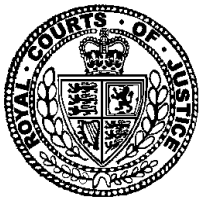

Neutral Citation Number: [2024] EWHC 3064 (Admin)

Case No: AC-2022-LON-002466

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2024

Before :

MR JUSTICE JOHNSON

- -

Between :

The King on the application of QA	**Claimant**
- and -	
SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	**Defendant**
- and –	
15 named members of QA's family	**Interested Parties**

- -
- -

Emma Daykin and Matthew Moriarty (instructed by Duncan Lewis) for the Claimant
Cathryn McGahey KC and Julie Anderson (instructed by Government Legal Department) for the Defendant
Tim Buley KC and Bilal Rawat (instructed by the Special Advocates' Support Office) as Special Advocates

Hearing dates: 20 and 21 November 2024

- -

Approved Judgment

This judgment was handed down by release to The National Archives on 29 November 2024

Mr Justice Johnson:

1. The Secretary of State refused an application by QA for the resettlement of his family from Afghanistan to the United Kingdom. QA seeks judicial review of that decision on the grounds that (1) it is irrational, and (2) it was procedurally unfair and/or it is vitiated because there is an appearance of bias and/or predetermination.

The facts

2. Prior to 2015, QA worked with the Ministry of Defence and the Foreign, Commonwealth and Development Office in Afghanistan. In 2015, the United Kingdom was preparing for departure from Afghanistan and a transition to an Afghan government. QA and his immediate family were resettled in the United Kingdom under the Afghanistan Locally Employed Staff Ex-Gratia Scheme because his role in Afghanistan put him and his immediate family in danger. In August 2021, the departure of United Kingdom personnel (and personnel from the United States of America and other NATO countries) was complete. The Taliban government has been in control of Afghanistan ever since.

3. The interested parties are 15 members of QA's extended family, including his siblings and their families. QA says that one of the interested parties has been detained by the Taliban, that another has been questioned by the Taliban and that another has disappeared (it being suspected that he, too, has been detained). QA attributes all this to his role in assisting the United Kingdom Government in Afghanistan. He says that all the interested parties are at risk and are having to keep a low profile for their own safety, and that they have become substantially dependent on him.

4. In April 2021, the United Kingdom Government established the Afghan Relocations and Assistance Policy ("ARAP"). ARAP was designed to support Afghan citizens whose safety was threatened in Afghanistan and who were at risk due to their work with the United Kingdom Government. This extends to "additional family members" but only where there are compelling reasons for resettlement. Guidance sets out the key factors to be applied when assessing applications for resettlement made on behalf of additional family members:

> "Key factors when assessing a grant of leave for additional family members include the proximity of the family relationship, the family circumstances of the individuals involved (including the nature and extent of any dependency), the way in which the employment or the relevant Afghan citizen has led to any risk to the family member and what those risks are.
> …
> Compelling reasons must be provided along with any supporting documentation to confirm both the relationship between them and the link to risk faced by the family members as a result of the work of the relevant Afghan citizen eligible for relocation under the ARAP. [Leave outside the rules] should only be considered where either there are genuine, verifiable compelling reasons relating to the family member's safety and security, or

> vulnerabilities. It is not intended to provide for all additional family members."

5. On 24 November 2021, QA applied for the resettlement of the interested parties. He provided extensive evidence that they were at high and immediate risk from the Taliban. On 24 December 2021, the application was refused (the first decision). The panel who refused the application had not been provided with all of the evidence. A second panel was held on 10 January 2022. That panel also refused the application (the second decision). QA was not told about the second decision at the time.

6. QA sent a pre-action protocol letter intimating an intention to challenge the first decision. The Secretary of State responded on 1 April 2022. The Secretary of State denied that the first decision was irrational. No mention was made of the fact that the panel making the first decision had not been provided with all of the evidence, and no mention was made of the second decision.

7. QA sought judicial review of the first decision. In the summary grounds of defence, the Secretary of State made no reference to the fact that the panel had not been provided with all the evidence. Nor was any reference made to the fact that a further decision had been made on 10 January 2022. It was said that permission to claim judicial review should be refused because it was premature and an abuse of process, since QA had not exhausted the alternative remedy of a full review of the application. It was also said that such a review would allow "for the application to be considered afresh by a new panel of officials with the benefit of any further evidence provided by the applicant."

8. Following discussions, the parties agreed that QA could seek a further review of the decision and the claim for judicial review was withdrawn. QA asked the Secretary of State to review the decision and he submitted extensive further evidence. The evidence he provided included a letter of support from the former Foreign and Commonwealth Office Head of Mission and others. On 8 June 2022 a further decision was made refusing the application (the third decision). On 9 September 2022 QA sought judicial review of the third decision. At that stage, QA did not know the names of those who had made the third decision (or the earlier decisions), because their names had been redacted in the disclosed documents.

9. Permission to claim judicial review was granted by Murray J on 24 August 2023.

10. On 3 November 2023, the Secretary of State filed a witness statement of Christine Ferguson. Ms Ferguson said that she had been employed by the Foreign, Commonwealth and Development Affairs for 40 years, that she had, since March 2022, been the Head of the Resettlement Department within the Afghanistan and Pakistan Directorate, and that she was a regular panel member for deciding resettlement applications made on behalf of additional family members. She gave evidence as to the background, and also as to the third decision. She said that the panel "was chaired by the G7, Head of the AFM Secretariat", that the panel minutes were circulated to the panel members for sign off, that requested amendments were made to the minutes to ensure accuracy, and that it was agreed by all three panel members as an accurate record of the decision and the reasons. Ms Ferguson said:

> "on the basis of my role and experience, the Decision and the approach taken remains within what would be expected in the

> circumstances. …on my own review of the materials [provided by QA] I consider that the reports are not such as to determine the outcome or justify deferring to the opinions expressed. For example, the conclusions drawn by [a witness] are not definitive; he had not visited Afghanistan since 2012… With respect to [an expert report], he has only visited Afghanistan twice, the most recent visit being in 2010… insofar any issue arises as to whether a reconsideration of the application would be likely to lead to a different outcome, for my part (given my role and experience in relation to such decisions), I would not expect a different outcome…"

11. The strong impression given by this statement is that Ms Ferguson was not part of the panel that made the decision. She describes the panel, and the process, as if she had not been part of it, and as if she were an independent expert commentator on the decision that they had made.

12. On 15 November 2023, QA's solicitors sought disclosure of the panel minutes for the third decision, and also some specified underlying documents. The request was chased in subsequent email correspondence. On 19 December 2023, QA made an application for disclosure. This included a request for a written explanation of redactions that had been made to documents disclosed by the Secretary of State. Those redactions had included the names of the panel members for each of the decisions. On 30 January 2024, the Secretary of State indicated that he would be likely to apply for a declaration pursuant to section 6 of the Justice and Security Act 2013 to permit a closed material application (so that the Secretary of State could apply to withhold relevant sensitive material from QA). In February 2024, the Secretary of State made an application under section 6 and also made an application for permission not to disclose sensitive material otherwise than to the court and the special advocates.

13. On 2 February 2024, judgment was given by the Court of Appeal in *R (IAB) v Secretary of State for the Home Department* [2024] EWCA Civ 66 [2024] 1 WLR 1916. That judgment upholds a judgment of Swift J given on 17 November 2023 ([2023] EWHC 2930 (Admin)) that defendants in judicial review proceedings may not (save for good and specific reasons) redact the names of civil servants from disclosed documents: *per* Bean LJ at [36], "The practice is inimical to open government and unsupported by authority." In the light of this decision, the continued redaction of the names of the panel members was unsustainable.

14. On 1 March 2024, the Secretary of State decided to undertake a further review of QA's application. QA was asked 43 questions.

15. The hearing of the claim for judicial review was listed for 12 March 2024. Skeleton arguments for the hearing were prepared. In the Secretary of State's skeleton argument it was said that QA's application "was fully considered… by the Review Panel (which comprised of different assessors to those who took the decision of December 2021)." There was no reference at all to the second decision (in January 2022), and no reference to the identities of those who made the third decision.

16. On 4 March 2024, there was a hearing of QA's application for disclosure and the Secretary of State's applications under the 2013 Act. At that hearing it was said on behalf of QA that he would provide further updated information concerning the current position of the interested parties in Afghanistan. The Secretary of State indicated that a panel would consider that material and make a further decision, which would supersede the decision under challenge. Swift J vacated the substantive hearing of the judicial review claim that was due to take place the following week. He made detailed case management directions which were premised on a new decision, and a challenge to that new decision. The directions made provision for a hearing to consider permission to claim judicial review of the new decision, with the substantive claim to be heard at the same time if permission were granted. Swift J made a declaration permitting a closed material application and made case management directions for any closed proceedings. He ordered the Secretary of State to pay QA's costs of the proceedings from 15 November 2023 to 4 March 2024.

17. On 5 March 2024, QA provided (by his solicitor) a written response to the 43 questions that had been asked by the Secretary of State. There followed further questions from the Secretary of State and answers from QA.

18. On 11 March 2024 a further decision was made, upholding the previous decisions to refuse the application (the fourth decision).

19. On 28 March 2024, QA served an amended statement of facts and grounds, which challenged the fourth decision.

20. On 5 April 2024, QA's solicitor wrote to the Secretary of State's solicitor and expressed concern about the Secretary of State's approach to disclosure and candour in the litigation, drawing attention to unexplained and material differences between different versions of documents that had been disclosed. It also expressed concern that Ms Ferguson had been a member of the panel for the third decision (as was only revealed once, finally and belatedly, the Secretary of State revealed the names of the panel members) but had given the impression in her witness statement that she had not been involved at all.

21. On 16 April 2024, the Government Legal Department said that the Secretary of State had carefully considered the amended statement of facts and grounds and, in the light of some of the points made, had agreed to reconsider QA's case.

22. On 22 April 2024, one of the members of the panel for the reconsideration of the application indicated (correctly) that he had been a member of a previous panel. He asked if that raised any concern. He was told by the chair of the panel that there needed to be a degree of pragmatism because there was only a finite number of potential panel members. On the same day, the panel decided to refuse the application (the fifth decision). Ms Ferguson was a member of the panel (with two other panel members, and a chair) that made this decision. It is this decision that is now under challenge.

23. On 7 May 2024, the Government Legal Department responded to QA's solicitor's letter of 5 April 2024, having taken instructions and reviewed the "history of the documents in full." In respect of Ms Ferguson's statement, the Government Legal Department said:

> "The purpose of her witness statement was… not to set out her personal view of the Claimant's application, or indeed to carry out any further informal review of the evidence provided, but rather to set out the chronology and what was considered at each stage, as set out in the panel minutes. As such my client considers that it was unnecessary to specify within her witness statement that she was a member of one of the panels which met."

24. On 9 May 2024, QA's solicitor made a detailed witness statement setting out the chronology in respect of disclosure and identifying ongoing concerns. These included that the Secretary of State had disclosed different versions of the same document, which indicated that documents had been edited (rather than redacted) before disclosure. QA's solicitor drew attention to the observation of Swift J in *R (L1T FM Holdings Ltd) v Secretary of State in the Cabinet Office* [2024] EWHC 386 (Admin) at [14]: "[t]he open versions of these documents ought not to have pretended to be something they were not." QA's solicitor also raised the concern that Ms Ferguson's statement had given the misleading impression that she had not been involved in the case at all.

25. On 20 May 2024, Ms Ferguson made a further witness statement. That statement again failed to acknowledge her previous involvement in the case as a decision maker, and did not explain why her previous statement had been misleading.

The grounds of challenge and submissions

26. QA challenges the fifth decision on two grounds:

    (1) The decision failed to take relevant matters into account and the conclusion that was reached was not reasonably open to the panel.

    (2) The decision was unfair on grounds of apparent bias and/or predetermination.

27. As to ground (1), Emma Daykin, on behalf of QA, submits that the panel failed to consider the particular role that QA had fulfilled in Afghanistan, failed to have regard to evidence as to the risk to those that fulfilled that role, failed properly to consider the significance that one of the interested parties had been detained and that another had been questioned, took too narrow an approach to the evidence of an expert, failed to recognise the risk from the Taliban of revenge attacks, and took an overly narrow assessment of social media evidence.

28. Cathryn McGahey KC, for the Secretary of State, submits that the panel comprised experienced and expert decision makers who have unique experience of applications and the up to date position in this area. It took account of all the evidence, and the evidence did not mandate only one conclusion. She submits that the claim impermissibly seeks to re-argue the merits of the application and thereby to misuse the judicial review process as an appeal on the facts for which there is no jurisdiction.

29. As to ground (2), Ms Daykin submits that QA was entitled to expect that the fifth decision would be made by a new panel, but instead the fifth decision was made by a panel that included a member who had previously rejected QA's application. She submits that in the particular circumstances of this case, including representations that had been made in the summary grounds of defence, and the involvement of Ms

Ferguson as both a witness who had expressed a firm view on the application and also a member of the panel, there has been procedural unfairness. A fair-minded observer would consider that there is a possibility that the decision maker was biased or that the decision had been predetermined.

30. Julie Anderson, who responded on behalf of the Secretary of State to this ground of challenge, submits that the allegation of apparent bias or predetermination is unfounded and inapt. She says that there was no promise that there would be a different panel constitution for the review(s) of QA's application, and that there is no requirement in law for a decision maker to recuse themselves from retaking a decision. There is a finite number of panel members with the requisite experience and expertise and it is not practicable to provide a completely new panel in every case where a decision needs to be retaken. Further, Ms Ferguson was not the sole decision-maker, she was part of a panel who had made a unanimous decision.

31. The hearing of the claim took place on 20 November 2024. A closed hearing took place on 21 November 2024. At the closed hearing I heard from Tim Buley KC for the special advocates, and Ms McGahey for the Secretary of State.

32. I deal first with ground (2).

Legal framework

33. A decision is flawed on public law grounds, and is liable to be set aside, if the decision-making process was unfair. If the decision maker was biased or if there is an appearance that the decision maker may have been biased then the decision-making process is unfair. An appearance of bias arises if, and only if, "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": *Porter v Magill* [2001] UKHL 67 [2002] AC 357 *per* Lord Hope at [103]. A court, in applying the test, must first ascertain, with an intense focus on the facts, all the relevant circumstances: *Helow v Secretary of State for the Home Department* [2008] UKHL 62 [2008] 1 WLR 2416 *per* Lord Hope at [2]. It there is a real possibility of bias, then the decision maker is disqualified (and the decision is liable to be set aside), irrespective of the inconvenience, cost or delay that is occasioned: *Man O'War Station Ltd v Auckland City Council* [2002] UKPC 28 *per* Lord Steyn at [11].

34. A decision is also flawed and liable to be set aside if the decision maker approaches the issue with a closed mind, so that the outcome is predetermined. As with bias, that is so both if the outcome is actually predetermined and also if there is an appearance of predetermination: *R (T) v West Berkshire Council* [2016] EWHC 1876 (Admin) *per* Elisabeth Laing J at [49]. Accordingly, if there is a real possibility that a decision maker has predetermined an issue, in the sense of closing their mind to the merits of the issue that is to be decided, then they are disqualified from making the decision, and if they do make the decision it is liable to be quashed. The test to be applied is the analogue of the *Porter* test for bias. That is, whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal had predetermined the issue: *Miller v Health Service Commission for England* [2018] EWCA Civ 144 [2018] PTSR 801 *per* Sir Ernest Ryder at [62].

35. In *Bovis Homes Ltd v New Forest District Council* [2002] EWHC 483 (Admin) Ouseley J, at [382], explained the vice of predetermination:

> "There is obviously an overlap between [the requirement for an open mind] and the commonplace requirement to have rational regard to relevant considerations. But, in my judgment, the requirement to avoid predetermination goes further. The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be true reasons but a sham."

36. The fact that a decision maker has determined an issue does not always prevent that decision maker from making a fresh decision on the issue. "The Court of Appeal sees nothing objectionable in a judge who has refused permission to appeal on the papers sitting on an oral hearing to reconsider his decision. That is because it is recognised that a judge is always prepared to be persuaded to change his mind": *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin) *per* Collins J.

37. The same applies ("in the ordinary case") to a judge who has refused permission to appeal but who is then part of a constitution that hears the substantive appeal following a successful renewed application before a different judge for permission to appeal: *Sengupta v Holmes* [2002] EWCA Civ 1104 *per* Laws LJ at [35] – [40]. There are, however, cases where apparent bias may be justifiably apprehended in such cases – see *per* Laws LJ at [32] – [34]:

> "32. …If a judge has presided at a first instance trial and roundly concluded on the facts – after hearing disputed, perhaps hotly disputed, evidence – that one of the parties lacks all merit, everyone would accept that it would be unthinkable that he should sit on that party's appeal. He has committed himself to a view of the facts which he himself had the responsibility to decide…
>
> 33. In some such cases the judge's inability to open his mind on the appeal would be not just apparent, but real: if after a careful and professional review of all the evidence, given by witnesses whom, so to speak, he has looked in the face, he has arrived at the conviction that the party in question is a crook or a rogue, guilty as charged (whether the case is criminal or civil), he might not *conscientiously* be able to put himself back into a state of

> mind where he has no preconceptions about the merits of the case.
>
> 34. There may also be cases, though one hopes there will not be, in which a judge called on to make a preliminary decision expresses himself in such vituperative language that any reasonable person will regard him as disqualified from taking a fair view of the case if he is called on to revisit it."

38. If a judge's decision is quashed on appeal then, depending on the circumstances, it is permissible for the issue to be remitted back to the same judge. The same is true if an administrative decision maker agrees to (or is required to) retake a decision. The test is whether there would be a reasonable perception of unfairness to the affected parties, or whether it would damage public confidence in the decision-making process: *HCA International Ltd v Competition and Markets Authority* [2015] EWCA Civ 492 [2015] 1 WLR 4341 *per* Vos LJ at [68]. Where there has been a finding of irrationality, then there may be real difficulties in ensuring confidence in the process unless the decision is retaken by a new panel: *R (FNM) v DPP* [2020] EWHC 870 (Admin) [2020] 2 Cr App R 187 at [52].

Is the decision unlawful on grounds of unfairness/bias/predetermination?

39. For the purpose of assessing whether the fair-minded observer would consider that there is a possibility that the decision maker was biased, or the decision was predetermined, the important features of the decision-making process are:

(1) Ms Ferguson is a public servant with considerable experience and expertise. I am prepared to assume that the same applies to the other panel members, or, at least, to the panel as a whole.

(2) Neither Ms Ferguson, nor any of the other panel members who made the fifth decision, nor any of the panel members who made any of the earlier decisions, has any pecuniary interest in the outcome of the decision, or any other personal interest in the outcome.

(3) There was unwarranted secrecy about the identity of the panel members, which is inimical to open government and which fuels suspicion.

(4) QA was not initially informed about the second decision (which had been made by exactly the same panel as the first decision). Nor was he initially told that the panel making the first decision had not been given all of the evidence. The Secretary of State instead maintained that the decision was not irrational, despite knowing that it had been made without considering all the evidence.

(5) The Secretary of State gave the impression that reviews were being conducted by newly constituted panels and sought to make a virtue of this. The summary grounds of defence in the first claim for judicial review said that the application would be "considered afresh by a new panel of officials." The skeleton argument for the hearing in March 2024 said that the third decision had been taken by a Panel "comprised of different assessors to those who took the decision of December 2021."

(6) Ms Ferguson was (unknown to QA) a member of the Panel that made the third decision. That decision was challenged on grounds of rationality. In the context of that challenge, Ms Ferguson made a witness statement strongly supporting the rationality of the decision, and disputing the challenge, and did so in a way that wrongly gave the impression that she had not been involved in the decision.

(7) The Secretary of State, in the face of that rationality-based challenge, agreed that the decision would be retaken.

(8) Ms Ferguson was then a member of the panel that took the fifth decision. One of the other members of the panel had been a member of the panel that took the first and second decisions. Another member had been a member of the panel that had taken the fourth decision. The chair of the panel for the fifth decision had chaired the panel that had taken the fourth decision and had also been a member of the panel that had taken the first and second decisions. This was all in the context of QA being told that the third decision would be the result of the application being "considered afresh by a new panel of officials". It was, but that was not the case for the fourth decision or the fifth decision. The identity of the panel members was only disclosed as a result of QA's solicitor's dogged pursuit of a disclosure application to require the Secretary of State to comply with the requirements set out by Swift J and the Court of Appeal in *IAB*.

(9) The Secretary of State maintained that it was unnecessary for Ms Ferguson, in her witness statement which comments on the decision, to have acknowledged that she was part of the panel that made the decision.

(10) The Secretary of State maintains that the purpose of Ms Ferguson's statement was to set out the chronology, and not to set out her personal view of QA's application. There was therefore no reason for Ms Ferguson to set out her personal view. Nevertheless, Ms Ferguson took it upon herself to do exactly that. She strongly supported the decision and expressed views about the further evidence on which QA sought to rely.

40. The fact that there is overlap between the constitution of a panel that makes a decision, and the constitution of a panel that retakes the decision, is not, itself, necessarily objectionable. The position may be different where, as here, the decision is retaken in the face of a challenge that the original decision is irrational: *HCA International Ltd* and *FNM*. That is more on grounds of public confidence than predetermination. It is unnecessary to decide whether the decision is flawed on this basis alone.

41. The unnecessary secrecy around the identities of the panel members is likewise a factor that impacts on confidence in the decision-making process: as Bean LJ observed, it is inimical to open government. What has happened in this case demonstrates what the consequences may have been if *IAB* had been decided differently. Again, it is unnecessary to decide whether the decision is flawed on this basis alone.

42. The further, critical, feature is that Ms Ferguson made a witness statement in these proceedings in which (whilst wrongly giving the impression that she was not a party to the third decision) she strongly defends the third decision, comments on the fresh material that would go before a further panel if there were to be a further decision and says that she would not expect a fresh decision to reach any different outcome.

43. She did say that was her expectation, rather than that it was her firm and unshakeable view such that her mind was closed to any other option. What she said is, in isolation, compatible with her having a predisposition to a particular outcome (which is not objectionable) rather than having predetermined the outcome. But the fact that she put this in a witness statement which had only been intended for the purpose of setting out a chronology, and that she went much further than providing a chronology and (unnecessarily) expressed a clear and firm view on QA's application, raises the possibility of predetermination. When taken together with the other important features of the decision-making process that I have set out above, the fair-minded observer would conclude that there is a possibility that Ms Ferguson had predetermined the outcome. More broadly, the constellation of features that I have identified demonstrates unfairness in the decision-making process.

44. There is nothing in the point that Ms Ferguson was just one member of the panel. In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 a decision of the House of Lords was vacated where one of the five-member Appellate Committee was disqualified from sitting. Nor does it make any difference that the decision was unanimous: *In re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350 [2001] 1 WLR 700 *per* Lord Phillips MR at [99] ("Dr Rowlatt must have discussed [issues in the case] with the other members of the court. We concluded that it was inevitable that the decision that Dr Rowlatt should be disqualified carried with it the consequence that the other two members of the court should stand down.") The same approach applies to a unanimous decision made by a 5-member tribunal where one member should have recused himself: *Suleman v General Optical Council* [2023] EWHC 2110 (Admin) *per* Chamberlain J at [32]: "It is impossible to know how influential the views of the individual panel members have been. If one member is tainted by apparent bias, the Committee's decision will be vitiated." In *R v Grant* [2017] EWCA Crim 414 [2018] 4 WLR 115, a retrial took place after the first jury were discharged. One of the jurors on the re-trial had been a juror on the first trial. The defendant was convicted in the second trial by a majority of 11 to 1. The Court of Appeal found that the jury was compromised from the outset and the conviction was not safe – see *per* Thirlwall LJ at [33].

Is the decision irrational?

45. QA has been deprived of a fair decision. For that reason, the fifth decision must be quashed, and, regrettably, a sixth decision will be necessary.

46. I do not consider it appropriate to rule on the question of whether the fifth decision was also irrational.

47. I did not understand Ms McGahey to submit that there was only one possible outcome of the application. She submits that some or all of QA's arguments amount, impermissibly, to an invitation to the court to engage in a merits-based appeal of the decision, rather than an irrationality challenge. I express no view about whether she is right about that, but to address ground 1 it would be necessary to analyse detailed argument about what was, in any event, a flawed decision-making process. It is for the Secretary of State, not the court, to make the decision. QA is entitled to a fair and unencumbered decision from the decision-maker. If I address ground 1, anything I say may risk influencing the decision-maker. I consider it is better to say nothing at all.

Closed hearing

48. Likewise, in the light of the conclusion that I have reached in respect of ground 2, it is not necessary to make any order in respect of the closed proceedings. Nor is it necessary to give a separate closed judgment or to make a closed order. This is therefore the only judgment.

Outcome

49. The fifth decision was unlawful because a fair-minded observer would consider that it was possible that the decision was predetermined. I grant permission to claim judicial review, and I give judgment for the claimant on the claim in respect of ground 2. The claim for judicial review therefore succeeds, and the fifth decision will be quashed.

50. I have not thought it appropriate to decide whether the fifth decision was also flawed on grounds of irrationality. I have not made any order, or given any judgment, in respect of the closed proceedings.