Neutral Citation Number: [2023] EWHC 1787 (Admin)

Case No: CO/4354/2022

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

Friday, 14th July 2023

**Before**:

**MR JUSTICE FORDHAM**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **THE KING (on the application of SA)** | **Claimant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**David Gardner** (instructed by Bhatia Best Solicitors) for the **Claimant**
**Catherine Brown** (instructed by GLD) for the **Defendant**

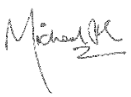
- - - - - - - - - - - - - - - - - - - - -

Hearing date: 6.7.23

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



.....

THE HON. MR JUSTICE FORDHAM

## MR JUSTICE FORDHAM:

Introduction

1. This is a case about the Home Secretary's statutory duty to provide "adequate" accommodation for an asylum seeker and her children. The claim for judicial review was commenced on 18 November 2022. HHJ Dight granted permission for judicial review at an oral hearing on 20 April 2023. The ground on which permission was granted is that the Home Secretary has acted in breach of her statutory duty and/or has failed without good reason to adhere to her published policy ("the Policy"). Other grounds, raising "systemic" issues, are to be addressed in other 'lead cases' including R (DK) v SSHD CO/4585/2020. The relevant legislation is the Immigration and Asylum Act 1999 and the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005 No.7). The Policy is the Healthcare Needs and Pregnancy Dispersal Policy (3rd edition, 1.2.16). The relevant line of authorities includes R (A) v NASS [2003] EWCA Civ 1473 [2004] 1 WLR 752 (23.10.03, CA), R (NB) v SSHD [2021] EWHC 1489 (Admin) [2021] 4 WLR 92 (3.6.21, Linden J) and R (MQ) v SSHD [2023] EWHC 205 (Admin) (7.2.23, HHJ Bird). As in all of those cases, an anonymity order is in place. The names which I will use for the Claimant's four children are aliases, chosen by her at my invitation.

2. The Claimant is aged 42. She came to the UK in December 2021, accompanied by Dara (born in April 2011), Pamlerin (born in December 2012) and Keji (born in June 2018). For a few months they were able to live with a friend. The Claimant claimed asylum on 4 March 2022. That month, she and the children – then aged 10, 9 and 3 – were provided by the Home Secretary with initial accommodation at a hotel in Croydon. That provision was pursuant to s.98 of the 1999 Act. On 14 April 2022, they were moved to other initial accommodation at a hotel in Peckham (the Best Western). On 5 May 2022, the Home Secretary accepted that the family faced being "destitute" for the purposes of s.95 of the 1999 Act. The initial accommodation at the Peckham hotel has been provided since 5 May 2022 pursuant to ss.95(1) and s.96(1)(a) of the 1999 Act. The Claimant, who was unmistakably heavily pregnant, gave birth in mid-June 2022 to baby Sola. After 7 months at the Peckham hotel the family was moved in late November 2022 to a larger room there. By that time, judicial review proceedings were on foot.

3. Bhatia Best solicitors had written a letter before claim on 7 October 2022, contending that the Home Secretary was acting unlawfully in not having relocated the family to suitable dispersal accommodation. The same contention was taken up in the judicial review claim. 'Dispersal accommodation' generally constitutes self-catered furnished flats and houses, to which asylum seekers move from the block booked hotels (or other initial accommodation centres) constituting 'initial accommodation' (MQ §79). The contention was resisted in a letter of response of 22 October 2022, in Summary Grounds of Resistance filed on 14 December 2022, and in a Detailed Grounds of Resistance filed on 25 May 2023. Supporting documents filed with the Summary Grounds included an undated response from the 'service provider' for the Peckham hotel. The first witness statement filed in these proceedings on behalf of the Home Secretary came from a Home Office official (Mr Shewell) and was filed on the evening of 3 July 2023, two working days before the substantive hearing. It is 2 pages long and records updates received on 6 June 2023 and 3 July 2023 from the service provider at the Peckham hotel. A second witness statement of Mr Shewell (5 July 2023) provided a chronology and exhibited the service provider updates. There were 4 witness statements from the

Claimant. These were dated 17 November 2022, 19 December 2022, 8 June 2023 and (in response to Mr Shewell's very late evidence) 5 July 2023. There has been a conspicuous degree of cooperation between the lawyers. Subject to the question of costs, Mr Gardner does not oppose the very late evidence of the Home Secretary, and Ms Brown does not (and could not) oppose the Claimant's fourth statement in response.

Evidence and Fact

4. There was no dispute about the approach to the evidence and resolving any direct conflict of evidence. The approach was described in NB at §§33-37. The latest encapsulation is in R (F) v Surrey County Council [2023] EWHC 980 (Admin) [2023] 4 WLR 45 §50. I can accept the uncontested photos from each side. I have uncontested documentary evidence of typical menu choices. The information from the service provider's response and updates, some of which is contested, is not contained within any witness statement made by any individual able to speak from direct knowledge and experience. The service provider's permission stage response said that witness statement evidence could be provided, but none was, and an email of 3 July 2023 asserts that "we do not provide witness statements". I have to take into account the quality of the evidence. I have the four direct witness statements of the Claimant. She was present in Court with an interpreter. There was no application to cross-examine her. Ms Brown does not submit that there is any feature of the Claimant's witness statement evidence which the Court should reject. I accept that evidence. In the event, there was really only one discernible material conflict on the evidence. It concerned whether there is a 'children's play area' within the Peckham hotel, a topic to which I will return.

The Law

5. Little divided the parties as regards the applicable law. Here, in essence, is how the statutory scheme operates. The required Home Office response to an asylum seeker and dependants facing destitution (s.95(1) of the 1999 Act) is the provision of accommodation adequate for their needs (s.96(1)(a)), alongside provision for other essential living needs (s.96(1)(b)). Evaluative judgment is needed, reflected in the language "who appear to the Secretary of State to be destitute" (s.95(1)), "appearing to the Secretary of State to be adequate" (s.96(1)(a)) and "what appear to the Secretary of State to be essential living needs"). Although expressed as a power, the response is a duty, in the case of children (s.122(3)(4)) and more generally (reg.5 of the 2005 Regulations). In discharging the function of providing adequate accommodation, regard must be had to the fact that the accommodation is temporary pending determination of the application for asylum (s.97(1)(a)). Although the duty can be delivered through private third-party contractors – service providers – the statutorily-required adequate accommodation and essential living needs remains the inalienable duty of the Home Secretary who is answerable for its discharge or breach: R (DMA) v SSHD [2020] EWHC 3416 (Admin) [2021] 1 WLR 2374 at §100. The Home Secretary therefore has an important duty to monitor provision of accommodation (see DMA) and it is for the Home Secretary to ensure that individual cases receive the diligent attention that they deserve, if necessary by 'putting her foot down' in relation to private providers (see the interim relief judgment in R (K) v SSHD [2020] EWHC 3639 (Admin) at §35).

6. In making the required provision, the Home Secretary is duty-bound to take into account the special needs of any asylum seeker who is a pregnant woman, or a lone

parent with a minor child, those being among the categories of "vulnerable person" as statutorily defined (reg.4(2)(3)).

7. The legislation uses the idea of accommodation being "adequate" at two distinct stages (A §52). The first stage asks whether there is an absence of "adequate" existing accommodation, in testing whether there is destitution (s.95(3)(a), (5), (6)). The second stage requires the provision of "adequate" accommodation as the response to destitution (s.96(1)(a)). The word "adequate" means the same thing at both stages. But the context is important (A §52). It must be the context which prevents the test for "adequate" at the second stage from being: 'would this accommodation, provided by the Secretary of State, constitute being destitute'. No decided case says that is the second stage test and Ms Brown did not advocate such a test.

8. There is a twin-track test for deciding whether the Home Secretary's duty has been discharged. This was well-established in relation to essential living needs (NB §§145-153). It is now recognised in relation to adequate accommodation (NB §§154-155, 161). This matches "housing" being a "material reception condition" in the foundational EU Directive (NB §154), with its continuing impact (NB §§157-158). Under the twin-track test, a first question is whether the Home Secretary's response meets an 'objective minimum standard', whose delineation is a hard-edged question for the judicial review court. A second question is whether the response involves an evaluative judgment which is reasonable, another objective standard but one involving the familiar secondary judgment, which respects the latitude afforded to the primary decision-maker. Both Mr Gardner and Ms Brown support that twin-track test. Ms Brown explains its logic by contending that the 'objective minimum standard' is reserved for features – which in the case of adequate accommodation would include windows and heating – which every asylum-seeker must necessarily need and receive. But that rigidity of logic cannot be right, because "nappies, formula milk and other special requirements of new mothers, babies and very young children" recognisably fell within the objective minimum standard for essential living needs (NB §151).

9. As with essential living needs, the question whether adequate accommodation is being provided in discharge of the statutory duty, requires this principled approach. (1) Adequacy must be tested by reference to the needs of those persons to whom the duty is owed, in a context where accommodation is being provided to prevent destitution (A §§52-53; MQ §127a). (2) Adequacy must be tested by reference to – and so measured against – the individual circumstances and needs of each relevant individual, including each dependent, having regard to the age of any child (A §53; NB §167, MQ §127b). (3) Adequacy must ensure, as an objective minimum standard, a dignified standard of living, which is adequate for health and is capable of ensuring subsistence (NB §§153, 155, 161, 171). (4) The evaluative judgment of adequacy of accommodation, carried out for the Home Secretary, must satisfy basic standards of reasonableness (and any other relevant public law grounds) (NB §§150, 161, 171). (5) These are high thresholds for an asylum seeker to meet (NB §161).

10. Adequacy is informed by length of time (A §54, NB §149, MQ §127c). (1) Accommodation may be adequate only in the short-term (A §59, MQ §128), and not adequate on a long-term basis (NB §159), becoming unsuitable by reason of the passage of time (A §55). (2) It is necessary to look at the totality of accommodation (MQ §169), the conditions and how long they are being experienced (NB §172). (3) There may also be a change in circumstances or change in needs which mean accommodation is no

longer adequate (A §59, NB §160). (4) It is relevant to consider the prospective picture and the explanation given: the period during which the accommodation was or is "likely to be" occupied (A §54), the "uncertainty" (NB §149), whether the "stay was only to be a short one", and whether those affected were "reliably informed that this was the case, so that they had the comfort of knowing that their stay was finite" (NB §165).

My Assessment

11. I have arrived at the clear conclusion that this is a case in which the Home Secretary has breached the statutory duty owed to the Claimant and the four children, to ensure the provision of adequate accommodation. I have concluded, applying the twin track test (NB §161), that there is a breach on each track (as in NB at §171), either of which suffices. The Claimant's legal team has demonstrated that the accommodation at the Peckham hotel has failed to meet that objective minimum standard, by failing to ensure a dignified standard of living, which is both adequate for health and capable of ensuring their subsistence. So far as any evaluative judgment is concerned – that this accommodation was and remains adequate – the Claimant's lawyers have demonstrated that such a view was unreasonable in a public law sense. I have reached these conclusions, notwithstanding Ms Brown drawing attention to the points in MQ §170: the hotel is in an adequate physical condition with no disrepair or inherent health risk; that the issues with food are not about the basic quality of the food provided; and that there is no medical evidence to suggest any health issue connected to the quality of the accommodation provided. I accept all of that. But these aspects cannot bear the weight of supporting a finding of compliance with the duty and applicable public law standard of reasonableness. I will identify the combination of features which have led me to those conclusions.

Pregnancy and Vulnerability

12. The starting point is that there has, in my judgment, been an unjustified departure from applicable Policy – as a matter of both process and substance – in the context of circumstances of particular vulnerability. Turn the clock back to the position as it was March to May 2022. The Home Office – and those acting on its behalf – were dealing with a heavily pregnant asylum seeker. That alone put her in the statutorily prescribed category of vulnerable person (reg.4(3)(d)), triggering a mandatory statutory duty to consider her special needs (reg.4(2)). The Claimant was, moreover, a lone parent with a minor child (reg.4(3)(e)); in fact three. That too was a statutory trigger. Mr Gardner gathered together some of the literature on the position of asylum seekers who are pregnant or new mothers: such as When Maternity Doesn't Matter: Dispersing Pregnant Women Seeking Asylum (Maternity Action and Refugee Council, 2013); Holding It All Together (Birthrights and Birth Companions 2019); Destitution in Pregnancy: Forced Migrant Women's Lived Experiences (Ellul, McCarthy and Haith-Cooper, British Journal of Midwifery 2020). It is in this important context that the Policy – first published in August 2012 and last revised in February 2016 – promulgates procedural and substantive standards attracting the duty of adherence to policy guidance, absent identified good reason for departure. It is described as a "Dispersal Policy', where dispersal is the function of making decisions about moving asylum seekers from initial accommodation to support by means of dispersal accommodation. The Policy refers to the September 2010 National Institute for Health and Clinical Excellence Guideline which identified particular groups of pregnant women affected by complex social factors, including women who are recent migrants, asylum seekers, refugees or who

have difficulty speaking or reading English, recognising also that maternal stress in pregnancy has a detrimental effect on subsequent childhood development (Policy §7.4.1).

13. The Policy states that where the asylum seeker's healthcare needs require the urgent provision of dispersal accommodation that should be prioritised wherever possible (§4.2), emphasising that pregnancy, birth and new motherhood have a significant impact on a woman's physical and psychological health (§7.4). The type of dispersal accommodation normally appropriate for pregnant women is a dispersal property suitable not just for the pregnant woman but also for mother and baby post birth (§4.9), where they can access services through pregnancy and into new motherhood (§7.4.2), achieved where possible in a single step (§7.4.6). Careful consideration is to be given to the specific circumstances of each case (§4.3) with each case sympathetically considered on its own merits and solutions sought in consultation with the woman (§§7.4, 7.4.2). Where the pregnant asylum-seeking woman has recently arrived in the UK it should be possible to disperse her from initial accommodation to suitable dispersal accommodation as soon as possible (§7.4.5). If she is in the later stages of pregnancy, but already accessing services at a local maternity unit, priority should be given to finding appropriate dispersal accommodation nearby to continue that access, but if that is not available then options for dispersal to another location or deferral of dispersal should be considered in consultation with the woman (§§7.4.5, 7.4.6).

14. The position as at 14 April 2022 when the family was moved from the Croydon hotel, and as at 5 May 2022 when the Home Secretary formally recognised the family's destitution and the applicability of the s.95 statutory duty, was that the Claimant fell squarely within the statutory definition of vulnerable person, on multiple and combination grounds, and squarely fell within the terms of the Policy. That brought into play the statutory duty to have regard to the circumstances of vulnerability, and the Policy with its substantive guidance and procedural discipline. The incompatibility of the Home Secretary's response with the regulations and policy have squarely been raised in these proceedings. But there is nothing approaching a satisfactory answer. No reasoning has been put forward to show that the actions and process were compatible with the Policy. No material provided to the Claimant or the Court shows that, or how, the vulnerability and circumstances were addressed in any evaluative decision, what action was identified as appropriate, or why. There is no evidenced evaluative decision of any kind. There is no evidence of the discipline required by the Policy being actioned, nor any good reason for any departure from the Policy, nor of any decision addressing the Claimant's needs and interests, still less in consultation with her. Ms Brown does not submit that this is all 'water under the bridge' and now irrelevant, because baby Sola was born 13 months ago in June 2022. I agree with her, and Mr Gardner, that it is not. The consequences and implications of the unjustified departure from the substantive content and procedural discipline embodied in the Policy continue to be reflected in the lived experience of this family. There they have been, through the final months of the pregnancy, with their new born baby daughter and siblings, at the Peckham hotel. They have been and so still are – in terms of the Policy – in the wrong type of accommodation. It might have been thought obvious that records must be kept of evaluative decision-making through important stages in the case of vulnerable asylum seekers, to whom statutory duties are owed. If there are decisions, and records, none have been shown to the Court. It is, naturally, especially difficult for a judicial

review Court to afford – in such a vacuum – the latitude afforded to a reasoned evaluative decision arrived at following consideration of relevant circumstances.

The Baby

15. Next, there are features of the present case which reinforce the implications of leaving a pregnant woman – with other young children – to be in initial accommodation at the Peckham hotel through the latter stages of the pregnancy and after the birth of baby Sola. There is evidence in the present case about laundry. There is no dispute that laundry is – once a week – collected (previously Monday, now Tuesday) and returned (Wednesday). Basic hygiene requires an ability to wash and dry Sola's clothing. Given the period of time between the weekly collections, the Claimant bought her own detergent – from her subsistence allowance – to wash clothes in the hand-basin and dry them in the family's room. There was damp and condensation. She was then told that she was causing the problem. The service provider response with the Summary Grounds said this: "we have clearly advised to stop washing drying clothes inside room as this will affect her on children's health due to drying of the clothes". So, the Claimant was told to stop, and she did. Her evidence, throughout, has been that the weekly laundry service is simply not enough with 3 children and a baby whose clothes have had to be changed 3 times a day. She is supposed to pile up soiled baby clothes. The pleaded grounds for judicial review (17 November 2022) contained the contention that the weekly clothes washing facilities were obviously inadequate for the children especially the baby to keep them clean and hygienic in circumstances where clothes will frequently become soiled and require washing. Two days before the substantive hearing, Mr Shewell tells her (3 July 2023) she could make an application for additional sets of clothes or for an allowance for mid-week washes. That is too little, too late. Leaving aside the laundry, I have found it helpful to pause and consider the other implications of a new born and growing baby for everything that the Claimant and the three other children do, day and night.

The Room

16. That brings me to the room which the family has been occupying at the Peckham hotel. I have clear photographic evidence of both rooms. I have evidence of the dimensions of the larger room which they have occupied in the 8 months since November 2022. It measures 11.5m² as a communal room with a 2.2m² ensuite shower room with washbasin and toilet. It is clear on the evidence that the first room (mid-April 2022 to late November 2022) was substantially smaller. I will describe what the photographs show. That first room is a bedroom whose floorspace is dominated by a double-width bunk bed. It has two single mattress beds side by side as the top bunk (for Dara and Pamlerin) and then a double mattress beneath (for the Claimant, Keji and baby Sola). There is a wall-mounted TV in the corner of the room, obscured by the bunk beds. The rest of the floorspace has a few chairs, some low drawers, the family's bags and clothes. I would not be able to sit, still less lie down, on the floorspace. That was the accommodation for the first 8 months at the hotel. It is where Dara celebrated his 11th birthday in April 2022, the room into which baby Sola began her childhood in June 2022, where Keji turned 4 the same month, where the family were when the letter before claim was written on 7 October 2022 and the judicial review proceedings were issued on 18 November 2022. The second room, available to the family after judicial review proceedings were commenced, is significantly bigger. It is 11.5 m². I will describe what I see. This is an L-shaped room. There are two separate single-width bunk beds, along

each of the long walls. Size-wise, the floor space alongside each bunk bed would allow another single mattress. There is a narrow storage space under the bunks for shoes etc, but not high enough to take a suitcase or box. There are chairs and a TV on the wall which can be viewed. The floorspace is largely taken up by the chairs, bags and baby buggy. The shower room has a single shelf. If you closed the door, you could change a baby's nappy but only by kneeling on the floor and using a changing mat placed in the base of the shower. I am satisfied, based on the evidence, that the first room is to be described as severely cramped and the second room as seriously cramped.

Somewhere to Eat

17. The next point is that this is not a bedroom in which the family only sleeps. On the Claimant's witness statement evidence, which I accept, this is the room where the family eats its meals, and all families living in the Peckham hotel are in that same position. There are meals provided for all residents with a rolling menu. But nowhere is it said, still less evidenced, that there is a 'dining room' with tables at which families can eat their meals. The pleaded grounds for judicial review (17 November 2022) contended that the entire family "has to live, eat and sleep in this small space". The Home Secretary's Summary Grounds do not say that there is somewhere else where families can eat meals; nor does the response from the service provider assert this; nor do the Detailed Grounds. The Claimant's latest witness statement (5 July 2023) repeats what was said 9 months earlier in the originally pleaded grounds for judicial review: that the Claimant and the children "live, eat and sleep" in the hotel room. She explains that there is no dining room and that, as a result, "we and everyone in the hotel eat in our rooms". This is a point of significance. The implications of a room are different if there is another space with tables for having meals (and therefore available in principle for other uses outside mealtimes too). In MQ it had been said in correspondence that the family had to "eat, sleep and live" in the same room (§58a), but – significantly – HHJ Bird found as a fact that this description was not supported by evidence (§63) of the hotel's "reasonable facilities" (§64). When HHJ Walden-Smith gave judgment explaining why she granted interim relief in K, she expressed clear concerns that the family of 2 parents and 3 young children including a baby were "sleeping in one room, eating in one room, and living in one room" (§26) so that this young family was "living in this one room for all purposes of sleeping and eating" (§32). Bereft of HHJ Bird's comfort, I share HHJ Walden-Smith's concern.

Somewhere for Homework

18. If there were a dining room with sufficient tables and chairs for families, then this could be an answer to a question about where – outside of meal times – school age children can do their homework. On that topic, I find on the evidence that Dara and Pamlerin have nowhere else in the hotel to do their homework, have to do their homework sitting on their bunk beds, which is uncomfortable for them and makes it hard for them to focus. That is what is said in the Claimant's November 2022 witness statement. The Home Secretary's summary grounds of resistance in December 2022 said that there was a childcare area equipped with desks. The attached response from the service provider asserted that there was "a spacious area for kids equipped with tables". The email from the service provider, received by the Home Secretary on 6 June 2023 but only communicated in these proceedings by Mr Shewell's witness statement of 3 July 2023, referred to the provision of a "communal play space", to which I will return. It then said this: "Moreover, we have arranged a spacious area with table for the kids to study during

evening hours". No photograph has ever been provided by the Home Secretary in these proceedings of any study area with tables. No floorplan has ever been provided by the Home Secretary to show where this room is supposed to be, how big it is, and whether it is a "table" or "tables". The best evidence is the photograph which the Claimant has provided. It depicts an area next to the food serving area. On that photograph I can see a "table" – consisting of 3 single-person tables pushed together – with 5 chairs. In the picture there is a mum sitting next to a young boy who is playing with Duplo. At the other end is an adult male on his laptop. Nothing in the room indicates that this is a study area for children. The use depicted is inconsistent with that. If Dara and Pamlerin were going to do homework at that table, the Claimant would need to get the 4 children – including Sola – together and try to monopolise the table. Nothing suggests that this is a practical possibility.

Somewhere to Play

19. This leads on to whether there is somewhere in the hotel for the children to play. One of the features which this Court emphasised in the case of K was that the two children in that family – aged 6 and 4 – had "nowhere to play" (§26). By contrast, HHJ Bird found that the two young children in MQ were in a hotel whose "reasonable facilities" included "a large playroom" (§64). Ms Brown did not contest – for the purposes of the present case – the appropriateness of this Court being reminded of the 1989 UN Convention on the Rights of the Child. That international legal instrument recognises the right of every child to a standard of living adequate for their physical, mental, spiritual, moral and social development and the duty on states to take appropriate measures in case of need to provide material assistance and support programs with regard to nutrition, clothing and housing (Article 27). The Convention also (Article 31) identifies "the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate fully in cultural life and the arts". This provides helpful and principled context for the topic being considered in K and MQ, and again in the present case. I find as a fact, on the evidence before me, that there is no "communal play space" accessible to Dara, Pamlerin, Keji and Sola. The letter before claim (7 October 2022) claimed that there was nowhere for the children to play. The letter of response (28 October 2022) did not dispute that. The pleaded grounds for judicial review (17 November 2022) described the room to play as the "very little room" in the family's hotel room. The Claimant's first witness statement (the same day) said "my children have nowhere to play". The Summary Grounds said: "the hotel has a childcare area that is open 24 hours a day … which is equipped with toys and desks". That was a reference to the service provider's response which said the hotel "has a sp[a]cious area for kids in the hotel, which is open to 24/7, equipped with tables, chairs, televisions and children's library". The Detailed Grounds (25 May 2023) repeated that the hotel has a childcare area that is open 24 hours a day, equipped with toys and desks. No evidence was filed. There is no witness statement from anyone who can give direct evidence. There is no photo or floor plan. The late Shewell witness statement (3 July 2023) conveys the service provider's description (6 June 2023) of "a communal space area which we have allocated for the kids to spend quality time in reading books and playing indoor games", in addition ("moreover") to a study area. I find that the Claimant's photograph – of the mum and child with the Duplo, and the man with his laptop – supplies the best evidence. The Claimant's latest witness statement explains that this was the area which she was shown as the supposed play area, but which is simply one table next to where the hotel serves food. I return to the

photograph. What I see in it is a hard tiled floor space, and the table with the five chairs. There is one other single-person table next to a trolley. This is the same area as is supposedly for homework. It is not reserved for children. It is not furnished for children. There is no sign of a children's library. There is no sign of the room being equipped with toys. There is nothing to say that it is a play area. Nobody looking at it would describe it as a play area. I find, on the evidence, that there is no children's play area.

Passage of Time

20. I come to the feature of the case which – when put alongside the other features – becomes decisive. It is the sheer passage of time. This family has been in initial accommodation since March 2022 in Croydon. They are a family who lived for 7 months in the severely cramped first room. Even after commencing their claim for judicial review, they have lived for a further 8 months in the second room. This case is a paradigm case of what the case law recognises (§10 above), that accommodation can have been legally adequate for a shorter timeframe but cannot satisfy the tests of legal adequacy in the longer term. Both Counsel recognise the legal relevance of that consideration, in light of that case law. For her part, Ms Brown accepts that there could come a time at which the passage of time makes this accommodation fall below the standards of adequacy for the purposes of the statutory duty and requirement of reasonableness. She submits that this time has not yet arrived. For his part, Mr Gardner accepts that there could have been a time at which this accommodation achieved the legal standards of adequacy. He submits that the time has long since been passed at which those standards have been breached. I agree with Mr Gardner.

21. The passage of time in this accommodation clearly exceeds what is tolerable or can be expected to be tolerated for this family. This Peckham hotel – in these rooms and with these arrangements – is where Pamlerin turned 10 in December 2022. It is where Dara celebrated his 11th and 12th birthdays in April 2022 and April 2023. It is where Keji turned 4 and then 5, in June 2022 and then June 2023. It is where the Claimant carried Sola through to her birth in June 2022 and where Sola still was when turning 1 last month. There is a clear and obvious contrast with MQ, where the court concluded that there had been no breach of statutory duty or unreasonableness in the provision of adequate accommodation for a period of 4 months until a Court intervened and granted interim relief, between January 2022 and May 2022, in hotel accommodation where the family was not required to eat in the bedroom and where the reasonable hotel facilities including a large play room (§§2-4, 64, 169-172). There is also a very sharp contrast between this case and the typical 14 days, pre-pandemic, for transfer of a person accepted under s.95 to dispersal accommodation (MQ §82A); and the 3-4 weeks still described as normal in the Home Office pamphlet still given – I am told – to asylum seekers entitled Guide to Living in Asylum Accommodation.

22. It is in the context of the passage of time that the concerns about food and nutrition, and privacy, become particularly weighty. As to nutrition, that is plainly a matter of legitimate concern for the Claimant. What she wants to be able to do, and what she would have been able to do had she been relocated to dispersal accommodation, is to cook and prepare food for her children. It should be recalled that the oldest three children came to the UK from Nigeria when Dara was 10, Pamlerin was 8 and Keji was 3. The rolling menus within the hotel are, as it is put by the service provider themselves, in the context that "this is temporary accommodation". The Claimant's evidence – which I accept – is that the children do not like the food provided, frequently refuse to

eat it, and frequently fill up on bread rolls. She cannot provide or prepare food herself. This point graphically illustrates the implications of the passage of time. The same, in my judgment, is true about the points relating to privacy. Yes, mum or the children can go into the small ensuite toilet and shower room to get changed. But the tolerability of that arrangement reduces with the passage of time.

Open-Ended Uncertainty

23. On the evidence, this is a case in which it has never been possible for the Claimant to see – and nobody ever told her – what the period was during which the hotel accommodation was "likely to be occupied" (A §54). This was not a case where the family were being told that their stay was only to be a short one, so that they were "reliably informed that this was the case so that they had the comfort of knowing that their stay was finite" (NB §165). As I see it, this is an important point, at the heart of the lived experience of "temporary" accommodation in the "short term". To tell an adult, still less a child, to cope with and tolerate a situation because it is "temporary" and "short-term" begs a question of how long. It is difficult to process, or identify strategies for dealing with, a situation which is said to be temporary and short-term, but which is open-ended and ongoing. Open-endedness and uncertainty exacerbates agony and undermines coping. The implications are graphically encapsulated in the Claimant's witness statement evidence. She talks about "living in an overcrowded shoebox" and not "feeling like they have a home". She says the longer they stay in the hotel accommodation the more hopeless she feels. She describes her sleepless nights thinking about how the children are going to be affected in later life. In her very first witness statement, 9 months ago in November 2022, she said this:

> ***my children feel very unsettled at the hotel and are always asking me how long we have to stay here. I try to reassure them and tell them that we won't be much longer, but this no longer works, and they just think that I'm lying to them.***

That is the context in which she describes the implications for her mental health, telling me: "I cry every day". In the Migrant Voice report No Rest No Security (April 2023),a report into the experiences of asylum seekers in hotels, under a heading "no end in sight" the writers of the Report say this: "Worst of all, [asylum seekers] are left for months with no communication from the Home Office, trapped in an endless limbo, sustained only by desperate hope of one day returning to a normal life". The Report continues, under a heading 'in limbo": "What makes the current situation unbearable for most is that they have no control over the most basic aspects of their lives, including choice of food, while there is no end in sight".

Cumulative Effect

24. It is the cumulative effect of all of these features that leave me with confidence to conclude that this is a case in which the Home Secretary is in present breach of her statutory duty. I add, in terms of a 'then and now' analysis (cf. R (CB) v SSHD [2022] EWHC 3329 (Admin) [2023] 4 WLR 28 §2), that I am satisfied that this is a case – in my judgment – where the Home Secretary was already in breach of that duty when these proceedings were commenced in November 2022.

Findings of the Independent Chief Inspector

25. I turn to two further topics which reinforce the conclusions at which I have arrived. The first comes from the external public domain material which Mr Gardner brought to the Court's attention. Some material of this nature was identified in MQ, which in turn referred to previous cases. HHJ Bird described the picture of some 38,300 asylum seekers in emergency accommodation (almost certainly hotels) as at September 2022, contrasting the dispersal accommodation in the form of self-catered furnished flats and houses with the initial accommodation in block-booked hotels (MQ §§78-79). He described the increase in asylum claims, referring to problems created during the pandemic, giving rise to the shortage of dispersal accommodation meaning that asylum seekers with young children who qualify for support were now living in hotel accommodation for long periods of time (§§78-80). There was then a discussion (MQ §§83-84) of the report presented to Parliament in May 2022 by the Independent Chief Inspector of Borders and Immigration on the issue of hotel initial accommodation. The Chief Inspector said (Report §10.3) that:

> ***The [stakeholder] submissions were consistent in stating that accommodation in hotels was not suitable for families with children over prolonged periods of time. This was acknowledged by the [Asylum Support Contracts] senior civil servant who said that the use of hotels was 'absolutely not appropriate for families'. Service providers were also aware of the limitations of hotel accommodation for families with children, acknowledging that their situation was not the same as a family staying in a hotel room during a holiday.***

HHJ Bird then summarises (MQ §84) the Chief Inspector's findings (Report §§9.25 to 9.32) as to "length of stay":

> ***that it is widely reported as unsettling for asylum seekers not to have any clear idea about when they will be moved to dispersal accommodation. It is noted that the mental health of service users is affected by 'long stays' and that hotel accommodation was not suitable for 'prolonged periods' or "extended stays'.***

The Report (§7.56) records the Home Office as accepting that the widespread and continued use of hotel accommodation to house asylum seekers is unsustainable "both in terms of service user impact and the cost to the Home Office" (MQ §81). The Report repeats (at §10.25) that: "Ultimately, as reflected by stakeholders, service providers and Home Office staff alike, long-term hotel accommodation is not suitable for families with children." To these references, I add that the Chief Inspector (Report §9.18) explained that:

> ***the problems around food provision are exacerbated when service users are accommodated for long periods in contingency accommodation. This was recognised by Home Office staff, with an [Asylum Support Contracts] senior manager telling inspectors that food was 'not a short-term issue, but if people are accommodated longer it becomes a problem'.***

The Chief Inspector (Report §§9.39-9.41) also says this about "Families with children":

> ***Third sector stakeholders raised concerns about activities for families with children accommodated in contingency asylum accommodation. One told inspectors that 'social activity is lacking' and that 'hotels are not appropriate for children'. Another echoed this and told inspectors that hotels 'are not appropriate for families with children, especially long term. There is limited play space'. They went on to state that: 'Children need physical space to learn how to walk, learn social skills. These are normal development milestones. We know that children in poverty start school one year behind. It is hard to be a good parent in normal circumstances. It is incredibly hard in a hotel and after a traumatic experience. It is hard for them to give love and they are set up to fail.'***

Decision-Making and Record-Keeping

26. The second topic which reinforces my conclusions is the complete absence of any record-keeping or decision-making or evaluative assessment documentation which has been available to the Court in the context of these judicial review proceedings. I have already made observations about the complete absence of information about decision-making in the context of the Claimant as a pregnant asylum seeker and s.95 applicant for support. The vacuum continues through the entire sequence of events of this case. The closest that the documents come, as Mr Brown accepts, is in the Home Secretary's pre-action letter of response of 22 October 2022 which said the service provider had reported conducting a "welfare check" at which "your client stated they were doing fine". Interestingly, the most recent June 2023 secondary information from the service provider says a "welfare check" has been conducted and the Claimant reported she was "doing well". The Claimant in her witness statement evidence denies all this. She says she is not aware of any welfare check. She says the staff occasionally come to the room to check things such as the temperature. She says no one has ever asked about her welfare or that of the children and she has not indicated to anyone that they are doing well. I accept that evidence. The Summary Grounds of Resistance identify no decision but say that the Home Secretary "will move the Claimant to dispersal accommodation in due course". The Home Secretary chose to serve no witness statement with the Summary Grounds, and no evidence at all with the Detailed Grounds. I have been unable to find any description anywhere to any evaluative decision being taken, nor to any reasons of a decision-maker. There is no evidence of any step in gathering relevant information to be able to make an informed decision. There is no description of any exercise of judgement and evaluation. If there is any system of decision-making, and record-keeping, it is very surprising indeed that the opportunity has not been taken to provide the relevant documents to the Court. The duty of candour would require that relevant decisions be explained. The most natural inference is that there have been no decisions, that there are no reasoned assessments, and that there are no records. If this had been a claim for judicial review 100 years ago, the claimant (applicant) would – by what is now permission for judicial review – have obtained a "rule nisi". That was a court order requiring the public authority defendant (respondent) to "show cause" why the prerogative writ should not be issued. The onus in judicial review remains formally on the claimant. Subject to compliance with the duty of candid disclosure, it is a strategic decision for a public authority defendant to choose how to respond by way of evidence. There was ample opportunity to file evidence, under the right in CPR54 and the directions of the Court, alongside a pleaded defence. That opportunity was not taken. A choice was made. The failure to engage by demonstrating and evidencing any evaluative decision-making can have practical consequences when the Court comes to grapple with the legality of the way in which a statutory function has been approached. There is a limit to the extent to which submissions – as opposed to evidenced decision-making – can successfully invoke the latitude built into the public law standards of reasonableness review. A judicial review defendant comes before the Court at a substantive hearing having had the full opportunity to explain, if it is able to do so and if it wishes to take that opportunity.

The Bigger Picture

27. Finally, this. One of the consequences of the Home Secretary's choice not to file any proper evidence in this case is that I have not benefited from any attempt to put the

Court in an informed position as regards any 'bigger picture' points facing the Home Secretary. I understand of course that accommodation resources are limited. I can derive, indirectly from MQ, evidence about the rise in asylum applications: see MQ §§78 and 82. General reference has been made to the problems caused by the pandemic (MQ §80), but I am not sure whether it is said that Covid-19 somehow made the asylum decision-making process longer, or delayed projects for new accommodation, or did something else. It is especially hard to see why the pandemic – or the increase in asylum claims – should lead to a typical 14 day (or 3 to 4 weeks) time-frame having now become more than 15 months and counting, in the case of a statutorily-recognised vulnerable person. It is chastening to think that the evidential vacuum was a chosen position in the face of judicial review proceedings for which the Court has granted permission and the opportunity to file evidence. There is no suggestion that the interim order in May 2022 which led to dispersal accommodation being provided, within 4 months of entering initial accommodation, for the mother and 2 children in MQ – who had been in hotel accommodation with reasonable facilities and a large playroom – has materially undermined the Home Secretary's ability to deal with more pressing cases. It was in granting interim relief in the December 2010 case of K – the case of the 2 parents and 3 children including the newborn baby who had been in hotel accommodation for less than a month – HHJ Walden-Smith spoke of the absence of the diligent attention that the case deserved, and the need for the Home Secretary to put her foot down in respect of the private providers (§35). In the December 2020 judgment of the then HHJ Cotter QC in IO v SSHD [2020] EWHC 3420 (Admin) – a challenge to a dispersal decision – this Court recorded (at §53) that there was no evidence that the relevant caseworker had considered the specific relevant factors and no evidence in relation to any decision still less a fully minuted decision, emphasising that a reasonable decision required consideration of the individual circumstances all relevant matters (§66). The judgments in K and IO were delivered in the midst of the pandemic.

## Conclusion

28. For the reasons that I have given, in all the circumstances of the case, I conclude that the Home Secretary has breached the statutory duty to provide adequate accommodation. This judgment was circulated as a confidential embargoed draft. It alerted the Home Secretary of the need to prepare promptly to implement the mandatory Order from this Court. It said as to time-frame, against that backcloth, that I was proposing to give the same 5 day timeframe as was considered appropriate when interim relief was ordered in K, to run from the date on which the judgment was handed down. In the event, the terms of the Order – to give effect to the judgment – were agreed, as were costs. The parties were agreed on 7 days (5 working days) to provide the accommodation, which is sensible and appropriate. My Order is (1) The claim is allowed. (2) The Defendant shall, no later than 4pm on 21 July 2023, provide adequate dispersal accommodation for the Claimant and her family as required under s.95 of the Immigration and Asylum Act 1999. (3) The Defendant shall pay the Claimant's costs on the standard basis, to be subject to detailed assessment if not agreed.