Case No: JR-2023-LON-001855

JR-2023-LON-001858

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

THE KING
on the application of
AA
BB
(Acting by their Litigation Friend, MM)
(Anonymity Order Made)

Applicants

and

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Mahmood

HAVING considered all documents lodged and having heard Mr Philip Nathan of counsel, instructed by Duncan Lewis Solicitors, for the Applicants and Mr Benjamin Seifert of counsel, instructed by the Government Legal Department, for the Respondent at a hearing on 30 September 2024.

IT IS ORDERED THAT:

(1) The application for Judicial Review is dismissed for the reasons in the attached judgment.

(2) The parties were granted two extensions of time to provide a draft order in respect of consequential matters arising, including costs, but no draft order has been provided. A final extension of time is granted until 4pm 21 January 2025 for a draft order to be submitted.

(3) Permission to appeal is refused. Although no application for permission to appeal has been made, in any event, I am required by rule 44(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to determine the issue of permission to appeal at any hearing where a decision is given which disposes of immigration Judicial Review proceedings. That applies whether or not any application for permission to appeal is made. I refuse permission to appeal as there is no arguable error of law in my decision.

Signed: Abid Mahmood

Upper Tribunal Judge Mahmood

Dated: **17 January 2025**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on 17 January 2025:

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2023-LON-001855
JR 2023-LON-001858

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

20 December 2024

Before:

UPPER TRIBUNAL JUDGE MAHMOOD

- -

Between:

THE KING
on the application of
AA
BB
(Acting by their Litigation Friend, MM)
(Anonymity Order Made)

Applicants

- and -

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

- -

Mr Philip Nathan
(instructed by Duncan Lewis Solicitors, for the Applicants

Mr Benjamin Seifert
(instructed by the Government Legal Department) for the Respondent

Hearing date: 30 September 2024

- -

J U D G M E N T

- -

Judge Mahmood:

1. I have anonymised the names of the Applicants. I shall refer to them as AA and BB. They are brother and sister. The Applicants' mother acts as their litigation friend as they are both minors. I have also anonymised their mother's name. I refer to the Applicants' mother as MM.

Outline of the Applicants' Challenge to the Respondent's Decisions

2. These applications for Judicial Review challenge the alleged unlawful delay by the Secretary of State in determining (1) the Applicants' applications under the Afghan Citizens Settlement Scheme dated 27 June 2022 and for entry clearance dated 20 January 2023 and (2) allegedly unlawful decisions to refuse to excuse each applicant from the requirement to attend a visa application centre (VAC) to enrol their biometric information, dated 19 September 2023. The remedies that the Applicants seek are declarations that the Respondent's delays have been unlawful and mandatory orders compelling the Respondent to determine the outstanding applications.

Operation Pitting

3. This matter has as its genesis, serious events which occurred in Kabul, Afghanistan between 13 August 2021 and 28 August 2021. Very extensive media coverage of the events showed the attempts made to evacuate people from Afghanistan when the Taliban had returned to power. It is right to observe that there were very distressing and graphic scenes at Kabul Airport with many having been killed or injured. Some had clung on to the outside of aeroplanes which were taking off and could be seen falling as the aeroplanes gained height. The United Kingdom military's name for the evacuation operation was Operation Pitting.

4. In R (on the application of BA) v Secretary of State for the Home Department, Foreign, Commonwealth and Development Office and Defence [2022] EWHC 1422 (Admin), Choudhury J helpfully explained the background to Operation Pitting in some detail. It is useful to set that out in this judgment,

> "4. Operation Pitting" was the name given to the UK military evacuation of British Nationals and certain groups of Afghan nationals from Afghanistan after the Taliban regained power. Operation Pitting commenced on 13 August 2021 and ended on 28 August. It was designed to implement the Government's policy decision to evacuate British and Afghan nationals who qualified under the Afghan Relocations and Assistance Policy ("ARAP"). ARAP was launched on 1 April 2021, and was designed primarily to enable the Government to support current or former locally employed staff members ("LES"), but was extended to include a category of "special cases" which, in August 2021, comprised those who:

"*... worked in meaningful enabling roles alongside HMG in extraordinary and unconventional contexts and whose responsible HMG unit built a credible case for consideration under the scheme*".

5. the evacuation had begun, Ministers indicated a willingness to also evacuate certain other groups of Afghan Nationals provided there was capacity on evacuation flights and provided it did not hinder the priority evacuation of British Nationals and those qualified under ARAP. Spare capacity of UK Military Aircraft leaving Afghanistan was extremely limited, and the number of individuals wishing to relocate to the UK far exceeded the capacity that was available.

6. Ministers decided, nonetheless, to utilise such capacity that existed to evacuate as many eligible individuals as possible in the time available. That decision required rapid determinations to be made about which other Afghan Nationals to evacuate. A number of cohorts of Afghan Nationals were identified and agreed, including some journalists, women's rights activists and Government officials, and a small group of "extremely vulnerable individuals". Evacuation under this route became known as LOTR or "Operation Pitting LOTR", the acronym denoting "Leave Outside The Rules", even though the decision to evacuate did not, by itself, confer any such leave, that being something granted by the first defendant, SSHD, to individuals arriving in the UK having been so evacuated. LOTR is a residual statutory power contained in the Immigration Act 1971, which confers upon the SSHD discretion to grant leave to enter or to remain in the UK outside the immigration rules.

7. The situation in Kabul during the short period when Operation Pitting LOTR was conducted has been described as "extremely perilous and uncertain". The evidence of Phillip Hall from the second defendant, the Foreign Commonwealth & Development Office ("FCDO") who assisted in the Afghanistan Crisis Centre from 16 August 2021, describes the situation as follows:

"*Operation Pitting ... took place in truly exceptional circumstances with the Afghan National Army and Government collapsing faster than expected leaving no civilian control, contested security, and the Taliban control of all territory including the capital, Kabul, and access to the airport. Only the airport itself was under NATO military control. Until around 22 August 2021 the United States of America was trying to persuade the Taliban to allow the evacuation to continue beyond the end of August, meaning there was uncertainty over how long Operation Pitting would continue.*

8. Decisions were taken under very challenging, constantly changing, circumstances and plans had to be adapted, including when, on 25 August, a terrorist threat to the airport necessitated an amendment to travel advice. The new travel advice advised against travel to the airport.

9. On 26 August a suicide bomber killed a large number of civilians and US Military personnel outside Kabul Airport. Operation Pitting ended on 28 August 2021 when the final British Military personnel withdrew from Afghanistan."

10. The description above is not disputed, nor is the fact that Government officials, both here and in Afghanistan, worked day and night during this period to progress the evacuation of as many eligible people as possible in these exceptionally difficult circumstances.

11. However, there has been considerable criticism of Government action generally in relation to the evacuation from Kabul; indeed, there was negative press coverage on the morning of the first day of the hearing upon the publication yesterday of the House of Commons Foreign Affairs Select Committee Report, entitled "Missing in action: UK leadership and the withdrawal from Afghanistan." The Select Committee was highly critical of the actions taken and the lack of preparedness of officers, including Sir Philip Barton. However, it is not for this court to express any view on such actions on the part of the Government more generally; its focus is much narrower, and that is to consider whether there was any unlawfulness in respect of the specific decisions under challenge. No doubt, in the course of these very difficult and challenging circumstances in August 2021, many decisions were taken which appeared harsh and unfair to those adversely affected. However, those are not considerations that can affect the analysis of the court when it comes to the legality of the decisions under challenge.

12. Operation Pitting LOTR was not an application-based process, whereby individuals seeking to be evacuated applied to the FCDO for consideration; instead, decisions were taken primarily by FCDO as to which Afghanistan Nationals from amongst the agreed cohorts would be "called forward" for evacuation, that being the process by which individuals were informed that they would be evacuated by the Government from Afghanistan to the UK. From 23 August 2021 decision-making Panels were established for this purpose. Panel members comprised senior FCDO officials working in the Crisis Centre. Mr Hall, in his evidence, states that the Panels:

"*... aimed for good decision making in full knowledge that it was not possible in the time available to subject each application to the level of scrutiny that we would normally have applied for an ARAP or other decision. If we were to give some people a chance of evacuation on a UK military flight ... we had to take decisions rapidly and on the basis of the information we had... If we had developed a more sophisticated and rigorous process and gathered more information, we would have taken no decisions in time for evacuation.*"

13. Once a decision by the FCDO was taken that someone should be called forward, that person would be subject to security checks and clearance by the Home Office. Those approved for evacuation were issued call-forward instructions by the military team working in FCDO's Crisis Centre instructing them to come to the airport. As already stated, FCDO did not grant individuals LOTR as such, or a visa to enter the UK. Individuals who were evacuated were granted LOTR, specifically leave to enter for six months by the SSHD on arrival in the UK. The usual requirements for entry clearance were temporarily relaxed between 15 and 28 August 2021.

14. Operation Pitting LOTR was in operation for a very limited time during the evacuation. Individuals were called forward for evacuation from around 21 August 2021 and continued until Operation Pitting ended on 28 August when the final British military personnel withdrew from Afghanistan. Once Operation Pitting ended Operation Pitting LOTR also came to an end. The normal policies and processes for relocation and resettlement in the UK then resumed as formalised in the Home Office Afghanistan resettlement and immigration policy statement of 13 September 2021."

Background, Procedural History and Decisions Under Challenge

5. The Applicants are nationals of Afghanistan. Their mother, MM, was evacuated from Kabul via Operation Pitting on 24 August 2021 and she relocated to the United Kingdom. On 19 May 2022 she was granted Indefinite Leave to Remain. For safety reasons and because this is a public judgment, I do not refer to the work that MM did in Afghanistan. The Applicants did not have the correct identity documents and so were not able travel with her. MM took what must have been a difficult decision to leave her children under the care of family members in Kabul and seek their repatriation at a later date. The Applicants were aged 9 and 12 when their mother was evacuated from Afghanistan.

6. As has been observed at the paper permission stage, it is difficult to imagine the agonising experience that this will inevitably have been for all involved. I do not underestimate the fear and concern that the Applicants would have felt being away from their mother and the fear that their mother would have felt being away from her children whilst she was in the UK and her children were in Afghanistan.

7. On 27 June 2022 the Applicants purported to make applications to join their mother in the UK as dependants under the Afghan Citizens' Resettlement Scheme (ACRS) and later parallel applications for entry clearance pursuant to Paragraph 297 of the Immigration Rules.

8. Thereafter the Applicants subsequently sought waivers of the requirement to provide biometrics. Before those applications were determined, on 24 August 2023, the Applicants commenced these proceedings for Judicial Review. On 19 September 2023 the Secretary of State refused the applications for biometric waivers. The Applicants' applications to amend their grounds so as to encompass a challenge to the 19 September 2023 decision was granted by Upper Tribunal Judge Kebede.

9. In respect of the amended grounds, relating to the biometric waivers, the Applicants' state,

> *"The Applicants accept that one element of their original challenge is now academic in that the Respondent has now determined the biometric waiver application... However, the Respondent has still failed to respond to the representations seeking leave to enter under the Afghan Citizens Resettlement Scheme, outstanding since 27 June 2022. As such the original claims are not academic."*

10. By way of a decision dated 19 December 2023 Upper Tribunal Judge Stephen Smith refused permission to apply for Judicial Review on the papers. The learned judge made various directions in respect of anonymity and the appointment of a litigation friend and in a

comprehensive decision explained why he was refusing permission to apply for Judicial Review.

11. The Applicants renewed their applications seeking an oral hearing. That application came before Upper Tribunal Judge Gleeson. By way of a decision sealed on 8 March 2024 the learned judge observed,

"Both applicants are children, their father was killed by the Taliban and their mother is in the UK having been evacuated under Operating PITTING. The applicants are living in Kabul and it is their case that they are unable to travel to a VAC because in practice they cannot do so without an adult male accompanying them (a Mahram). [One] of the applicants is a girl. It is their case that their only adult male relative is their uncle in the UK who is not in a position to make the dangerous journey to bring them out of Afghanistan to a VAC, by reason of his health and its history".

12. The matter was listed for a substantive Judicial Review hearing on 24 May 2024. By way of a consent order dated 18 April 2024 that hearing was vacated and the matter stayed pending the parties providing an update to the Upper Tribunal in respect of progress of Entry Clearance applications and in respect of settlement of the proceedings.

13. By way of decisions dated 21 May 2024 the Secretary of State granted the Applicants United Kingdom visas (vignettes). This was said not be permission to travel to the United Kingdom.

14. The Respondent's decision of 21 May 2024 states,

"*Before you can travel to the UK, you will need to collect your visa from the visa application centre, or if you have purchased a courier return service, wait until you have received your visa. Please do not attempt to travel to the UK until you have your visa...This notice explains that, when you arrive in the UK, you will have permission to be in the UK (known as permission to enter) as LEAVE TO ENTER OUTSIDE OF THE RULES from 21 May 2024 until 24 FEB 2027".*

15. The Applicants arrived in the UK on 29 May 2024. The parties had sought time to consider whether the proceedings were to continue or not. No agreement was reached between the parties and so the Upper Tribunal made directions for the filing and service of skeleton arguments in readiness for this hearing before me.

Summary of the Written Arguments and Correspondence

16. The Respondent's skeleton argument dated 27 September 2024 and, so 3 days before the hearing, contends that because the Applicants have arrived in the United Kingdom then that rendered their Judicial Review claims academic. The Respondent states that is because the Applicants have received the relief they had sought in their applications. Namely, Entry clearance has been granted to

them outside of the Immigration Rules. The Respondent thereby contends that there are no live public law issues to be heard.

17. The Applicants' case is in their Skeleton Argument dated 27 September 2024 is that after they made their application on 27 June 2022, that the Respondent acknowledged receipt of the application and that it had been forwarded to the relevant team and that, "*… they will get in touch with you soon"*.

18. The Applicants complain that there has been no communication from the Respondent regarding that application of 27 June 2022 and that there were delays to the Applicants' application made pursuant to paragraph 297 of the Immigration Rules in January 2023.

19. The Applicants also state in respect of the Respondent's detailed grounds of defence filed on 28 August 2024 that,

"*Notably they refer to the determination of the January [2023] visa applications but make no reference to the 27 June 2022 ACRS applications. Until those applications are determined that aspect of the existing claim is not academic and remains unresolved"*.

20. The Applicants further state that their application was made on 27 June 2022 and that when Upper Tribunal Judge Gleeson granted permission to apply for Judicial Review, the delay was 21 months but the delay is now 27 months. They say that the Respondent has not filed detailed grounds seeking to justify the delay but the Respondent instead contends that the entire claim is academic. The Applicants say that there is reference by the Respondent to the 27 June 2022 applications as being 'applications' in her pleadings. Finally, it is said that in any event the Applicants were only granted limited leave to remain on a 10- year route to settlement and that this would prejudice them because they would have to pay for multiple visas and would also be treated as foreign students for the purposes of any tertiary education.

21. In response, the Respondent states that 'applications' for entry to the UK under the ACRS scheme dated 27 June 2022 are not outstanding,

"*…because no such applications were made or accepted by her. The Respondent refers to the archived webpage for the Afghan Citizens Resettlement Scheme ("ACRS") as of 29 June 2022. It is clear from the published policy that the scheme was not application-based. Given that the ACRS scheme is explicitly not an application based scheme, it was not possible to apply for it. Therefore, no decision following from the Applicants' letter 27 June 2022 was required and no decision remains outstanding."*

22. The Applicants state in their skeleton argument that,

"*It is hoped that even now, days before the hearing, that the Respondent may render this claim academic by making a decision on the June 2022 application, If that decision is made, the Applicants accepts that this claim will be rendered academic and will seek to withdraw it. Whether the decision is positive or negative, is in this respect irrelevant. Clearly the Applicants would prefer a positive conclusion but even if the decision is negative, the Applicants acknowledge that the decision necessarily would need to be challenged by way of fresh proceedings".*

23. At the hearing the parties provided me with a supplementary bundle. That contained correspondence which had been passed between them during the period 10 June 2024 and 12 July 2024.

24. I summarise some of that correspondence because it is relevant to the oral submissions made to me.

25. On 10 June 2024 the Applicants' solicitor's letter to the Respondent said,

"…much has been rendered academic through the belated but nonetheless appreciated grant of Entry Clearance. However, the Applicants applied for resettlement as their mother's dependants under the Afghan Citizens Resettlement Scheme was long ago as 27 June 2022…We are placing the Respondent and his solicitor on notice that unless we receive a written explanation as to why the ACRS policy, which on its face does appear to support the Applicants' claim to be entitled to ILR in in line with their mother,, does not allow for the grant of ILR then we will be filing an Application Notice on 17 June 2024 seeking the lifting of the stay and seeking directions for the Respondent to file detailed Grounds of Defence to the ACRS aspect of Ground 1 and thereafter standard directions for the listing of the substantive hearing".

26. On 14 June 2024 the Respondent replied with a detailed letter stating in summary that,

(1) The Respondent's Leave Outside of the Immigration Rules policy Version 3.0 (published on 29 August 2023) states that "*Applicants overseas must apply on the application for the route which most closely matches their circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry clearance on their chosen route."*

(2) Lane J in R (CX1) v Secretary of State for Defence and Secretary of State for the Home Department [2023] EWHC 284 (Admin) held that it was rational for the Secretary of State to require applicants seeking Leave Outside of the Rules to use the most closely connected visa application form notwithstanding it being *'distinctly suboptimal'* for the Claimant to have to use a visa application form for a category of leave whose requirements they

could not meet. This was an alternative remedy to Judicial Review.

(3) It was rational to require an application form because it was a rational exercise of the border control function constitutionally allocated to the Respondent. It was confirmed in S and AZ v Secretary of State for the Home Department [2022] EWCA Civ 1092 at paragraph 14 that it was not irrational to require individuals to apply for entry clearance by providing information in a form as to elicit certain key information. The application process leads to a requirement to provide biometric information, in the form of fingerprints and facial photographs and underpins the immigration system's ability to support identify and suitability checks of foreign nationals.

(4) Paragraph 34 of the Immigration Rules provides that an application for permission to stay must be made on an application form which is specified for the immigration category under which the applicant is applying.

(5) There was reference to other case law and also to section 55 of the Borders, Citizenship and Immigration Act 2009 in respect of the need to have regard to the best interests of the children.

27. On 26 June 2024 the Applicants' solicitors replied to the Respondent who was seeking an urgent update in respect of the Applicants' Biometric Residence Permits. The Respondent also sought clarification because the Applicants' solicitors did not agree that their e-mail of 27 June 2022 could not constitute such application, but they had nonetheless made formal applications for a visa for each Applicant on 20 January 2023.

28. The Respondent letter of 12 July 2024 stated in summary that the Applicants' solicitors e-mail and representations dated 27 June 2022 regarding "resettlement for our client's unaccompanied children under the ACRS scheme" was made prematurely. It was said to be premature because the Respondent was in the process of creating a referral process. There was currently no route for immediate family members of those who were evacuated under Pathway 1 of the ACRS to be reunited in the United Kingdom. The Respondent said she intended to establish a route for immediate family members. Individuals remaining in Afghanistan were not obliged to wait for the pathway to open. The Applicants could have waited for Pathway 1 to open or to apply under existing routes. Because the Applicants had entered the UK via a different route then that was a suitable alternative remedy, given that the Applicants did not wish to wait for the immediate family route. As the Applicants were in the UK they will not qualify under the new route as the family are already reunited.

Afghan Citizens' Resettlement Scheme ["ACRS"]

29. The ACRS scheme requires consideration. In R (on the Application of MTA) v Secretary of State for the Home Department, Secretary of State for Foreign, Commonwealth and Development Affairs and Secretary of State for Defence [2024] EWHC 553 (Admin) Swift J provided a comprehensive background to the introduction and development of the ACRS scheme. His Lordship helpfully explained,

"...The ACRS is a scheme under which Afghan nationals may come to the United Kingdom to live and work. By letter dated 31 March 2023, the Claimant was informed that he would not be offered resettlement under the scheme. The letter set out the following reasons:

"*1. Thank you for submitting an Expression of Interest for Pathway 3 of the Afghan Citizens' Resettlement Scheme (ACRS). Having carefully considered your submission and taking into account the ACRS Pathway 3 requirements, we regret to inform you that you will not be referred for resettlement in the United Kingdom under this scheme. The reason for this decision is set out below.*

2. In Year 1 of Pathway 3, we are considering eligible at-risk Chevening alumni and British Council and GardaWorld contractors for resettlement. Based on the information provided, we do not believe you are eligible for consideration as you have not demonstrated you are part of one of these groups."

In these proceedings the Claimant challenges the legality of this decision. As explained below, the ACRS is a scheme described as comprising three pathways. The decision challenged in this claim concerns what has been termed the third referral pathway.

2. The ACRS was first announced on 18 August 2021 by the Prime Minister and the Home Secretary. Their announcement included the following:

"*Thousands of Afghan women, children, and others most in need will be welcomed to the UK under one of the most generous resettlement schemes in our country's history.*

Those who have been forced to flee their homes or face threats of persecution from the Taliban will be offered a route to set up home in the UK permanently.

The UK government's ambition is for the new Afghanistan Citizens' Resettlement Scheme to resettle 5,000 Afghan nationals who are at risk due to the current crisis, in its first year.

Priority will be given to women and girls, and religious and other minorities, who are most at risk of human rights abuses and dehumanising treatment by the Taliban.

This resettlement scheme will be kept under further review for future years, with up to 20,000 in the long-term. The ambition to provide protection to thousands of people fleeing Afghanistan and the complex picture on the ground means there will be significant challenges delivering the scheme, but the government is working at speed to address these obstacles.

...

The UK is working with international partners to develop a system to identify those most at risk and resettle them, insuring help goes to those that need it. The Prime Minister is expected to discuss this with G7 leaders in a virtual meeting in the coming days."

3. The first version of a guidance document was published on 6 September 2021. That document stated that the scheme was not yet open and that "the eligibility requirement will be published in due course".

4. On 13 September 2021 the Home Office published a policy document "Afghanistan Resettlement and Immigration Policy Statement", and a second version of the guidance on the ACRS. The material part of the policy statement was as follows:

"***Eligibility and referrals***

23. The ACRS provides those put at risk by recent events in Afghanistan with a route to safety. The scheme will prioritise:

a. those who have assisted the UK efforts in Afghanistan and stood up for values such as democracy, women's rights and freedom of speech, rule of law (for example, judges, women's rights activists, academics, journalists); and

b. vulnerable people, including women and girls at risk, and members of minority groups at risk (including ethnic and religious minorities and LGBT).

24. There will be many more people seeking to come to the UK under the scheme than there are places. It is right that we take a considered approach, working with partners to resettle people to the UK. There will not be a formal Home Office owned application process for the ACRS. Instead, eligible people will be prioritised and referred for resettlement to the UK in one of three ways.

25. First, some of those who arrived in the UK under the evacuation programme, which included individuals who are considered to be at particular risk – including women's rights activists, prosecutors and journalists – will be resettled under the ACRS. People who were notified by the UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK. Efforts are being made to facilitate their travel to the UK.

26. Second, the government will work with the United Nations High Commissioner for Refugees (UNHCR) to identify and resettle refugees who have fled Afghanistan ... UNHCR has expertise in the field and will refer refugees based on assessments of protection need. We will work with UNHCR as partners in the region to prioritise those in need of protection such as women and girls at risk, and ethnic, religious and LGBT minority groups at risk. We will start this process as soon as possible following consultations with UNHCR.

27. 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."

The guidance document also indicated that the ACRS would comprise three elements:

"*Prioritisation and referral for resettlement will be in one of three ways:*

1. Vulnerable and at-risk individuals who arrived in the UK under the evacuation programme will be the first to be resettled under the ACRS. People who were notified by the UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK.

2. Secondly, the government will work with the UNHCR to identify people most at risk and refer them for resettlement, replicating the approach the UK has taken in response to the conflict in Syria.

3. Finally, the government will work with our international partners 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 process will likely be affected by the ongoing situation within Afghanistan."

One matter that is clear both from the policy statement and the 13 September 2021 version of the guidance document, is that the ACRS was at a formative stage, in the process of development. This was most clearly so for the second and third elements of the scheme. At this stage, the ACRS was not open for business."

5. On 6 January 2022 a third version of the guidance document was published, and the Minister for Afghan Resettlement made a statement in the House of Commons. This marked a partial opening of the ACRS. Both the guidance document and the Ministerial statement described the scheme as comprising "three pathways". The Minister's statement included the announcement that the first of the three pathways of the resettlement scheme was now open. The guidance document included the following:

"*There is no application process for the ACRS. Prioritisation and referral for resettlement will be in one of three ways:*

1. Vulnerable and at-risk individuals who arrived in the UK under the evacuation program will be the first to be settled under the ACRS. Eligible people who were notified by UK government that they had been called forward or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK. The first Afghan families have been granted ILR under the scheme.

2. Secondly, from spring 2022, the UNHCR will refer refugees in need of resettlement who have fled Afghanistan. The UNHCR has the global mandate to provide international protection and humanitarian assistance to refugees. We will continue to receive such referrals to the scheme in coming years.

3. The third referral pathway will relocate 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 year of this pathway, the government will offer ACRS places to the most at risk British Council and GardaWorld contractors and Chevening alumni. The Foreign, Commonwealth and Development Office will be in touch with those eligible to support them through next steps. Beyond the first year, the government will work with international partners and NGOs to welcome wider groups of Afghans at risk."

The three referral pathways reflected the three elements of the resettlement scheme that had been set out in the September 2021 version of the guidance.

6. The second and third referral pathways of the ACRS opened on 13 June 2022. At this time there was a further Ministerial statement (made by the Minister for Safe and Legal Migration), and a further (fourth) version of the guidance was published. So far as concerns the third referral pathway, the Ministerial statement included the following:

"*Under pathway 3, we committed to considering eligible at-risk British Council and GardaWorld contractors and Chevening alumni. The Foreign, Commonwealth and Development Office (FCDO) will refer up to 1,500 people from Afghanistan and the region to the Home Office for resettlement, including any eligible family members. The FCDO will launch an online system on Monday 20 June, where eligible individuals will be able to express interest in UK resettlement. Expressions of interest will be considered in the order they are received, although some groups will be prioritised because the role they performed or the project they worked on mean they are particularly at risk, or because there are exceptionally compelling circumstances. Expressions of interests will be accepted until Monday 15 August 2022, when the online system will close. Guidance on the expression of interest process is available … from Monday 13 June.*"

The June 2022 guidance document included the following:

"*The scheme is not application-based. Instead, eligible people will be prioritised and referred for resettlement to the UK through one of 3 referral pathways:*

1. 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 or specifically authorised for evacuation, but were not able to board flights, will also be offered a place under the scheme if they subsequently come to the UK.

2. Under Pathway 2, we are now able to begin receiving 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.

3. 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 year of this pathway, the government will consider eligible, at-risk British Council and GardaWorld contractors and Chevening alumni for resettlement. There are 1,500 places available in the first year under Pathway 3, this number includes the principal applicants and their eligible family members."

This was then, in very similar terms to what had been said about the third referral pathway in the third (January 2022) version of the guidance. The point that is material for present purposes is that the versions of the guidance published in January 2022 and June 2022 both stated that in the first year of its operation, resettlement under referral pathway 3 would only be available to persons who had worked in Afghanistan for either the British Council or GardaWorld, the contractor who had provided security for the British embassy in Kabul, and to the former Chevening scholars…"

Summary of the Oral Submissions Before Me

30. At the hearing before me, Mr Nathan said on behalf of the Applicants that the situation remained that no decision has been made by the Respondent in respect of the Applicants' applications. He submitted that it was notable that there was no reference to the 27 June 2022 application in the Respondent's detailed grounds of defence. Mr Nathan said that all that the Respondent needed to do was to communicate with the Applicants' solicitors.

31. Mr Seifert on behalf of the Respondent submitted that he accepted that the Respondent's detailed grounds of defence dated 18 April 2024 did indeed refer to the requests as 'applications' but that was wrong and it was a mistake in the Respondent's pleadings. The wider scheme was not available and it was not an application-based scheme. This was not a volte-face as was being suggested by the Applicants. He submitted that it was very important to appreciate that there was no application process under the ACRS. Mr Seifert said that there were very complicated logistics. Urgency had been arranged and the Applicants were now in the UK with their mother and so are not unaccompanied.

32. Mr Seifert also submitted that as the Applicants are in the UK, in order to regularise their status, they could apply for asylum and a right of appeal would follow if there was an adverse decision. It was submitted that the Judicial Review was wholly academic. I note the bundle contains references in recent e-mails to such applications having been made.

33. Mr Nathan submitted by way of reply that the Respondent's own grounds had referred to the June 2022 'application' and that Mr Seifert had drafted the grounds and it referred to it being an 'application'. The pleadings had always referred to this as being an 'application'. Mr Nathan said he needed some time to think about the matter and that the Applicant would be entitled to costs to today.

34. Mr Seifert said that it was not a felicitous use of language to say 'application' in the pleadings/the Respondent's skeleton argument, but the focus of the case at the early permission stage was to ensure that the two child applicants be with their mother in the UK.

35. Mr Nathan invited me to grant some time to enable the asylum claim being suggested as an alternative remedy to be considered and for the two parties to discuss matters which might lead to a position in which an agreement might be reached about the proceedings being withdrawn. If I understood him correctly, Mr Nathan said that the idea of an asylum claim had initially come from his side.

36. I had put the matter back to enable those discussions to take place.

37. When the parties returned there was no agreement and I then heard further submissions. I refused Mr Nathan's further request that I adjourn the matter to a new date. Instead, I put the matter back to later in the day to enable Mr Nathan to consider the correspondence which I have referred to above which had passed between the parties during June 2024 to July 2024 which he did not appear to have seen in full.

38. When the hearing resumed, Mr Nathan submitted that the case law relied on by the Respondent was a 'red herring because those cases related to persons stuck abroad'. Mr Nathan said that an asylum application was a suggestion from the Applicants' side. Mr Nathan submitted that an explanation was sought why ILR had not been granted. Asked what remedy was being sought from me, Mr Nathan said that a mandatory order was required to compel the Respondent to respond to the application of 27 June 2022. Mr Nathan said he did not seek to rely on any other authorities or caselaw.

39. I reserved my judgment.

40. The parties had not provided an authorities bundle for the hearing, but the caselaw cited was provided to me after the hearing, for which I am grateful.

Analysis and Consideration

Whether the Claim is Academic

41. I first consider whether the claim is academic. Mr Seifert submitted that because the Applicants are in the United Kingdom with their mother then there is nothing left to consider. Mr Nathan submitted that the 27 June 2022 letter from the Applicants' solicitors to the Respondent was an application and a decision had still not been made on it.

42. I therefore consider whether the claim is academic as a preliminary issue. I have considered the judgment of Hickinbottom J (as he then was) in R (on the application of Williams) v Secretary of State for the Home Department [2015] EWHC 1268 (Admin), [2015] A.C.D. 111[1]. It was said at paragraph 55,

> "i) A distinction can be drawn between an issue which is "academic" and one that is "hypothetical" (see, e.g., Omar at [37] per Beatson J; and Sir John Laws, "Judicial Remedies and the Constitution" (1994) 57 MLR 213). An academic question is one which does not need to be answered for any practical purpose at all. A hypothetical question is one which may need to be answered for real practical purposes at some stage, although the answer may not have immediate practical consequences for the particular parties in respect of the extant matter before the court.
>
> ii) The courts will not determine academic issues. However, in a public law claim, it has a discretion to hear a matter which raises a hypothetical question, even when the determination of that question will not directly affect the rights and obligations of the parties inter se in an extant cause (see, e.g., *R v Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450* at page 456 per Lord Slynn).
>
> iii) Nevertheless, the court will only do so if there is good reason in the public interest, and then only after exercising considerable caution (ibid).
>
> iv) Whether it is in the public interest for the court to proceed to determine an issue which has become hypothetical will, of course, depend upon all the circumstances of the particular case. In *R v BBC ex parte Quintavelle (1998) 10 Admin LR 425* , Lord Woolf MR (with whom Aldous and Chadwick LJ agreed) said that the exercise of the court's discretion should be informed by two considerations: (i) whether there was any relief that could be granted "which would be of value to those who have to decide matters such as this", and (ii) whether the particular case was an appropriate vehicle for providing that guidance. If an issue is necessarily fact-sensitive, it is unlikely to be in the public interest to proceed. If it is likely that the courts will be required to determine the issue in the near future, it may be more likely to be in

[1] The Court of Appeal dismissed an appeal against the decision without considering this aspect of the decision of the High Court in R (on the application of Williams) v Secretary of State for the Hone Department [2017] EWCA Civ 98.

the public interest for the issue to be determined now, especially if it affects a substantial number of people and/or the costs of preparing the issue for hearing have already been expended by the parties."

43. The Court of Appeal in R (on the application of Heathrow Hub Limited) v Secretary of State for Transport [2020] EWCA Civ 213 (Lindblom, Singh and Haddon-Cave LJJ) made clear,

> "208. It is well-established that courts should not opine on academic or hypothetical issues in public law cases other than in exceptional circumstances where there is good reason in the public interest for doing so. As Lord Slynn of Hadley said in his classic statement in *R. v Secretary of State for the Home Department Ex p. Salem [1999] 1 A.C. 450* (at 456):
>
> > "… I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to questions of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House, there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se … The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard *unless there is good reason in the public interest for doing so* as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the facts, and where large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future." (Our emphasis.)
>
> 209. Many similar statements are to be found in the relevant case law (see e.g. per Lord Goff in *R. v Secretary of State for the Home Department Ex p. Wynne [1993] 1 W.L.R. 115* at 120A–120B; per Lord Hutton in *R. (on the application of Rusbridger) v Attorney General [2004] 1 A.C. 357* at [35]; per Munby J in *Smeaton v Secretary of State [2002] EWHC 886 (Admin); [2002] 2 F.L.R. 146* , 244 at [420]; per Davis J in *BBC v Sugar [2007] EWHC 905 (Admin); [2007] 1 W.L.R. 2583* at [70]). A helpful review of the authorities is to be found in the judgment of Silber J in *R. (on the application of Zoolife) v Secretary of State for the Environment, Food and Rural Affairs [2007] EWHC 2995 (Admin); [2008] A.C.D. 44* at [32]–[36]."

44. I consider that the claim is academic because the Applicants are in the UK and so the need for a decision to be made for their entry clearance is not necessary or alternatively it is hypothetical. Put another way, it is an empty claim. Nor is there any other important point of principle for me to consider, as interesting as the academic arguments might be.

45. There are no exceptional circumstances where there is good reason in the public interest to consider the claim further. I conclude that there might be wider public interest in respect of Operation Pitting and the events which took place, but that is not the precise

issue before me. I see no public interest in dealing with the factual matrix which arises in this case. Whilst I should hesitate in deciding the claim is academic at the substantive hearing stage as opposed to at the permission stage, it must be remembered that at the permission stage the Applicants were still outside of the country and therefore very different urgent considerations applied.

46. In my judgment, the real remedy being sought by the Applicant has been obtained. Namely, the Applicants sought to be in the UK with their mother and they are. Whilst Mr Nathan submitted that a declaratory order ought to be granted stating that there had been delays in the decision making, in my judgment, the intended relief was to obtain entry clearance for the Applicants.

47. Nor did the parties suggest that there are other cases which require this decision or that there are potentially wider implications for me to deal with.

Consideration of the Arguments in the Alternative

48. In any event, even if I had to decide the Applicants' arguments, they would fail. There was no 'application' made by the Applicants' solicitor's letter of 27 June 2022 letter. Whilst the Respondent concedes that a mistake was made when referring to the 27 June 2022 letter as 'an application', the context and background to the serious and uncertain events at the time must be taken into account. This is clear when considering R (on the application of HR, HR2(A minor by their adult sister HR acting as a litigation friend), FR (A minor by their adult sister HR acting as a litigation friend) v Secretary of State for the Home Department v MMR, BHF, MYR, MOR, Spelthorne Borough Council [2024] EWHC 786 (Admin).

49. In R (HR) Lane J referred at [33] to the judgment of Underhill LJ in S and Z v Secretary of State for the Home Department and Secretary of State for Defence [2022] EWCA Civ 1092. At paragraph 33 his Lordship said,

> "33. The Court of Appeal's judgment records that, in respect of the defendant's statement of the purpose of requiring submission of a VAF:
>
> > "14. The requirement that applicants for LOTR must apply "on the application form for the route which most closely matches their circumstances" is at the heart of the issues on this appeal, and I will return to it below. But it is convenient to note at this stage that Ms Giovannetti explained that the essential purpose of the requirement that the applicant should use one of the online VAFs was simply so that the application could be dealt with under the Home Office's automated system for dealing with applications, with an assigned reference number and access (among other things) to the procedure for the

provision of biometrics as described above. That being so, it was in truth a matter of indifference which online route the applicant selected as most closely matching their circumstances. By definition many of the boxes in the form would be inappropriate to the basis on which they were seeking leave, which they would be expected to explain in the "additional information" box. She told us on instructions that in practice applications would not be rejected on the basis only that a form more closely matching their circumstances could have been chosen."

50. At paragraph 37 Lane J also said,

"37. In R (CX1) v SSD and SSHD [2023] EWHC 284 (Admin) , the court considered the evidence of Ms Weston and further information from the defendant regarding the "free text" box in all VAFs: paragraphs 108-109. At paragraphs 121-127, the court held that it was rational for the defendant to require applicants seeking LOTR to use the most closely connected VAF, notwithstanding it being "distinctly sub-optimal" for the claimants to have to use a VAF for a category of leave whose requirements they could not meet (paragraph 127)."

51. Lane J then made clear at paragraph 66 that,

"66. ...Even in the challenging context of Afghanistan, following the Taliban takeover, the courts have recognised the importance of requiring applications to be made using the online forms: see esp. S at paragraph 130 and S and AZ at paragraph 14. The witness statement of Sally Weston (Head of the Home Office's Simplification and Systems Unit in the Migration and Borders Group), originally filed in connection with another case but provided also in these proceedings, explains that the requirement is not only a matter of good and efficient administration but is imposed "with a view to applicants being treated fairly". The visa application process "involves an integrated system which aims to be efficient and where possible automated to make consideration of applications manageable and which easily enables identification of the type of application for the appropriate Home Office officials to consider". Mr Tabori also points out that the applications process prevents spurious applications being submitted by the same person using multiple identities.

67. These are not considerations to be brushed aside, even where the facts of the individual case are apparently demanding of sympathy. Requiring the process to be followed creates a "level playing field" for all applicants, many of whom might possess characteristics equally demanding of sympathy. It furthermore minimises the potential for error. There is also the important point that the LOTR policy involves consideration not only of whether a grant of leave is required in order to avoid a breach of article 8 of the ECHR (and so a breach of section 6 of the 1998 Act) but also whether there are compelling compassionate factors which mean that a refusal of entry clearance "would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8…".

52. The Secretary of State retains a discretion pursuant to section 3 of the Immigration Act 1971 to grant leave to enter or remain in circumstances not provided for in the Immigration Rules. R (on the application of Munir and another) v Secretary of State for the Home Department [2012] UKSC 32; [2012] 1 WLR 2192, refers to the Home Office Leave Outside the Rules Guidance. Version 3.0 was issued on 29 August 2023 which states that applicants seeking ILR outside the Rules must provide details why they should be granted ILR rather than limited leave to remain and that ILR is a privilege and not a right.

53. I accept the Respondent's submissions that the focus in August 2021 and thereafter was to seek to consider whether and how the Applicants might be reunited with their mother in the UK. As the decision R (BA) shows, there was considerable confusion and uncertainty in dealing with the events during and following the evacuations and their process. The large number of applications will have added to the confusion.

54. The decision in R (HR) makes clear that the Leave Outside of the Rules process required an application. Whilst there was no specific application form to use and the form to be used has been referred previously as 'sub-optimal' in my judgment it is not for judges to tell the Secretary of State how to deal with the security, enquiry and legitimacy of the applications at the initial stage.

55. I also accept the Respondent's submissions that an application form provides a necessary baseline for considering requests for persons to enter the UK. Perhaps even more so when applications have to be considered swiftly from a war zone where some applicants may be seeking to take advantage of the disorder that can be brought to systems and to usual processes.

56. As the Respondent's letter to the Applicants' solicitor dated 12 July 2024 in the supplementary bundle makes clear, a freestanding application could not be made by a child in abroad whose parent had already been evacuated from Afghanistan during Operation Pitting under the ACRS.

Section 31(2A) of the Senior Courts Act 1981

57. In my judgment the admitted mistake made by the Respondent in referring to the Applicants' solicitor's letter of 27 June 2022 as an application is of no consequence because it appears to me highly likely that the outcome for the Applicants would not have been substantially different in any event. I therefore conclude that the mistake made by the Respondent in that regard was immaterial to the outcome.

Respondent's Application Forms

58. It has been observed in some of the case law that many applicants will have lawyers assisting them with applications. It has to observed though that there will also be many others who do not lawyers. I remind myself of the Equal Treatment Bench Book which refers to the serious difficulties which unrepresented legal representatives face, particularly for those whom English is not their first language or where they cannot speak or read English.

59. I also remind myself and temper that with the Supreme Court's decision in Barton v Wright Hassall LLP [2018] UKSC 12. Lord Sumption with whom Lord Wilson and Lord Carnwath agreed, thereby comprising the majority) said at paragraph 18,

> "…In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ)"

Other Submissions of the Applicants

60. For completeness and out of respect to Mr Nathan's extensive written and oral submissions, I consider the Applicants' arguments relating to alleged delays by the Respondent in decision making.

61. To do so, it is necessary to consider the time periods and the context. The Applicants submitted their Afghan Settlement Scheme applications on 27 June 2022. The Judicial Review proceedings were filed on 24 August 2023. The time period was therefore 1 year, 1 month and 28 days. The Applicants submitted their entry clearance applications on 20 January 2023 and so there was a period of 7 months and 4 days up to the date that Judicial Review proceedings were lodged.

62. In R (on the application of O and H) v Secretary of State for the Home Department [2019] EWHC 148 (Admin) Garnham J considered the authorities in respect of delay. There, the delay was in the context of a case concerning the National Referral Mechanism, but

the principles apply here. Garnham J helpfully summarised at paragraph 89 that,

> "From those cases I draw the following principles which seem to me relevant to the present case:
>
> i) Delay may be unlawful when the right in question arises as a matter of established status and the delay causes hardship (*Phansopkar)*.
>
> ii) An authority acts unlawfully if it fails to have regard to the fact that what is in issue is an established right rather than the claim to a right (*Mersin*).
>
> iii) Delay is also unlawful if it is shown to result from actions or inactions which can be regarded as irrational. However, a failure merely to reach the best standards is not unlawful (*FH)*.
>
> iv) The court will not generally involve itself in questions concerning the internal management of a government department (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* and *Arbab)*
>
> v) The provision of inadequate resources by Government may be relevant to a charge of systematically unlawful delay, but the Courts will be wary of deciding questions that turn on the allocation of scarce resources *(Arbab)*."

63. Garnham J referred to the decision in R (on the application of FH) v Secretary of State for the Home Department [2007] EWHC 1571 (Admin) in detail at paragraphs 85 and 86,

> "The case of *R (FH) v SSHD* [2007] EWHC 1571 (Admin) bears closer comparison with the present case. There a number of applicants applied for an order that their applications to be allowed to remain in the United Kingdom should be considered forthwith by the respondent Secretary of State. They also sought a declaration that the delay in determining their applications was unlawful. Theirs were all "incomplete asylum cases", in that their initial applications for asylum had been rejected, and their appeals against those decisions did not succeed, but they had not been removed from the UK. Some years previously they had submitted fresh claims based on further evidence, or new circumstances, which were said to justify fresh consideration. The claims had not been considered by the Secretary of State. They submitted that the Secretary of State had failed in his duty to decide the applications within a reasonable time and operated a system to deal with the backlog of applications which was unfair and unlawful.
>
> 86. Thus, *FH* was not a case of an established right. At paragraph 11 Collins J held:
>
> "Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions which can be regarded as irrational … What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been

> made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible."

64. In my judgment the delay ground would have failed in any event. Whilst the Applicants missed school, that their grandmother was in hospital and that there was distress are not sufficient to enable me to conclude otherwise.

65. It is not for me to dictate to the Respondent how immigration policy ought to apply or to dictate the resources that ought to be allocated. Ultimately, these were difficult and exceptional circumstances in which the Applicants found themselves in, but it was one of many cases that the Respondent had to deal with. I agree with the Respondent that there were challenging issues and much information both during and after the events of August 2021 to decipher and to evaluate.

66. I also note that it appears clear that the Applicants concede that they could not meet Paragraph 297 of the Immigration Rules because their mother was not able to satisfy the financial requirements as their sponsor.

67. Therefore, in my judgment any delay was not unlawful when considering all the circumstances of the case including the length of the delay, the explanation provided by the Respondent and the impact of delay on the Applicants.

68. Ground 2 contends that section 55 of the Borders, Citizenship and Immigration Act 2009 was not considered or not correctly considered.

69. In my judgment the duty imposed on the Respondent was to have regard to the best interests of the Applicants. The duty was not a duty that the best interests of the Applicants were the primary consideration or that such best interests must prevail. The Supreme Court’s judgment in CAO v Secretary of State for the Home Department (Northern Ireland) [2024] UKSC 32 has made that clear.

70. I also consider FA (Sudan) v Secretary of State for the Home Department [2021] EWCA Civ 59 whereby Singh LJ, with whom Popplewell and Phillips LJJ agreed explained the section 55 duty,

> "69. Section 55 of the 2009 Act provides:
>
> > "(1) The Secretary of State must make arrangements for ensuring that—
> >
> > (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
> >
> > (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
> >
> > (2) The functions referred to in subsection (1) are—
> >
> > (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
> >
> > (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> ..."
>
> 70. Mr de Mello emphasises that FA has two dependent children who are British citizens. Before us he described them as being "secondary victims" of the domestic abuse suffered by their mother.
>
> 71. Section 55 is undoubtedly important, as has been stressed by the Supreme Court, including in immigration cases such as *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 271. Nevertheless, it is a process duty and does not dictate any particular outcome in a case like the present. Yet Mr de Mello submits, as he must if his challenge is to succeed, that the Respondent was required to extend the scope of the Concession to include applicants such as this Appellant."

71. The Applicants were in Afghanistan and thereby 'out of country' for section 55 purposes when they originally sought to enter the UK. The real emphasis of the section 55 duty refers to children who are 'in country', namely in the United Kingdom. Once the Applicants were in the United Kingdom, their claims became academic in any event.

Alternative Remedy

72. I must also take account of Mr Nathan's submissions that the Applicants, as they are now in the UK, have the option to make claims for asylum.

73. It is well known that Article 1 of the 1951 Refugee Convention defines a refugee as someone who owing to a well-founded fear of being persecuted is "outside the country of their nationality". The

Applicants are in the UK and are obviously outside of their country of nationality and can therefore make claims for asylum.

74. It seems clear to me that the Applicants have by their own admission an alternative remedy in respect of their claim that their limited leave to remain is deficient. Be those claimed deficiencies that they are required to make paid-for applications on a 10-year route to settlement or in respect of the Applicants' intended future tertiary education. The alternative remedy open to them is that they can make in country applications for asylum. Indeed, I note the e-mails from last month in the bundle which refer to applications already having been made.

75. If the Applicants' claims for asylum are rejected by the Respondent, then they will have an in country right of appeal to the First-tier Tribunal unless their claims are certified as being clearly unfounded.

76. Judicial Review is a discretionary remedy and I am not prepared to exercise my discretion to allow the challenge to succeed when the remedy being sought is not truly a remedy of last resort.

77. Ground 3 was conceded by the Applicants as being academic in view of them being in the United Kingdom and so they did not need to attend a VAC for their biometrics to be taken. Therefore, I need say no more about Ground 3.

Observation on Application Forms for Leave Outside of the Rules

78. Having reflected on matters and the difficulties which online application forms can cause, I consider that it is likely to be useful for the Respondent to clearly state when and how a Leave to Remain Outside of the Rules application can and should be made. Here I refer in particular to persons whose applications do not otherwise seem to come within listed categories of applications which have set application forms.

79. The issue which appears to arise at the moment is that applicants cannot progress their online claims unless their answer in response to standard questions asked is what the form asks.

80. In my judgment there are likely to be applicants who do not progress their online applications beyond the initial stage because when they answer correctly, the online form does not permit them to advance to the next page because of the restrictions within the online drop-down box or answer.

81. It appears to me that this can be remedied by the Respondent's forms. The form can highlight clearly at the head of the application

form that applicants can add comments in the free text area to clarify or to correct answers which were provided.

82. Anyone who has ever filled out any online application forms knows that they can be difficult to complete and perhaps frustratingly so when the answer is not a mere ‘yes’ or ‘no’. That is because not being able to answer ‘yes’ or ‘no’ prohibits the application form being finalised or from even being submitted. In such circumstances, the online form keeps showing that there is an error because the box has remained unchecked.

83. I am aware that the Respondent regularly reviews how the online forms operate and this judgment might be useful for that purpose.

Conclusion

84. I am grateful to Mr Nathan and to Mr Seifert for their oral and written submissions. For the reasons referred to, even though Mr Nathan has said all that he can on behalf of the Applicants, I am unable to agree with him.

85. I conclude that the entire claim is academic. In any event, I do not accept that the Respondent’s decision was flawed by public law errors which were material to the outcome. Accordingly, the claim will be dismissed.

86. I invite the parties to deal with any consequential matters which arise and to provide a draft order for my approval.

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Postscript

I had granted two extensions to the parties to provide a draft order for my consideration and I had delayed handing down judgment. I have been informed that parties have not been able to resolve issues, which appear to include issues in respect of costs. I shall therefore grant one final extension for a draft order to be provided to me by no later than 4pm on 21 January 2025.
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