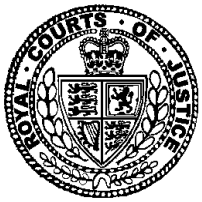

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 1 April 2022

Neutral Citation Number: [2022] EWHC 771 (Admin)

Case No: CO/4090/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2022

Before :

MRS JUSTICE LIEVEN

- -

Between :

The QUEEN
(on the application of JZ)

Claimant

and

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

(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) THE SECRETARY OF STATE FOR DEFENCE

Defendants

and

(1) Q1, (2) Q2, (3) Q3, (4) Q4, (5) Q5, (6) Q6, (7) Q7

Interested Parties

- -
- -

Ms Sonali Naik QC, Ms Irena Sabic and Ms Emma Fitzsimons (instructed by **Wilson Solicitors LLP**) for the **Claimant**
Ms Lisa Giovannetti QC, Mr Mark Vinall and Ms Hafsah Mahsood (instructed by **Government Legal Department**) for the **Defendants**

Hearing dates: **24 March 2022**

- -

Approved Judgment

Mrs Justice Lieven DBE :

1. This case concerns Judge Z ('JZ'), an Afghan judge presently in hiding in Kabul, and his family who are also still in Afghanistan. There are two issues before me, whether to allow JZ to amend his claim, which is effectively the consideration of whether permission for judicial review should be granted, and an application for interim relief.

2. JZ served between July 2008 and May 2011 as judge on the Public Security Bench at the Justice Centre at Bagram Air Force Base and Pol-e-Charki prison in Kabul. He subsequently served in other judicial roles. The fact of his judicial role is not disputed by the Defendant, and there is before the court a letter of appointment, his judicial photographic ID cards and a letter from US Colonel Thomas English referring to the role JZ, amongst others, played in maintaining the US mission in Afghanistan. This material is relevant because it does, to a considerable degree, fix who JZ is, both in appearance and background history.

3. JZ says, and again this is not disputed, that he tried a number of cases of Taliban insurgents, including imposing lengthy prison sentences. There is evidence that well before 2021 JZ had received threats and had been provided with security by US forces.

4. Days before the fall of Kabul, JZ began efforts to try to leave Afghanistan with his family, assisted by his brother, "SQ", a British citizen living in the UK. SQ, through his work as a security professional, made contact with various people connected with Operation Pitting, the UK operation seeking to evacuate UK nationals and non-nationals from Afghanistan at the time of the Taliban's entry into Kabul in late August 2021. In his evidence, SQ anonymises the names of the people he was in contact with and has said that he does not have their consent to share personal identifiable information. I note that these people all appear likely to be UK citizens living in the UK who were involved in Operation Pitting. I will return to this matter below.

5. SQ in his evidence refers to the following communications which he, and then JZ, had with these contacts between 25-30 August 2021.

6. On 14 August JZ applied under the Afghan Relocations and Assistance Policy ('ARAP') scheme for relocation to the UK. SQ made contact with a colleague in Operation Pitting on 23 August who said he had "pinged" some other colleagues about JZ. SQ provided details of JZ and his family via WhatsApp, including dates of birth and passport numbers.

7. SQ's witness statement dated 23 March 2022 states:

> *"16. Between 00:49 and 00:51 on 26 August 2021 PM messaged via WhatsApp "can you confirm ASAP where your brother and family are" "an exception has been made thus far for them. Cannot influence final step", "they need to get to Abbey Gate past TB checkpoint ASAP", please revert ASAP"*
>
> *17. At 00:51 on 26 August 2021 PM also tried calling me, but I was unable to take the call as I fell asleep on my chair waiting for his call.*

> *18. When I did not answer, PM called my brother at 03:23 Kabul time informing him that he, alongside his wife, 6 children and brother,* [*name redacted] must go to Abbey Gate, Kabul Airport.*
>
> *19. At 1:10 on 26 August my nephew messaged me via WhatsApp. "we got call from the UK, he tells me that we come to abigate [Abbey Gate] door of the airport I also asked him that where is the gate located he tells that he don't knows"."*

8. There is a WhatsApp message in the following terms:

> *"Re Urgent; SQ's family need urgent evacuation*
>
> *Ok*
>
> *Please advise the family to make their way to the British embassy compound in Kabul – there is transport from there to the airport.*
>
> *The Taliban are blocking access by Afghan nationals to the airport so don't try that*
>
> *UK operations will wind down on Friday COP to allow safe withdrawal of UK forces prior to final US withdrawl*
>
> *They are on the list of approved persons according to the Foreign Office*
>
> *Good luck and god speed"* [SQ anonymised]

The name at the foot of this message is cut off, but for somebody with a list of people concerned in Operation Pitting it would not be difficult to decipher. The Defendant says this letter is not in a format generally used and that she cannot investigate it without being told the name of the author. Ms Sabic says that if permission is granted then the Claimant, and in particular SQ can consider further whether the name can be revealed. In my view, at the very least this message needs further investigation by the Defendant.

9. The material disclosed, so far, by the Defendant seems to support an analysis that JZ was very close to being called forward for evacuation. However, the evacuation process rapidly ceased, and the Defendant says the relevant Panel was not convened *"because of the deteriorating security situation".*

10. The Claimant and his family did not succeed in leaving Afghanistan. They are currently in hiding, separately, in Afghanistan. JZ says he is being actively sought by the Taliban, with the Taliban having come to the family home to try to find him and having tried to abduct his 16 year old son in September 2021. SQ currently has no direct contact with him because of the risk of the Taliban identifying his location through mobile phone communications. SQ evidence is that he has been told that in the first week of March the Taliban had again searched JZ's house.

11. On 9 September 2021 the Claimant's legal representatives wrote to the Government Legal Department ('GLD') on behalf of a group of Afghan judges and lawyers with an urgent request that they be granted visas. After some correspondence between the

parties, on 20 October 2021 the Defendant refused the Claimant's application under ARAP. The most relevant parts of the decision letter are as follows:

> *"In addition to the above, I have applied my own knowledge developed through heading the Counter Terrorism Team at the British Embassy in Kabul (BE Kabul) since January 2021 to its closure in August 2021, I consulted with my team who worked with me there and who on my behalf undertook enquiries with Afghan judges relocated to the UK under Operation PITTING. These confirm that [JZ] was a judge, who most recently sat in the Traffic Courts in Kabul.*
>
> *My knowledge of the application of military and civilian law in justice operations at Bagram Air Base is limited. I note that in June 2010, the Justice Centre in Parwan became an Afghan controlled and operated court that benefitted from mentoring and training by coalition forces. Prior to June 2010 (during the applicant's employment) cases were prosecuted under the US Law of Armed Conflict and it was a US military establishment."*

The decision further states that the following test was applied:

> *"individuals who (1) had worked in a role that made a material contribution to HMG's mission in Afghanistan, and (2) without whose work the UK's operations would have been adversely affected, and (3) who were now at risk because of their work given the changing situation in Afghanistan."*

The decision maker refused to sponsor the Claimant's application for the following reasons:

> *"2. On the evidence provided to me, I have concluded that the applicant was indeed a judge within Afghanistan and sat as a judge at the Justice Centre in Parwan (referred to in the evidence bundle as Bagram Air Force Base) and at Pol-e-Charki prison. I note the threats the applicant claims are against him. I am personally aware of threats made against other members of the Afghan Justice System that considered issues of Afghanistan's national security.*
>
> *3. I note that the US Marshals Service provided support and training whilst [JZ] worked at the Justice Centre in Parwan demonstrating the high threat he faced in 2008-11. [JZ's] own statement (para 15, page 11 of the evidence bundle) references that some of those he convicted would have been released by now. In addition, I am aware that many other prisoners have now been released either as a consequence of the US Taliban peace deal (referred to in the statement) or the thousands of detainees let out of prison by the Taliban following the collapse of the Afghan Government.*
>
> *4. The translated threat document (pages 25 to 27 of the evidence bundle) does make reference to [JZ] having "imprisoned many of our members/personnel", whilst this might well be a consequence of his time*

at the Justice Centre in Parwan, there is no mention of his involvement with international forces or foreign governments.

5. In light of these considerations, whilst I accept that [JZ] is at risk, I am not satisfied that the threat to [JZ] is heightened as a consequence of engagement with the United Kingdom. My decision not to sponsor this application are further based on the following factors:

6. I have no evidence to lead me to believe that [JZ] was an employee of Her Majesty's Government, nor does it refer to work alongside or in cooperation with HMG units. The Justice Centre in Parwan was not a UK or HMG led intervention and from June 2010 was indeed an Afghan institution – albeit one that benefitted from extensive donor support.

7. Based on the evidence reviewed, it does not appear to me that [JZ] made a material contribution to HMG's mission in Afghanistan. The UK's capacity building effort around justice and the rule of law over the last nine years was focussed in Kabul – that was also the focus of HMG's counter terrorism mission in Afghanistan. As [JZ] does not claim to have worked in the anti-terrorism courts within Kabul he did not make a material contribution to HMG's mission there. Based on my limited knowledge of military operations in Afghanistan and the limited detail about [JZ's] involvement with HMG provided in the evidence bundle, I cannot come to an alternative view.

8. In view of the above, it is not apparent that the UK's operations would have been adversely affected without [JZ's] work. As stated in paragraph 7, the UK's counter-terrorism mission was focussed in Kabul. As [JZ] did not work there, his contribution to the UK's counter terrorism mission was minimal. Mr English's letter of support highlights [JZ's] role in hearing cases to determine if detainees should continue to be detained under Afghan law and how this facilitated the exit of ISAF. However, from my position in determining whether the FCDO Counter-Terrorism team within the Afghanistan Task Force should sponsor [JZ] the case does not provide clear evidence on how [JZ's] work supported UK counter-terrorism operations."

12. The covering letter to this decision included the following:

"ii. The Claimant's case was "included on a list of "remaining unprocessed, high profile cases" sent by a military liaison officer in the Crisis Unit to FCDO staff in the Crisis Unit early in the morning of 26 August 2021, indicating that your client had not been approved for evacuation at that time. Our clients have no record of your client having been "called forward" or otherwise approved for evacuation. His name does not appear on the list of those called forward. We note the information you have provided about (a) emails on 25 August 2021; (b) a telephone call at 03:23 AFT on 26 August 2021; and (c) WhatsApp messages on 26 August 2021. The refusal, in your letter of 8 October 2021, to provide details of the senders of the messages has made it impossible

> *for our clients to investigate this aspect of the case as fully as they would have wished."*

13. There was then further correspondence in which the Defendant refused to reconsider her decision and the Claim was issued on 30 November 2021. On 9 December Lane J refused permission on the papers. On 15 December Kerr J, at an oral renewal hearing, granted permission on the papers on Ground 2 (relating to Leave to Remain Outside the Rules ('LOTR')), but refused permission on Ground 1 (ARAP). Lewis LJ refused renewal on Ground 1 in the Court of Appeal on 1 March 2022.

14. JZ has obtained a visa for him and the family to enter Pakistan through the services of an agent. The visa is a "Family Visa", but SQ says that they have no family in Pakistan. The Defendant suggests that the visa must indicate that there is family in Pakistan.

15. The Defendant indicated on 4 February 2022 that she is prepared to treat the Claimant "as if he had made an online claim for entry clearance and a biometric immigration document indicating an intention to enrol biometrics outside the UK".

16. On 16 February 2022 the Claimant's solicitors made representations for the waiver/deferral of biometrics and eligibility under LOTR on the grounds of compelling, compassionate circumstances. They also served evidence from Colonel English and SQ

17. The current problem for the Claimant is that there is no biometric facility in Afghanistan, so he and the family would have to travel to Pakistan to enrol their biometric data. JZ has said that to do this would entail the family taking a very significant risk in crossing Afghanistan and crossing the border into Pakistan. There is the further risk that if his LOTR application is refused then he may be returned by the Pakistani authorities to Afghanistan, and thus into the hands of the Taliban. He is unwilling to entail this risk unless he knows that the Defendant has in principle accepted his application and thus granted entry clearance, subject to the provision of acceptable biometric information.

18. The Claimant asked for deferral or waiver of the biometric information until the Defendant had substantively considered the application for LOTR, and that he would then only travel to Pakistan if his application had in principle been successful.

19. On 4 March 2022 GLD, on behalf of the Defendant, refused this request in the following terms:

> *"4. Biometric data is normally provided at the same time that an entry clearance application is made, subject to any exemptions or exceptions to this requirement. This is because any biometric data results form an integral and mandatory part of any consideration on any entry clearance applications, whether being considered within Part 9 of the Rules or outside the Immigration Rules. It enables the Secretary of State to confirm and fix the applicant's identity and undertake background suitability checks to assess whether the applicant poses a threat to public safety. No circumstances have been put forward now as to why [JZ] and his family should be exempted or excused under the standard exemptions or exceptions, such as physical incapacity or children aged under 5 years,*

> *from some or all of the normal biometric data provision, facial image and ten fingerprints, for entry clearance applications.*
>
> *5. It is therefore necessary to consider whether it is appropriate to make an exception to the usual requirements in [JZ's] particular case. I note that [JZ] and his family have all held valid Pakistani family visit visas since October 2021, which they can use to legally enter Pakistan. This means that they are able to cross the border to access a visa application centre (VAC). Your representations refer to the fact that biometrics cannot be enrolled in Afghanistan at present. In itself, the absence of a VAC in Afghanistan is not considered to be a circumstance so exceptional for [JZ] and his family as to result in the deferral or waiver of the requirement to enrol biometric data. Even prior to the change of government in Afghanistan, there were no UK visa application centres in Afghanistan; Afghan nationals provided biometric data for entry clearance applications at any of the VACs in Pakistan. There have not been direct air links between the UK and Afghanistan for some years, and any air links between Afghanistan and other neighbouring countries have always remained limited. In this respect there has not been any change to the UK entry clearance application process for Afghan nationals. Furthermore, [JZ] and his family are able to travel legally to Pakistan."*

20. This decision is the subject of Grounds Three, Four and Five.

21. Ground One alleges that there is material inconsistency between the decisions in respect of the Claimant of 20 October and 24 November, and those concerning other judges whose circumstances are not materially different. There are a number of other cases where permission has been granted by judges of the Administrative Court on the same ground. The Claimant says that most, if not all, of those cases have weaker facts than JZ because they applied after Operation Pitting ended. In the circumstances of the other grants of permission for judicial review, the Defendant does not resist the grant of permission on Ground One.

22. Ground Two is that the Defendant should have treated or determined that the Claimant was a "call forward" case in the light of the evidence that has been produced. The Claimant relies on the communications set out above to argue that he was in fact called forward. He relies on the fact that the Defendant's position has changed during the course of these proceedings. Originally the Defendant did not accept that the Claimant had made an online ARAP application on 14 August 2021 because they could not confirm receipt. However, on 4 February 2022 GLD said that *"in light of further investigation my clients now accept that it is very likely that the Claimant did submit an online ARAP application".* The Claimant argues that this casts doubt on the reliability of the Defendant's records during what was undoubtedly a chaotic period.

23. On my analysis, Ground Two is a material error of fact argument based on ***E v Secretary of State for the Home Department*** [2004] QB 1044. Any such fact must be an existing, objective fact. Ms Giovannetti argues that the fact or otherwise of JZ being called forward is not established. However, in my view there is sufficient evidence, in particular the WhatsApp message referred to above, to establish an arguable case. It may be that upon further investigation and disclosure, the fact is not established, and this Ground cannot be pursued. But in the light of the material I have seen, and the

apparently chaotic (for perfectly understandable reasons) record keeping, it as at least arguable that the Defendant has erred in her factual consideration of JZ's case. I therefore grant permission on this Ground.

24. Ground Three challenges the Defendant's refusal to defer the submission of biometrics until after an in-principle decision is made on the LOTR application. The Claimant argues that there is no material difference between those judges for whom biometrics were waived during Operation Pitting and his situation.

25. Also under this Ground, the Claimant argues the Defendant failed to have regard to relevant factors. It is argued the decision fails to take into account the dangers to the Defendant and his family of having to cross Afghanistan in order to enter Pakistan, the threats to the Defendant and his family, and the FCDO's own advice that "crossing Afghanistan is extremely dangerous…".

26. It is also argued that the Defendant did not take into account the following factors which are relevant to the discretion to waive biometrics: that the Defendant is accepted to have been an Afghan judge upholding the rule of law, and being a "high profile case", and the evidence of Colonel English that the Defendant was "fully vetted" in his role as a judge.

27. In my view the difference in treatment between the waiving of biometrics during Operation Pitting and now is plainly reasonable and justifiable. The situations are not analogous. However, I do consider that the Defendant has arguably failed to consider JZ's particular situation, but I will deal with this under Ground Five. The pure inconsistency of approach Ground is not in my view arguable.

28. Ground Four alleges that the Defendant did not properly address herself to the discretion in relation to biometric requirements. The 4 March 2022 letter refers to *"the circumstances outlined for him and his family are not sufficiently exceptional, extraordinary or compassionate to warrant deferring or waiving"* the biometric data.

29. Ms Sabic refers to the discretion that exists in regulations 5 and 8 of the Biometric Regulation and argues that the Biometrics Policy does not appear to properly reflect the statutory discretion.

30. She also relies on the fact that the decision letter refers to the Family Reunion Guidance. This Guidance was found by Upper Tribunal Judge Norton-Taylor in *SGW v Secretary of State for the Home Department* [2022] to be unlawful at [85]:

> *" 'it fails to acknowledge the existence of discretion derived from the 2008 Regulations as to the enrolment of biometric information. Indeed, the distinct impression arising from the guidance is that there is no discretion, save in respect of children under 5 years old. This is a misleading picture of the true legal position, which in fact provides for a broader discretion."*

31. The letter of 4 March refers to the Family Reunion Guidance and I inquired of Ms Giovannetti whether it had been changed in the light of *SGW*. She took instructions and was not sure during the hearing whether it had been amended by 4 March. I ordered that GLD investigate this matter and inform me in writing the following day as to the version of the Guidance that had been relied upon. It transpired that the Secretary of

State has continued to rely on unlawful Guidance since *SGW* was handed down. On the facts of this case, I do not consider that that reliance made any difference to the decision. However, it is unacceptable for the Secretary of State to be ignoring, whether by oversight or otherwise, a finding of a court or tribunal that Guidance is unlawful and continuing to rely upon it in the decision-making process. For the reasons set out by the Supreme Court in *R (Majera) v Secretary of State for the Home Department* [2021] 3 WLR 1075, it is contrary to constitutional principle and the rule of law for the Executive to ignore a finding of a court that a policy document is unlawful and to continue to rely on the unlawful section.

32. In the light of this issue the Defendant has indicated that she is in the process of revising the Guidance so that it accurately reflects the true legal position. In the interim, she will make clear on Gov.uk that the relevant part of the Guidance is being revised and the discretion is not limited to children under 5. She is also writing to UTJ Norton-Taylor.

33. I am confident however from the terms of the letter of 4 March that the Defendant was aware that she had a discretion to waive the biometrics requirements but chose not to exercise it in JZ's case. Therefore, although the continued reference to the Family Reunion Guidance was more than unfortunate, I do not consider it was causative on the facts of the case.

34. Ground Five is that the Defendant has acted irrationally in refusing to consider the application for LOTR without having submitted the biometric data. The merits of this Ground are very closely aligned to the application for interim relief. The Claimant seeks an order that the Defendant makes an "in-principle" decision on the Claimant's eligibility for LOTR to enter the UK, taking account of the representations made on 16 and 22 February 2022. The Claimant and his family will only travel to Pakistan if he knows that, subject to biometric data, he will be granted entry clearance to the UK.

35. Both parties agree that the test for the grant of interim relief is that set out in *American Cyanamid v Ethicon* [1975] AC 396; whether there is a serious issue to be tried, the balance of convenience, any special factors and the adequacy of damages. Two relevant special factors here are that this is a public law case, and the relationship between the interim relief sought and the final remedy.

36. In *BACONGO v Department of the Environment for Belize* [2003] 1 WLR 2839 Lord Walker held at [35]:

> *"Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in American Cyanamid… but with modifications appropriate to the public law element is one of the possible "special factors" referred to by Lord Diplock in that case, at p. 409. Another special factor might be if the grant of refusal of interim relief were likely to be, in practical terms, decisive of the whole case…"*

37. The law on interim relief in public law proceedings was summarised in *R (Detention Action) v SSHD* [2020] EWHC 732 (Admin) at [17]:

> *"American Cyanamid principles apply, subject to appropriate modification for the public law context. In this case, the claimants must show a real prospect that at trial they will succeed in obtaining a permanent injunction, taking account of the fact that any decision to grant any such relief would include consideration of the public interest. If the required "real prospect" exists, the issue is whether or not the balance of convenience favours the grant of relief at this stage, too, the public interest is a relevant consideration… In this case, the relevant public interest is that of the Secretary of State continuing to operate an effective system of immigration control. We also accept the submission made by the Secretary of State that since the relief sought at (c) [that is, an order requiring the SSHD to release from immigration detention all persons (except high-risk offenders) who would otherwise be removed to any country not presently accepting returns because of COVID-19] is, for all practical purposes, final relief, and for that matter also is an application for a mandatory order, this application for interim relief cannot succeed unless a particularly strong case is shown."*

38. In *R (MO) v SSHD [2021] EWHC 561 (Admin*), the court held at [27]-[28] that:

> *"… It is well-established that there are effectively two stages [in an application for interim relief]. First of all, the court must satisfy itself that there is a reasonable prospect of the claim succeeding: the court must at the very least take account of whether the underlying substantive claim is one that is reasonably arguable. The second stage is to consider where the balance of convenience lies. Mr Anderson has drawn my attention helpfully to what Saini J said about that in the case of R (Zalys) v Secretary of State for the Home Department [2020] EWHC 2029 (Admin) [17], where Saini J observed that:*
>
> *"The availability of rapid "rolled-up" hearings in the Administrative Court is an important factor in exercising the discretion to make interim injunctions in the public law jurisdiction; and indeed may point in certain cases to not making injunctions which require potentially irreversible steps (such as release) to be taken by public authorities when a final resolution by way of expedited hearing is available."*
>
> *28. Those observations – and there are many others in the cases – point to the importance, in a case such as the present one where the decision on interim relief may well resolve the underlying claim, of the court being astute to consider, firstly, the underlying merits of the claim and, secondly, a sensible and robust approach as to where the balance of convenience lies."*

39. The Claimant argues, both in relation to Ground Five and interim relief, that the Defendant's refusal is irrational and fails to properly consider the balance of impact on the Claimant against any harm to the public interest from deferring the biometric data. The Defendant relies on the evidence of John Allen, the policy lead on biometric policy, about the importance of biometric data being provided in advance of a decision being made. The importance of biometric data being provided before an individual is granted entry clearance is obvious. It is necessary for checking relevant databases to ensure that

there is no history of criminal conduct or links to associations that may impact on national security. Mr Allen refers to there often being no readily identifiable information about those applying, and the importance therefore of checking relevant databases.

40. I note that the Defendant has accepted that in some instances, such as the evacuation under Operation Pitting and the present Ukrainian crisis, that it may be appropriate to allow individuals to only provide biometric information once they enter the UK. Such general waivers are plainly ones for the discretion of the Defendant. Mr Allen makes the point, which I accept, that the fact someone is coming from a conflict zone is not itself a good ground for a waiver.

41. Ms Giovannetti also argues that it is of great importance to provide biometric data before an application is processed. She says that this is to ensure that the person who submits the application is the person they say they are and ensures that they cannot subsequently submit a further application but in a different name. As a generality I entirely accept that this is a good reason.

42. In the present case there is no suggestion that JZ should be allowed to enter the UK without providing the biometric data, he agrees to provide it once he is in Pakistan. Therefore, that aspect of the public interest is fully protected because relevant databases can be checked before he enters the UK.

43. In respect of the argument about the same person not being able to apply twice, I fully accept the generality of Ms Giovannetti's argument but, in my view, it fails to engage with the facts of the particular case. Unlike most applicants for entry clearance, certainly most asylum seekers, JZ is a known and documented individual with a history that is transparent and verifiable. He has been accepted by the Defendant to have been a judge in Afghanistan with an accepted and evidenced history and full documentation. He can be fully authenticated both by Colonel English but also UK citizens who were working in Afghanistan for the UK mission. It is relevant that Colonel English says he was security vetted in his position.

44. Therefore, on the facts of his case I can see no risk that the person who submitted the application for LOTR will not be the same person who attends the biometric centre in Pakistan and, if found to be so entitled, would then be granted entry clearance. There is no risk that JZ would be rejected for LOTR on the present facts and then present himself again in a different guise.

45. In my view the harm to the public interest that is relied upon by the Defendant is one of generality and fails to engage with the specifics of the present case. As such it is a good example of failing to apply the discretion to defer biometrics in a rational manner, taking into account the individual facts of the case.

46. On the other side of the balance, I accept that the risk to JZ and his family of crossing Afghanistan and entering Pakistan are great, although any precise quantification is not possible. The Defendant does not seek to argue that there is no risk but suggests that it is not so great as the Claimant is suggesting. The Claimant relies upon a witness statement from a security expert in the relevant field, Mr Foxley, about the level of Taliban efforts to find individuals and the dangers of trying to get out of Afghanistan. The Defendant relies on evidence of Lesley Craig, Head of the Afghanistan and

Pakistan Department of the FCDO. She refers to a Twitter post by a Taliban spokesperson that Afghans with legal documents can leave the country. In my view, limited weight can be put on such a statement, but in any event it does not (self-evidently) refer to the Taliban interest in JZ. She says the High Commission is not aware of individuals being deported from Pakistan to Afghanistan when their visas have expired, although illegal entrants were deported in February and March.

47. The Defendant also argues that the Claimant must have some family support in Pakistan and therefore could stay there if entry clearance to the UK was refused SQ says that they do not have family in Pakistan.

48. It is not possible to quantify the risk of the Claimant trying to leave Afghanistan. However, there is evidence that the Taliban have been actively trying to find him, and in September 2021 tried to abduct his son. There is also evidence that the Taliban have increased their door to door searches and attacks on opponents since February 2022. It is extremely difficult to determine the level of risk of the Claimant and his family being deported from Pakistan back to Afghanistan, much may depend on individual connections within Pakistan. However, I do accept that if such a deportation did happen, it would place JZ and possibly his family at real and immediate risk of death.

49. I also take into account that the grant of interim relief is effectively final relief on Grounds Three to Five which means I must apply a heightened balance to the *American Cyanamid* test.

50. In my view, the balance is plainly in favour of granting the relief sought. The Defendant concedes that permission should be granted on Ground One and I consider Ground Two to be arguable. Further I consider Ground Five to be arguable. The Defendant's decision of 4 March applies the biometric policy without engaging with whether there is any real (as opposed to theoretical) harm to the public interest in the maintenance of the policy on JZ's own facts. It is arguable that the decision is Wednesbury irrational. There is therefore a serious issue to be tried.

51. The risks to the Claimant of travelling to Pakistan to provide biometric data and, if entry clearance is then refused, being obliged to return to Afghanistan are obvious. If the risk was minimal, then it is difficult to see why the Claimant would not have long since taken that course. There is a very considerable risk of him getting across Afghanistan and being identified whilst he does so, as well as the risk of deportation from Pakistan.

52. I fully accept the importance of the maintenance of immigration control, including the provision of biometrics before the grant of entry clearance, but that public interest will be fully protected by the interim relief sought. The only impact on the public interest is that somebody purporting to be JZ might make multiple applications, but that does not appear to me to be a real risk on the facts of the case.

53. Finally, Ms Giovannetti poses the precedent effect of granting interim relief. As I have explained, the documented and identifiable history of JZ makes his case different from that of most immigrants. It is not possible to know how many people might argue they are in an analogous situation to him, but the Defendant must under the policy exercise an individual discretion in any event. The combination of being a known and documented individual who is accepted to have assisted the US/UK mission in Afghanistan, and to have produced clear evidence of his identity, with effectively

references, differentiates this case from many others. Ultimately, the rather nebulous fear that this case might set a precedent does not outweigh the other factors in the *American Cyanamid* balance.