IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 879 (Admin)

No. CO/309/2021

Royal Courts of Justice

Tuesday, 23 March 2021

Before:

MR JUSTICE CALVER

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
KMI — Claimant

- and -

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT — Defendant

MR S. COX and MR D. CLARKE (instructed by Deighton Pierce Glynn Solicitors) appeared on behalf of the Claimant.

MR A. PAYNE QC and MR B. KEITH (instructed by Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

(Transcript prepared from Microsoft TEAMs recording)

MR JUSTICE CALVER:

1 As set out in the claim form of 26 January 2021 the claimant claims judicial review of the decision of the Secretary of State for the Home Department ("SSHD") to refuse the claimant's application for accommodation and support under s.4 of the Immigration and Asylum Act 1990 ("the IAA") of 7 January 2021; and, secondly, the SSHD's policy to refuse to provide accommodation under Section 4 during the Covid-19 public health emergency to destitute former asylum-seekers ("DFAS") who do not make a voluntary departure from the UK ongoing, it is said, since December 2020. The persons subject to this policy are DFAS who are not already accommodated (refusal cases).

2 The SSHD decided, in November or December 2020 to continue to provide accommodation under section 4 to all those already accommodated under Section 4 or Section 95 of the IAA. The claimant calls these "discontinuation cases". The defendant refers to "a stay on cessation decisions", regardless of whether the case meets the criteria stated in the Immigration and Asylum Regulations 2005. On 24 February 2021 Garnham J granted the claimant permission for the claim to proceed on ground (ii), which is said to be a breach of Article 14 of the ECHR with Article 3 and/or Article 8; and ground (iv) 4, said to be a breach of Article 2, Article 3 and/or Article 8 of the ECHR, directing that the claim be heard with the similar case of *R (EW) v SSHD*, CO/4866/2020, on an expedited basis. These are now listed for hearing on 5 and 6 May 2021.

3 In his observations, Garnham J said this:

> "In my view grounds (ii) and (iv) are properly arguable for the reasons set out in the Claimant's grounds, in particular in paragraph 119. On the other grounds, the Defendant's summary grounds provide a convincing defence. Grounds (i) and (iii) are misconceived. They assume that the March 2020 [policy] provided for all failed destitute asylum-seekers including those whose applications were refused to be accommodated under Section 4 of the 1999 Act. On its face, it did no such thing. It only applied to those already accommodated. Grounds (v) and (vi) allege a failure to comply with the PSED when implementing the March 2020 refusal policy. There was no such policy. Ground (vi) seeks to challenge a decision to cease to provide the claimant with accommodation. He was never provided with accommodation. In any event, the Claimant succeeded in his appeal to the AST and accordingly this ground is now academic."

4 Paragraphs 118 to 119 of the grounds provide as follows:

> "118. As set out above, in November/December 2020 SSHD suspended or withdrew her 15 September 2020 policy to evict former asylum-seekers. Her explanation in the Summary Grounds of Defence in *R (QBB* ... and related cases was that this was because of the change in policy on Covid restrictions.
>
> "119. C submits that in the light of that policy and the reasons for it, 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."

5 In his submissions to me today Mr Cox, who appeared with Mr Clarke on behalf of the claimant, made clear that the irrationality challenge in ground (ii) of the grounds for relief is part and parcel of an allegation that the Section 4 refusal policy was irrational when read in the context of Article 14 ECHR. I will come back to that in due course.

6 By order of 15 March 2021 Eady J listed for determination the claimant's applications (a) for permission on grounds (i), (v) and (vi) but not (iii) and (vii), renewed on 3 March 2021; and (b) of 9 March 2021 for permission to rely on additional grounds, (viii) (ix) and (x). The new proposed grounds (viii), (ix) and (x) are framed as follows. Ground (viii) reads:

> "(viii) the [SSHD's] practice or policy in place on 7 January 2021 and ongoing whether published or not for the determination of applications for section 4 accommodation (s.4 application policy) is irrational for (1) [SSHD's] failure since 12 March 2020 to consider the risks to public health of [SSHD] refusing to provide during the Covid-19 pandemic s,4 accommodation to destitute failed asylum-seekers who apply for that accommodation and who are not in the group already accommodated under s.4 or s.95 (the already accommodated) and are not considered by [SSHD] to fall under paragraphs (a) to (e) of Regulation 3(2) of the Accommodation Regulations (the public health risks); (2) alternatively [SSHD's] failure since 12 March 2020 to have adequately considered the public health risks."

7 Ground (ix), which is also new, provides as follows.

> "(ix) the [SSHD] acted in breach of the Public Sector Equality Duty on grounds of race by implementing the s.4 application policy (i.e. on and since 7 January 2021)."

8 Ground (x), which is also new, provides as follows:

> "(x) the [SSHD] acted in breach of the Public Sector Equality Duty on grounds of disability by implementing the s.4 application policy (i.e. on and since 7 January 2021)."

9 At the time the claim was filed it was the claimant's misunderstanding that SSHD had previously had a policy from March 2020 to September 2020 of accommodating all DFAS including refusal cases. This misapprehension was referred to by the court in its judgment concerning the claimant's application for interim relief on 3 March 2021, which is published 2021 EWHC 477 (Admin). At paras.30 to 33 of that judgment the court said this:

> "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 s.4 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."

10 It follows that the position which the claimant had adopted at that stage is as is set out in paras.9 and 10 of Mr Payne's response to the claimant's application to amend filed on behalf of the Secretary of State, Mr Payne appearing on this application together with Mr Keith, Mr Anderson and Saara Idelbi. That paragraph of the Secretary of State's submission provides as follows:

> "(a) the March 2020 policy provided for all failed destitute asylum-seekers to be accommodated under s.4."

11 It is now clear that that was false.

> "(b) the March 2020 policy was brought to an end in September 2020 and thereafter decisions started to be taken to (i) withdraw accommodation (cessation decisions) and (ii) refuse section applications (refusal decisions);
>
> "(c) a decision was taken in November/December 2020 to withdraw the September policy and to implement a stay on cessation decisions but not on refusal decisions (the December decision)."

12 Mr Payne adds, at para.10 of his document,

> "10. In fact, whilst the Secretary of State's practice in considering whether applicants met the criteria in Regulation 3, and in particular Regulation 3(2)(c) where temporarily applicants who raise difficulties in relation to

return were granted s.4 support, temporarily changed, there was no policy to provide all destitute asylum-seekers with support."

13 For the purposes of this application, the claimant accepts the correctness of the Secretary of State's statement that she has not changed her policy in relation to Section 4 refusal cases since 2018. In consequence of this fact, Garnham J refused permission on grounds (i), (v) and (vi). That is because those grounds are formulated as follows. Ground (i):

> "(i) [SSHD] 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."

14 It is then provided, at para.89 of the Grounds:

> "C submits that SSHD was required by law carefully to consider the risks to public health of ending the practice she adopted in March 2020 of accommodating destitute failed asylum-seekers who refused to make a voluntary departure from the UK."

15 Thus it appeared that the claimant was advancing a case in ground (i), and it also appeared to be the case following on in grounds (v) and (vi), that the defendant had a policy in March 2020, because of the pandemic, to provide Section 4 accommodation to all destitute failed asylum-seekers, and that was not so. Accordingly, as I have said, by order of 24 February 2021 Garnham J refused permission on grounds (i) (v) and (vi) on the basis that there was no policy as contended by the claimant. The claimant does not, however, as I understand it, accept that that accurately states the position, be that as it may, as Eady J stated in her order, the claimant now seeks to rely on additional grounds which essentially recast grounds (i), (v) and (vi) to pursue a challenge to what is now said to be a failure on the part of the defendant since March 2020 as opposed to a challenge to a policy that has been denied by the defendant as existing. Therefore, if permission is granted on grounds (viii) (ix) or (x), the claimant recognises that he does not need to rely upon grounds (i), (v) and (vi).

16 In renewing his application, the claimant suggests in his skeleton argument on this application that grounds (i), (v) and (vi) in fact did not depend upon there having been a policy in March to September 2020 to accommodate all DFAS. The disagrees and submits that each of those grounds must fail because they are indeed dependent on a policy which never existed.

17 It does appear to me that as worded, ground (i) did indeed depend upon a misunderstanding of the relevant policy of the SSHD in March 2020 and that grounds (v) and (vi) followed on, adopting a similar approach and in any event did not, unlike new grounds (ix) and (x), refer to the implementation of the policy as regards the claimant on 7 January 2021. It follows that I consider that Garnham J was right to refuse to grant permission in respect of those grounds. In any event, if the court were to refuse to grant permission in respect of grounds (viii), (ix) and (x) before it today, then grounds (i), (v) and (vi) are certainly no better. So, the sensible course, with which Mr Cox agreed, is to consider whether or not to grant permission in respect of grounds (viii) to (x).

18 I therefore turn next to those grounds. The claimant says that he seeks permission under either ground (i) or (viii) to advance an argument of irrationality. The allegation is that the Secretary of State was required to give consideration to the public health consequences to the general public, as well as the DFAS, of denying Section 4 accommodation to DFAS

despite the pandemic, and it was irrational of her not to do so. For grounds (ix) and (x) it is said to be arguable that the SSHD failed to comply with a Section 149 Equality Act duty by continuing to deny Section 4 accommodation to DFAS despite the pandemic without having any regard to the aims listed in Section 149(1) of that Act.

19 So far as the ground (viii) challenge is concerned, it is common ground that the challenge is brought in time. So far as ground (viii) is concerned, the claimant submits as follows. It says, firstly, that it appears to be SSHD's position that she has power to provide Section 4 support to DFAS who do not meet the criteria under Regulation 3(2) of the 2005 Regulations. Secondly, she accepts that she did so between March 2020 and September 2020 to discontinuation cases on the basis of public health considerations. Thirdly, this was consistent with the government's general approach to the public health implications of homelessness during the Covid-19 pandemic. The claimant refers to the observations of Freeman J in his discussion of the Everyone In initiative in *R (Ncube) v Brighton & Hove City Council* [2021] EWHC 578 (Admin) [12-13].

> "12. On 23 March 2020, the first national lockdown was announced in response to the pandemic. On 26 March 2020, as part of the national measures adopted by the government to counter the pandemic, Luke Hall MP, Minister for Local Government and Homelessness, wrote to all local authorities stating that 'it is now imperative that rough sleepers and other vulnerable homeless are supported into appropriate accommodation by the end of the week'. He referred to the need to 'bring in those on the streets to protect their health and stop wider transmission'.
>
> "13. This marked the start of what has become known as the 'Everyone In' initiative. The object of this public health initiative was to provide accommodation for rough sleepers as a matter of urgency. It recognised a heightened risk arising from homelessness."

20 The claimant, in respect of this ground, also relies upon para.34 of its grounds for permission which reads as follows:

> "On 17 June 2020 a Parliamentary debate was held on the possible withdrawal of support for asylum-seekers in light of the Home Office's intention imminently to restart decision-making in asylum cases. In response to concerns from MPs, Mr Philp stated that no eviction notices had been issued and that the Home Office was 'thinking carefully' about the transition to a more 'normal state of affairs' and that the Home Office 'will talk to the relevant authorities including local government and take public health advice seriously.'"

21 The claimant relies on a number of other statements by the relevant government ministers in its grounds.

22 The claimant continues that the SSHD has subsequently exercised the power again in relation to the already accommodated cohort from November to December 2020 to date. This has coincided with the national lockdown imposed in response to the second wave of the Covid-19 pandemic which has exacerbated the public health risks. As illustrated, it is said, by the facts of the claimant's case, the public health consequences of ceasing to accommodate a member of the discontinuation cohort and of refusing to accommodate a member of the refusal cohort are essentially the same. In either case, the result is that the

person will be destitute during the pandemic. In short, Mr Cox submitted that the SSHD acted irrationally in not even considering the change to her policy.

23 The SSHD's response to draft ground (viii) is that the threshold for a rationality challenge is particularly high in areas of executive policy where the broad margin of appreciation afforded to the state is well established. It is even higher, Mr Payne submits, where the court is being asked to scrutinise the actions of the government in seeking to respond to an emergency pandemic and where resources are stretched in the context of the need to take urgent decisions as to the ever-changing national response to Covid-19. These decisions not only involve difficult assessments relating to allocation of scarce resources, but the consequences of each change in circumstances and policy response, he submits, are difficult to predict.

24 Mr Payne also submits that the claimant fails to say when it became irrational for the SSHD not to have considered the impact of the national lockdowns, beyond saying that it should have been done by 7 January 2021. Mr Payne submits that the claimant advances no positive case as to when that duty is said to have arisen.

25 Mr Cox's response to this is that the claimant does not need to. It picked the date of 7 January. By that date the SSHD was, applying a rational approach, required to have done this. The historical position, he submits, is the same as the current position. The SSHD has not thought about changing her mind since 2018, but the SSHD, he submits, has not put before the court any of the public health advice or information that she has received in this respect.

26 Mr Payne also submits that the claimant does not identify any evidence which it is said should have been considered, nor indeed that any of the risks eventuated. This is so, he says, whether one considers the Covid risks said to arise for the individual failed asylum-seeker or for the wider community. There is simply no evidence to support the ground alleged, he suggests. He further submits that in so far as it is the claimant's case that the numbers of destitute failed asylum-seekers refused Section 4 support cause an adverse impact on the wider community, then this has to be evidenced. It is unacceptable, he says, to raise a rationality challenge, particularly in terms of the risks from Covid-19, based solely on submissions as opposed to evidence.

27 Finally, on this ground, Mr Payne submits that the reliance on the claimant's individual position as evidence of the adverse impact of Section 4 refusal during Covid serves to highlight the fundamentally misconceived basis for this ground of challenge. The claimant's Section 4 support was withdrawn in January 2019. In the months thereafter it is alleged that by reason of being street homeless his mental health deteriorated. The alleged adverse impact on his mental health continued in 2020 with no evidence of any adverse impact by reason of Covid-19. The claimant did not apply for Section 4 support until 31 December 202. Between applying for Section 4 support and his appeal being allowed, he was accommodated. As such, Mr Payne submits, his case provides no evidence as to the adverse impact on the individual or the wider community and decisions are being taken, Mr Payne submits, on a case by case basis as is appropriate.

28 However, as the claimant states in para.96 of its grounds, the public health rationale for the March 2020 policy was clear. It was the government's general policy which remains, in the words of the 7 September 2020 statement of the Minister for Communities, Housing and Local Government to be -

> "Aware of the need to prevent displacement and homelessness in the light of the public health risk this poses in relation to the spread of infection and

> to reduce pressures on essential public services during this time. The government's primary consideration is public health and the potential strain on public services. The government is cognisant of the ongoing need to minimise the impact on public services of households either contracting the virus or being made homeless during the winter months."

29 Likewise, the decision which was taken in November and December 2020 to withdraw the September policy and to implement a stay on cessation decisions, that is a stay of the withdrawal of accommodation for those DAFS who had already been granted accommodation, was also taken in order to protect public health.

30 The defendant itself having identified this general need to protect the public health in this way, it does seem to me to be arguable that it is then irrational to fail to consider the risks to public health of the SSHD refusing to provide during the Covid-19 pandemic Section 4 accommodation to destitute failed asylum-seekers who apply for that accommodation and are not in the group already accommodated under Section 4 or Section 95, and are not considered by the SSHD to fall under paras.(a) to (e) of Regulation 3(2) of the Accommodation Regulations, as the threat to public health from each of these categories of DAFS would certainly appear to be the same.

31 It became apparent in argument that there is in fact little between the parties on ground (viii). Ground (viii), Mr Cox clarified, is a pure irrationality challenge, whereas ground (ii) for which permission has already been granted is an allegation that the refusal policy is irrational but in the context of Article 14 ECHR, as I have previously mentioned.

32 I therefore consider that so far as ground (viii) is concerned, there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and the relevant evidence. Thus, in the light of the way in which this ground has been reformulated, it seems to me to be appropriate that this ground should go forward with grounds (ii) and (iv) to a full hearing.

33 I turn next to grounds (ix) and (x). In respect of these grounds, the court does not yet know what the Secretary of State for the Home Department has to say about them, other than brief written submissions and brief oral submissions which were attractively articulated by Mr Payne this morning.

34 That, of course, is not the SSHD's fault. However, the opposing arguments this morning demonstrated that the court requires the benefit of the SSHD's written response and evidence to these grounds in order to properly assess their merits. In respect of these grounds, the claimant submits essentially as follows. Firstly, the Public Sector Equality Duty ("PSED") requires a public authority to have due regard to the needs set out in Section 149 of the Equality Act in the exercise of its functions rather than solely at the moment of a particular decision. The provision of Section 4 accommodation and the formulation and application of policies in this regard is a function of the SSHD. The PSED is obviously a continuing one such that the authority must continue to have due regard to the needs as further information comes to light.

35 Secondly, the Covid-19 pandemic constitutes a fundamental change in circumstances since the adopting of the 2018 policy relied upon by the SSHD. They rely upon the Everyone In initiative to which I have previously referred.

36 Thirdly, from very early in the pandemic it is said that it was recognised that the risks associated with Covid-19 (1) would be higher for those suffering from pre-existing medical

conditions and (2) appeared also to be higher for those from BAME backgrounds and homeless people. This has been consistently confirmed, it is said, by subsequent research.

37 Fourthly, in these circumstances the due regard required by the PSED arguably requires SSHD to give some consideration of the equality impacts of continuing to deny Section 4 accommodation in refusals cases.

38 Fifthly, despite this, SSHD's position is that she continued to apply the 2018 policy to refusal cases as though the Covid-19 pandemic was not happening. In those circumstances, it is said that it is arguable that the SSHD failed to comply with the PSED.

39 The defendant's response is essentially as follows. So far as ground (ix) is concerned, the SSHD says that the claimant identifies no factual basis or evidence which is said to establish that prior to 7 January 2021 there were well-established concerns that people of minority race or colour were being disproportionately affected by the Covid-19 pandemic, now when these concerns are said to have become apparent, nor the time frame in which it was said that the SSHD was legally obliged to reconsider the PSED from the moment those concerns were apparent, given the competing demands on government resources.

40 So far as ground (x) is concerned, the SSHD submits that it is no part of the claimant's case that Covid-19 increased the adverse impact on those with those disabilities of being refused Section 4 support. Rather, the challenge is limited to an alleged failure to consider any potential adverse impact. So, it is said on the claimant's own case, there is no suggestion or evidence that any failure to consider this issue has had any adverse effect on persons with disabilities.

41 Mr Cox's short point for the claimant is this: if the court is minded to grant permission on ground (viii), as indeed I have, such that the SSHD should have considered those risks to public health, then the SSHD ought also, as part of that consideration, to have considered the public sector equalities issues and in particular the impact of her policy upon black and brown and disabled people who it is said are the most vulnerable from a public health point of view. Such a consideration, he submits, would be a necessary part of a rational consideration as to whether to change her policy. The court should have the opportunity therefore to consider all of these issues in the context of the policy which she in fact adopted.

42 The difficulty which this court has in considering these two grounds at this hearing is that the SSHD has not, as I have said, had a proper opportunity to respond to them by way of detailed grounds of defence. It may well be, as Mr Payne submits, that the impact of the SSHD's policy on these sections of the population, over and above the population as a whole, is shown to be negligible. I recognise as well that these are complicated issues and Mr Payne may well be right when he says that it is unclear how a decision-maker could make any meaningful assessment of the impact of any policy upon these communities from a public health perspective. However, at this stage I do not consider that grounds (ix) and (x) are so hopeless as to not be pleadable. Without pre-judging in any way whether it is appropriate to grant permission to advance these two grounds, before considering that question I consider that the SSHD should put in a detailed response to these grounds (grounds (ix) and (x)) with any evidence that she wishes to rely upon, and that the claimant should file a reply to that response, and the question of whether permission should be granted on these two grounds can then be rolled up to be considered at the substantive judicial review hearing. This can be done at the same time that the SSHD serves her detailed response on ground (viii).

43 I should add that I refuse the renewed permission application for grounds (i) , (v) and (vi) and so it follows that the claimant has permission for grounds (ii), (iv) and (viii). It can restore its application for permission for grounds (ix) and (x) at the rolled up hearing so far as those two grounds are concerned, that is at the substantive judicial review hearing.

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This transcript has been approved by the Judge.