i.e., was not employed and did not work under contract, but was (or claims to have been) in the third, partnership, close support and assistance, category. Conditions 1 and 2 are, obviously, interdependent. Condition 2 is the more important because it identifies the substantive activity that the applicant must have undertaken to meet the eligibility requirement. By contrast, Condition 1 operates as a filter by requiring that activity to have been performed either in consequence of a contractual obligation (the first and second categories) or in consequence of some other sufficiently close connection (the third category). Since the third category is not defined by reference to an objective criterion, I do not think it possible to apply it without, as part of a single exercise, also considering the nature and extent of the applicant's contribution

> to the relevant military or national security objectives. Put shortly, the position of such an applicant must be considered in the round; whether an applicant has "worked … alongside a UK government department" cannot be reduced simply to whether he worked somewhere while it received specific support from a UK government department (with the consequence in this instance that the First Claimant's work as a judge at the Kabul Terrorism Court between 2008 and 2012 did not count, whereas doing the same work at the same court after 2015 would have counted), or whether his name can be remembered by one or more United Kingdom civil servants who worked in Afghanistan, or whether he received some form of payment from a United Kingdom government department. An approach that focusses only on matters that are in some respects peripheral, risks missing the wood for the trees. In this case the decision-maker ought also to have taken account of the substance of the work the First Claimant undertook, the nature of the institutions in which he worked, the nature of the connection between those institutions and the relevant United Kingdom government departments, and the contribution made by the work of those institutions to the United Kingdom's military and national security objectives in Afghanistan during the period the First Claimant worked in them."

24. The application of condition 1c to the matters relied on by the Claimant in support of his application in the present case did not rest on a correct approach, so described. The point I made in the judgment in *LND1* was that the proper approach to condition 1c of the ARAP policy requires consideration of all circumstances in which the work relied on came to be and was undertaken. Conditions 1a and b lend themselves to a step by step approach. When applying either condition 1a or 1b the first matter is whether the ARAP applicant performed work under a contract made with a UK government department. If the answer to this is yes, the work that is relevant can be identified by reference to the terms of the contract and the evaluation required by condition 2 is applied to that work. Condition 1c is different; the same approach does not work when the ARAP application relies on condition 1c. Whether work was performed in the circumstances specified in condition 1c will almost always be informed by the nature of the work itself. The matters relevant to the qualitative assessment required by condition 2 will also likely indicate whether the requirement in condition 1c is met. The proper approach to condition 1c is, to this extent, holistic.

25. In *LND1* the decision challenged rested on a mechanistic approach to condition 1c, an approach which had focused almost entirely on whether the work relied on by the applicant had been supported by funding provided by a UK government department, or whether the applicant had been known to UK civil servants working in a relevant government department. My conclusion was that that approach was in error: see the judgment at paragraph 20 and in particular the passage at the end of that paragraph.

26. The error in the application of condition 1c in this case is similar in that the context in which the work relied on in support of the application was either not considered (this was the case so far as concerns the Claimant's involvement in drafting the constitution

and the penal code) or, to the extent it was considered, was wrongly disregarded (in the case of the Claimant's work with the MEC). This makes good the Claimant's submission that there was a misapplication of condition 1c. The meaning and effect of that condition were not properly understood. Further, and notwithstanding that the application of condition 1c is an exercise of evaluation for the Secretary of State, once relevant circumstances are brought into consideration the only possible outcome is that this part of the Claimant's application meets the requirements in condition 1c. To this extent, even accounting for the leeway to be afforded the Secretary of State to evaluate the matter for himself, the conclusions reached were *Wednesbury* unreasonable.

27. The material parts of the notes in support of the October 2022 decision reads as follows.

> "Whilst the roles … were undoubtedly important in the establishment of the rule of law in Afghanistan, something which the UK no doubt supported, they do not provide evidence of working alongside, in partnership or closely supporting an HMG department. For example, the MEC is an independent body that was supported financially by a number of international donors."

The notes supporting the January 2023 review decision reveal similar reasoning. They state that the work undertaken drafting the Afghan constitution and the Afghan penal code and the work advising the MEC, were evidence only of delivery "of a shared agenda" and not of "a close association with HMG per se".

(3) Application of condition 1c: the Claimant's work on the penal code.

28. The most striking example of the errors in this case is the treatment of the Claimant's work as chairman of the Criminal Law Reform Working Group which led to the drafting and adoption of a new penal code. The CLRWG was an Afghan-led body but was supported by two United Nations organisations, UNAMA and UNODC (the United Nations Office for Drugs and Crime). The support provided by the United Nations reflected the importance attached at the London Conference that had preceded the Afghan Compact to law reform and, in particular, law reform directed to combating corruption. HM Government provided funding to both UNAMA and UNODC.

29. The work drafting the penal code took place between 2013 and 2017. The penal code was adopted in 2017 and came into effect on 14 February 2018. The CLRWG's work was undertaken through three sub-committees. The Claimant was chairman of each sub-committee. The evidence I have seen has focussed on the work of sub-committee 1. Sub-committee 1 worked on what was referred to as the "general part of the code". Both the CLRWG and the sub-committees included "international members", representatives from UN organisations present in Afghanistan and from the UN member states primarily involved in Afghanistan. Sub-committee 1 included United Kingdom civil servants from the (then) Foreign and Commonwealth Office and the Department for International Development. Those civil servants were not simply observers; they played a full role in the sub-committee's work. During 2017, sub-committee 1 took on the work of reviewing the draft anti-corruption law. This was a part of the penal code and pursued one of the central objectives set out in the Afghan Compact.

30. Taking these matters in the round I can see no reasonable basis for a conclusion that the circumstances under which this work was done did not meet the requirements of condition 1c. Three points may be made. *First*, the reform of the penal code including the adoption of effective anti-corruption laws fell within the United Kingdom's strategic objectives in Afghanistan. *Second*, HM Government provided financial support for the CLRWG's work. In the course of his submissions, leading counsel for the Secretary of State confirmed that for the purposes of the ARAP conditions it was immaterial that the funding was provided indirectly, via UNAMA and UNODC rather than directly by a government department to the CLRWG. *Third*, when the Claimant worked as chairman of sub-committee 1 he worked alongside United Kingdom civil servants over an extended period of time. Drawing these matters together, the conclusion in the notes supporting the October 2022 decision that there was no evidence of "working alongside, in partnership or closely supporting a HMG department" is a conclusion unsupported by evidence, or alternatively one that must rest on a misapplication of condition 1c. Similarly, the conclusion in the notes supporting the January 2023 decision that there was no close association merely "delivery of a shared agenda" is equally flawed.

(4) Application of condition 1c: the Claimant's work for the MEC

31. The Claimant's work with the MEC should also have been treated as meeting the requirements in condition 1c. The nature of the MEC and its work is summarised above at paragraph 7. In a press release issued on 20 May 2011 the then Foreign and Commonwealth Office referred to the MEC as follows.

> "The launch of this committee marks a major milestone in the effort to tackle corruption in Afghanistan.
>
> The MEC was a significant commitment made by the Government at the Kabul and London Conferences last year, and its inauguration demonstrates the commitment of the Afghan Government and international community to work together on tackling corruption.
>
> At the inauguration ceremony in Kabul last week, Michael Keating of the United Nations Assistance Mission in Afghanistan (UNAMA) told the audience: "the MEC itself is significant. Its presence represents collective efforts to fight corruption, and it's a powerful sign of the Government's and President's determination. The UN is pleased to have such a truly exceptional group of people on the MEC, bringing experience to bear from three continents."
>
> The Committee is made up of three Afghan and three international experts, and is chaired by Mohammad Yasin Osmani, former head of Afghanistan's High Office of Oversight. UK aid is helping to fund the work of the committee."

32. The notes in support of the October 2022 decision dismissed the Claimant's application so far as it rested his work for the MEC on the basis that the MEC was "an independent body that was supported financially by a number of international donors". Although I

accept that each of these matters (independence and sources of funding) was capable of being a relevant consideration, it is notable that in other cases neither has been considered to be determinative.

33. So far as concerns the independent body point, in the judgments in *R(S and AZ) v Secretary of State for the Home Department* [2022] EWHC 1402 (Admin) and *R (JZ) v Secretary of State for the Home Department* [2022] EWHC 2056 (Admin) Lang J and Hill J, respectively, referred to an ARAP application made by "Judge W", a judge at the Anti-Terrorism Court in Kabul (see per Lang J at paragraphs 101 and 108, and per Hill J at paragraphs 40 and 41). Judge W was not a claimant in either case, rather the claimants in those cases relied on the fact that Judge W's ARAP application had been successful and contended their applications should also have succeed. What is material for present purposes is that Judge W's ARAP application, which rested on his work as a judge at the Anti-Terrorism Court, did succeed, apparently because it met a criterion materially similar to condition 1c. The fact that that court was self-evidently independent of any UK government department was not any obstacle to meeting the condition 1c requirement. Essentially the same point was apparent in *LND1's* case. The claimant in that case had been a judge at the same court. His ARAP application had not failed because the independence of the court took the application out-with condition 1c; his application failed because he had not been a judge of that court during the period when HM government provided financial assistance to it (see the evidence referred to at paragraph 15 of the judgment in *LND1*).

34. The point on sources of financial support is similar. It is apparent from the judgment in *LND1* that when that application was decided (in the period October to December 2022) the presence or absence of UK government funding was a decisive consideration. One reason why LND1's ARAP application failed was that his work had not been supported by UK government funding. In the present case the Claimant's work for the MEC was held to fail to meet the requirement in condition 1c because the MEC received funding from HM Government and also from other international donors. There is no explanation why the existence of other donors is significant for the purposes of condition 1c. I can see no rational reason why it should be. There is nothing in the language of condition 1c capable of being understood as meaning that the required association could only exist when HM government was the sole provider of financial support. In the context of the MEC it is obvious that the fact that other states also provided financial assistance only served to underline the importance of its anti-corruption work. Turning to the notes in support of the January 2023 decision, the conclusion that the Claimant's work for the MEC was merely an example of "delivery of a shared agenda" rather than of "close association" is at odds with the fact that HM Government was one of the funders of the MEC.

35. Drawing these matters together, the decision that the Claimant's work for MEC fell outside condition 1c also rests either on a misunderstanding of the meaning of the condition, or on an application of it that is entirely at odds with the evidence available (and therefore *Wednesbury* unreasonable), or both.

(5) Application of condition 1c: the Claimant's work as a member of the Constitutional Review Commission.

36. The final part of the evidence the Claimant relied on in support of his ARAP application, referred to above at paragraph 6, concerned his work as a member of the Constitutional Review Commission. Had this work stood on its own I consider it would have been open to the Secretary of State to conclude it did not meet the requirement in condition 1c. Notwithstanding that the initiative for the new constitution came from the Bonn Agreement, there is little evidence of HM Government support for the work of the Constitutional Review Commission. To this extent, and considering this part of the Claimant's application in isolation, the Secretary of State would be entitled to characterise this work as work in pursuit of a shared agenda. However, the success of the Claimant's application for judicial review of the Secretary of State's decision that concerns the application of condition 1c does not depend on this point.

C. Conclusion and disposal

37. For the reasons above, the Claimant's claim for judicial review of the Secretary of State's decision to refuse his ARAP application succeeds. So far as concerns the Claimant's involvement in providing training to judges and prosecutors on the new penal code, the Secretary of State's application of condition 2 was legally flawed: see above at paragraphs 15 – 20. The same conclusion applies to the Secretary of State's conclusion on the application of condition 1c to the Claimant's work as chairman of the CLRWG and as legal advisor to the MEC: see above at paragraphs 28 – 30, and paragraphs 31 – 35, respectively.

38. Notwithstanding that the application of each of conditions 1c and 2 requires evaluation on the part of the Secretary of State, I am satisfied on the facts of this case, that the appropriate course is to quash the Secretary of State's decision that the Claimant's application did not meet the requirements of conditions 1 and 2 and substitute a conclusion that those conditions are met. Having regard to the evidence available to the Secretary of State for his decision on the Claimant's ARAP application the only conclusions lawfully available were: (a) that the Claimant's work providing training through the Security and Justice Programme in Afghanistan did meet the requirement in condition 2; and (b) that the Claimant's work on the penal code as chairman of the CLRWG and as legal advisor to the MEC met both condition 1c and condition 2. In the premises, I remit the Claimant's ARAP application to the Secretary of State for consideration by him of whether either condition 3 or condition 4 is met.