Neutral Citation Number: [2021] EWHC 477 (Admin)

Case No: CO/309/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2021

Before:

LORD JUSTICE LEWIS
and
MR JUSTICE GARNHAM

- -

Between :

THE QUEEN (on the application of KMI)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Simon Cox and Daniel Clarke (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimant**
Alan Payne Q.C., Ben Keith and Saara Idelbi (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 11 February

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Wednesday, 3 March 2021.

Lord Justice Lewis and Mr Justice Garnham handed down the following judgment of the Court:

Introduction

1. The Claimant, who has the benefit of an anonymity order and is known in these proceedings as "KMI", is a failed asylum seeker. He has commenced judicial review proceedings against the Defendant, the Secretary of State for the Home Department ("the Secretary of State"). First, the Claimant seeks to challenge the Secretary of State's decision to refuse his own application for accommodation and support under s. 4 of the Immigration and Asylum Act 1999 ("the 1999 Act"). Second, he seeks to challenge the Defendant's policy to refuse to provide accommodation under s.4 during the Covid-19 public health emergency to all destitute former asylum seekers who do not make a voluntary departure from the UK. He also seeks a declaration that in adopting the policy the Defendant acted unlawfully.

2. The Claimant also sought interim relief requiring the defendant to provide him with accommodation pursuant to s.4 of the 1999 Act pending the determination by the First-Tier Tribunal (Social Entitlement Chamber) ("AST") of his appeal against the refusal of accommodation. By an order dated 27 January 2021, Chamberlain J granted interim relief on consideration of the papers alone requiring the Defendant provide the Claimant with accommodation within London Zones 1-6 from 2 p.m. on 28 January 2021 (the time by which accommodation was to be provided was subsequently varied).

3. Pending resolution of his application for permission to apply for judicial review, the Claimant seeks interim relief in one or other of two forms. He seeks what was described as "class interim relief" by way of an order requiring the Secretary of State either:

   (i) to offer accommodation under s.4 of the 1999 Act to any person who applies for such accommodation whom she considers to be a destitute failed asylum seeker; or alternatively

   (ii) to offer accommodation under s.4 to persons with a pending appeal to the AST from a decision of hers to refuse such accommodation, in which she does not dispute that the person is a destitute failed asylum seeker.

4. As is clear from the terms of the order sought, that interim relief did not apply to persons who were parties to this claim for judicial review. Rather it was intended to apply to classes, or categories, of persons described in the abstract. Chamberlain J declined to grant such interim relief on the papers and directed a hearing noting that whether "class interim relief is appropriate at all, or is appropriate on the facts of this case, are issues of potentially wider significance".

5. In the event, neither party made detailed submissions on the jurisdiction to grant such interim relief, or the circumstances in which such interim relief would be appropriate. Rather, both parties approached the issue on the basis of the usual approach to interim relief in cases where an order is sought by a party to proceedings against another party to those proceedings, namely whether there was a serious issue to be tried and, if so,

whether the balance of convenience, having regard to the wider public interest, favoured the grant or refusal of interim relief.

6. At the close of the hearing, which was conducted remotely on 11 February 2020, we indicated that we would refuse both those applications. We did not consider that it was appropriate on the facts of this case to grant interim relief to persons who were not parties. We did recognise, however, that there was a need to put in place an urgent, and stream-lined process, for persons in a similar situation to the Claimant to be able to make an application for interim relief before issuing a claim for judicial review. The order we made, therefore, included the following:

> "It is DIRECTED that:
> …The High Court will, until further order, be prepared to consider urgent applications, before the issuing of a claim for judicial review, for interim relief in the following category of individual cases: Any appellant to the First-Tier Tribunal (Social Entitlement Chamber) ("FTT") who has given notice of appeal, in accordance with rule 23 of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008, against a decision of the Defendant refusing support under section 4 of the Immigration and Asylum Act 1999 ("section 4 support") whom the Defendant accepts is destitute.

7. We indicated we would give our reasons for that order in writing subsequently. We now set out those reasons.

The Legal Framework

The Statutory Scheme

8. Section 4 of the 1999 Act provides, so far as material, that:

> "(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—
>
> (a) he was (but is no longer) an asylum-seeker, and
>
> (b) his claim for asylum was rejected…
>
> (5) The Secretary of State may make regulations specifying criteria to be used in determining–
>
> (a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;
>
> (b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section…
>
> (10) The Secretary of State may make regulations permitting a person who is provided with accommodation under this section

to be supplied also with services or facilities of a specified kind.

(11) Regulations under subsection (10)–

(a) may, in particular, permit a person to be supplied with a voucher which may be exchanged for goods or services,

(b) may not permit a person to be supplied with money,

(c) may restrict the extent or value of services or facilities to be provided, and

(d) may confer a discretion."

9. Section 95(3) of the 1999 Act provides:

" (3) For the purposes of this section, a person is destitute if—

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

10. This definition of "destitute" is adopted for cases under s. 4 by the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 ("Accommodation Regulations"), reg. 2. In exercise of the power under s. 4(5), reg. 3 provides:

"Eligibility for and provision of accommodation to a failed asylum-seeker

(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person

falling within section 4(2) or (3) of that Act are—

(a) that he appears to the Secretary of State to be destitute, and

(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.

(2) Those conditions are that—

(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include

> complying with attempts to obtain a travel document to facilitate his departure;
>
> (b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;
>
> (c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
>
> (d) he has made an application for judicial review of a decision in relation to his asylum claim–
>
> (i) in England and Wales, and has been granted permission to proceed pursuant to
>
> Part 54 of the Civil Procedure Rules 1998, . . .
>
> (e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."

11. Under reg. 2 of the Accommodation Regulations, "destitute" has the meaning given in s.95(3) of the 1999 Act:

> "a person is destitute if—
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

12. Rule 8 of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008 (S.I. 2008 No. 2685) provides so far as is material:

> "(3)The Tribunal may strike out the whole or a part of the proceedings if— …
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
>
> (5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

> …
>
> (7) This rule applies to a respondent as it applies to an appellant except that— (a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings; and (b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings.
>
> (8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent and may summarily determine any or all issues against that respondent."

The decisions in PA and MA and subsequent cases

13. The nature of the obligations on the Secretary of State under s.4 of the 1999 Act was considered by the AST's Principal Judge, Ms Sehba Haroon Storey, in a case called *PA and MA* (AS/20/09/42386 and 42397). The Judge was there considering an appeal against a decision by the Secretary of State to discontinue support under s.4. At paragraph 48 of her decision, the Judge said, obiter, that it seemed to her that it would be unreasonable to discontinue support to persons in receipt of support who resided in a Tier 3 area (at that stage, the most stringent restrictions during the coronavirus pandemic applied to areas designated as Tier 3 areas). The Judge considered, obiter, that to discontinue support in those circumstances would raise an issue under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and that any assessment of the proportionality of any interference with rights guaranteed by Article 8(1) of the Convention would need to have regard to the public interest, including public health considerations. On the facts, however, PA and MA were in Tier 2, not Tier 3 areas, where less restrictive regulations applied. PA and MA were not prevented by the regulations applicable in those areas from taking steps to leave the UK or to co-operate with the Home Office Voluntary Return Service for that purpose. At paragraph 52 of her decision, the Judge said that "*on the evidence before me, I am satisfied that for the purposes of deciding the regulation 3(2)(e) issue, that the respondent's March 2020 policy…was lawfully withdrawn from PA and MA with effect from 7 October 2020…".* On that finding, the Judge would not normally have allowed the appeal as

> "PA is not entitled to the provisions (sic) of support under regulation 3(2)(a) –(e). It cannot, in my judgement, be right that a person who has remained unlawfully in the UK for 13 years, who has wilfully refused to mitigate the consequences of being left without accommodation by not taking all reasonable steps to leave the UK, can nevertheless require the Secretary of State to support him under the ECHR simply by refusing to leave."

14. The Judge then turned to consider the significance of the fact that pre-action protocol letters had been served on behalf of PA and MA challenging the lawfulness of a decision of the Secretary of State in September 2020 to withdraw the March 2020 policy. She concluded her decision with the following:

> "57. In PA's and MA's appeals, the PAP letters seek to challenge the lawfulness of the Secretary of State's decision to withdraw accommodation from persons who continued to receive it in March 2020 because of coronavirus and whose support has now been terminated. It seems to me that the proposed judicial review raises an important issue which can only be challenged before the Administrative Court, and the appellants' representatives ought to be allowed the opportunity to make an application for permission to the Administrative Court and present their argument. Applying the rationale of *R(NS)* to the appeals before me, and solely on account of the proposed judicial review concerning the legality and rationality of the Secretary of State's decision to withdraw support from PA and MA in September 2020, I conclude that the provision of accommodation is necessary under regulation 3(2)(e) for the purpose of avoiding a breach of their Convention rights within the meaning of the Human Rights Act 1998."

15. The Secretary of State has not sought judicial review of that decision of Principal Judge Storey. A number of other judges of the AST have relied upon those dicta in *PA and MA* in appeals by applicants *applying* for s.4 support (not merely discontinuing support). Furthermore, the decisions indicate that they have applied the dicta of Principal Judge Storey. They have observed that the current restrictions imposed throughout England because of the coronavirus pandemic are at least as restrictive as the restrictions applicable in the former Tier 3 areas. They have found that refusal of support would be a breach of Article 8 of the Convention having regard to the public interest, including public health considerations.

16. We are told that since *PA and MA* all, or almost all, appeals by destitute failed asylum seekers refused such support have succeeded before the AST. Furthermore, on repeated occasions, the AST has made orders under rule 8(3) striking out the Secretary of State's case, with the result, as provided for by rule 8(7) that the Secretary of State has been barred from taking part in the proceedings and, pursuant to rule 8(8), the Tribunal is not required even to consider submissions made by her.

17. Surprising as it seems to us given her stance in the present proceedings, the Secretary of State has not sought, as yet, judicial review of any of the decisions allowing appeals against refusal to grant s.4 support which were based on the reasoning in *PA and MA*. She has merely invited the AST to list a case in which Judge Storey's analysis can be challenged. That has not yet occurred. Nor, to our knowledge, has she sought an order, pursuant to rule 8(7)(b), lifting the bar on her taking part in individual appeals.

The Claimant's History

18. The Claimant claimed asylum in the United Kingdom on 2 April 2016. He was provided with accommodation under s.95 of the 1999 Act. On 3 October 2017, the Secretary of State refused the Claimant's claim for asylum. On 7 September 2018, the Claimant had exhausted all his rights to appeal against the refusal of asylum.

19. On 7 January 2021 the Secretary of State notified the Claimant of her decision to refuse support under s.4 of the 1999 Act on the basis that none of the grounds in reg. 3(2) of the Accommodation Regulations applied. The letter included the following:

> "You have applied for support on the basis that you have outstanding further submissions with the Home Office. However, the Home Office have no record of you currently having any outstanding further submissions or having any open appointments.
>
> You state in your application that you are unable to travel due to the Covid-19 ban on travel. However, considering the easing of these restrictions, it is no longer accepted that you are unable to leave the United Kingdom or that you are unable to take the necessary steps to resolve any practical problems that may be preventing you from leaving. The Home Office Voluntary Returns Service is available to help you to leave.
>
> Furthermore, I do not consider that you meet any of the other conditions set out in paragraph 3(2) of the 2005 Regulations".

20. Thereafter, the Claimant says, he began sleeping on the streets of Lambeth and his physical and mental health deteriorated. On 5 February 2019, the Claimant approached the British Red Cross who provided him with some destitution payments. On 15 July 2020, the Claimant attempted to commit suicide by jumping from a window. He broke his arm and was admitted to hospital. Subsequently, he was discharged and returned to being homeless.

21. On 30 October 2020, the Claimant was admitted to the Mildmay Hospital with symptoms suggestive of Covid-19. His resulting Covid-19 test was negative. He was however diagnosed with depression, post-traumatic stress disorder and suicidal ideation. On 5 November 2020, the Claimant was admitted to hospital under the Mental Health Act 1983. He was discharged from that hospital on 11 December 2020 into bed and breakfast accommodation arranged by the NHS which was in place until Christmas Day 2020.

22. On 18 December 2020, the Claimant approached the Jesuit Refugee Service ("JRS") and was provided with some support. On 23 December 2020, the JRS emailed Migrant Help Ltd ("MHL") with a view to their making an application for s.4 accommodation on his behalf. On 25 December 2020, the Claimant's bed and breakfast accommodation ended and JRS paid for him to stay in a hotel until 4 January 2021.

23. On 31 December 2020, MHL contacted the Claimant and completed a s.4 application on his behalf. On 4 January 2021, the Claimant's hotel accommodation ended, and he returned to street homelessness. Two days later, JRS arranged for his return to hotel accommodation. On 7 January 2021, the Secretary of State refused the Claimant's application for s.4 accommodation on the basis that he could agree to make a voluntary departure from the UK.

24. On 15 January 2021, the British Red Cross sent the Secretary of State a Pre-Action Protocol action letter on behalf of the Claimant indicating a challenge to the refusal of s.4 support.

25. On 20 January 2021, the Claimant instructed solicitors and, that same day, a Notice of Appeal against the s.4 refusal was sent to the AST, (together with an application for a three-day extension of time to do so). It was conceded in the grounds of appeal that KMI did not currently have further asylum submissions outstanding. However it was argued on his behalf, relying on *PA and MA*, that he should be provided with accommodation because the level of Covid-19 transmission across the UK meant that not providing support would pose a risk to the health and well-being of failed asylum seekers and to others in their communities, in breach of their Convention rights.

26. In directions dated 26 January 2021 AST Tribunal Judge Penrose warned the Secretary of State that the AST would consider as a preliminary issue barring her under Rule 8 because her case had no reasonable prospect of success. That provisional assessment was based on the fact that the Appellant was accepted to be destitute, and that the reasoning of AST Principal Judge Storey, at paragraph 48 of her decision in *PA and MA*, was equally applicable to a refusal of support as it was to a discontinuance, because refusing support would place the Appellant and others in his community at risk of a breach of their Convention rights.

27. On 27 January 2021, the Claimant filed his claim for judicial review seeking urgent consideration. The Court emailed the Defendant seeking her view on the claim for interim relief. Later that same day, Chamberlain J made an order anonymising the Claimant as KMI and directing the Secretary of State to provide s.4 accommodation for the Claimant within London Zones 1-6 from 2pm the following day. On 29 January 2021, that was varied by consent to increase the time for the provision of accommodation.

28. On 9 February 2021, the AST allowed the Claimant's appeal, holding that he was entitled to the provision of support in accordance with s.4 of the 1999 Act. In the course of his ruling, AST Judge Penrose said this:

> "I find that PA and MA, and paragraphs 48 and 49 in particular, have bearing on this appeal. This is because
>
> (a) While the decision in PA and MA is challenged in judicial review proceedings, it has not yet been quashed by consent or otherwise.
>
> (b) The judicial review challenge, as outlined in the Respondent's Note, is to the lawfulness of decisions to withdraw a blanket policy of s.4 support for destitute failed asylum seekers, and also to the Principal Judge's decision that she has no jurisdiction over the lawfulness of policy decisions. These are not issues of direct relevance to the decision appealed by KMI. The findings in PA and MA about the application of article 8 ECHR to individual decisions on support are not at issue in the judicial review proceedings.
>
> (c) While the SSHD asserts that assessing the impact of a decision on persons in the locality is beyond the remit of the AST … I do not find this is made out by the analysis of the cases of Osman and NS or otherwise. A natural reading of regulation 3(2)(e) requires consideration of whether support is necessary to avoid a breach of Convention rights generally, not restricted to the rights of the applicant for support. In any event, the SSHD in submissions expressly agrees with the Principal Judge's findings that the Tribunal has jurisdiction to consider

> the consequences of an appealable decision on both the human rights of the Appellant and those of others (para 35 of PA and MA, …). I find no reason to limit consideration of the human rights impact to some groups to the exclusion of others, such as those in the Appellant's locality or community.
>
> (d) The findings of the Principal Judge with respect to the risks presented during the pandemic by destitute failed asylum seekers to members of the broader community were made after she had reviewed evidence presented (see for example paragraph 37). This evidence is consistent with repeated announcements of ministers when justifying the imposition of restrictions to prevent spread of the COVID virus across the community, to the effect that individuals must stay at home to protect the NHS and save lives. This clearly raises questions of the risks arising from those who are destitute and have no home to isolate in.
>
> (e) The Respondent relies heavily on the argument that there is nothing to stop the Appellant taking steps to leave the UK. However, the Principal Judge in PA and MA clearly had the possibility of voluntary return in mind when reaching her decision. While the Appellant has responsibility for his own actions when assessing the risk he faces of infection, the risks to the community arise from his destitute state and presence in the UK during the pandemic. It might be considered that the risk to the community arises precisely because of his failure to take steps to leave (and so take advantage of support under regulation 3(2)(a)). The duty to provide support on this basis is not mitigated by the Appellant's failure (or otherwise) to take up an option of leaving the UK.
>
> (f) I find no reason why the article 8 reasoning in PA and MA should not apply to a decision refusing support as well as to a discontinuance of support. The reasoning does not rely on a policy with respect to discontinuation, or otherwise. What matters is the potential adverse impact of the decision on the health of members of the community, and the potential for this to breach their ECHR rights. The Respondent has not argued the point in submissions."

29. He concluded:

> "I find the Respondent has no reasonable prospects of success. This is because of the uncontested facts and the authority in PA and MA. The Appellant is destitute during a period of high risk of COVID transmission that warrants unprecedented restrictions on the lives of individuals in the UK. His destitution in these circumstances represents an interference with the Convention rights (article 8) of others in the community. I follow PA and MA as authority that the provision of asylum support under s.4(2) of the 1999 Act is warranted by virtue of regulation 3(2)(e) of the 2005 Regulations."

Government Policy

30. It is common ground that on 27 March 2020, Mr Chris Philp MP, Parliamentary Under Secretary of State for the Home Office, announced a new policy ("the March 2020 policy") in relation to those who had been granted accommodation under s.4. He said:

> "*I have taken the decision that, for the next three months, we will not be requiring people to leave their accommodation because their asylum claim or appeal has been finally decided…"*

31. It appears that that policy has not been applied continuously since March 2020, but came to an end in the autumn of 2020. However, in November 2020, in a case called *R (QBB) v SSHD and AST* (CO/3986/2020) Fordham J made an interim order requiring that accommodation be continued to be provided for a short period pending an oral hearing to determine whether interim relief should be continued. That hearing did not take place. Instead the Secretary of State decided to continue to operate the March policy, and not to discontinue the provision of accommodation, and has operated that policy to date. It is to be noted, however, that the March 2020 policy only applies to destitute failed asylum seekers already in receipt of s.4 support and operates to prevent them being removed from the accommodation provided under s.4.

32. The Claimant alleges that from 27 March 2020 until at least July 2020 it was the Secretary of State's policy, because of the pandemic, to provide s.4 accommodation to all destitute failed asylum seekers. He says that on a date unknown she began refusing new applications for s4 accommodation for those who had no pending asylum submissions and that she announced that from 15 September 2020 "she would begin discontinuing accommodation". The Secretary of State denies that there was any such policy.

33. There is no evidence before us at present to support the Claimant's case that there was ever a policy or practice on the part of the Secretary of State to provide support under s.4 to all destitute failed asylum seekers. The evidence available at present points firmly to a conclusion that the only policy related to not terminating existing support to such persons.

The Grounds

34. The Claimant advances seven grounds in support of his application for permission to apply for judicial review. He says:

    (i) the Secretary of State acted irrationally in failing, before adopting the s.4 refusal policy, to give adequate consideration to the risks to public health of ceasing to provide s.4 accommodation to failed asylum-seekers during the Covid-19 pandemic.

    (ii) the Secretary of State's s.4 refusal policy is irrational and/or disproportionate discrimination contrary to Articles 3 and 8 of the Convention read with Article 14 in light of her s.4 discontinuation policy not to cease the provision of s. 4 accommodation.

    (iii) the Secretary of State acted irrationally in failing, before adopting the September 2020 policy, to give adequate consideration to measures to mitigate the risks to public health of ceasing to provide s.4 accommodation to failed asylum-seekers during the Covid-19 pandemic.

    (iv) the Secretary of State acted in breach of the human rights of the general population under Articles 2, 3 and 8 of the Convention by adopting and

implementing the s.4 refusal policy without properly determining the risk to public health of doing so.

(v) the Secretary of State acted in breach of the public sector equality duty on grounds of race when adopting and implementing the s.4 refusal policy.

(vi) the Secretary of State acted in breach of the public sector equality duty on grounds of disability when adopting and implementing the s.4 refusal policy.

(vii) the Secretary of State acted in breach of the Claimant's rights under Article 8 of the Convention in that the decision to discontinue the provision of s.4 accommodation to him was neither 'in accordance with the law' nor proportionate.

Preliminary Observations

35. As noted above, two days before the hearing before us, the AST allowed the Claimant's appeal. Accordingly he is now entitled to support under s4. Ordinarily, that would render a judicial review by him of the decision under challenge academic. However, this claim has always been framed as one seeking relief not just in relation to the particular decision affecting the Claimant but also to the Defendant's policy in respect of the provision of accommodation for destitute asylum seekers during the coronavirus pandemic The former claim may now be academic but the Claimant's success in his appeal to the AST does not necessarily invalidate his claim in relation to the policy or this particular claim for "class interim relief". Mr Payne QC for the Defendant does not suggest it does.

36. The application for interim relief is expressed as an application for class relief, that is, the Claimant is not seeking interim relief in relation to his own case (that was granted by Chamberlain J on 27 January 2021). Rather he is seeking interim relief in respect of two categories, or classes, of individuals whose cases are not presently before the court. The order as sought is set out at paragraph 3 above.

37. Chamberlain J gave directions to enable the issue of whether, and if so in what circumstances, such general, or "class" relief may be granted. In the event the parties did not seek to address in oral submissions the basis of the jurisdiction or the circumstances in which it would be appropriate to grant such interim relief.

38. In terms of jurisdiction, the Claimant drew attention in his skeleton argument to the decision of Julian Knowles J. in *R (NN) v Secretary of State for the Home Department* [2019] EWHC 1003 (Admin). He held, at paragraph 22, that he had jurisdiction to grant interim relief in public law proceedings relating to those affected by a particular issue who were identically situated to the claimant even though they were not parties to the proceedings.

39. In terms of the appropriateness of the grant of such relief, we have not received submissions and the question of jurisdiction and the appropriateness of such relief will, doubtless, have to be considered in a suitable case at some stage. However, we would make the following observations. An injunction is an order by a court to a party to proceedings requiring him to do or to refrain from doing a particular act. First, on any analysis, it is appropriate that the persons intended to be the beneficiaries of any

order are clearly identified and that the terms of any injunction are clear as to what the defendant is and is not required to do. It would not, generally, seem desirable to make orders where the beneficiaries or the terms are unclear, or where those issues would need to be subject of argument, nor would that appear fair to the defendant who is required to comply with the order. Further, lack of clarity could create difficulties over the enforcement of the orders. Breach of an order can be made the subject of an application for contempt in appropriate circumstances: see *Mohammad v Secretary of State for the Home Department* [2021] EWHC 240 at paragraph 26.

40 Secondly, the court will need to be astute to ensure that the grant of generic or "class" relief respects the different roles of the court and the decision-maker. In judicial review claims, the court is concerned only with the legality as a matter of public law of actions, or a failure to act, by a public body. The determination of policy, and the merits of decisions in individual cases, are matters for the decision-maker. The courts would need to be astute to ensure that, in any grant of interim relief requiring a public body to do, or refrain from doing, an act in relation to general classes of people, they do not go beyond their limited role in judicial review claims. The courts would need to ensure that consideration of the grant of generalised, or "class" interim relief does not draw them into the role of deciding how public law powers should be exercised.

The Test to be applied

41 The test to be applied by us in determining this application for interim relief is not in dispute. The position is neatly summarised in the Administrative Court Judicial Review Guide 2020:

> "When considering whether to grant interim relief while a judicial review claim is pending, the Court should consider: (1) Whether there is a real issue to be tried – i.e. whether there is a real prospect that the claim will succeed at the substantive hearing and (2) Whether the balance of convenience lies in favour of granting the interim order. The balance of convenience includes consideration of any matters relevant to whether or not the interim relief sought should be granted, including any relevant public interests which either favour or oppose grant of the interim relief sought. There is often a strong public interest in permitting a public authority's decision to remain in force pending a final hearing of the application for judicial review, so the party applying for interim relief must make out a strong case for the grant of interim relief."

Discussion

Real issue to be tried

42 It is neither necessary nor appropriate for us to set out in this judgment on interim relief any concluded views on the merits of the application for judicial review. It is to be remembered the Claimant does not at present have permission to bring the JR proceedings. It is certainly not appropriate for us to express a view on each of the Claimant's seven grounds.

43 Our first task is to identify whether or not there is a real issue to be tried. On the material presently available which involves the claim form and evidence to date, but not including any acknowledgement of service, there is and it arises out of Ground 2.

44 By Ground 2, the Claimant alleges, in essence, that the Defendant's use of her powers under s.4 is irrational, disproportionate and discriminatory. The point is best captured in paragraph 119 of the Detailed Grounds of Claim where it is asserted that:

> "it is irrational, or disproportionate discrimination, for SSHD to refuse to provide s. 4 accommodation to persons who, if they were already accommodated, would (under SSHD's policy) continue to be so during the pandemic. The consequence for public health and the individual of refusing to accommodate a destitute former asylum-seeker is not rationally distinguishable from a decision to cease to accommodate a former asylum-seeker who would therefore become destitute."

45 The Secretary of State's response to that allegation is two-fold. First, it is said to be obvious that the scale of the threat to public health, by not accommodating or supporting failed asylum seekers who are destitute, is far less severe than that of not continuing to accommodate similar persons who are already housed and supported under s.4. We are not satisfied that that is necessarily obvious. Certainly, there is, at present, no evidence to support that assertion and no evidence that the Secretary of State reached any positive decision on the relative risks posed by the two classes of case.

46 Second, and more powerfully, it is argued by the Secretary of State that she has chosen to introduce a policy to govern decisions whether or not to terminate the existing provision of accommodation, as she is entitled to do. She has not introduced any such policy in respect of fresh applications for s.4 support which, accordingly, continue to be governed by the statutory criteria set out in s.4 itself. Having decided to make an exception for those already being accommodated, she has decided not to make any such exception for those not yet accommodated. That, it is said, she was entitled to do.

47 Without expressing any concluded views on the issue, it seems to us there is here, at least on the material presently available, an issue of real substance. The question is whether in the light of the health emergency facing the UK, it was a rational and proportionate decision for the Secretary of State to limit the provision of accommodation to those who happen already to be accommodated and not to extend it to those who are not. It seems to us that there are arguments of substance both at common law and under Article 14 read with Article 8 of the Convention. That, in substance, was the view of AST Judge Penrose on the Claimant's appeal, as set out above.

48 In those circumstances, it seems to us, there is a real issue to be tried.

Balance of Convenience

49 The primary relief the Claimant sought from the court is an order that would require the Secretary of State to provide accommodation to any person who applies for such

accommodation whom she considers to be a destitute failed asylum-seeker. The alternative he sought is an order that the Secretary of State provide accommodation to everyone with a pending appeal to the AST from a decision of hers to refuse such accommodation.

50 We deal first with the wider form of relief sought, namely that the Defendant provides accommodation for persons whom she considers to be destitute failed asylum seekers. As Mr Payne submits, the asylum support system is already under intense pressure as a result of the pandemic and a blanket obligation to accommodate all failed asylum seekers who are destitute, but who are able to return to their country of origin, would appear inconsistent with the statutory regime.

51 At this early stage of the proceedings, the court here has no substantial evidence as to the number of persons who potentially might benefit from such an order; nor as to their individual circumstances; nor as to the availability nationally of appropriate accommodation; nor as to the practicality of introducing such arrangements; nor as to the impact of such arrangements on others; nor as to the cost of such an exercise; nor as to the competing demands on the public purse. Furthermore, the length of time over which such arrangements would operate is entirely uncertain given the nature of the current pandemic.

52 It may be that all these matters will be subject to further evidence if this matter were to proceed to a full judicial review, but at present there is a dearth of evidence on any of them. In our judgment, the balance of convenience on the present state of the evidence clearly favours the refusal of the wide form of interim relief the Claimant seeks.

53 Further, the Claimant is seeking an interim mandatory injunction requiring the Defendant to provide accommodation for failed asylum seekers whom she considers are destitute. The courts are reluctant to grant mandatory interim relief unless the claimant can establish a strong case that the public body is acting unlawfully: see *R (Detention Action) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin) at 17. Whilst we are satisfied on the material presently available that there is a serious issue to be tried, we do not accept Mr Cox's submission that the Claimant's case is overwhelming. We would not have regarded the claim, on the material as presently before us, to be so strong as to merit the grant of interim mandatory relief in respect of destitute failed asylum seekers generally.

54 We would also refer to our observations above about the need for clarity as to the individuals whom the order is intended to benefit and the terms of the order. We note that the class identified is those "whom the Secretary of State considers are destitute" or persons whom she does not dispute are destitute. Further, there is a lack of clarity as to the date by which the accommodation is to be provided (or as to where) in contrast with the order in the Claimant's case where the time from which, and the broad location within which, the accommodation should be provided were specified. We would not regard the order sought as sufficiently clear as to who are the beneficiaries, nor on what terms accommodation must be provided.

55 Furthermore, there is a real risk that the wider interim relief sought would involve the courts straying into the area of policy formulation. There are a number of ways in which the Secretary of State may address any alleged irrationality or any alleged

unlawful discrimination in relation to the class of destitute, failed asylum seekers applying for support. It cannot be assumed that the only remedy for the illegality would be to provide accommodation for any destitute failed asylum seeker applying for accommodation irrespective of the circumstances. For those reasons, even if (contrary to our conclusion) we had considered that the balance of convenience otherwise favoured the grant of interim relief to groups of persons who were not parties, we doubt that the type of order sought would be appropriate.

56 The second form of relief only seeks interim relief in respect of those with an appeal pending with the AST against a decision to refuse accommodation and where that decision did not dispute that the appellant was a failed asylum-seeker. We understand that this is an attempt to specify as clearly as possible the group of person affected (although even then, the terms of the order, particularly as to the time by which the accommodation must be provided, are undefined).

57 In normal circumstances, judicial review of a refusal of s.4 support would not be an appropriate remedy as there would be an alternative remedy available in the form of an appeal to the AST. The AST is treating *PA and MA* as providing authoritative guidance not only in cases where s.4 support is discontinued, but also where fresh applications for such support is refused. Whilst asserting that those decision are wrong, the Secretary of State has chosen thus far not to challenge them and not even to challenge decisions that she is debarred from responding to the appeals. The result is that such appeals are almost bound to succeed at present.

58 The difficulty is that those appeals take three or four weeks to be heard. During that period, appellants are likely to be homeless. Each appellant is likely to have strong grounds for seeking mandatory injunctive relief that the Secretary of State provide s.4 support during that period (as was the case with the Claimant in this case). In those circumstances, judicial review with a view to seeking interim relief may be appropriate. However, that would require the individual to bring a claim for judicial review and also to make an urgent application for interim relief. We recognise that that may pose additional difficulties for individuals and create burdens for the courts. Nonetheless, we still do not consider it appropriate to grant general or "class" relief, which may be uncertain in its terms, to groups of persons who are not parties before the court.

59 Rather, it seems to us that the sensible course is to streamline the process whereby those who have appealed a refusal of s.4 support to the AST, but have not yet received a decision on the appeal, can apply to the court for an order for interim relief. Applications for interim relief can be granted without first issuing a claim form. We will direct, therefore, that an urgent application may be made by a failed asylum-seeker who has filed an appeal with the AST against a decision refusing s.4 support. Further, we consider it appropriate to dispense with the usual application form in the present situation and provide that the application for this form of urgent, pre-claim interim relief in these particular cases may (but need not) be limited to 2 pages in length, identifying, (1) the name of the appellant, (2) whether the Defendant has accepted that he or she is destitute, (3) the date on which the Defendant decided to refuse section 4 support, and (4) the date on which the appellant appealed to the AST. The application should include a copy of the decision refusing s.4 support and, if possible, a copy of the appeal. That will be served on the Defendant who will have 24 hours to reply. The application will then go before a nominated judge who can

determine the application. We understand that there are likely to be somewhere in the region of 14 cases a month.

60 By that means, we hope to ensure fairness to each individual applicant for asylum support and to the Defendant who will have the opportunity to indicate why, in a particular case, an interim order should not be made. It will ensure that the court retains control over the process of granting, or refusing, interim relief and the terms of such relief. It will avoid the need for a large number of claim forms to be issued.

61 Furthermore, it seems to us that an appropriate means of dealing with this case in the longer term may be for the court to consider expedition of the hearing if it grants permission to apply for judicial review. To that end, we abridged time for the service of the acknowledgement of service and provided for the papers to be placed before the nominated judge to determine whether permission to apply for judicial review should be granted and, if so, whether expedition should be ordered and other case management directions made.

62 We have made the appropriate order. In our judgment, that exercise of discretion by this court provides the appropriate remedy in the circumstances of this case.

Conclusion

63 In those circumstances, this application for interim relief is refused.