Neutral Citation Number: [2023] EWHC 205 (Admin)

Case No: CO/1735/2022

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

Date: Tuesday, 7th February 2023

Before :

HIS HONOUR JUDGE BIRD
(Sitting as a Deputy Judge of the High Court)

- -

Between :

R (MQ)	**Claimant**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Zoë Leventhal KC & Alex Shattock (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Alan Payne KC (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 20th October 2022

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APPROVED JUDGMENT

…….

His Honour Judge Bird:

Introduction and Overview

1. The Defendant ("the SoS") has a statutory obligation (under Part VI of the Asylum Act 1999) to provide appropriate support (which might include accommodation) to destitute asylum seekers in the United Kingdom until such time as their asylum claims are resolved. Interim (or emergency) support will be granted in appropriate cases whilst the SoS considers the merits of an application. Accommodation provided otherwise than on an emergency basis is known as "*dispersal accommodation*".

2. The claimant was born in Jordan. She speaks Arabic and has confirmed that she cannot speak or read English[1]. She and her 2 young children sought asylum and were granted the right to initial accommodation on 5 January 2022. They were accommodated in a hotel in Rochdale. On 21 February 2022, the claimant applied for full support. The application was granted on 28 February 2022. The claimant and her family remained at the hotel but joined the queue of those waiting for "*dispersal accommodation*".

3. On 29 March 2022 and again on 4 May 2022, the claimant submitted a Pre-action Protocol ("PaP") letter asking that her claim for dispersal accommodation be expedited (allowing she and her children to jump the queue). Both requests were refused.

4. On 4 May 2022, because of a flood at the first hotel, the claimant and her children were moved to a hotel in Preston. Proceedings were issued on 16 May 2022 and on 30 May 2022, after the Court had made an interim order, the claimant and her children were moved to dispersal accommodation where they remain.

5. The structure of this judgment is as follows:

    a. Section A: The challenges advanced by the claimant.
    b. Section B: Three initial procedural matters: the extent of the claimant's case, the extent to which the claimant's evidence complies with the CPR and whether certain expert evidence should be admitted.
    c. Section C: The conditions at Hotel 1 and Hotel 2 and the problems and difficulties encountered by the claimant and her children in some detail.
    d. Section D: A summary of the complaints relating to conditions under 3 heads: the adequacy of hotel accommodation; food issues and health issues.
    e. Section E: Some short issues about timing.
    f. Section F: The claimant's case in respect of the adequacy of hotel accommodation; food issues and health issues.
    g. Section G: The evidence available to the SoS when her decisions not to expedite were made.
    h. Section H: The decisions.
    i. Section I: The general and widespread delay in securing dispersal accommodation.
    j. Section J: The evidence of how the SoS processes applications for expedited dispersal.
    k. Section K: The SoS's position in respect of the claim.
    l. The law is set out at sections L (the statutory framework) and M (the case law).

[1] See form ASF1

m. Section N: Deals with the grounds and section O sets out my conclusion.

A. The challenges

6. There are seven grounds of challenge:

   a. Ground 1: the SoS is unlawfully operating an unpublished policy requiring dispersal to be carried out in strict date order unless evidence is submitted that demonstrates "exceptional circumstances".

   b. Ground 2: by applying the unpublished policy, the SoS is fettering her discretion to disperse those who qualify for section 95 support. In particular the policy is such that the SoS is fettering her own discretion to disperse families with young children in priority to others.

   c. Ground 3: by applying the unpublished policy the SoS acts in breach of her duty (section 55 of the Borders, Citizenship and Immigration Act 2009) to have regard to the best interests of children.

   d. Ground 4: the SoS acted in the present case in breach of her duty under section 98 and under section 95 to provide adequate accommodation.

   e. Grounds 5 and 6: in refusing to expedite the dispersal of the claimant and her children, the SoS failed to take account of a material consideration, namely the needs of the claimant's children. Alternatively, her failure to move the claimant and her children before being ordered to do so by the Court was irrational.

   f. Ground 7: The SoS's failure to move the claimant and her children within a reasonable period of time amounts to a breach of her Article 8 rights to a private and family life.

7. Grounds 1 to 3 are policy challenges. Grounds 4 to 7 are specific challenges dealing with the particular circumstances and experiences of the claimant and her family and the SoS's failure to deal with her specific application.

8. To deal with grounds 4 to 7 I need to consider the facts and matters that the SoS had available to her when she made her decisions and I need to consider the claimant's evidence.

B. Procedural issues

9. Three substantive procedural points have arisen: first, the extent of the claimant's case, secondly the form of the claimant's witness evidence and its compliance with the CPR and thirdly the admissibility of certain purported expert evidence on which the claimant seeks to

rely.

B1. The extent of the claimant's case

10. The SoS submits that the claimant's policy challenge is limited to the allegation that the SoS is operating an unpublished policy. As I understand it, the SoS submits that the claimant is not entitled to argue that the policy itself (requiring dispersal to be carried out in strict date order unless evidence is submitted that demonstrates "exceptional circumstances") is unlawful.

11. I cannot accept that argument. In my view the claimant attacks the SoS's policy on 2 bases: that it is unpublished and that in substance it is unlawful. That is why at ground 1 the claimant specifically identifies the apparently unpublished policy. The SoS appears to have engaged with the claimant on both grounds (see paragraphs 85 to 87 below).

12. Ground 2 and ground 3 concern the application of the policy and can only sensibly be read as attacks on the lawfulness of an "exceptional circumstances" policy. The SoS's answer to the point, as I understand it, is that there is no unpublished policy and the policy that is applied is not an "exceptional circumstances" policy.

B2. The claimant's witness evidence and its compliance with the CPR

13. As I describe below, the claimant has provided 3 witness statements. Each is written in English. The first notes that it has been taken "*with the assistance of an interpreter in Arabic over the telephone*". The statement of truth is written in English. The witness statement is signed by the interpreter who confirms that he has "*translated the above statement to [the claimant] and confirm that she has appeared to understand it and has confirmed to me that the facts stated in this statement are true*". The claimant's solicitor then certifies that she has ("*with the assistance of an interpreter*") read over the contents of both the witness statement and the "*declaration of truth*" to the claimant who "*appeared to understand*" (a) the statement and approved its contents as accurate and (b) the declaration of truth and the consequences of making a false witness statement and "*has signed the statement in my presence*".

14. The second witness statement is said to have been "*taken over the phone with my solicitors….and an Arabic interpreter…*". At the end of the statement the claimant has signed the statement of truth in English and the interpreter, and her solicitor have signed the same declarations that appear on the first statement.

15. The third witness statement is in response to evidence served late by the SoS. It was filed and served, with my permission, after the hearing. Like the second statement it is said to have been "*taken over the phone with my solicitors….and an Arabic interpreter…*". The claimant explains that her solicitor "*has told me the contents of [the late evidence] and asked for my response to those comments*". This statement explains, and to some extent changes the evidence set out in the first 2 statements.

16. I should add that the Claimant's solicitor has signed the statement of truth on the Claim Form on behalf of the Claimant. By CPR PD 22 paragraph 3.8, I proceed on the basis that the claimant has authorised the solicitor to sign the statement of truth and that before signing the solicitor had explained to the claimant *"(through an interpreter where necessary) that in signing the statement of truth [the solicitor] would be confirming the client's belief that the facts stated in the document were true, and…. that before signing he had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts (see rule 32.14)*."

17. None of the claimants' three witness statements has been prepared in accordance with the CPR.

    a. CPR PD 22 para.2.4 requires a statement of truth to be written verifying a witness statement to be in the witness' own language. The point is repeated at CPR PD 32 para.20.1.

    b. CPR PD 32 para.18 requires the witness statement to be drafted in the witness' "*own language*". This point is emphasised and repeated at para.23.1.3 of the 2022 Administrative Court Guide and para.19.1(8) of the same PD.

    c. A witness statement in a language other than English must be translated. The translator must sign the original statement and must certify that the translation is accurate (CPR PD 32 para.23.2). Both statements should be filed.

18. The claimant accepts these failings but invites me, nonetheless, to rely on the claimant's evidence. The SoS invites me to take account of these failings but does not suggest that it would be appropriate to simply ignore the evidence.

19. Despite the shortcomings in the form of the evidence the SoS does not invite me to refuse to admit it or to ignore it. I have come to the view that the SoS's approach is the right one. It would be inappropriate for me to refuse to admit, or to ignore, the evidence.

20. The difficulties with the claimant's evidence mean that, unusually in public law proceedings, I need to engage in a degree of fact finding.

B3. Expert evidence

21. On 6 October 2022, the claimant sought permission to adduce an expert report prepared by Dr Julia Nelki, Gillian Hughes and Ellie Kanver. The application explains that Dr Nelki is a consultant child and adolescent psychiatrist with significant experience of working with refugee children. Gillian Hughes is a chartered clinical psychologist and a former consultant clinical psychologist at the Tavistock and Portland NHS trust where she was clinical lead and manager for the child and family refugee services. Ellie Kanver is a social worker and systemic psychotherapist who has worked with refugees. I proceed on the basis that the authors of the report are experts in their field.

22. It is clear from the summary of instructions set out in the report, that the report is intended to be generic and to cover a wide range of circumstances. For example, the authors are invited to comment on the child's "*ability to recover from traumatic experiences and difficult journeys to the UK*". I note that the authors are invited to express a view on whether full board hotel or hostel accommodation could reasonably be described as adequate or suitable.

23. Permission to admit the report is required. I am invited to refuse.

24. The report is undated. Whilst it is described as being "*prepared for the court*" there is no statement (required by CPR 35.10(2)) that the experts understand and have complied with their duty to the court. Neither is there a statement of truth in the form set out at CPR PD 35 para.3.3 or (as required by PD 35 para.3.2(9)(b)) that the experts are aware of CPR Pt.35, its Practice Direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

25. I am also concerned that the experts may have misunderstood their role. The question of adequacy or suitability is not a question for the experts but is a question for the court. It is concerning that the question was asked and concerning that it was answered.

26. In my view, the absence of an appropriate certification as required by CPR 35 is fatal to the admission of the report. The certification is fundamental. It provides the court with the confidence it needs to admit the evidence.

27. For those reasons I refuse to admit the report.

C. *The Facts*

28. To determine the factual foundation of the claim, in order of importance, I will have regard to undisputed facts, the evidence of the parties and facts and matters raised before issue and in the pleadings.

C1. Undisputed facts

29. The claimant was born in Jordan in 1994. She has 2 young children, one born in 2016 ("AB"), the other in 2021 ("CD"). She arrived at this country on 5 January 2022 and immediately claimed asylum. She had a screening interview on 7 January 2022.

30. She and her children were offered "*initial*" accommodation by means of temporary support pursuant to section 98 of the Immigration and Asylum Act 1999 ("the IAA") at a hotel in Rochdale ("Hotel 1"). They accepted the offer and moved in.

31. On 21 February 2022 the claimant made a claim under section 95 of the IAA for asylum support (using form ASF1) on the ground that, having regard to the factors set out in Regulation 8(3) of the Asylum Support Regulations 2000, she was destitute. The ages of the children were noted in the claim, and it was said that CD suffered from anaemia. The claimant's evidence is that she was not aware that this application was the place to set out any reasons (exceptional or otherwise) to justify an early departure from hotel accommodation. The form was completed over the telephone with the assistance of Migrant Help and an

interpreter. She was not given a copy.

32. At the end of the form the following appears:

> "*In making decisions about the allocation of asylum support accommodation, the Home Office has regard to the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. Do any of these apply to you?" If so, what?*

33. In my judgment this section of the application form is of some importance. The words on the form appear (as I have set out) in quotation marks and it is clear that they are reproduced from Article 17 of Council Directive 2003/9/EC of 27 January 2003 (see the decision on the case of *NB* referred to below). These words openly explain, in a manner consistent with the SoS's pleaded case and evidence, how she sets out deciding how to allocate dispersal accommodation, in particular that she has regard to "*the specific situation of vulnerable persons*". There is no reference here to the need to show "exceptional circumstances".

34. The answer given to the "*if so, what?*" question was "*the above does not apply to me*". It is however clear from the form that the claimant was a "*single parent with minor children*".

35. On 28 February 2022, the claimant's application was approved. The approval letter makes specific reference to AB and CD and to their dates of birth. The SoS was therefore clearly aware, and took account of the fact, that the claimant had minor children with her. It was made clear that accommodation was allocated on a "*no choice basis*" and that she would be told in due course when she would be moved to her dispersal accommodation. The claimant would receive £24.72 as a weekly subsistence allowance (£8.24 per person) as her accommodation was full board. This payment is described as a pre-dispersal (or PREDIS) payment. The amount would increase to £122.85 (£40.85 per person) once in (self-catering) dispersal accommodation.

36. On 16 March 2022, the claimant was unwell. After a short delay she was prescribed antibiotics for sepsis. There is some suggestion that she may have been admitted to hospital. Her sister (about whom no details have been provided, save that I am told at paragraph 15 of the claimant's skeleton argument that she too is an asylum seeker) was allowed to move into the hotel to care for the children whilst the claimant needed help.

37. Following a flood at Hotel 1, the claimant and her children were moved to a hotel in Preston ("Hotel 2") on 3 May 2022. It appears (see the inspection report below) that at that time, Hotel 2 had only been used to house asylum seekers for 1 or 2 weeks. On 6 May 2022 AB was offered a place at a Primary School close to Hotel 1. Given the move (which was necessitated by events beyond the SoS's control), she could not take up the place. These proceedings were commenced on 16 May 2022. Interim relief was granted on 19 May 2022 and on 30 May 2022 the claimant and her family were moved to long term (dispersal) accommodation in Liverpool.

C2. Factual Evidence

The claimant's evidence

38. Judicial review claims usually proceed on the basis of clear and agreed facts. Normally, witness statements filed in support of the claim will confirm and perhaps supplement the brief summary of facts that must be set out in PaP correspondence.

39. The specific adequacy issues raised by the claimant in the first statement are not expressly attributed to Hotel 1 or Hotel 2. As the statement was signed on 12 May 2022, a little over a week after she had arrived at Hotel 2 it cannot be assumed that the references are only to Hotel 1.

Statement 1

40. The first witness statement gives Hotel 2 as the claimant's address.

41. The following appears from the (non-compliant) evidence:

> *7. The three of us share a room. This was the case when we were in the hotel in Rochdale, and is still the case in the hotel in Preston. This is difficult, as the room is not that large. I attach to this statement photographs of the room at Exhibit MAQ-1. My eldest child, who is now 6 years old, is quite active and he does not have enough space to play. My youngest son is now learning to walk, but there is very little room for him to move around.*
>
> *8. The other main issue with the hotel is that the food is of poor quality and is often very spicy. My eldest son will only eat chips and as a result he has been losing weight. I am very worried about his diet and the impact on his health of having to live off this food. Because of this, I have taken him to my GP who has prescribed him multivitamins. I have also found that the poor diet has affected the quantity of breast milk that I can produce for my baby.*
>
> *9. I asked the hotel to provide special food for my baby, but they refused and said that he should just eat the hotel food. He is not even 2 years old yet, he cannot be expected to eat the food from the hotel. He needs special food, and definitely food that is not spicy, but the hotel will not provide that for me.*
>
> *10. I also feel very isolated here. I spend most of the time in the one room with my children and I feel that this is having a bad effect on my mental health.*
>
> *17. I do not understand what information the Home Office want me to provide in relation to my request to move, nor understand how that information would be dealt with by the Home Office. I have already told the Home Office of the impact that our current situation is having on me and my children. We just want to be able to move somewhere with enough room for me and my two children, and to have a place where I can cook proper food that my child can eat. I do not think that this is too much to ask, especially as I have been granted asylum support.*

Statement 2

42. The claimant's second witness statement was written after she was in dispersal accommodation. She makes the following points:

> *5. We arrived in the UK on 5 January 2022, and I claimed asylum the same day. I am still waiting for my asylum claim to be determined. When I first got here it was a difficult time for me and my family. We were placed in [Hotel 1]. I was sharing the room with my two sons, aged 5 and less than a year old. It was too small for all of us to share and my eldest son was very active and did not have enough space to play, while my youngest was just learning to walk and there was very little room for him to walk around. However, I was grateful to have somewhere warm and dry, but it was not ideal.*
>
> …….
>
> *13. Throughout this time I had been feeling very unwell. I was having bad headaches and was struggling with considerable fatigue. On 16 March 2022 I went to A&E and was told that I could not be admitted to the hospital while I had my youngest son with me. I then had to discharge myself because there was nobody to help look after my son while I was in hospital. Refugee Action helped get my sister moved to my hotel so that she could then look after my son. I then went to hospital again and was given a course of anti-biotics for Sepsis.*
>
> *14. This was an extremely different time for me. I had just come to the UK, and I was speaking with many different people and making many applications and having multiple letters sent to the Home Office on my behalf, all while I was in a small room with my two children and having to go in and out of hospital.*

The factual evidence of the SoS relating to conditions

43. Evidence was submitted by the SoS at the eleventh hour in the form of a witness statement from Jonathan Kingham and further documents. Mr Kingham deals with the conditions at each hotel. His evidence is that Hotel 1 was located close to a park and that Hotel 2 has a playroom. His evidence is that neither hotel refused to provide "baby food" and that there is no record of any request for baby food. The supplemental documents show that:

Hotel 1

a. At Hotel 1 there was an inspection on 4 August 2022. By then the claimant and her children had left. It records that the hotel has 27 rooms and is used to house families and single females. The rooms are described as "of a good size". Two rooms were measured (one was 12.3m^2 and one 14.5m^2).

b. Snacks are said to be available throughout the hotel including fruit, crisps and biscuits which can be topped up on request. Food is served at a buffet and eaten in the hotel restaurant. A register is taken in the dining room to ensure that staff are aware if service users are skipping meals.

c. As to facilities, the report notes that there is a local "kids club" that is free for children of service users to attend.

d. No complaint is raised about laundry facilities, but the report notes that 2 washing machines and 2 driers are available and that service users are provided with washing tablets and fabric conditioner. Nappies and sanitary products are provided. The "general feel of the hotel" was described as "good".

e. The menu at Hotel 1 is described in the report as a "new menu" brought in to "cater more to the [service users'] requests". It therefore appears that it would be unsafe to take the menu as indicative of the type of food that was on offer whilst the claimant was at the hotel.

Hotel 2

f. At Hotel 2 there was an inspection on 19 May 2022 when the claimant was living there. The hotel has 93 rooms and houses 170 families and single females and at the time of the inspection had only been used to house asylum seekers for a matter of weeks. The hotel has a "health team" seeing service users 3 days per week. The report notes that "space standards (Housing Act 1985)" are being met. Snacks are available throughout the hotel. Food is served in the foyer of the hotel; it can be eaten in the restaurant or in one of the other "leisure areas". Laundry is collected, taken off site and delivered back. Nappies and sanitary products are available at the hotel. The hotel was described as:

> "*of a really high standard. The room were great, very modern with nice fittings. The [service users] all seemed happy. The hotel have put on a lot of extras for the [service users] they have turned one of the rooms into a large playroom. They have also put a large movie projector in for children to watch movies on*".

g. The sample menu in Hotel 2 does not include a breakfast menu and covers lunch and dinner from Thursday to Sunday and Wednesday dinner. There is a children's menu and an adult menu. As far as spicy food is concerned the adult menu includes 2 curries.

The claimant's evidence round 2

Statement 3

44. The statement is provided "in response to" Mr Kingham's evidence. There is no indication that Mr Kingham's statement has been translated and considered by the claimant or even read to her by the interpreter. Instead, her evidence is that her solicitor has "told [her] the contents of [Mr Kingham's] statement".

45. The claimant:

a. Accepts that Hotel 1 and Hotel 2 each had dining rooms. Her evidence is that in Hotel 1, the family ate meals in their room because the children were still sleeping at breakfast time and at lunchtime, they were having a nap. Sometimes the family would eat their evening meal in the dining room but that would depend on what the children

wanted to do. She accepts that in Hotel 2 the family always took their meals in the hotel dining room.

b. As to available space the claimant confirms that Hotel 2 had a playroom of sorts, but that there were "very few toys or things for the children to play with". She says that AB "did not use the playroom that much because there were a lot of kids there and many were fighting, it was not a good environment".

c. For the first time in her evidence, the claimant refers in this statement to "baby food" (as opposed to special food). The evidence is that she asked for baby food and that the requests were initially refused in both hotels. It appears to be the claimant's evidence that "some weeks after asking" at Hotel 1, baby food was provided but not on a regular basis. She was told that whenever she needed it, she "*should go and ask, but sometimes it was not there, it depended on whether the hotel shopping had been done*." Her evidence is that hotel also refused to supply yoghurt. Baby food was not provided at Hotel 2, but the claimant used her weekly small allowance to buy it.

C3. Pre-Issue information

PaP 1

46. A PaP letter was sent to the SoS on behalf of the claimant by "Refugee Action" on 29 March 2022. It refers only to the conditions at Hotel 1.

47. The basis of the claim set out in that letter, is that accommodation at Hotel 1 was inadequate:

> *5.6.1. As is generally accepted, the use of B&B accommodation for families with children causes children harm. See for example the Local Government Ombudsman Report of October 2013 confirming that B&Bs should not be used and quoting and accepting the outcomes from a Shelter report into the use of B&Bs.*
>
> *5.6.2. All food is provided pre-cooked. The eldest child refuses to eat the food provided on a regular basis and misses meals as a result and there is no opportunity for the Claimant to cook for the family herself or to provide culturally appropriate food.*
>
> *5.6.3. The food is not of a decent quality and does not constitute a balanced diet. The eldest child will mainly only eat chips and the Claimant is worried about the impact of this on his health. He is losing weight, and their GP has provided multi-vitamins as she is concerned the food is not nutritious enough.*
>
> *5.6.4. The entire family must sleep, eat and live in the same room. There is no space for storage or for the children to play, and no toys, games, or books have been provided for her. The Claimant has not been given money to purchase these items. The family being in just one room together and being isolated*

> *is causing a great amount of stress and anxiety as the children are very young. The baby has no space to learn to walk and this is impacting his development. The eldest son has no other space to play or to rest, away from the baby and being there all day long, needs his own space.*
>
> *5.6.5. The Claimant states that the isolation she feels and having to be in one small bedroom with two young children for most of the day is having a detrimental effect on her mental health and she feels low. She has recently been hospitalised with sepsis, and her physical and mental resources are very low.*

48. The grounds of challenge set out in the letter are wider than those advanced now but include a complaint that the SoS has not "*taken into account her safeguarding duties to the Claimant's children under s55 of the Borders, Citizenship and Immigration Act 2009 or the relevant policy guidance*."

49. The SoS was invited to take urgent steps to accommodate the claimant and her family in adequate accommodation within 14 days and to review the policy of placing families in hotels for more than 6 weeks.

50. In her short response of 11 April 2022, the SoS refused to expedite the move to dispersal accommodation because the claimant had not submitted "*any exceptional circumstances to be considered and therefore their dispersal cannot be expedited on medical grounds*". The claimant was invited to state if there were any "*exceptional circumstances*" or to provide any relevant evidence directly to Migrant Help. I deal with this explanation in more detail later in this judgment.

PaP 2

51. The claimant's solicitors (DPG) sent a second PaP letter to the SoS on 4 May 2022, the day after the claimant had left Hotel 1. The claimant set out fresh and detailed grounds of challenge in this second letter covering both a challenge to policy ("the Policy Challenge") and to the delay in providing the claimant and her family with suitable accommodation ("the Specific Challenge"). In respect of the Policy Challenge, the claimant asserted (amongst other matters) that the SoS appeared to be "operating an unpublished practice/guidance" in prioritising certain applicants over others, on the basis of "exceptional circumstances" and was fettering her discretion by an overly rigid application of an "exceptional circumstances" test. The claimant continued to rely on the grounds set out in the early PaP letter in respect of the Specific Challenge. No new specific grounds were added.

52. The SoS was invited to provide suitable and adequate accommodation within 14 days and to confirm that the "exceptional circumstance" policy was unlawful and so would be abandoned. The SoS was also invited to disclose the unpublished "exceptional circumstances" policy and any guidance as to how it is applied.

53. On the same day, the SoS was informed that the claimant and her family had been moved to Hotel 2.

54. In another short response dated 9 May 2022, the SoS responded to the Specific Challenge in the same terms set out previously. The response referred to each child by name and quoted the date of birth of each.

C4. The Proceedings

55. The proceedings were commenced on 16 May 2022.

56. The detailed facts and grounds sets out the following:

> *19. The family share a single small hotel room in Preston, as they did in Rochdale. The family must sleep, eat and live in the same room. There is no space for storage or for the children to play, and no toys, games, or books have been provided for her. This situation is causing the family a great amount of stress and anxiety. The baby has no space to learn to walk and this is impacting on his development. The eldest son has no other space to play or to rest away from the baby.*
>
> *20. The food provided by the hotel is of poor quality and is often spicy. The eldest child refuses to eat the food provided on a regular basis and misses meals as a result. There is no opportunity for the Claimant to cook for the family herself or to provide culturally appropriate food.*
>
> *21. The Claimant has requested baby food for her 1 year old son, but the hotel have refused to provide this, despite the accommodation being said to be full board.*
>
> *22. Having recently been moved to a hotel in a different area, the Claimant's eldest son is no longer enrolled at a school and spends all his time in the hotel room. He is missing out on vital education.*

D. Summary of facts and matters relevant to the decision to expedite

57. The claimant raises three broad areas of concern in the PaP correspondence and in the statement of facts and grounds: the adequacy of the hotel accommodation; hotel food generally and general health concerns.

58. As to the inadequacy of the hotel accommodation,

    a. The PaP correspondence sets out that the family "must eat, sleep and live in the same room"; there is no space for storage in the room or for AB to play and there are no toys, games or books.

    b. The detailed facts and grounds repeat the same points.

59. As to food,

    a. The PaP correspondence sets out that AB refuses to eat hotel food on a regular basis and misses meals. He will often only eat chips. As a result, he is losing weight and has been described multi-vitamins and the food is not "of a decent quality" and is not

balanced.

b. The detailed facts and grounds repeat complaints about the food and add (for the first time) that the claimant's requests for baby food for CD had been refused.

60. As to health,

a. The PaP correspondence sets out that the claimant's mental health is impacted because she has to be in a room with the children for most of the day.

b. The detailed facts and ground repeat the point.

E. Timing

61. From the undisputed facts and procedural chronology there are 3 important time periods to consider:

a. The claimant was accommodated at Hotel 1 under section 98 provision from 5 January to 28 February 2022. That is 54 days.

b. Her right to section 95 (dispersal) accommodation arose on 28 February 2022. She remained at Hotel 1 until 3 May 2022. That is a further 65 days. The first PaP letter was sent whilst the claimant was at Hotel 1 (on 29 March 2022).

c. On 3 May 2022 she was moved to Hotel 2 and remained there until she was moved to dispersal accommodation in Liverpool on 30 May 2022. That is a further 28 days. The second PaP letter was sent whilst the claimant was at Hotel 2, but (because it was sent on 4 May 2022) clearly related to issues that had arisen at Hotel 1. The claimant's first witness statements was prepared when she was at Hotel 2 (8 days after arrival), the second and third were prepared once she and her family were settled into the dispersal accommodation.

F. The claimant's factual case

62. Bearing in mind the real difficulties caused by the fact that the claimant's evidence is inherently unreliable because it is not written in her own language, I have come to the view that I should proceed on the following bases.

The adequacy of the hotel accommodation

63. The evidence does not support the important (and in my view most serious) complaint made in both PaP letters and in the statement of facts and grounds (and relied on by the claimant at paragraph 2 of her skeleton) that "*the entire family [had to] sleep, eat and live in the same room*." The claimant now accepts that not to be the case.

64. The SoS's evidence of hotel inspections makes it clear that Hotel 2 had reasonable facilities including a large playroom and that Hotel 1 had a park close by. The claimant now accepts that to be the case. The inspection report on Hotel 1 notes that the rooms are of a good size

and comply with the requirements of the Housing Act 1985[2]. I take this to mean that there is no formal "overcrowding" at Hotel 1.

The food

65. At the time the SoS made her decision not to expedite the claimant's move to dispersal accommodation the SoS was unaware that the claimant was asserting that her requests for baby food had been refused. The point was only raised after proceedings had been commenced. The claimant's (post issue) evidence is that she asked the hotel kitchen to prepare different food for AB. As I understand it (but it is not clear), this is what she describes as "special food".

66. Whatever the position in respect of requests for baby food there is thankfully no suggestion at all that CD's health or development has suffered. It appears that baby food was made available at some point and that the claimant bought (or was given) baby food.

67. I accept, because it accords with common sense, that AB did not always eat the food made available to him. I am prepared to accept that a young child is likely to find it difficult to adapt to an essentially English diet if accustomed to home-cooked food of a type commonly eaten in Jordan.

Health

68. The claimant's evidence appears to be that she felt "very isolated" in Hotel 2 ("*I also feel very isolated here*" at a time when she had been at Hotel 2 for more than a week). The PaP letters note that whilst at Hotel 1 she was feeling isolated and felt low.

69. As to specific ill-health the evidence is that the claimant went to A&E on 16 March 2022 (whilst at Hotel 1). She was to be admitted but had a child with her so that admission was not possible. Her sister came to Hotel 1 to look after the children and the claimant went back to the hospital and was given a course of antibiotics. She does not describe being admitted to hospital but does (in passing) says that during this time she was "having to go in and out of hospital". The PaP letter refers to the claimant having "recently been hospitalised". The facts and grounds make no reference to hospitalisation.

70. It is not clear to me from the evidence if the claimant was hospitalised or not.

71. There is no medical evidence, by way of report, letter, medical records or otherwise of the extent or cause of any ill health suffered either by the claimant or her children.

General concerns

72. I accept that the widespread and continued use of hotel accommodation to house asylum seekers is unsustainable "in terms of service user impact".

[2] I was not taken to the Act. Part X deals with overcrowding and section 327 makes it a criminal offence for an "occupier" to cause or permit overcrowding.

G. The evidence available to the SoS when she took her decisions

73. When the SoS took the decision not to expedite the claimant's dispersal, the evidence she considered is that set out in the PaP correspondence and in the ASF1 application for section 95 support. For reasons I set out below (and as the claimant appears to accept) the important assertion that "*the entire family must sleep, eat and live in the same room*" is incorrect.

74. The SoS was aware that the claimant had 2 small children. Save for one possible exception, she had no medical evidence to support any of the health issues raised in the application or the correspondence (malnutrition related to the hotel food, stress and anxiety caused by living conditions and anaemia). The exception is that the SoS appears to have accepted that the claimant was unwell in March 2022 and may have accepted that she was hospitalised.

H. The decision

75. The SoS had 3 specific opportunities to expedite the move to dispersal accommodation: when considering whether to grant section 95 support and on considering each PaP letter. The claim form does not identify a specific date on which any decision was made, but instead refers to an "ongoing failure and delay" to provide adequate accommodation.

76. The PaP response letters contain the only explanation the SoS has given of her position before the commencement of proceedings. The explanation is not entirely clear. The SoS appears to link the absence of "exceptional circumstances" with the refusal to grant expedition on healthcare or medical grounds. It is not clear what if any connection there is between the two.

77. In my view the only sensible reading of the SoS's decision is that no healthcare grounds for expedition in accordance with the healthcare policy have been raised and, separately, no further grounds for expedition have been raised.

I. General delays in dispersal

78. In *Ipswich Borough Council v Fairview Hotels* [2022] EWHC 2868 Mr Justice Holgate noted the number of asylum seekers seeking support is growing: there were 8,042 on 31 March 2020; 56,812 on 31 March 2021, and 80,399 on 31 March 2022. Home Office estimates for the end of September 2022 suggest that 99,000 asylum seekers were being accommodated. Of those, 38,300 were in emergency (almost certainly hotel) accommodation. Data published in a report entitled "*Lives on Hold: experiences of people living in hotel asylum accommodation. A follow-up report*" published in July 2022 by the Refugee Council suggest that at the end of 2021, 10% of those accommodated in hotels were children[3].

79. The following helpful explanation is set out at paragraph 24 and 25 of the *Ipswich* case:

> *"Where an asylum seeker is at immediate risk of homelessness, the Home Office provides emergency accommodation under s. 98 of the 1999 Act. In what are described by Mr. Kingham as "normal" times…. that accommodation would*

[3] Pages 7 and 8 of the report. Of 25,637 asylum seekers accommodated in hotels, 2,569 were children.

> *generally be provided in one of eight "initial accommodation" sites across the UK, in the form of a "full-board multi-person hotel or accommodation setting" ("Core IA"). Individuals would remain in IA for a few weeks whilst their needs for support were assessed and longer-term arrangements made. Thereafter, accommodation under s. 95 has generally been provided in "dispersal accommodation" across the country, often in the form of self-catered furnished flats and houses. Such accommodation is provided by third party suppliers under regional contracts, who are to consult with local authorities before a property is used."*
>
> *"Where the need for emergency accommodation temporarily exceeds capacity at IA sites, block-booked hotels are used as a short-term contingency, whilst longer-term dispersal accommodation is procured. Contingency IA is substantially more expensive to the taxpayer and its temporary nature does not allow for the same level of services to be provided. Suitable sole-use contingency IA is becoming more difficult for accommodation providers to source. It is only ever intended to serve as short-term mitigation."*

80. The increase in asylum claims and problems created during the recent covid epidemic, mean there is a shortage of dispersal accommodation. This means that asylum seekers with young children who qualify for support, are often living in hotel accommodation for long periods of time. Based on the data set out by Holgate J (see paragraph 5 above), it would not be unreasonable to proceed on the basis that at least 3,830 children of asylum seekers are presently accommodated in temporary hotel accommodation.

81. The Home Office accepts (see paragraph 7.56 of the CI Border report) 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 HO*".

82. The SoS has provided the following data:

    a. Before March 2020, a person applying for section 95 would typically be transferred to dispersal accommodation within 14 days of the application being approved.

    b. Between 27 March 2020 and September 2020 and between January and July 2021, failed asylum seekers were not required to give up their dispersal accommodation. Given the difficulties at that time in obtaining new accommodation, during these periods, there was no opportunity to transfer asylum seekers whose claim had not been determined to dispersal accommodation.

    h. The number of people seeking asylum in England grew over the same period so that:

        i. Asylum applications in 2021 were 63% higher than in 2020. Numbers have continued to increase in 2022 with Q1 of 2022 bringing more than double the number of applications.

        ii. At the end of 2021 there were 81,978 outstanding asylum applications (involving 100,564 people). This is 60% higher than the same point in 2020.

iii. At the end of March 2021 there were 61,241 people in receipt of asylum support. At the end of March 2022, the number had risen to 85,007 and "unassured management figures" suggest that there are currently 94,500 in asylum support accommodation.

83. The claimant's solicitors have provided further data with further evidence in the form of a report presented to Parliament in May 2022 by the Independent Chief Inspector of Borders and Immigration ("CIBI") on the issue of hotel IA following inspections between May and November 2021. It included the following (at paragraph 10.3):

> "*The 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 ASC 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*."

84. Paragraphs 9.25 to 9.32 of the report deal with length of stay. The report notes 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".

J. Evidence on how the SoS deals with requests for expedited dispersal

J1. From the claimant

85. The claimant's solicitors have provided "examples" of cases which they suggest the SoS is applying an unpublished policy.

86. MM sought an expedited transfer from initial hotel accommodation because it was having a detrimental effect on his health. The request was refused on health grounds. The SoS then appears to have asked if the matters relied on are "sufficiently exceptional" to approve an expedited move to dispersal accommodation. In a later statement the solicitors explain that MM was moved after a second PaP letter was sent and without the need for any court intervention.

87. BB's request to be moved from initial hotel accommodation was turned down. It appears for 8 months he was required to share a double bed with his 12-year old son. The situation was remedied after receipt of PaP letter. Responding to a PaP letter, the SoS noted that she would assess "*specific requests on a case by case basis*." In that case no "*mitigating circumstances*" were identified.

88. AA's request to move from initial hotel accommodation was refused on the ground that there were no "*exceptional circumstances*". It appears that AA had "*severe mental health issues*" with suicidal ideation and complex physical health issues. He was moved from the hotel without the need for proceedings.

89. DD's request, on medical grounds, to move from initial hotel accommodation was refused on the ground that an expedited move to dispersal accommodation was not "*medically essential*". Proceedings were issued and an interim order made.

90. In later evidence four further examples are provided:

91. Case number 5227/002 concerned a young man with no health needs who wanted to move from hotel accommodation to be closer to his brothers. The claim elicited a PaP response which included the following: "*Please note, there is no policy on "chronological dispersal". Applicants are normally dispersed in chronological order unless there are exceptional circumstances which require expedited dispersal. The circumstances include a pregnant, street homeless application and applicants with health care needs, these dispersals can be prioritised upon receiving the required evidence to substantiate the claim. A copy of the Healthcare Needs and Pregnancy Dispersal Policy and Allocation of Accommodation Policy is enclosed*."

92. Case number 5288/002 has been issued and medical evidence produced. The grounds of review include the same grounds 1 and 2 relied on in this case. There is an agreement, based on the medical evidence that the claimant in that case should be dispersed.

93. In 2 cases from Bristol Refugee Rights PaP responses have referred to exceptional or compassionate circumstances.

94. Dominic Riley of Refugee Action in Manchester cites 4 cases (which are "not at all uncommon") in which its clients were refused expedited dispersal because of either a lack of medical evidence or a failure to show exceptional circumstances. I do not find the examples particularly helpful. In one case (IZ) permission to proceed with a judicial review has been granted, in another (SK) legal aid for judicial review proceedings has been granted. Ms X appears to have successfully asked for expedited dispersal (the request was made on 12 August 2022 and the move arranged for 18 October 2022) and the court made an interim order in HS so that there has been a move.

J2. From the SoS

95. There is evidence from Julie Karpuz, a senior caseworker in the Defendant's Asylum support team. I have not found that evidence particularly easy to understand. It is however clear that her evidence is that the Defendant does not operate an unpublished "exceptional circumstances" policy in relation to expediting transfer to dispersal accommodation. Instead (see paragraph 7), case workers:

> "*determine whether, on the particular facts of a given case, circumstances have been advanced in support of a request for expedition which require it to be prioritised over and above other cases waiting for transfer and, if so, the extent and manner of prioritisation. This assessment is undertaken on a case by case basis as opposed to by reference to a policy or policy criteria*."

96. At paragraphs 17 and 18 of the witness statement, Ms Karpuz explains that before March 2020, the SoS would issue instructions to her contractors to find dispersal accommodation for an applicant as soon as the section 95 application was approved. At that time, a move to

dispersal accommodation (barring the need to address any particular needs) would be completed within 14 days.

97. As I understand paragraph 18 of the evidence, the position is that instructions are no longer issued when a section 95 application is approved, they are issued when an applicant reaches (in effect) the top of the list or when the transfer is expedited. The details of how this operates in practice are not set out.

98. The SoS has a list of evidenced, special accommodation requirements raised (and evidenced) by those who have been granted section 95 support. This list is important. It forms the basis of any decision to be made about an expedited move to dispersal accommodation.

99. Paragraphs 20 and 21 deal with claims for prioritisation based on health related issues. Those issues are dealt with through the "Healthcare and Pregnancy Dispersal" guidance.

    a. Paragraph 4.2 of that policy provides (with added emphasis) that:

    "*If an applicant's healthcare need requires the urgent provision of dispersal accommodation, the application for support should be prioritised wherever possible*."

    b. Paragraph 4.4 provides that:

    "*Each application should be assessed on its individual merits. Careful consideration must be given to the specific circumstances of each case. Decisions must be taken based on the circumstances of the applicant's entire household who have been granted support, and where required, with the guidance of medical experts*."

100. At paragraph 22 of her evidence, Ms Karpuz deals with the procedure where there is a request for prioritisation not based on health considerations (I take that from the words "*in addition*" at the start of the paragraph in the context set out at paragraph 7 of the witness statement and note that the SoS describes the evidence in this way at paragraph 49 of her skeleton argument). Her evidence is:

> "*…caseworkers will consider requests by applicants to prioritise their transfer…. and will decide whether the factors/circumstances of a particular case [justify] the applicant in question "jumping the queue". Where the circumstances are considered to be sufficiently compelling, appropriate steps are then taken to seek to prioritise the applicants dispersal*."

101. The evidence deals with the claimant's particular circumstances at paragraph 41 onwards. It is the Defendant's case that by noting that the claimant had "*not submitted any exceptional circumstances to be considered and therefore their dispersal cannot be expedited on medical grounds*" the Defendant was simply saying that no compelling reasons to jump the queue had been provided.

102. The witness statement exhibits (without explaining) a number of documents, including 3 flowcharts. The claimant suggests that these flowcharts, together with the "dispersal comments guidance" represent the unpublished policy or unpublished guidance followed by the SoS.

Flowcharts and guidance

103. There are 3 flowcharts. One is entitled "*ASF1 – IA and Private to Both – s95 assessment*" ("the ASF1 flowchart"). The second is entitled "*change of circumstances s95 – Home Office to home office relocation*" ("the relocation flowchart"). The third is entitled "*change of circumstances – pre-dispersal payment s95 and s4*" ("the payment flowchart"). There is also a document entitled "*dispersal comments guidance*".

ASF1

104. The ASF1 flowchart is dated 10 November 2021. It maps the process to be followed when a caseworker considers an application for s.95 support. This is the process the claimant went through on 28 February 2022. It expressly requires the caseworker to "*fully review ASF1 and any supporting documents*".

105. Under the heading "person summary" it is noted that "*all accommodation requests must be assessed against the allocation of accommodation and health care needs policy prior to granting or refusing a specific request*". If granted a "s95 grant letter" is generated and sent. If refused, an "eviction letter" is to be sent. In the event of a grant of support the flowchart then requires that a "dispersal request" be prepared in 2 stages. Stage 2 includes a standard instruction to "*process within 9 days of today; disperse within 14 days of today*". In light of the evidence of Ms Karpuz (and given the date of the policy), this appears to be out of date.

Relocation

106. The relocation flowchart in my view maps the process to be followed when a person who is already living in accommodation provided under section 95 wishes to relocate to new accommodation. It covers applicants "*who are living in asylum support accommodation*". If the request is granted, the notification letter is described as a "*s95 change of address letter*".

107. The payment flowchart maps the process of creating, re-instating and amending a pre-dispersal (PREDIS) payment.

Comments guidance

108. The "dispersal comments guidance" is described as a "fluid document". It appears to be dated July 2021. It seems to be nothing more than an in-house style guide prepared to ensure a consistent approach to the language used when comments are provided and to ensure that information is captured in an efficient way (the system seems to limit comments to a maximum of 256 characters). For example, the guidance suggests how proposal and dispersal dates should be recorded using only 19 characters.

109. The claimant suggests that the relocation flowchart is wide enough to cover a request for expedited dispersal made by someone in the position of the claimant who is living in initial accommodation.

K. The SoS's Position

The specific challenge

110. In the AoS, the SoS maintained that the Specific Challenge was academic and so should not proceed on the ground that the claimant and her family had been satisfactorily accommodated as a result of the court's interim order.

111. In the detailed grounds the SoS, argued that the provision of hotel accommodation fulfilled the defendant's statutory obligations under sections 95 and 98 of IAA, that due consideration was given to the interests of the children pursuant to section 55 of the 2009 Act and that there had been no breach of the claimant's Article 8 rights.

The Policy Challenge

112. In the AoS, the SoS denied she was operating an unpublished policy (paragraph 9) and denied the existence of an "exceptional circumstances" policy (paragraph 12). She averred that parties in initial accommodation are being dispersed:

> *"11….in order of vulnerability and length of stay. Where a person has no specific need to be dispersed in advance of someone who has been waiting longer than they have then they will be expected to wait. If they have such a need, they can provide evidence to support such a request.*
>
> *12….The [SoS] maintains that the applicants are being dispersed in order, unless any specific needs (i.e., exceptional circumstances) are presented for an expedited dispersal which would require their prioritisation. The [SoS] has not defined what exceptional circumstances are, as this is considered on a case by case basis.*
>
> *14…. Applicants who present medical evidence or mitigating circumstances send their evidence to Migrant Help…. If it is deemed by the Home Office medical adviser that expedited dispersal is needed, then a dispersal will be raised. Otherwise…*
>
> *17… The defendant simply maintains that requests are considered in order, and in order to be prioritised one must show special reasons as to why their request should be prioritised over others this would then be considered on its own merits."*

113. In the detailed grounds of Defence, the SoS denied the existence of an unpublished "exceptional grounds" policy and stated that: "*case workers determine whether, on the particular facts of a given case, circumstances have been advanced in support of a request for expedition which require it to be prioritised over and above other cases waiting for transfer and, if so, the extent and manner….*"

114. The SoS notes that transfers from initial accommodation

> "*are undertaken on a chronological basis, with applicants awaiting transfer entering a list and progressing up the list as those above them are transferred into dispersal accommodation. Applicants who consider that their particular circumstances are such that their transfer needs to be prioritised over and above other applicants who are awaiting transfer, can make a request for expedited transfer. Such requests are*

*considered on a case by [case basis] and where the particular circumstances identified by an applicant are considered jumping the queue and thereby delaying the transfer of those ahead of the queue steps are taken to prioritise their transfe*r…. *On occasion, where a request is refused on the basis that there are no sufficiently compelling circumstances to justify the applicant "jumping the queue" decision letters (and indeed pre-action response letters) referred to the absence of "exceptional circumstances". The latter however is merely shorthand for the decision that the facts of a particular case do not justify applicant being prioritised over other applicants.*"

L. <u>The Legal Framework</u>

115. Part VI of the Immigration and Asylum Act 1999 deals with support for asylum seekers. Section 98 deals with interim support pending a decision to grant or refuse section 95 longer term support until such time as the asylum claim is dealt with. As drafted, both sections 95 and 98 give the SoS a power to provide support.

116. Section 122 of the Act provides that where an application for section 95 support is made by a person whose household includes a dependent child under the age of 18 the SoS must exercise her section 95 powers by providing adequate accommodation.

117. Regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005 mandates the provision of support to a qualifying person under both sections 95 and 98 even if there are no dependent children in the household.

118. I have reflected the effect of these provisions to sections 95 and 98 in square brackets.

119. Section 98.

98.— Temporary support.

(1) The Secretary of State [must] provide, or arrange for the provision of, support for—
(a) asylum-seekers, or
(b) dependants of asylum-seekers,
who it appears to the Secretary of State may be destitute.

(2) Support may be provided under this section only until the Secretary of State is able to determine whether support may be provided under section 95.

(3) Subsections (2) to (11) of section 95 apply for the purposes of this section as they apply for the purposes of that section.

120. Section 95.

95.— Persons for whom support may be provided.

(1) The Secretary of State [must] provide, or arrange for the provision of, support for—

(a) asylum-seekers, or
(b) dependants of asylum-seekers,
who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.

(2) ....

(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.

(4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together.

(5) In determining, for the purposes of this section, whether a person's accommodation is adequate, the Secretary of State—
(a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but
(b) may not have regard to such matters as may be prescribed for the purposes of this paragraph or to any of the matters mentioned in subsection (6).

(6) Those matters are—
(a) the fact that the person concerned has no enforceable right to occupy the accommodation.
(b) the fact that he shares the accommodation, or any part of the accommodation, with one or more other persons.
(c) the fact that the accommodation is temporary.
(d) the location of the accommodation.

121. Section 96

96.— Ways in which support may be provided.

(1) Support may be provided under section 95—
(a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any);
…….

122. Section 97

97.— Supplemental.

(1) When exercising his power under section 95 to provide accommodation, the Secretary of State must have regard to—
(a) the fact that the accommodation is to be temporary pending determination of the asylum-seeker's claim.

(b) ….
(c) ….

123. Section 122

122.— Support for children.

(1) In this section "eligible person" means a person who appears to the Secretary of State to be a person for whom support may be provided under section 95.
(2) Subsections (3) and (4) apply if an application for support under section 95 has been made by an eligible person whose household includes a dependant under the age of 18 ("the child").
(3) If it appears to the Secretary of State that adequate accommodation is not being provided for the child, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, adequate accommodation for the child as part of the eligible person's household.
(4) If it appears to the Secretary of State that essential living needs of the child are not being met, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, essential living needs for the child as part of the eligible person's household……

124. Section 55 of the Borders, Citizenship and Immigration Act 2009

55 Duty regarding the welfare of children

(1) The Secretary of State must make arrangements for ensuring that—
(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—
(a) any function of the Secretary of State in relation to immigration, asylum or nationality.
(b) ….

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

125. The SoS's "Healthcare Needs and Pregnancy Dispersal Policy" contains an initial paragraph headed "application of this instruction in respect of children and those with children". It includes the following:

"Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to section 55. The Home Office instruction "Arrangements to Safeguard and Promote Children's Welfare in the Home Office" set out the key principles to take into account in all activities where

children are involved."

126. I was not taken to the section 55 Home Office guidance.

M. The Authorities

127. In *R (oao A) v NASS* [2003] EWCA Civ 1473 the Court of Appeal considered the meaning of sections 95 and 98 of the 1999 Act. I note that the case was decided in (as it was put to Holgate J in *Ipswich Borough Council v Fairview Hotels*) "normal" times. The Court concluded that the "adequacy" of accommodation must be tested by reference to the needs of persons to whom the support duty is owed. It is important to bear in mind:

a. the general context, that accommodation is provided to prevent destitution and

b. the specific context in the form of the express needs and circumstances of the applicant and the applicant's family. It follows that the age of children and any disabilities will be a factor to consider when assessing adequacy.

c. The period for which the accommodation is likely to be occupied is relevant (section 95(6) was held means that the temporary nature of the accommodation cannot support the argument that the accommodation is inadequate). Accommodation which is adequate over a short period may become inadequate if occupied "*for a very long time*".

128. In the same case, the Court of Appeal considered the nature of the obligation on the SoS. The Court decided that the SoS (NASS), when exercising her section 95 duty could properly place the applicant in accommodation that would be adequate in the short-term until the SoS finds accommodation adequate for the slightly longer term.

129. In the joined judicial reviews of *AB, OK and MKD* [2022] EWHC 1524 (Admin), Lane J considered (amongst other things) the legality of guidance on *Family Policy: Family life (as a partner or parent), private life in exceptional circumstances* with particular reference to the SoS's section 55 duty. The guidance provided that the default position was that there should be no recourse to public funds ("NRPF") for those seeking to establish family life in the United Kingdom. Dealing with the rights and interests of children, the guidance directed the decision maker to conduct a proportionality analysis. If the NRPF condition:

> "*would not be in the best interests of any relevant child and would significantly impact on a child's particular and essential needs, then you need to decide whether in all the circumstances, and treating the best interests of any relevant child as a primary (but not the only) consideration, the adverse effect of an NRPF condition on the child is sufficient to outweigh any other considerations to not impose or to lift the NRPF condition*". (emphasis added).

130. On the facts before Lane J, AB (who had children) had been granted limited leave to remain with a condition preventing recourse to public funds. The SoS had refused a request to lift the condition. In her decision letter the SoS said:

> "*Consideration has also been given to section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children). We have considered the best interests of your children. As set out above no evidence has been provided which shows that the children are in inadequate accommodation or that their essential living needs are not being met*." (emphasis added)

131. The Court undertook a comprehensive review of the section 55 authorities and re-stated the principles set out in *Zoumbas v SoS* [2013] UKSC 74 by Lord Hodge:

> *(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR.*
> *(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration.*
> *(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.*
> *(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play.*
> *(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations.*
> *(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment: and*
> *(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent .*

132. In considering the lawfulness of the guidance, the court noted that the correct test to apply was the *Gillick* test (see *R (A) v Secretary of State for the Home Department [2021] UKSC 37* summarised at paragraph 38 of that decision and paragraph 30 of the decision of Lane J). In short: It is only if the guidance sanctions, authorises, approves or encourages unlawful conduct by those to whom it is addressed that the Court should interfere. In those circumstances, the public authority could be said to have acted unlawfully "*by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others*".

133. Applying the *Zoumbas* principles in light of that guidance, Lane J found that by requiring the decision maker to consider if the NRPF condition "*would significantly impact on a child's particular and essential needs*" the guidance prevented a proper consideration of the best interests of the child. In effect, it substituted a different (significant impact on essential needs) test and so encouraged the decision maker to make an unlawful decision. The point is summarised at paragraph 60:

> *"The essential point, however, remains that in all cases where it would not be in the best interests of the child for the NRPF condition be maintained, the section 55 duty to make the child's interest a primary consideration is operative. The present words tell caseworkers (wrongly) that this is not the position."*

134. *R (Lumba) v SSHD* [2011] UKSC 12 concerned the right of the State to detain a foreign national prisoner pending deportation following completion of their sentence. Schedule 3 of the Immigration Act 1971 gave the SoS a power to detain a person who had served his sentence. It was common ground that between April 2006 and September 2008 the Secretary of State purported to make decisions about the detention of foreign national prisoners based on a published policy but in fact applied "*quite a different unpublished policy*".

135. The published policy set out a presumption in favour of release, although detention could be justified in some circumstances. The unpublished policy was a "near blanket ban" on release. Guidance issued to caseworkers (but unpublished) referred to "*an extensive list of offences…where release from immigration detention or at the end of custody will not be appropriate*".

136. It is important to note that the unpublished policy in Lumba was specific, clearly contrary to published policy and governed the circumstances in which an individual's established and important right to liberty (see Art 5 of the ECHR) could be interfered with. The unfairness to any individual asking for release was obvious. The SoS purported to make decisions on one basis but in fact was making decisions on another.

137. Under the heading "were these policies unlawful?" it is noted that three propositions which applied to "a policy" were agreed.

a. First, it must not be a blanket policy admitting of no possibility of exceptions.
b. Secondly, if unpublished, it must not be inconsistent with any published policy.
c. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representation.

138. The third proposition is important. It is discussed and explained by the Supreme Court at paragraphs 27 to 39. It is clear that the unpublished policy in *Lumba* would inform (and indeed largely dictate) how the power to release would be exercised. The Supreme Court noted at paragraph 32 (by reference to the jurisprudence of the European Court of Human Rights) that it is "*essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined*".

139. At paragraph 34 of the decision, the Court noted that:

> "*The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria [in respect of detention] will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements*."

140. The claimant relies on paragraph 35 of *Lumba* as a statement of general application (see her skeleton at paragraph 6(a)). It confirms an individual's

> *"basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute…. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations*

in relation to it."

141. In *R (NB) v SoS* [2021] 4 WLR 92, the Court was concerned to assess whether Napier Barracks constituted appropriate accommodation for asylum seekers. The Judge in that case needed to engage in a degree of fact finding, just as I have needed to so in this case. Linden J considered the standards that section 95 accommodation needed to reach. He concluded that the SoS needed to provide accommodation "*to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence*" and was under a duty to consider the needs of vulnerable persons as required by regulation 4 of the Asylum Seekers (Reception Conditions) Regulations 2005 which implement Article 17 of the Reception Conditions Directive. The latter Article is reproduced at section 27 of the ASF1 application for section 95 support form.

N. Discussion and conclusions

142. I will deal first with the general policy challenge. I have found that grounds 1 to 3 go beyond an allegation of unlawfulness by reason of being unpublished.

Ground 1

143. The first ground requires a finding that the SoS has an unpublished exceptional circumstances policy which is engaged when the SoS is asked to expedite dispersal on grounds not covered in published polices. The published grounds, broadly speaking, are health grounds and grounds in respect of location.

Is there an unpublished exceptional needs policy?

144. An allegation that the SoS is making decisions unlawfully by reference to an unpublished policy is in my view a serious allegation and one that the SoS, pursuant to her duty of candour, is under a duty to investigate and report to the court on.

145. The Administrative Court Judicial Review Guide 2022 describes the duty of candour as a "*special duty*" to "*ensure that all relevant information and all material facts are before the court*". There can be doubt that the existence of an unpublished policy would fall to be considered under this heading. The starting point in the enquiry (but not the end point) must therefore be to consider what the SoS says about the existence and application of an unpublished policy. Her emphatic position (and her evidence) is that there is no such policy or guidance.

146. The SoS's position is that any request to expedite dispersal (not based on geographical location) must be considered against the healthcare policy if made on healthcare grounds. If the policy does not apply (because there are no healthcare grounds), that is not an end of the matter. The SoS retains a discretion to consider if the reasons put forward are sufficient to justify an expedited move (or queue-jump). This approach is supported by paragraph 4.4 of the guidance which makes clear that decisions must be taken based on the circumstances of the applicant's entire household and "where required, with the guidance of medical experts". The underlined words make it clear that the circumstances might include

matters which are without the remit of medical experts.

147. What evidence is there (contrary to the SoS's position) to support the proposition that there is an unpublished policy? The evidence is that in a number of cases (those set out above) the SoS has refused to expedite a move to dispersal accommodation on the ground that insufficient reasons for expedition have been advanced. The claimant says that the relocation flowchart sets out the unpublished policy.

Evidence of an unpublished policy

The approach taken in other cases

148. In my view the evidence of the approach taken in other cases, taken at its highest, is not evidence that there is an unpublished policy. Very few cases (12) are referred to. Those cases have been chosen specifically to illustrate the point the claimant wishes to make. Whilst I have no doubt the exercise has been carried out in good faith; I note that the cases put forward by Refugee Action in Manchester are described as "*not at all uncommon*". It seems to follow that the cases are not illustrations of a universal approach.

149. In my view, the cases referred to are entirely consistent with the evidence of the SoS that there is no unpublished exceptional circumstances policy but that she deals with matters on a case by case basis. Such a test is expressly referred to in BB (paragraph 79(b) above). Case 5227/002 (paragraph 80(a) above) makes a similar point, namely that "*dispersals can be prioritised upon receiving the required evidence*". A good part of the 12 cases appear to have been based on medical matters (see claims MM, AA, DD and 5288/002).

150. The evidence does not allow me to conclude that a previously unpublished policy is being deployed. Rather it supports the view that in each case published policies are being applied and if they are found not to apply, circumstances sufficient to warrant expedition are being considered.

The relocation flowchart

151. I am unable to accept the submission that the flowchart sets out the unpublished policy for a number of reasons:

a. The relocation policy expressly covers those "*living in asylum support accommodation*". In my view that description does not cover initial (section 98) accommodation:

    i. Asylum support is granted under section 95 and so asylum support accommodation appears to be accommodation provided under section 95
    ii. At section 27 of the ASF1 form completed by the claimant reference is made to factors that will be taken into account when "making decisions about the allocation of asylum support accommodation" and
    iii. Paragraph 4.13 of the Healthcare Policy refers to arrangements "for dispersal to asylum support accommodation".

b. The flowchart is concerned with a request to "relocate" not with requests to expedite a dispersal. The grant of a request governed by the flowchart leads to the sending of a "*s.95 change of address*" letter. That suggests that the outcome of the process is to

move (relocate) from one form of section 95 accommodation to another, not from section 98 accommodation to section 95 accommodation.

Form ASF1

152. I have also formed the view (although the point was not raised in argument) that section 27 of the ASF1 form (application for s.95 asylum support) suggests that there is no unpublished exceptional needs policy.

153. Section 27 of form ASF1 (see paragraphs 26 and 27 above) explains what matters the SoS takes into account when deciding on "the allocation of" dispersal accommodation. Decisions about allocation are decisions about who gets what accommodation and when. It includes considerations of expedition. The SoS's clear and open position is that she "has regard to the specific situation of vulnerable persons" (emphasis added). Vulnerable people include children and single parents.

Formulation

154. In my view the formulation of the apparent policy is vague. The need to look for circumstances that are exceptional is nothing more than a shorthand way of expressing the need to consider if the particular circumstances of an applicant and, if relevant, the family of the applicant who live with them, are such that the applicant's case is out of the normal run of cases and so requires bespoke consideration.

Conclusion

155. In my judgment there is no unpublished policy (whether an exceptional circumstances policy or not) covering requests that fall outside the healthcare and general accommodation policies. Neither is the relocation flowchart being used as a policy to be followed in cases where there is a request to expedite a move to dispersal accommodation. In my view, the SoS rightly recognises that she has a residual discretion to expedite dispersal in circumstances not covered by the healthcare policy. A clear example of cases in which such a discretion arises is where a vulnerable person seeks accommodation. Such a situation is covered in the ASF1 form, as we have seen, in terms taken from the reception conditions directive.

156. My finding that there is no unpublished policy is sufficient to deal with ground 1 which must be dismissed.

157. If I am wrong, and there is an unpublished "exceptional circumstances" policy, it is in my view not one that is contrary to the published policies of the SoS, and neither is it a policy which must be published. It does not therefore fall foul of the *Lumba* considerations, and its operation is not in that sense unlawful.

158. There would be nothing in my judgment, in an "exceptional circumstances" policy that contradicts paragraph 27 of the ASF1 or the published healthcare or location policies. It is important to appreciate that, unlike in Lumba, if there was here such a policy, it would only fall to be considered if the published policies had no application.

159. If there was such a policy, it would in my judgment not be a policy that needed to be published. I reach that view for a number of reasons:

a. Knowing that the SoS would consider any "exceptional circumstances" when looking at expedition is not of great assistance to an asylum seeker granted section 95 support. A policy in those terms would be unlikely to inform, in any meaningful way, discretionary decisions of the SoS.

b. The policy (if it existed) does not therefore set out what could sensibly be described as "*the circumstances in which …. Statutory criteria will be exercised*". If it existed, the policy would not be prescriptive. It is the prescriptive nature of a policy which requires it be published. The point is made by Fordham J in ***R (ZLL) v SoS for Housing, Communities and Local Government and others*** [2022] EWHC 85 (Admin).

160. The circumstances to be considered (described as "exceptional") would be so wide and varied that it is difficult to see how a policy could be formulated other than in the most general and therefore unhelpful terms. Leaving the obvious practical difficulty of doing so to one side, there is in my judgment no obligation to produce a policy to cover this residual discretion. As there is no policy, and no obligation to produce one, the principle set out at paragraph 35 of *Lumba* has no application.

161. Neither in my judgment could the policy be unlawful in the ***Gillick*** sense. If there was an unpublished exceptional circumstances policy, it would not in my judgment sanction unlawful conduct.

162. For all of those reasons I dismiss ground 1.

Ground 2

163. Ground 2 is concerned with the application (not the existence) of an "exceptional circumstances" policy. In my view there is no such policy. I have dealt with my reasons from that conclusion above.

164. If I am wrong and there is such a policy, in my view its application would not amount to a fettering of the SoS's discretion.

Ground 3

165. Ground 3 is also concerned with the application of an exceptional circumstances policy. I have concluded that there is no such policy. That is sufficient to deal with the ground.

166. I have set out what I find the SoS's approach to be, that she exercises a residual discretion on a case-by-case basis. There is no real suggestion that the SoS thereby ignores her obligations to treat the interests of children as a primary concern. The present claim is different to that set out in ***AB***. In that case, the test applied by the SoS overrode the section 55 test. That is not the case here. There is no contradiction between the SoS's duty under section 55 and her operation of a residual discretion.

Ground 4

167. I then turn to the issue of adequacy.

168. It is accepted the SoS is under a duty to provide "adequate" accommodation. The obligation applies to section 98 initial accommodation and to section 95 accommodation. The context of the obligations are different. The section 98 duty is an interim duty pending consideration of an applicant's right to section 95 support.

169. When considering the general adequacy question (as opposed to the delay question) I am satisfied that I should look at the totality of the time the claimant and her family were accommodated at Hotel 1 and Hotel 2.

170. It is sensible to recap on the facts I understand them to be. The hotels had reasonable facilities and there was no overcrowding. The physical condition of the hotel accommodation was adequate in that there was no disrepair or inherent health risk. There were some issues with food, but they appear to be about individual taste rather than the basic quality of the food provided. There is no medical evidence to suggest that any health issue (sepsis, anxiety, loss of weight) were connected to the quality of the accommodation provided.

171. Applying the approach set out in ***R (oao A) v NASS*** in the context of the findings I have made I am satisfied that it cannot be said that the SoS failed to provide adequate accommodation.

172. Applying the tests set out in ***NB*** it is plain that the hurdle the claimant has to overcome is a high one. I am satisfied that for the period before the claimant and her children were moved that SoS provided them with accommodation which afforded than "a standard of living adequate for the health of applicants and capable of ensuring their subsistence".

Ground 5 and 6

173. The failure to expedite dispersal can only be relevant from 28 February 2022 when section 95 support was granted. It may arguably arise a little later because the SoS may well be entitled to the benefit of a short period (of say 14 days, the previous general period within which dispersal took effect) in which to find accommodation and arrange for a move to that accommodation.

174. I am not satisfied that the SoS failed to take account of her section 55 duty. I reach that conclusion for these reasons:

a. In order to follow the ***Zoumbas*** guidelines the SoS needs to have information about the needs and circumstances of the child. That information would need to be communicated to the SoS by the claimant. In form ASF1 the claimant refers to the age of the children and the fact that CD had anaemia. No further issues are raised and there is no detail as to how accommodation might affect CD's condition (making it worse or improving it). The SoS took account of those matters.
b. It is incumbent on the claimant to explain how any failure to apply the section 55 duty is material. What would have happened if the duty had been addressed that did not happen (assuming the duty was ignored)? The only vague suggestion that the

application of the duty would have made a difference is set out in the general views expressed in various reports (including the CIBI report) that over longer periods hotel accommodation is not suitable for children. Even then, there is no suggestion that for the period from (at the earliest) 28 February 2022 to 30 May 2022 the section 55 duty would have made a difference to the outcome.

c. In any event, form ASF1 makes it clear that the SoS was aware of a special duty to vulnerable persons and the healthcare policy (to which the SoS's caseworkers might well have had regard and certainly with which they would have been familiar) reminded the caseworkers of the need to consider section 55.

175. The SoS's decisions communicated to the claimant in response to the PaP letters is in many ways unhelpful. The responses (that there can be no expedition) are premised on the fact that no sufficient grounds for expedition have been provided. Details were invited but not provided. The fact that the SoS made no reference to section 55 in the "decisions" is not, in these circumstances, surprising. In my view, read appropriately, the decision is an answer to the application made. The PaP letters refer to section 55 and it is fanciful to say the SoS did not have it in mind.

176. Regrettably, the number of children in temporary accommodation is not a point that helps the claimant. Regrettably, others are in a difficult situation and possibly worse. The SoS is best placed to judge who should get priority. That decision will stand unless it is irrational.

177. The hurdle of irrationality is a high one to overcome. The claimant's arguments do not get over that hurdle.

Ground 7

178. Ground 7 is a catch-all ground. I do not accept that the SoS's delay in moving the claimant and her family amounts to a breach of Article 8. I accept that Article 8 is engaged, and that part of a family life is the right to enjoy appropriate accommodation. For the reasons I have explained I am not satisfied the right was breached. If the right was breached, then the breach was in my view proportionate.

O. Conclusion

179. For these reasons, the claim must be dismissed. I am grateful to Leading counsel for their assistance in dealing with the case.