OUTER HOUSE, COURT OF SESSION

[2018] CSOH 7

P1391/15 & P1418/15

OPINION OF LADY WOLFFE

In the Petitions of

O

Petitioner

against

THE ADVOCATE GENERAL FOR SCOTLAND

Respondent

and

N

Petitioner

Against

THE ADVOCATE GENERAL FOR SCOTLAND

Respondent

for Judicial Review

Petitioners: McBrearty QC, Irvine; Balfour + Manson LLP
Defender: Johnston QC, Gill; Office of the Advocate General

1 February 2018

Introduction

[1] The petitioner in each these two judicial review proceedings is a single parent asylum seeker with one or more dependent children. Asylum seekers are ineligible for mainstream welfare benefits. However, an asylum seeker is eligible to receive financial (ie cash) support payable under regulation 10(2) of the Asylum Support Regulations 2000/704 (the "2000 Regulations") in respect of themselves and any dependants ("asylum support").

Amendment to Regulation 10 of the 2000 Regulations

[2] Following a government review of the level of asylum support, the amount of asylum support payable was reduced, with effect from 10 August 2015, by the Asylum Support (Amendment No 3) Regulations 2015 (the "Amending Regulations"). As a consequence, the amounts payable in respect of each petitioner and each dependant child (of £43.94 and of £52.90, respectively) was reduced in each case to the figure of £36.95 per person (ie whether a child or adult). In practical terms, this resulted in a reduction of about 30% of the amount of asylum support payable to the petitioners in respect of themselves and their dependant children. The petitioners challenge these changes in asylum support effected by the Amending Regulations.

Regulation 9 of the 2000 Regulations

[3] They also challenge the exclusion, by virtue of amendments to regulation 9(4) of the 2000 Regulations, of (i) recreational items (ie toys), (ii) entertainment expenses and, as regards school age children in particular, (iii) either the cost of computer facilities or the cost of travel to obtain the use of free computer facilities ("the excluded items") from the

definition of "essential living needs" for the purposes of section 95 of the Immigration and Asylum Act 1999 ("the 1999 Act").

Commission for Equality and Human Rights

[4] The Commission for Equality and Human Rights ("the CEHR") has been given leave to lodge written submissions in these proceedings. I summarise those below.

Orders Sought by the Petitioners

[5] The petitioners seek the following substantive orders:

1) Reduction of regulation 10(2) of the 2000 Regulations;
2) Declarator that the Secretary of State in reducing the amount of asylum support payable in respect of each petitioner *et separatim* her children has acted in breach of one or more of the following:
    i. Council Directive 2003/9/EC of 27 January 2003 ("the Reception Directive") laying down minimum standards for the reception of asylum seekers;
    ii. Articles 21 and 24 of the Charter of Fundamental Rights of the European Union ("the CFR");
    iii. Article 14 when read with Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the ECHR");
    iv. section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act");
3) Declarator that the Secretary of State has acted in breach of the public sector equality duty ("the PSED") in section 149 of the Equality Act 2010 ("the 2010

Act") in so far as she has failed to have regard, in reducing the amount of asylum support payable to and in respect of persons such as the petitioner and her children, to the protected characteristic of sex/gender *viz* single parent households, the majority of which are headed by women;

4) Reduction of regulation 9(4)(b),(e) and (f) of the 2000 Regulations; and

5) Declarator that regulation 9(4) of the 2000 Regulations is unlawful in so far as, as regards children in general, it excludes the excluded items from the definition of "essential living needs" for the purposes of section 95 of 1999 Act.

Outline of Grounds of Challenge

[6] There is some overlap in the legal bases of the grounds of challenge to regulations 10(2) and 9(4), in their amended form, and which are summarised in the following paragraphs.

Grounds of Challenge to Regulation 10(2) of the 2000 Regulations

[7] The challenge to the reduction of asylum support is advanced on three broad fronts. First, it is contended that the methodology used by the Secretary of State in reaching the figure of £36.95 is flawed. The petitioners challenge these inadequacies (as regards both adults and children) under reference to an expert report of Ms Zoe Charlesworth ("the Charlesworth Report"), on the basis that the Secretary of State has acted irrationally or unreasonably, or has failed to take relevant matters into account ("the methodological challenge").

[8] Secondly, it is also contended that the decision to reduce and "flat-line" the previously tiered rates of asylum support is unlawful ("the unlawfulness challenge") by reason of breach of one or more of the following:

(i) the right (of children) to non-discrimination on grounds of immigration status, as protected by the CFR (when read with the Reception Directive and the United Nations' Convention on the Rights of the Child ("the UNCRC) and Article 14 of the ECHR;

(ii) the best interests of and need to safeguard and promote the welfare of children, as protected by the Reception Directive, the CFR, and UK primary legislation (section 55 of the 2009 Act); and

(iii) the public sector equality duty ("PSED"), in so far as the reduction of support bears upon the "protected characteristic" of sex/gender, and so single parent households headed by women.

[9] Thirdly, it is argued that the new rate of asylum support is discriminatory, in comparison with the level of mainstream state benefits paid in respect of the children of adults with a right of residence in the UK ("settled adults").

Challenge to Regulation 9(4) of the 2000 Regulations

[10] The methodological challenge also extends to the exclusion of the excluded items. Separately, the petitioners also rely on grounds (i) and (ii), set out in the preceding paragraph, in support of the argument as to the unlawfulness of regulation 9(4)(b), (e) and (f) of the 2000 Regulations by reason of the exclusion (in the case of N's petition) of toys and other recreational items and the expenses arising out of entertainment, and (in the case

of O's petition) either the cost of computer facilities or the cost of travel to obtain the use of free computer facilities.

Proceedings in England

The Refugee Action Case

[11] In England there have been several recent challenges to the level of asylum support, namely, before Popplewell J in *R (Refugee Action)* v *SSHD* [2014] EWHC 1033 (Admin) ("*Refugee Action*") and *R (SG)* v *SSHD and another* [2016] EWHC 2639 (Admin) ("*SG*") before Flaux J (as he then was).

The New Methodology Adopted by the Secretary of State

[12] As a consequence of the successful challenge in the *Refugee Action* case, the Secretary of State undertook a comprehensive review of the rate of the cash support provided by way of asylum support in 2014 and 2015. She developed a new methodology for assessing the adequacy of the cash support rate in order to take account of the guidance provided by the court in *Refugee Action*. The new methodology involved identifying the full range of needs of the asylum seeker and dependants and assessing the costs of meeting those needs. The starting point was survey data published by the Office of National Statistics ("the ONS") relating to household expenditure of the lowest 10% income group in the population of the United Kingdom. The ONS data was supplemented by Home Office research as to the actual cost of particular items, and adjusted as necessary to reflect the particular needs and typical circumstances of asylum seekers as a cohort. In the 2015 review, the Secretary of State also had regard to the level of support afforded to asylum seekers in other EU member states, which included making allowances for economies of scale. She took into account

economies of scale in the 2015 review. The Secretary of State concluded that the figure of £36.95 was sufficient to cover the essential living needs of a single asylum seeker and the same amount per person was also sufficient to meet the essential living needs of persons (including dependent children) in a multi-person household. The rate of asylum support payable in respect of a child was reduced from the figure of £52.96. The petitioners refer to this equalisation of the rate as between adults and children as "flat-lining".

[13] The Secretary of State explained her approach in letters to the National Asylum Stakeholder Forum ("the NASF") dated 11 August 2014 and 16 July 2015 ("the NASF letters"). Additional information to complement the NASF letters was provided by a letter dated 22 October 2015 from Lord Bates, Minister of State at the Home Office, to Baroness Hamwee ("the Lord Bates letter"). The Secretary of State carried out an assessment of the methodology under section 149 of the 2010 Act, contained in a Policy Equality Statement headed "Review of Asylum Support Rates: 2015", dated 24 June 2015 ("the PES").

The SG Case in the High Court and Court of Appeal

[14] More recently, a challenge was made to the Amending Regulations in *SG*, on many of the same grounds as are advanced in these proceedings against the same regulations. That challenge failed on all grounds advanced. The decision of Flaux J in *SG*, which extends to 343 paragraphs, has been described as "powerful and comprehensive". In turn, that decision relied to a considerable extent on *Refugee Action*. In *SG*, Flaux J considered that he should follow and apply *Refugee Action* unless he concluded that it was wrong in any particular respect, which he did not (see para 34).

[15] While this case was at *avizandum*, leave to appeal some aspects of the decision in *SG* was sought from the Court of Appeal: see *sub nom JK* v *SSHD* [2017] EWCA Civ 433. I put

the matter out for a further one-day hearing, at which parties addressed me on the Court of Appeal's decision and under reference to their further written submissions. In what bears to be an extended leave hearing, the Court of Appeal considered the claimants' application for leave to appeal against the decision of Flaux J. Two features of his decision were challenged: (i) whether the Secretary of State had carried out a flawed assessment by failing to treat the best interests of the child as a primary consideration, ie by wrongly focusing on subsistence rather than the welfare of children; and (ii) discrimination against the child dependents of asylum seekers in comparison with the children of settled residents in receipt of mainstream welfare benefits. That second ground was abandoned in the course of the hearing before the English Court of Appeal, a decision the court commended. It refused leave on the other ground as having no prospects of success: see paragraph 91 of the decision.

The Charlesworth Report and the Bentley Affidavits

[16] The petitioners' methodological challenge is heavily reliant on a report prepared by Ms Charlesworth ("the Charlesworth Report"). She is a member of the Welfare Reform Club. The Secretary of State relies on two affidavits from Mr Simon Bentley ("Bentley Affidavit 1" and "Bentley Affidavit 2"), a senior official in the Asylum and Family Policy Unit of the Home Office who has lead responsibility for policy relating to support arrangements for asylum seekers. These were augmented by a third affidavit, of a Mr Bonnar, addressing specific criticisms (ie regarding nutritional values and deductions from the ONS data for the costs of takeaways).

[17] Having considered parties' oral and written submissions, the Charlesworth Report and the Bentley and Bonnar affidavits, it appears to me that there is very considerable overlap in this material and that considered by Flaux J in *SG*. It is unnecessary, therefore, to

quote extensively from this material in the body of this Opinion. (I note that one of the claimants in *SG* also relied on expert reports from a Mr Aspinal. His reports are not relied upon by the petitioners, though he makes some of the same criticisms as Ms Charlesworth.) In *SG* Ms Charlesworth produced a report and a supplementary report. These appear to be consolidated in the Charlesworth Report produced in these proceedings. The substance of what was produced to the court in *SG* (in the form of four witness statements) is replicated in the Bentley Affidavit 1.

[18] Flaux J described the import of Ms Charlesworth's reports and the witness statements produced by Mr Bentley in *SG* at paragraphs 104 to 120. His own consideration of this material is set out at paragraphs 138 to 171. It suffices for present purposes to note the following features of the Charlesworth Report:

1) Ms Charlesworth is "not an expert on the legal obligations of the Home Office in providing support to asylum seekers" (para 1.1); she is "not an expert on the requirements of children in relation to clothing" (see section 4.2.2) and she is "not an expert on child development or health" and for that reason "a comprehensive list of requirements for children is not therefore within the scope of this report" (see para 4.3.3). Her degree is in Anthropology (*per* the CV at p 57) but her experience and knowledge is in the area of the calculation of state benefits, local authority revenue, qualitative and quantitative research on benefit issues and benefit policy development;
2) In her critique of the methodology adopted by the Secretary of State in setting the level of asylum support for the purposes of section 95 of the 1999 Act, Ms Charlesworth equiparates the duty or standard under section 55 of the 2009 Act to that imposed on local authorities and other agencies by section 11 of the

Children Act 2004, which in turn is treated as equivalent to section 17 of the Children (Scotland) Act 1995 (and the equivalent provision in England in the Children Act 1989) (paras 1.1 and 1.2);

3) The purpose of the Charlesworth Report is to evaluate whether there has been sufficient regard to "preventing impairment of children's health and development" in the setting of the asylum support rate as those terms are defined in the English Children Act 1989. (Ms Charlesworth has not carried through to para 1.2 or the rest of her report the recognition at para 1.1 that there is different legislation in Scotland). For other examples of Children Act terminology see eg para 3.4, para 7.8;

4) She is critical of what she described as the "pick and mix" approach, meaning the use of ONS data for some categories of expenditure and Home Office research for others (para 3.2); from this she infers that this indicates "budgetary considerations rather than reference to actual need" (end of para 3.2); she concludes that this leads to "anomalies" and that it "would be more reasonable to use a single method in determining rates rather than different methods for different items of expenditure" (para 7.4); she asserts that some figures derived from the Home Office research and deployed in the methodology are arbitrary (eg at para 3.2 (last para)); and she also refers to some of the ONS data to criticise the Home Office research (where that is used in place of the ONS data) (eg paras 4.1.1, 4.5.1 and 4.5.2);

5) In respect of the use of economies of scale, she criticises this (eg at para 3.3) on the basis that, as the ONS data accounts for economies of scale through the use of averages derived from multi-person households, there is double-counting in the

Secretary of State's methodology; she goes further in her conclusion (at paragraph 7.5) to contend that it is "unreasonable to presume that the duty towards children" can be met through the economies of scale resulting from a multi-person household or that the duty can be met through other savings (see para 7.6);

6) She is critical of the fact that the adjusted single person equivalent is only 52.9% of that of equivalent expenditure by individuals in the lowest decile of the ONS data;

7) On the basis that the support rate does not take account of individual circumstances and that the same rate is applied to both adults and children, she asserts that the rate "is therefore not adjusted to take account of items that are reasonably necessary 'to safeguard and promote the welfare of children in the UK' as required by section 55" of the 2009 Act (para 2.3; see also para 3.4); from this she positively concludes that the specific needs of children "are not addressed" in the calculation of the asylum support rate (para 7.3); she also concludes that, given the different requirements for children and adults, it is "unlikely" that rate will be the same for both children and adults (para 7.4);

8) From the fact that the level of asylum support is significantly below the average weekly spend of the lowest 10th decile, based on the ONS data, she asserts that excluded items "will have a bearing" on the health of children or may result in material deprivation (eg in respect of recreational items) (para 3.5); she states (at para 7.3) that there is no evidence to support the assumption that the ONS data expenditure of the lowest decile by household income is sufficient to meet "basic living costs"; and, given that the asylum support rate is lower than the lowest

10th decile, she states that it is reasonable to ask whether it is "sufficient to meet the basic living needs of an adult, let alone provide for the additional duty of care the state has toward a child" (end of para 7.3);

9) Ms Charlesworth examines in detail the methodology for five categories of expenditure asylum support is intended to cover: namely, of food and drink, clothing, toiletries, travel and household items, and communication, (paras 4.1.1 to 4.8.2);

10) She specifically criticises the exclusion of certain items, such as hair products and baby toiletries (para 4.3.2), asserting in relation to these that these "would reasonably be deemed essential items"; in relation to maintaining interpersonal relationships and participation in social, cultural and religious life, she is critical of the failure to make specific provision for an amount to cover internet access;

11) On the basis that support for children (whatever the context) has the "single objective" of providing "what is reasonably necessary for a child's health and development" (see para 5.1), section 5 of the Charlesworth Report draws a comparison with other forms of support for children as found in benefit rates (eg child benefit and universal credit); and Section 4 payments, being payments made under section 4 of the Immigration and Asylum Act 1999 to failed asylum seekers awaiting repatriation ("S4S"); from this she concludes (at para 7.9) that it "seems unlikely" that the current rate would meet the duty under section 55 of the 2009 Act.

For completeness, I record that a supplementary report by Ms Charlesworth was lodged. In the course of the six days of submissions, this was referred to only once. This was to a

sentence questioning the basis for a deduction made to the ONS food figures to strip out the costs of a takeaway meal.

[19] Mr Bentley produced two affidavits explaining the policy adopted, and the analysis and research carried out by the Secretary of State, which led to the current asylum support arrangements. He also responds to certain matters raised in the Charlesworth Report lodged by the petitioners. In summary, Bentley Affidavit 1 addresses the following topics: the background and history of asylum support (paras 6-14); the ways in which asylum support is provided (paras 15-19); the historic link with benefits provided by the Department for Work and Pensions (paras 20-21); the *Refugee Action* case (paras 22-29); the Secretary of State's general approach to reviewing the level of cash support in the light of the *Refugee Action* case (paras 30-33); the Secretary of State's methodology for setting the cash allowance for a single adult in her 2014 review (paras 34-69); the conclusions of the 2014 review (para 70); the Secretary of State's 2015 review of the cash allowance for a single adult (paras 71-82); the Secretary of State's assessment of the level of cash needed by families (paras 83-97); the Secretary of State's assessment of the particular needs of children (paras 98-141); the Secretary of State's conclusion on the costs of meeting the essential living needs of children (paras 142-148); comparisons with payments made in respect of income support, fostering allowances and S4S (paras 149-159); further support for essential living needs under section 96(2) of the 1999 Act (paras 160-166); specific issues in Ms (N's) case (paras 167-174); specific issues in Ms (O's) case (paras 175-186); section 55 of the 2009 Act and the UNCRC (paras 187-191); and the public sector equality duty ("the PSED") (paras 192-199). This first affidavit covered the same topics as arose in *SG*.

[20] Mr Bentley's second affidavit was prepared specifically to address the Charlesworth Report and some additional issues raised in the petitioners' draft note of

argument. It addresses the following particular topics: the criticism by Ms Charlesworth in section 3.2 of her report (of what she describes as a "pick and mix" approach in the Secretary of State's methodology) (paras 5-7); Ms Charlesworth's discussion of economies of scale in section 3.3 of her report (paras 8-12); references to baby toiletries and hair products in section 3.5 of Ms Charlesworth's report and the draft note of argument (paras 13-15); Ms Charlesworth's discussion of "child-specific issues" that she claims in section 4.3.3 of her report were not taken into account (paras 16-17); Ms Charlesworth's criticisms in relation to travel costs in section 4.4 of her report (paras 18-22); Ms Charlesworth's discussion of payments made to the parents or foster parents of children under other regimes in section 5 of her report (paras 23-27); Ms Charlesworth's discussion of whether asylum seekers in receipt of asylum support are living in relative or absolute poverty in section 6 of her report (paras 28-34); a response to the incorrect claim in the petitioners' draft note of argument that EU law requires asylum claims to be decided within six months (para 35); and a response to comments in the petitioners' draft note of argument about S4S to failed asylum seekers, including confirmation that the Secretary of State has not conducted any assessment of the minimum amount of support that would be required to avoid a breach of a person's rights under Article 3 of the Convention (para 36).

Outline of Asylum Support and What it is Intended to Cover

Asylum Support

[21] Asylum support is limited to those who are destitute, defined by section 95(3) of the 1999 Act as (a) those who do not have any adequate accommodation or means of obtaining it, and (b) those who in any event cannot meet their essential living needs (even

if they have accommodation). The petitioners in these proceedings have accommodation. The essential challenge here is whether the cash payment of asylum support is sufficient to meet their essential living needs and those of their dependent children.

[22] By virtue of regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005, the power under section 95 of the 1999 Act to provide support was converted into a duty upon the Secretary of State to offer the provision of asylum support to any asylum seeker or family member who applies for support under section 95 of the 1999 Act if the Secretary of State thinks that the person is eligible for support under that provision. This was done in implementation of the Reception Directive.

[23] Following the amendment effected by the Amending Regulations, the level of the cash payment representing asylum support payable weekly under regulation 10 of the 2000 Regulations is the figure of £36.95. Regulation 10A of the 2000 Regulations provides for additional support for pregnant women and children under the age of 3, namely of £3 per week in respect of a pregnant woman and a child under the age of 3, and £5 in respect of a child under the age of 1.

[24] At the heart of the challenge in these proceedings is the sufficiency of asylum support, as well as the methodology by which the Secretary of State determined the current level at which it is payable. However, the payment of asylum support is only one form of support, among several, provided by the United Kingdom to asylum seekers. In common with Flaux J in *SG*, it is in my view relevant in assessing the challenges made, to have regard to the overall provision of support provided by the UK to asylum seekers under section 95 of the 1999 Act, of which the cash payments of asylum support form part.

Other Forms of Support Provided

[25] When an asylum seeker applies for and is granted asylum support, accommodation is generally provided, at no cost to the asylum seeker, under section 96(1)(a) of the 1999 Act. It should be noted that the provider of accommodation meets all utility bills and council tax and also provides basic furniture and household equipment (cooker, fridge, washing machine, cooking utensils, crockery and cutlery). Cots and high chairs are provided for young children and sterilising equipment for babies under twelve months.

[26] In terms of provision by the State, asylum seekers have free access to the NHS. They obtain free prescriptions, dental care, eye tests and glasses. They are reimbursed reasonable costs of travel to and from hospital for scheduled appointments. They benefit from free access to libraries. Further, child dependants of asylum seekers are, depending on their age, entitled to free state education, free early years childcare of at least 15 hours a week, free school meals in term time and free transport to and from school up to the age of 16, where the school is outside the statutory walking distance or in certain other circumstances. They may also benefit from discretionary schemes run by local authorities in certain areas such as free or concessionary travel on public transport and (in Scotland) grants for the purchase of school uniforms.

Payment of Asylum Support to meet Essential Living Needs

[27] In addition to the accommodation support provided in kind and the educational, health and other provision just noted, an asylum seeker receives a weekly cash payment under section 96(1)(b), namely the asylum support under challenge, to meet essential

living needs such as food and clothing for him or herself and any dependants, as set by the 2000 Regulations. Those weekly cash payments are the subject of the challenge in these proceedings. The challenge is to the reduction in the level of support, not its form as a cash payment.

[28] There is no statutory definition of "essential living needs" but further provision as to the meaning of "essential living needs" for the purposes of section 95 of the 1999 Act is made in the 2000 Regulations. Regulation 9 of the 2000 Regulations sets out certain items and expenses which are excluded from the definition of "essential living needs" of a person. This includes the excluded items.

[29] I note that there is also provision, under section 96(2) of the 1999 Act, for payment of additional cash sums in exceptional circumstances. That provision is not challenged in these proceedings. Nor have the petitioners sought to invoke payment of additional cash sums. Their challenge is to the general level of asylum support paid, in the absence of any exceptional payments.

Preliminary Observations

[30] As noted above, there have been several sets of English proceedings: the original *Refugee Action* case, which led to the reviews in 2014 and 2015 of the methodology and data used, and the case of *SG*, in which similar challenges as argued here were advanced. I have also had the benefit of full oral written, and supplementary, submissions. Much of what was canvassed before me was either not controversial or has been fully argued in the cases mentioned. Having regard to these materials, it may assist if I first set out the matters I accept in respect of challenges to statutory provisions of this character.

1) As a general consideration, underpinning the court's consideration of the kind

of challenge as is made in these proceedings, I accept the correctness of the observation of Popplewell J (and cited with approval in para 36 of *SG*):

> "It is worth emphasising at the outset that the question is not what the Court considers to be the appropriate amount to meet the essential living needs of asylum seekers. That judgment does not lie with the unelected judges, but is vested by Parliament in the elected government of the day. The latter's decision can only be challenged on well recognised public law principles." (para 3 of *Refugee Action*)".

2) The standard of provision required by the Reception Directive is not for the subjective judgment of the Secretary of State, but it is an objective standard;

3) The minimum standard required by the Reception Directive is one that is "adequate for the health of applicants and capable of ensuring their subsistence" (Article 13(2) of the Reception Directive). The seventh recital in the preamble to the Reception Directive states its purpose as follows: "Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down".

4) It is a matter for the judgment of the Secretary of State what is necessary to meet "essential living needs" for the purposes of section 95 of the 1999 Act. (See *Refugee Action* at paras 85 to 91; and paras 34 and 35 of *SG*.) The assessments of what is essential and the extent to which something is a "need" involve value judgements. The function of making those value judgements is conferred by Parliament on the elected government in the person of the Secretary of State (*Refugee Action*, paragraph 91);

5) Accordingly, subject to compliance with the minimum content required by the Reception Directive, the Secretary of State's judgment on whether goods or

facilities constitute a need which is essential is only open to review on the high threshold of *Wednesbury* unreasonableness or other established public law grounds (*Refugee Action*, paragraph 91 (approved in paragraph 36 of *SG*));

6) In considering the essential living needs of asylum seekers as a group for the purpose of section 96(1)(b), and in setting the level of cash support under regulation 10 of the 2000 Regulations, the disparate needs of all asylum seekers must be taken into account to the extent that they are such as can be reasonably contemplated. Section 96(1)(b) permits cash payments to be made to meet essential living needs of individuals "as a general rule" in the normal course of events (*Refugee Action*, paragraphs 36 and 37);

7) In setting the level of cash payments to be made under section 96(1)(b):

   (i) the Secretary of State is not bound to take into account every conceivable need of every single individual asylum seeker; instead, the disparate needs of all individual asylum seekers must be taken into account to the extent that they are such as can reasonably be contemplated as arising in the normal course of events (*Refugee Action*, para 37);

   (ii) the Secretary of State does not have to provide sufficient support for exceptional cases, which fall to be dealt with on a case-by-case basis under section 96(2) (*Refugee Action*, para 37);

   (iii) the Secretary of State is entitled and required to take into account any other support which is, or may reasonably be expected to be, available from other organs of the State (such as healthcare, education and other community care and support) (*Refugee Action*, paragraph 39).

Petitioners' Submissions

Petitioners' Challenge to the Methodology Underpinning the Amending Regulations

[31] The petitioners traced the evolution of the methodology underpinning the Secretary of State's conclusion that the amount of £36.95 is appropriate for a single adult, a lone parent, and also a child, whatever his or her age. Their purpose in doing so was to identify the basis for the equalization of the rates payable in respect of adult and child asylum seekers, referred to by the petitioners as "flat-lining", and the reliance on economies of scale, being some of the features of the methodology they criticise.

[32] The general approach adopted by the Secretary of State in the 2014 and 2015 reviews was to identify the various items identified as "essential" and assess the costs to the person of purchasing these items. In assessing the necessary cost, the most relevant material examined was the most recent survey data published by the ONS relating to household expenditure of the lowest 10% income group among the UK population. This was subject to verification from other sources that the levels of ONS expenditure on the particular item met the actual need. Adjustments were then made, as appear necessary to the spending levels, in order to reflect the particular needs and typical circumstances of asylum seekers. The essential living needs identified by the Home Office:

> "… included food, clothing, toiletries, household cleaning items, non-prescription medication, and the opportunity to maintain interpersonal relationships and a minimum level of participation in social, cultural and religious life. It was considered that the latter need could generally be undertaken without spending money, subject to (a) occasional travel costs and (b) communications costs."

For the purposes of the 2015 review, regard was also had to support levels provided in other EU countries.

[33] The petitioners note that the "other sources" referred to included internal Home Office research carried out by members of staff. They also note, and are critical of the fact

that, certain of the needs (eg for a "minimum level of participation in social, cultural and religious life") were quantified solely according to that data. These were not independent and so not a legitimate cross check to Home Office researches.

[34] As a result of the 2015 review, the Home Office concluded (at page 3 of the PES) that the allowance provided to single persons should be set at £36.95, and the rate "flat-lined" across all categories previously entitled to tiered amounts of support, the latter on the basis that:

> "… the review has shown that the current rates exceed what is necessary to meet the essential living needs of asylum seekers with children and there is scope to reduce the payment levels provided to them".

[35] The basis for reducing the amount payable in respect of children was set out as follows:

> "The needs of children are not identical to adults and they may in some instances require extra expenditure on certain items. Children, for example, may need to replace clothes more often as they are growing. Babies also require nappies and formula milk, if they are not breastfed.
>
> But equally, some needs essential for adult asylum seekers (e.g. the need to keep in contact with legal advisers) do not apply to their children. Also, children do not in general consume more food than adults.
>
> Overall, the evidence considered shows that any extra needs specific to children are offset by the economies available to a larger household. This is supported by analysis of the ONS data available which shows that expenditure on the relevant essential items by family groups (of all sizes) is considerably lower than the cash payments currently made available to asylum seeking families."

[36] The petitioners contend that nowhere in the methodological documentation (eg the PES) was there any consideration given to "welfare" or to the "best interests" of the child. The only reference to welfare at all was in the following statement (included in one of the letters referred to in para [13], above (No 7/1 of process)):

> "In taking this decision, we have fully considered our legal duty to have regard to the need to safeguard and promote the welfare of children. The changes involve

> reductions in cash payments to families, but still ensure that sufficient funds are available to enable parents to care for their children safely and effectively and provide for their development."

From this the petitioners drew two key points: first, that there is no support for that statement in the methodological documentation, a point of critical importance in relation to interests or welfare of children; and secondly, there was no reference to the particular difficulties faced by lone parents, the vast majority of whom are women.

[37] In making the methodological challenge, the petitioners' principal criticisms were:

(1) the reliance on the lowest decile data of the ONS;

(2) the reliance on economies of scale;

(3) other errors in the use of ONS data; and

(4) the failure to consider children's welfare.

[38] In relation to the reliance on the lowest decile of ONS data, the petitioners argue that the Secretary of State's methodology is premised on the assumption that the expenditure of the lowest decile by household on the items surveyed is sufficient to meet an asylum seeker's essential living needs. Under reference to the Charlesworth Report, the petitioners argue that there are two strong indicators positively to suggest that this assumption is incorrect.

[39] First, the amount of asylum support payable to an asylum seeker and in respect of their children is below the household income which the lowest decile by income of the population enjoys, and places the asylum seeker and any children in both absolute and relative poverty: paragraphs 6.2.2-6.2.3 of the Charlesworth Report. For a single parent asylum seeker with three children under 14, the difference would be around £30-£40 per week less than the minimum equalised median income. Second, the petitioners contend that there is a correlation between poverty, malnutrition, and ill-health and they point to

the HM Government, "State of the nation report: poverty, worklessness and welfare dependency in the UK" (May 2010) at p 46. Reference was made to paragraph 3.3 of Ms Charlesworth's Report, where it is stated:

> "The current rate of asylum support is significantly below the average level of expenditure of individuals in the lowest income decile of households and falls within the government's own definition of severe poverty so it is reasonable to ask whether it is sufficient to meet the basic living needs of an adult, let alone provide for the additional duty of care the state has towards children." (para 3.3.)

[40] The petitioners argued that having regard to the foregoing, and in particular having regard to the absence of positive evidence put forward by the Secretary of State to support her assumption, the use of data from the lowest decile by household to establish what is sufficient to meet the basic living costs of one of the most vulnerable groups in society, without enquiring at all into whether that is in fact appropriate having regard to the Government's own measures on poverty, the methodology underpinning the Secretary of State's approach was straightforwardly irrational, standing the human context and legal framework within which the decision to proceed in this manner is taking place.

[41] The petitioners also challenged the Secretary of State's reliance on economies of scale to support the conclusion that the sum of £36.95 per week was adequate to meet the essential living needs of child and adult asylum seekers. Under reference to paragraph 3.3 of the Charlesworth Report they advanced two related attacks: first, they argued that this involved a degree of double-counting. The majority of the asylum support rate covers food and drink. The level for this is set by reference to ONS data, which already accounts for economies of scale through the use of averages derived from multi-person households. Accordingly, the economies of scale relied upon are, in short, counted twice.

[42] The second aspect of this argument related to the fact that the "economies of scale"

argument was deployed by the Secretary of State not just as regards food and drink, but family expenditure as a whole. The petitioners argued, however, that for certain types for multi-person households expenditure (eg shoes and clothing) economies of scale cannot, as a matter of common sense (it was said), apply (eg differently-sized clothes for differently-aged children with differently-sized feet).

[43] In relation to what was said were other errors of the ONS data, the petitioners contended that there are a number of errors, including:

1) the failure, it was said, to have regard to the different calorific and nutritional needs of older children, which, it was submitted for older children may be substantial, instead asserting that "children do not in general consume more food than adults"; and
2) The Secretary of State had also failed to have regard to the point that children's clothing, as well as requiring to be replaced due to outgrowing, may also require to be regularly replaced as the ordinary result of wear and tear: see Charlesworth Report at paragraph 4.2.2.

[44] The fourth ground of challenge to the Secretary of State's methodology was the failure to have regard to children's welfare. Mr McBrearty explained that this was one of the principal planks of his challenge and was, apart from the "lowest decile" point, undoubtedly the most significant. It is that, in assessing (inadequately) the level of support which requires to be provided in respect of the "essential living needs" of children (ie their subsistence), the Secretary of State has failed to have any regard to their welfare at all. That she has so failed to have regard was, he said, clear from the absence of any mention of welfare in any of the documents in which the methodology was set out. This was further supported by the fact that the ONS data used by the Secretary of State

was heavily weighted towards adult expenditure, with around 87% of the household members in the lowest decile of family expenditure being over the age of 18: see paragraph 3.4 of Charlesworth Report. This data was not child-centred and so was the wrong starting point. It was not sufficient to "bolt on" the consideration of children. He also pointed to the fact that the internal Home Office research undertaken specifically to set the asylum support rate appears to consist of compiling data on the cost of items that meet adult needs: *Ibid.* The Secretary of State has thus had regard only to adult needs in purporting to assess the needs of children, and has in any event failed to assess their requirements in terms of welfare at all. She has acted irrationally.

[45] Collectively, these errors showed she had not carried out an adequate or rational assessment. Assumptions had been piled upon layers of assumptions, and there was no adequate factual basis. For each and all of these reasons, the methodology underpinning the changes introduced by the Amending Regulations was flawed, and regulations 10(2) and 9(4) fell to be reduced.

The Petitioners' Challenge Based on the Best Interests and Welfare of Children

[46] The second main plank of the petitioners' attack on regulation 10(2), namely the reduction and "flat-lining" of asylum support, was based on obligations owed in respect of the best interests and welfare of children. It was argued that these features of regulation 10(2), together with a failure to make specific provision for their welfare (as opposed to subsistence) was unlawful because contrary to the "best interests" principle as given effect to by Article 24 of the CFR and Article 18 of the Reception Directive, and was also in material breach of section 55 of the 2009 Act. The blanket exclusion of the excluded items (ie expenses relating to toys, recreation, and entertainment, and either the cost of

computer facilities or the cost of travel to obtain the use of free computer facilities), was said to be unlawful on the same basis.

[47] The parties' arguments on the unlawfulness issue mirror those made in *SG*, and are fully set out by Flaux J at paragraphs 194 to 234. I mean no disrespect to the full and ably-presented submissions of Mr McBrearty QC (or to Mr Johnston QC, when I come to summarise his reply), if I do not set these out in full.

[48] The gravamen of Mr McBrearty's submission was to argue for a "heightened" standard by reason of the obligation to have regard to "best interests" of the child and its welfare. This involved taking a holistic child-centred welfare-based approach which had the effect of requiring regard to more than bare subsistence levels of support. In support of this submission, Mr McBrearty referred to the following:

1) The Reception Directive: Reference was made to the preamble (the fifth and seventh recitals), and to Articles 13(2), 17 and 18(1). Particular emphasis was placed on Article 18(1) which provides that the best interests of the child "shall be a primary consideration" for Member States when implementing the provisions of the Reception Directive that involve minors. It was argued that by virtue of Articles 17 and 18, and having regard to the "best interest" provisions of the CFR and the UNCRC, the word "subsistence" in Article 13, could not be limited as regards children to the minimum level of financial support necessary to keep an individual alive. Further, as primary law, the CFR took precedence over the Reception Directive and the Reception Directive fell to be construed consistently with the CFR. The Reception Directive was directly effective.

2) The CFR: Reference was made to Articles 21(1) (prohibition against

discrimination), 24 (giving effect to the rights of children in EU law), 51 (reliance in implementation of EU law) and 52 (justification). Reference was also made to the Explanations Relating to the Charter of Fundamental Rights [2007] OJ 303/17 (the "Explanations"), which did not have the status of law but was a valuable tool in the interpretation of the CFR. Read together with Article 52(3) of the Charter and the Explanations, to the extent that Article 21 corresponded with Article 14 of the ECHR, it prohibited discrimination on the ground of immigration status. The Explanations made clear that Article 24 was based on the UNCRC. Article 24 and the UNHRC Guidelines justified a holistic and generous reading of what was in the best interests or welfare of children. The provisions of the CFR were to be read harmoniously with the UNCRC: *Mathieson* v *Sec of State for Work and Pensions* [2015] 1 WLR 3250.

3) The UNCRC: Reference was made to Article 2 (ensuring respect for the rights of each child without discrimination in respect of any right under the UNCRC that was engaged), Article 3 (the source of the "best interest" provisions in the Receptions Directive, the Charter and section 55 of the 2009 Act, and stipulating that the "best interest" of the child be "a primary" consideration), Article 31 (the right to play), and to Articles 22 (ensuring appropriate humanitarian support to refugee children), 26 (the right of every child to benefit from social security) and 27 (the right to a standard of living adequate for a child's physical, mental, spiritual, moral and social development). Reference was also made to the observations in paragraph 9 of the General Comment No 17 (2013) of the UNCRC ("UN General Comment No 17") regarding the importance of play.

4) Section 55 of the 2009 Act: This provision implemented the "best interests of the child" requirement of the UNCRC and required the Secretary of State to have regard to the need to safeguard and promote the welfare of children in the UK, regardless of their citizenship or settlement status. This duty extended to preventing impairment to health and development. It was argued that this was therefore analogous to the "holistic development" of the child referred to in General Comment No 14 (2013) of the UN Committee on the Rights of Children ("the UN General Comment no 14"). This gave rise to a three-fold concept: (i) the substantive right of the child to have his or her best interests assessed as a primary consideration; (ii) a fundamental interpretative principle, requiring an interpretation that most effectively serves a child's best interests (where more than one interpretation is possible); and (iii) a rule of procedure requiring of any decision-making process a demonstrable evaluation of the impact on the child and justification for the decision. Mr McBrearty argued that the statutory duty in section 55 of the 2009 Act requires the Secretary of State to demonstrate "fair treatment" as regards children falling within the scope of that provision, and which treatment requires to meet the same standard a British child would receive.

5) The Guidance "Every Child Matters: Change for Children", dated November 2009 ("the ECM Guidance"). Reference was made to passages in the Introduction and paragraphs 1.2 to 1.6 and 1.17a, with particular reliance on para 1.4 which identified the need to safeguard and promote the welfare of children, meaning "preventing impairment of children's health and development".

[49] From all of this Mr McBrearty QC argued for a heightened standard based on the "best interests of the child" and which informed the reading of section 55 of the 2009 Act. In particular, he submitted that the Reception Directive, when read with Article 24 of the CFR and the UNCRC, required the national legislation implementing the provisions relating to material reception conditions (including the daily expenses allowance) to take into account the specific situation of children, the best interests of whom require to be a primary consideration. The best interests of the child encompassed issues of welfare and well-being over and above mere subsistence, and the UNCRC itself recognised the rights of the child to education and to engage in age-appropriate recreational activities. It was therefore wrong for the Secretary of State to start with or assume a minimum standard. Indeed, as I understood him, it was argued that the best interests of the child duty was the necessary starting point in any approach. The Secretary of State had to proceed "top down" from the starting point of the best interests of the child as a primary consideration. For that reason it was incompatible with the requirements of the Reception Directive to apply a reduced and flat rate of asylum support or to exclude the cost of computer facilities in so far as required for the purposes of education, or alternatively the costs of travel in so far as required in order to access free computer facilities, or recreational items and expenses incurred in relation to entertainment on a blanket basis from the definition of "essential living needs" in respect of which asylum support may be payable under section 95 of the 1999 Act.

[50] He also argued that, in assessing whether the duties of the Secretary of State under section 55 of the 2009 Act have been properly performed, it will be necessary for a reviewing court to ask not just whether the Secretary of State has asked herself the right question, but whether she has taken reasonable steps to acquaint herself with the relevant information in

order to enable her to answer that question correctly. Reference is made to *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1975] AC 1014; *JO & Others (section 55 duty) Nigeria* [2014] UKUT 00517 (IAC); and *AA (Afghanistan)* v *Secretary of State for the Home Department* [2013] 1 WLR 2224. Any decision taken by the Secretary of State by which she directly or vicariously fails to have regard to the duty under section 55 of the 2009 Act, including by failing to take reasonable steps to acquaint herself with the relevant information, will be in material breach of that provision.

[51] Further, it was submitted that the statutory guidance issued under section 55 of the 2009 Act expressly identifies safeguarding and promoting the welfare of children to mean preventing impairment of children's mental and physical health and physical, intellectual, emotional, social or behavioural development (not causing such impairment), and enabling children to have optimum life chances and to enter adulthood successfully. It was submitted that there was no basis in any of the methodological documentation produced in relation to the reduction and flat-lining of support for the assertion by the Secretary of State elsewhere that this duty has been discharged.

[52] This argument was developed further. It was contended that it is settled that the duty imposed by section 55 of the 2009 Act mandates careful inquiry, yet there is no evidential basis on which to conclude that such inquiry has been undertaken. The sole focus for the Secretary of State in assessing the level of asylum support to be provided has been subsistence, and largely the subsistence of adults. While the Secretary of State accepts that the needs of children are different, at no stage does she have regard to such of those needs (ie in relation to welfare) as are protected by section 55 of the 2009 Act. Rather, having regard to the decision itself, together with the evidence of Mr Bentley, it seems that the approach adopted has been to take the rate deemed appropriate for an adult asylum seeker

and to apply it without modification to children. While the Secretary of State accepted that some costs will be higher for children than adults, the absence of an increased amount for children is justified on the basis that any additional costs are "comfortably offset" by other expenses that children would not incur, and by economies of scale. Even assuming, however, that the overall methodological approach to economies of scale is not flawed (contrary to the petitioners' methodological argument), there has been no proper assessment by the Secretary of State of the extent of additional costs nor of the extent to which they can be properly offset.

[53] Mr McBrearty made other criticisms, as follows:

(i) Whilst it is said that additional costs are off-set by expenses that children would not incur, only one example is given of such an expense, namely the cost of communicating with legal representatives. No specific cost is attributed to that expense but, in so far as it is touched upon by Mr Bentley's affidavits, it would appear to be a relatively small amount.

(ii) It is accepted on behalf of the Secretary of State that no assessment has been made of the cost of children's clothing, notwithstanding it is also accepted that there will be factors which cause the cost of children's clothing to be higher than the clothing of adults.

(iii) It is contended on behalf of the Secretary of State that any additional costs associated with children will be marginal and will be covered ("easily offset") by the leeway provided by the economies of scale in relation to food. That contention should be rejected in the absence of proper assessment of the additional costs, due to the fact that the difference is unlikely to be marginal and given that the extent of any economies of scale will, on the approach of the

respondent, depend upon the size of the particular household. Thus, it is impossible to assess either the additional cost or, on the other side of the equation, the extent of the saving due to economies of scale.

(iv) There has been a failure to carry out any kind of proper assessment of a child's travel needs. The child's travel costs have been adopted at the same rate of £3 as is applicable to adults, yet there is no assessment of travel needs which are particular to children—by way of example only, the extent to which children may have to travel regularly to use library facilities in order to access resources online and to use computers for word processing, etc.

(v) There has been no proper assessment of the additional costs of children's non-prescription medication.

[54] Having regard to the foregoing factors, it is submitted to be clear that there has been no proper assessment of the additional needs of children, whereas what is required is, in fact, a careful assessment. Thus, the conclusion that any additional needs can be comfortably offset by economies of scale is lacking in any proper evidential foundation, let alone the robust evidential foundation which the context is submitted to require.

[55] Separately, the petitioners' submit that the assessment of children's needs was, in itself, wholly insufficient, giving rise to a breach of the procedural duty to assess and give effect to the children's best interests as a primary consideration.

Discrimination

[56] The petitioners also contend that the decision of the Secretary of State to reduce and "flat-line" the rate of asylum support payment is discriminatory contrary to Article 21 of the Charter and Article 14 ECHR, insofar as it bears upon a protected category of sex/gender.

The former ground is also relied on for the purpose of the challenge to the exclusion of the excluded items from essential living needs by virtue of regulation 9(4) of the 2000 Regulations. Mr McBrearty posed four questions: (1) what is the difference in the level of support offered to children of asylum seekers and the children of those in receipt of UK state benefits; (2) were these the proper comparators; (3) did it matter that the asylum support was received by the parent of the child asylum seeker; and (4) if there was a difference in treatment, was the test for justification met?

[57] The benefit payments the petitioners referred to for the purposes of comparison with the level of asylum support were S4S and payments made in respect of children by way of child benefit. (The petitioners abandoned the further comparator of fostering allowance.)

1) S4S: This was the form of support provided to a failed asylum-seeker without dependants pending his or her removal from the United Kingdom. The amount payable was around £35.39 per week (by way of credit to a pre-payment card) to cover food, clothing and essential toiletries. Accommodation was provided separately. S4S is a measure of last resort. It is made available to provide a minimum level of humanitarian support and is intended to be the minimum necessary to avoid breach of a person's rights under the ECHR. Additional weekly payments were payable for a baby aged under 1 (of £5) and for pregnant women or a child aged at least 1 and under 3 (of £3). The marginal difference between S4S and the present asylum support rate was a strong indicator of a failure to meet the objective standard.
2) State benefits: The petitioners note that the equivalent amount of financial (cash) support payable by way of state benefits in respect of the child of a

settled adult, as opposed to the asylum support payable to the child of an asylum-seeker (or the S4S payable to a failed asylum-seeker), is around £30 more per week than asylum support. It is not necessary to detail the exact figures; the petitioners found on the fact that the mainstream state benefits paid are nearly double the rate of asylum support.

[58] The petitioners submitted that Article 21 of the Charter required to be read consistently with Article 14 ECHR and its case law. The ambit of "private life" for Article 8 purposes includes but extends beyond the development and maintenance of personal relationships to encompass the right to physical and moral integrity, and thus protection against the likelihood of treatment which does not reach the threshold of inhuman and degrading treatment but in respect of which "sufficiently adverse effects" are able to be shown. Further, the reduction in the level of support was bound to have an impact on the welfare of children, thus engaging their private life. "Other status" as a ground of discrimination under Article 14 of the Convention is a broad concept, capable of extending to a distinction drawn (directly or indirectly) on the basis of a status (including immigration status) conferred by law. Reference is made to *Hode* v *United Kingdom* (2013) 56 EHRR 27 and *Bah* v *United Kingdom* (2012) 54 EHRR 21. It accordingly extends to discrimination on grounds of immigration status, and thus extends (as did Article 14 ECHR) to the discrimination against a child asylum seeker ("Child A") and a child in respect of whom benefits were paid ("Child B"). The petitioners argued that it was of no legal consequence for either provision that the discrimination is directed at the child rather than the parent, and in any event it may legitimately be considered to be directed at both. Article 14 of the Convention may be relied upon by any individual satisfying the victim requirements of Article 34 of the Convention. Article 34 of the Convention is concerned not only with the

direct victim or victims of the alleged violation (in the respondent's analogy, the adult recipient of Asylum Support) but also any indirect victims to whom the violation would cause or has caused harm or would have a valid and personal interest in seeing it brought to an end (again in the respondent's analogy, the child in respect of whom asylum support is paid): *Vallianatos* v *Greece* (2014) 59 EHRR 12.

[59] Although the right to non-discrimination in Article 21 of the Charter may be restricted under Article 52 thereof, any such restriction ("limitation") requires at minimum to be "provided for by law and respect the essence of those rights and freedoms" (ie the rights and freedoms of the Charter as a whole—not just the right to non-discrimination). The limitations in this case (ie the restriction of the amount payable to Child A to about 50% of the amount payable to Child B; and the blanket exclusion of expenses relating to toys, recreation and entertainment; and either the cost of computer facilities or the cost of travel to obtain the use of free computer facilities) fails on both counts.

[60] It was submitted that this was contrary to, rather than provided, by the following: Article 24 of the Charter itself; Articles 13, 17 and 18 of the Reception Directive; and Articles 2, 3, 22, 26, 27 and 31 of the UNCRC. These limitations in any event hollowed out the right afforded by Article 24 of the Charter, as they either fail to make any provision at all as regards the best interests of the child or operate directly contrary to those interests, and accordingly can in no way be said to respect the essence of the right which Article 24 confers.

[61] In respect of proportionality, the petitioners' primary position was that there was no need to go on to consider the proportionality of the interference in this case, but even if there were, the reduction in support would fail to satisfy the requirement of either of the two stages applicable under EU law, being whether the measure in question is suitable or

appropriate to achieve the objective pursued, and whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method: *R (Lumsdon)* v *Legal Services Board* [2016] AC 697 at p 719G paragraph 33 (Lord Reed and Lord Toulson). Justification for any difference in treatment on a ground prohibited by Article 14 of the Convention is for the state to advance.

[62] The petitioners developed their submission on the correct approach to proportionality under Article 14, by separate written submission. In brief, this was to argue that the "manifestly without reasonable foundation" test was correctly understood as one that was applied on a supranational level by the Strasbourg Court as part of the margin of appreciation afforded to states. It did not fall to be applied, at the domestic level, without the domestic court abdicating in its assessment of whether or not the UK's obligations under the ECHR have been satisfied. Reliance was placed on Lord Mance in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] 2 WLR 481 at paragraph 52, although it was accepted that a number of Supreme Court cases were against them and were binding on a first instance court.

[63] For the purposes of the proportionality issue, the only objectives referred to by the Secretary of State in her answers (in the context of Article 14 ECHR) are: (i) discouraging economic migration; and (ii) ensuring that limited financial resources are not expended on providing support which is in excess of the United Kingdom's obligations under the Reception Directive. The third basis cited in justification ("asylum seekers and their dependants do not have an established right to remain in the United Kingdom") was, it was argued, neither an objective nor a basis of justification but rather the ground on which the discrimination claim is being brought, and can be ignored.

[64] As to (i), in asserting this as an objective for the rate of support provided to the children of asylum seekers, the Secretary of State overlooks the fact that, if the petitioners' argument is correct, and the effect of that argument being correct is to increase the amount of asylum support payable where children are concerned, then it will have been on the basis of EU law. There will be no grounds for the Secretary of State's concern as to "economic migration" within the European Union; indeed addressing this very concern was one of the reasons why the Reception Directive was introduced. The eighth recital stated: "The harmonisation of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception".

[65] As to (ii), this also falls away: the support is not in excess of the UK's obligations under the Reception Directive, when that Directive (secondary law) is read with the CFR (primary law) and the UNCRC as regards, *inter alia*, the best interests of the child. Even were there an objective against which the court could properly assess the discrimination, the Secretary of State would not succeed: it is plain that any such objective could be attained by a less onerous method—it was so attained prior to the reduction in support which is the subject of the challenge in this case.

[66] Separately, Mr McBrearty submitted that the question of justification as regards Article 14 ECHR is similarly answered having regard to the four-stage *Bank Mellat* test, none of which stages are able to be satisfied in this case. The first stage ("whether the objective of the measure is sufficiently important to justify the limitation of a protected right") cannot be satisfied. Even were this stage able to be satisfied, the Secretary of State would get no further. There is no basis on which to assert any aim as being "rationally connected" to the effects of the measure in issue, standing the methodological flaws already addressed. The

Secretary of State would further fail if she made it to the third stage ("whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective"), a less intrusive measure having previously been used without such compromise for a number of years. The Secretary of State would, finally, fail at the fourth stage of proportionality proper ("whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective to the extent that the measure will contribute to the achievement of that objective, the former outweighs the latter") standing the severity of the impact of the reductions as evidenced by the petitioner in this case.

[67] Turning to section 55 of the 2009 Act, Mr McBrearty argued that the proper discharge of the duty imposed on the Secretary of State by section 55 presupposes the Secretary of State having taken reasonable steps to acquaint herself with the relevant information before taking the decision and making the 2000 Regulations under review, including the effect of the proposed reductions to asylum support on the educational needs and welfare of children within the jurisdiction. Further, and in any event, the duty in section 55 of the 2009 Act is predicated on fair treatment and non-discrimination as between a British child and the non-British child of an asylum-seeking individual. The equivalent amount payable by way of income-replacement benefit in respect of the child of a settled adult in the UK is, however, almost twice that payable in respect of the child of an asylum-seeker. The current rate of asylum support is, further, almost exactly the same as the rate of S4S which is the bare minimum payable to an adult, failed asylum-seeker to avoid a breach of their Convention rights. No consideration of the comparable rates of benefits or fostering allowance nor explanation for the marked discrepancy between those rates, and the marked similarities with the rate of S4S, has been given. In summary, the

Secretary of State having failed to take reasonable steps to acquaint herself with the relevant information *et separatim* having given no consideration to the comparable rates of support payable in respect of the children of those in receipt of state benefits or Fostering Allowance, nor the fact that the rate of asylum support has been reduced to a rate of "last resort", has acted in further material breach of section 55 of the 2009 Act *et separatim* contrary to Article 21 of the CFR *et separatim* Article 14 when read with Article 8 of the ECHR (having put forward no justification therefor). Declarator to that effect as sought in paragraphs 3(i) of the petition ought to be pronounced.

[68] For the foregoing reasons, the reduction in support and the blanket exclusion of expenses relating to toys, recreation and entertainment, and the cost of computer facilities (or the cost of travel to obtain the use of free computer facilities) constituted unlawful discrimination against the petitioners' children contrary to Article 21 of the Charter and Article 14 ECHR, regulation 10(2) of the 2000 Regulations, which gives effect to that reduction, is ultra vires the Secretary of State and ought to be reduced. Mr McBrearty submitted that the orders sought at paragraphs 4(i), (ii), (iv) and (v) of each of the petitions should also accordingly be granted.

PSED

[69] Section 149(1) of the 2010 Act imposes a public sector equality duty on specified public authorities and persons exercising public functions. The Secretary of State is a "public authority" for the purposes of section 149 of the 2010 Act pursuant to paragraph 1 of Schedule 19 thereto. The duty in section 149(1) of the 2010 Act requires the Secretary of State, in the exercise of her functions, to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between

persons who share a "relevant protected characteristic" and persons who do not share it. Sex is a relevant protected characteristic for the purposes of section 149(1) of the 2010 Act by virtue of subsection (7) thereof when read with Schedule 18 thereto. "Due regard" in the context of advancing equality of opportunity means having due regard, in particular, to the need, *inter alia*, to take steps to meet the needs of persons of a particular sex that are different from the needs of persons who are not of that sex.

[70] While the PES which was published by the Secretary of State prior to the relevant amendments to the 2000 Regulations being made purports to assess the appropriateness of the levels of Asylum Support payable in respect of each of the "protected characteristics" including that of sex/gender, Mr McBrearty argued that no reference is made in it to the specific position of single parents with minor children, the majority of whom are women, and who are therefore indirectly discriminated against as a result of the reduction in support. No other equalities assessment is understood to have been undertaken by the Secretary of State prior to the 2000 Regulations being made. No other consideration of the effect of the proposed policy change on the protected characteristic of sex/gender is understood to have been given.

Reply on behalf of the Respondents

Methodology: Preliminary Observations

[71] Mr Johnston began by making some general points about the methodological challenge. The determination of the rate for asylum support was not an exact science and a range of reasonable responses was open to the Secretary of State in determining the amount. In respect of the petitioners' reliance on a duty to have regard to the best interests of the child, Mr Johnston accepted that in a finely balanced case, then the

Secretary of State might reach a different outcome for a child, by reason of the best interests duty. However, this did not mean, as the petitioners appeared to suggest, that the best interests consideration brought into play a different intensity of review. That was not correct. Judicial review was on the basis of the accepted grounds. In relation to any procedural obligation, this was accepted in the sense that it remained incumbent upon the Secretary of State to have regard to all relevant information. This did not, however, translate into any heighted duty owed in respect of child asylum seekers.

[72] The Secretary of State had considered the best interests of the child before making the Amending Regulations: see paragraph 7.8 of the Explanatory Memorandum and also paragraphs 189 to 190 of Bentley Affidavit 1. These paragraphs disclose that the Secretary of State considered wider considerations than just subsistence. The reviews carried out were very detailed, as described in the Bentley Affidavits and as was also demonstrated by the 600 pages of documentation which formed the basis of the review. The ONS data for the lowest decile was the most comprehensive data source available, with breakdown figures for specific categories of expenditure: see Bentley Affidavit 1 at paragraphs 34 and 41. This is why this data was used as the starting point and cross-checked or adjusted as necessary. Some data sources provided information by household composition, not income. Other sources provided per person data, so the question of economies of scale did not arise, but the information was not as detailed or broken down into categories of expenditure. A conscientious effort was made to use objective statistical data, albeit this was not precisely correlated to the legislative issues. This was all used in good faith.

[73] Finally, in relation to the status of the Charlesworth Report, Mr Johnston submitted that I should treat this with caution. This was not by reason of her qualifications, but because much of it went beyond her asserted expertise as a data analyst. Notwithstanding

her acknowledging her lack of expertise (eg at paras 1.1(a), 4.2.2 and 4.3.3) she nonetheless strayed into these areas. Her own report was based on many assumptions that were unsupported by evidence. Reference was made to the recent comment by the Supreme Court in *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 about the role of an expert. There was a further difficulty with her report. She had used as her starting point the test in section 17 of the Children Act 1989, as she had done in her reports used in *SG*. In *SG* Flaux J accepted that the test under section 17 was not the relevant test in this challenge. Nonetheless, she had repeated her error in the Charlesworth Report lodged in these proceedings.

Methodology: Response to Criticisms

[74] In relation to the petitioners' several claims of irrationality, based on detailed criticisms of the methodology that they claim was adopted, the respondents argued that none of these was well founded, as was clear from Mr Bentley's detailed explanation of the methodology that was in fact employed and all of the matters that the respondent in fact took into account.

[75] Many of the petitioners' detailed criticisms had contended that the methodology was flawed, and hence the Secretary of State had acted irrationally, by reason of what were said to be omissions to consider certain matters. The respondents sought to refute this by reference to the affidavits, especially the two Bentley affidavits. Under reference to passages in these affidavits, it was submitted that the petitioners' contentions were ill-founded:

1) In respect of the petitioners' claims that the Secretary of State had failed to take into account that in a household of variously aged and sized children and

adults, and accordingly that the extra amount for replacement clothing cannot be adjusted downwards by economies of scale, reference was made to Bentley Affidavit 1 at paragraphs 107-111. It was concluded that the additional costs arising from the absence of economies of scale in relation to replacement clothing for children was comfortably covered by the economies of scale already identified in relation to the cost of food in the larger household. This was a reasoned position. If it was accepted that there was no double-counting, then there was sufficient in the cash envelope of asylum support provided to allow for relatively greater frequency of replacing children's clothes.

2) In relation to the failure to take into account the requirement identified in *Refugee Action* for asylum support to furnish an opportunity to maintain interpersonal relationships and a minimum level of participation in social, cultural and religious life, this was also unfounded, as Mr Bentley explained at paragraphs 57-59 of Bentley Affidavit 1. It was concluded that persons generally have the opportunity to maintain interpersonal relationships and a level of participation in social, cultural and religious life without spending money (subject to occasional travel and communications costs). The criticisms had amounted to no more than that this was a "superficial" approach. See the response in Bentley Affidavit 1 at paragraphs 117 to 123. There was material that was considered. There was a reasoned basis for the use of this material, even if those reasons were not detailed ones.

3) In relation to the contention that the Secretary of State failed to take into account that older children may require a calorific intake more akin to that of an adult (Ms [O's] petition) and that infant and young children have particular

nutritional needs (Ms [N's] petition), this was addressed in Bentley Affidavit 1 at paragraphs 99-106. The Secretary of State did not just approach this as a matter of cost. She considered the nutritional data. It was not accepted that the nutritional needs of children was necessarily greater; they were different. The nutritional and calorific needs of children of all ages were considered in detail, based on an examination of data from the National Diet and Nutrition Survey (2014) ("the 2014 Survey"). This was also dealt with in the Bentley Affidavits. In any event, there is no "accepted correlation between low income and ill health". In particular, the respondent took into account data from the 2014 Survey to consider whether there was a relationship between income levels and dietary deficiencies. The data demonstrated that there was no consistent pattern in energy or macronutrient intakes across income groups. Where intakes failed to meet recommended levels, that was the case for all income groups (Bentley Affidavit 1 at para 104).

4) In relation to the issue of double-counting, as Mr Bentley makes clear, this suggestion is unfounded. The ONS household figures used were adjusted so as to arrive at figures indicative of the expenditure of a single adult (Bentley Affidavit 1 at para 41). The reliance on the research of the Home Office (eg the food diary) was a cross check; significant reliance had not been placed on this. This was done in good faith.

[76] Separately, the petitioners criticised aspects of the methodology as being irrational. It was claimed that it was irrational for the respondent to "premise her entire methodology" on the assumption that the expenditure of the lowest decile is sufficient to meet an asylum seeker's essential living needs, without giving any consideration to the

correlation between low income and ill health. However, it was submitted that as Mr Bentley makes clear, the respondent made no such assumption. The methodology did not look only at the expenditure of the ONS lowest decile income group: that data was supplemented by market research as to the actual cost of particular items (clothing, travel and communications), adjusted as necessary to reflect the particular needs and typical circumstances of asylum seekers: Bentley Affidavit 1 at para 35. In any event, the respondent used the ONS lowest decile to assess the cost of meeting some needs because she reasonably considered that it was the best available indicator of the likely amount of money needed to meet most of the various needs identified as essential (Bentley Affidavit 1 at para 34). The ONS data shows that all income groups, including the lowest decile group, spend considerable sums on non-essential items and that expenditure per head reduces as the size of the household grows (Bentley Affidavit 1 at paras 35-36).

[77] It is claimed that the respondent selectively used certain ONS figures and omitted others in favour of those produced as a result of internal individual research. Mr Bentley's affidavits make clear that this criticism is unfounded. He explains that the methodology did not use ONS data for clothing, travel and communications (Bentley Affidavit 1 at para 35). Lower figures were used because it was considered reasonable to use the researched figures rather than the ONS data, which simply reflected the annual spending of the lowest 10% of the UK population rather than reflecting expenditure on essential clothing needs.

[78] More generally, the respondents argued that in *SG*, Flaux J rejected the same criticism as the petitioners now make. He considered that, given Popplewell J's criticisms, the Home Office was "quite right to conduct its own research". He also accepted the reasoning for using the lower figures on clothing. Reference is made to paragraph 158 of

SG.

[79] It is claimed that it was irrational to seek to offset the additional costs associated with the needs of children against the savings available to a multi-person household, in circumstances where the figures against which those extra costs are being offset already account for economies of scale. In this connection, Ms Charlesworth repeats a criticism made in the *SG*, that this approach therefore involved "double counting". This criticism is unfounded. As noted above under reference to Mr Bentley's explanation about the adjustment of the ONS household figures (Bentley Affidavit 1 at para 41), the respondent did not proceed as the petitioners claim. Mr Bentley explains the detail of the assessment that was in fact carried out, which was considerably more complex than Ms Charlesworth's assertion. He specifically explains why there was no material double counting of economies of scale (Bentley Affidavit 2 at para 9-11).

[80] In *SG*, Flaux J rejected the allegation of double counting precisely because of the specific cross-check that the respondent carried out with the data in ONS Table 3.3 for single adult non-retired households in the lowest 20% income group. Reference is made to paragraph 255 of *SG*.

[81] All relevant considerations, including to have regard to the best interests of the child, have been taken into account. There had been specific consideration to the interests of children and whether the sum provided was enough for a family, whatever its composition. That was the relevant end point for any methodology. There was no error or unreasonableness vitiating the Secretary of State's approach. The petitioners' methodological challenge was unfounded.

The Bests Interests and Welfare of Children

[82] In reply to this ground of challenge, Mr Johnston submitted that the Secretary of State's decision to make the Amending Regulations was fully in compliance with her duty in relation to the best interests duty owed to the children affected, regardless of whether the best interests duty was considered in relation to section 55 of the 2009 Act, Article 24(1) of the CFR or the ECM Guidance.

[83] As a starting point, it was submitted that the correct analysis was that the requirement to make the best interests of the child a primary consideration arises in the overall context or framework of setting the asylum support rate in accordance with the Reception Directive and the 1999 Act. The standard prescribed by the Reception Directive, derived from a reading of Article 13 in the light of the recitals, was to ensure full respect for human dignity and a dignified standard of living to maintain an adequate level of health and meet the needs of the asylum seeker. This has not been the subject of decision by the Court of Justice of the European Union. The court should approach this in the usual way commensurate with a judicial review, as Flaux had done (see paras 288 and 289). In any event, there was no requirement for the imposition of a higher standard of support than the objective minimum under the Reception Directive and nothing in the Reception Directive required a higher standard for children, though their needs may differ (see paras 243 to 249 of *SG*). The best interests duty did not require an equivalence between asylum seeker children and the children of settled adults in receipt of mainstream benefits (eg Income Support); it did not require some higher standard of asylum support for children than the minimum standard under the Reception Directive or "essential living needs" under section 96(1)(b) of the 1999 Act (para 259 of *SG*). The Reception Directive had been given effect to in the 1999 Act and the 2000 Regulations, and in which the best

interests of the child were taken into account. Reference was made to the Explanatory Note to the Amending Regulations. The petitioners did not suggest that there was a deficiency in transposition other than, perhaps, in respect of regulation 9(4) of the 2000 Regulations.

[84] In support of that submission, Mr Johnston advanced the following propositions:

1) The best interests of relevant children are simply one relevant consideration: as Lady Hale made clear in *ZH (Tanzania)* v *Secretary of State for the Home Department* [2011] 2 AC 166, "despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'" (para 25). It could be overridden by other considerations; it was not determinative, but it had to be weighed in the balance.

2) Where there is an obligation to have regard to the best interests of relevant children, there is no obligation to begin the analysis with, or give primacy to, that consideration: all that is necessary is that there is proper consideration of the interests of children as a primary consideration in the overall balancing exercise (*H(H)* v *Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338 (per Lord Judge CJ (para 125), Lord Mance (paragraph 98) and Lord Wilson (para 153)). Lord Wilson's observation was sufficient to refute the petitioners' "top down" argument. It simply showed where one had to finish.

3) The fact that a decision may impact adversely (even severely) on children does not support any inference that proper regard has not been had to their interests (*R (JS)* v *Secretary of State for Work and Pensions* [2014] PTSR 23 (Divisional Court) (para 49)).

[85] In relation to the petitioners' reliance on the provisions the UNCRC for the interpretation and application of the best interests duty, they offered no legal basis on which they can claim to be entitled to rely on the provisions of the UNCRC as a matter of domestic law. He made two points of fundamental principle about the strictly limited relevance of unincorporated international treaties as a matter of domestic law. First, as a matter of fundamental constitutional principle, unincorporated international treaties do not form part of domestic law and do not give rise to any enforceable legal rights or obligations (*JH Rayner (Mincing Lane) Ltd* v *Department of Trade and Industry* [1990] 2 AC 418 (Lord Templeman, pages 567-577); *R (Yam)* v *Central Criminal Court* [2016] AC 771 (Lord Mance, para 35)). Secondly, that position is not altered in any way by the fact that in a small number of specific contexts "the spirit if not the precise language" of Article 3(1) of the UNCRC has been implemented in domestic law: *R (JS)* v *Secretary of State for Work and Pensions* [2015] 1 WLR 1449 (Supreme Court) ("*JS*"), per Lord Reed, paragraphs 82 and 90. The petitioners' resort to the UNCRC was impermissible for another reason, namely, in that it was being relied on not as an aid of interpretation to resolve an ambiguity, but to advance an expansive interpretation of a UK statute. This was beyond what the cases (eg such as that of *JS*) permitted (ie where the interpretation was in respect of a Convention Right). It was simply not legitimate to rely on Article 3 in this kind of way. Further, breach of an international treaty obligation was not justiciable in a UK court (this distinction was observed in *Mathieson* at para 41). In the absence of any antecedent doubt or ambiguity of the domestic provision to be construed, which the petitioners do not contend, and which is said to be implementing the UNCRC, it was not competent to rely on the UNCRC. The best interests of the child consideration was already embedded in Article 18 of the Reception Directive and in Article 24(1) of the CFR.

These instruments therefore added nothing to the domestic provisions.

[86] In respect of the petitioners' contention that no regard was had to the best interests duty in the formulation of the policy or methodology underpinning the Amending Regulations, it was, he submitted, clear from the information before the Court that the Secretary of State did in fact consider the best interests duty before making the Amending Regulations. This was clear from paragraph 7.8 of the Explanatory Memorandum accompanying the Amending Regulations and from Mr Bentley's Affidavit 1. The Explanatory Memorandum explained:

> "In taking this decision full consideration has been given to the legal duty to have regard to the need to safeguard and promote the welfare of children. The changes involve reductions in cash payments to families, but ensure that sufficient funds continue to be available to enable parents to care for their children safely and effectively and provide for their health and development."

Mr Bentley explained (at paras 187- 191 of Bentley Affidavit 1) that the team conducting the 2015 review did consider the specific needs of children in accordance with the best interests duty. Furthermore, he dealt with each item of expenditure in relation to children separately and in detail in his Affidavits. Flaux J accepted this material (see *SG*, at para 261) and he urged the court to accept it, too.

[87] Mr Johnston also noted that in considering the best interests duty, Flaux J relied on the following statement by Mr Bentley, which is also before this Court (see para 189 of Bentley Affidavit 1):

> "The package of support available, both before and after the changes to the payment rates, ensures that the children of destitute asylum seekers are provided with stable and safe accommodation and with adequate provision for their ordinary everyday essential needs. I do not consider that the reduction in the amount of cash provided to the parents therefore has an adverse effect on their safety or the quality of the care they receive from their parents or their general health".

Flaux J entirely accepted this statement and considered that it demonstrated that the respondent had complied with her best interests duty (*SG*, para 279). (Parenthetically, I note that Flaux J considered this passage of such importance that he quoted it twice: see para 86 of *SG*). In his view, once it was recognised that section 55 of the 2009 Act did not require some higher minimum standard under the Reception Directive or some broader definition of essential living needs in the case of children than in the case of adults, the respondent's approach to the needs of children was sufficiently child-centric and holistic (*SG* at para 280).

[88] For these reasons, Mr Johnston submitted that Flaux J was correct in this conclusion and the Court should follow *SG*.

Challenge to Regulation 9(4) and the Excluded Items

[89] The arguments already advanced were sufficient to answer this ground. Mr Johnston urged that I should follow Popplewell J and Flaux J and conclude that toys and computers are not within "essential living needs". Regulation 9(4) was not unlawful as read against the proper background.

[90] Finally, in respect of this ground, Mr Johnston argued that, even if well established, it would be going too far to reduce regulation 9(4). This was because the provisions of regulation 9(4) also apply in relation to adult asylum seekers, as well. The best interests duty is of no application to them. For the court to grant reduction of these provisions would, therefore, be to go too far.

Discrimination

[91] On behalf of the Secretary of State it is argued that the making of regulation 10(2) did not involve any unlawful discrimination incompatible with the rights under

Article 14, read with Article 8 of the Convention or under any of the other provisions relied on by the petitioners.

[92] The response to this challenge is threefold: in the first place, the petitioners have chosen the wrong comparator, as the right to the benefit is that of the parent not the child. Secondly, there is no discrimination and, in any event, any discrimination was proportionate and so permissible.

[93] It was clear that the right to a benefit was that of a parent and not the child. The issue of discrimination could only arise in relation to a difference in treatment between adult asylum seekers and adults on benefits. This was accepted in *SG* at paragraph 237.

[94] In the second place, regulation 10(2) involved no discrimination. There was no analogy between asylum seekers (or their children) and those on benefits with a right to reside and remain in the United Kingdom (or their children). Reference is made to paragraphs 65-66 of *Blakesley* v *Secretary of State for Work and Pensions* [2015] 1 WLR 3150; and to paragraph 236 of *SG*.

[95] Even if there were any discrimination, it is well established that the appropriate test for justification, where general measures of economic or social policy are involved, is the "manifestly without reasonable foundation" test. Reference is made to *Bah* v *United Kingdom* (2012) 54 EHRR 21 ("*Bah*") (paragraph 37); *R(MA)* v *Secretary of State for Work and Pensions* [2016] 1 WLR 4550 ("*MA*"); *Humphreys* v *Revenue and Customs Commissioner* [2012] 1 WLR 1545 and *SG* (para 238).

[96] The petitioners' resort to dicta of Lord Mance in paragraph 52 of *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 to argue that the "manifestly without reasonable foundation" test should not apply reflects a failure of analysis. That discussion is concerned with the fourth stage of the consideration under Article 1 of

Protocol 1 of the Convention ("A1P1"): whether, on a fair balance, the benefits of achieving the legitimate aim of a measure outweigh the disbenefits resulting from the restriction of the relevant protected right. The context of that discussion was a restriction of the private economic rights of the insurers. It involved no general measure of economic or social policy. That is a quite different context from the present case, which falls squarely into a consistent line of authority (including *Bah* and *Humphreys*) which has very recently been confirmed by the Supreme Court in *MA*. As Lord Toulson explained in *MA*: "Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities" (para 32). Reference is made to paragraph 238 of *SG*, where Flaux J accepted that that was the correct test.

[97] Furthermore, if it were necessary to justify any difference of treatment towards asylum seekers, such a difference would be justified under that test. There is a legitimate purpose in the setting of asylum support rates, of discouraging economic migration and ensuring that limited financial resources are not expended on providing support which is in excess of the United Kingdom's obligations under the Directive. The difference would in any event be justified because asylum seekers and their dependants do not have an established right to remain in the United Kingdom *SG*, paragraphs 241-242).

[98] This ground of challenge was without foundation. That left the petitioners' case based on the PSED.

PSED

[99] Mr Johnston pointed out that in *SG* the court considered the claim that the respondent was in breach of the PSED under section 149 of 2010 Act in making the Amending Regulations. It held that that claim was unarguable. Leave for this ground had

been sought at the outset of the hearing before Flaux J (see para 5), but, after argument, he refused permission to apply for judicial review on that ground (para 334). Mr Johnston submitted that Flaux J was correct in so holding.

[100] Mr Johnston noted that the PSED is not a duty to achieve a result but only to have regard to the need to achieve the goals identified in section 149(1) of the 2010 Act (*Hotak* v *Southwark LBC* [2016] AC 811, paragraph 74). The PSED is concerned with process, not outcome, and the court should interfere only in circumstances where the approach adopted by the public authority is unreasonable or perverse. What is required is a realistic and proportionate approach to evidence of compliance with the PSED, not micro-management or a detailed forensic analysis by the court (para 329 of *SG*).

[101] He noted that Mr Bentley explained (at para 192 of Bentley Affidavit 1) that the PES was prepared for the purpose of compliance with the PSED and considered by the Immigration Minister before the Amending Regulations were made. The PES concluded that the respondent had complied with section 149 of the 2010 Act and that due regard had been given to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations. On the basis of the PES the Secretary of State was satisfied that there would be no disproportionate or unique impact arising solely on the grounds of sex: see Bentley Affidavit 1 at paragraph 199.

[102] Mr Johnston submitted that the PES was an adequate assessment of the respondent's PSED. No further assessment was necessary or appropriate. At its core, he said, the petitioner's argument in relation to the PSED is that lone parents need more money for their children. The issue is accordingly the needs of the children and not the sex of the parent. In the PES, the respondent looked at the needs of children carefully. Lone parents, whatever their sex, did not need more. Due regard under the PSED did not

require more detailed consideration of a problem which had not been demonstrated to exist (para 333 of *SG*).

[103] This ground of challenge should fail.

CEHR Submission

[104] As noted at the outset, the CEHR submitted written submission. It advanced the following propositions:

1) PSED: The Secretary of State was under the PSED when exercising her functions under the 1999 Act. In particular, the Secretary of State was under a duty to have due regard to the impact of reduction in asylum support on single parents with children, the majority of which were headed by woman, and sex was a protected characteristic. It was queried whether the PES constituted sufficient evidence of that due regard.
2) Section 55 of the 2009 Act: In exercising her functions under the 1999 Act, and in fulfilling her duties under section 55 of the 2009 Act, the Secretary of State was required to act compatibly with the Convention Rights of the petitioners under Article 3 and Article 1 of Protocol 1 ("A1P1") of the Convention. In respect of these, it was suggested that the court should be satisfied that the level to which asylum support had been reduced does not infringe Article 3 nor constitute impermissible discrimination on the grounds of sex (in respect of the petitioners) or on the grounds of asylum status (in respect of the petitioners and their children);
3) CFR: the Secretary of State was acting within the scope of EU law (namely, the Reception Directive) and was bound to act compatibly with the CFR, and

specially Article 24 concerning the rights of the child. It was suggested that the court would wish to examine whether the reduction in asylum support reflected the requirement that a child's best interests are the primary consideration; and

4) UNCRC: in fulfilling her duties under the 1999 Act, section 55 of the 2009 Act and under the Reception Directive, that the Secretary of State had due regard to the importance of meeting the requirements of Articles 3 (best interests of the child as a primary consideration), 28 (right to education) and 31 (right to rest and leisure).

[105] In respect of the PSED, and under reference to summary provided by Lord Uist in *Watt* v *Lothian Health Board* [2015] CSOH 117 of the treatment of the PSED in the English cases, it was suggested that there was a paucity of treatment of sex/gender in the PES, to the extent that it was queried whether the due regard duty had been discharged. There was no account taken of the disadvantage that will be suffered by predominantly female lone parents who will be unable to pool resources with a second parent. It was also suggested that the PES could not be characterised as being a "most careful" (*R (Bailey)* v *London Borough of Brent* [2011] EWHC 2572 (Admin) nor indicative with sufficient "particularity" (*R(Hurley and Moore)* v *Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) as to the discharge of the PSED. It was also suggested that there had not been regard to the impact on lone parent households.

[106] In respect of section 55 of the 2009 Act, the CEHR queried whether the answers lodged on behalf of the Secretary of State had disclosed how there had been compliance with the duty under section 55 of the 2009 Act and asked the court to ensure it was so satisfied.

[107] In relation to the Convention Rights referred to, it was suggested that it was a question for the court as to whether the reduction in asylum support (taken together with the "entire 'package' of restrictions and deprivations") was compatible with the Article 3 rights of the petitioners or their children, on the premise that a "decision" about the level of provision could constitute relevant treatment to engage the Article. Separately, it was submitted that benefits could be "possessions" for the purpose of A1P1 and, once conferred, must be administered in a way that was not discriminatory. The court was asked to consider whether the blanket reduction of asylum support and the reliance on economies of scale discriminated on the grounds of sex. The same question was posed separately, on the basis of immigration status (as an accepted category of "other status"), and hence it was said, asylum status, and discrimination in comparison with the children of persons settled in the UK and in receipt of state benefit.

[108] Finally, in relation to the CFR and the UNCRC, it was submitted that the Secretary of State was acting within the scope of EU law (the Reception Directive) and, in that context, bound to act compatibly with the CFR and Article 24 (concerning the rights of the child). The court was invited to consider whether the reduction in asylum support complied with the requirement of Article 24 that a child's best interests are the primary consideration. Separately, in fulfilling her duties under the 1999 Act, section 55 of the 2009 Act and under the Reception Directive the Secretary of State had to have regard to the importance of complying with the requirements of Articles 3, 28 and 31 of the UNCRC. While it was accepted that the UNCRC was not directly enforceable in domestic law, where Convention rights were engaged, those must be interpreted consistently with the UNCRC. In like fashion EU law instruments had to be interpreted consistently with the requirements of international instruments binding on member states.

Discussion

[109] At the heart of the petitioners' challenge is the contention that, at least in relation to child asylum seekers, the relative standard required by the Reception Directive (and any transposing provision) was a heightened welfare standard and not a basic one of subsistence. This was the central premise of the unlawfulness challenge (eg because the reduction and flat-lining offended against that heightened standard or other substantive rights), which was said to be derived from instruments such as the UNCRC and the CFR, but it also informed aspects of the methodological challenge and the discrimination arguments. It is appropriate therefore to begin by considering the standard required by the Reception Directive, before addressing the petitioners' grounds of challenge.

The Standard Required by the Reception Directive

[110] It was not disputed that the Reception Directive requires that the asylum support provided ensures full respect for human dignity and a dignified standard of living, maintains an adequate standard of health and meets the subsistence needs of the asylum seeker. This is the summary formulation used by Flaux J in *SG* (at para 138) and which I am content to adopt (see recital 5 and Article 13.2 of the Reception Directive). There are two aspects to this issue arising from the submissions before me: what standard the Reception Directive imposes (and whether this is different for children) and whether, in concrete terms, the present overall level of support (including asylum support) complies with that standard. (I address the second issue when I consider the lawfulness challenge.) The question of the standard required by the Reception Directive was considered in detail in the *Refugee Action* case (eg see paras 85 to 91, cited in *SG*) and again in *SG* (see the discussion

from para 138 onwards). In relation to the first issue, Flaux J accepted the legal analysis in the *Refugee Action* case as "entirely correct" (at para 138). He put it thus:

> "[138] In other words, the question whether the Secretary of State has complied with the minimum standard under the Reception Directive is an objective one to be determined by the court. The Secretary of State must make provision under sections 95 and 96 of the 1999 Act which ensures full respect for human dignity and a dignified standard of living, maintains an adequate standard of health and meets the subsistence needs of the asylum seeker. There is no margin of judgment or discretion available to the Secretary of State in considering whether that objective standard has been achieved. That is the point which is being made by the CJEU in Saciri.
>
> [139] However, as Recital (15) to the preamble to the Reception Directive recognises, it is open to member states to provide for a more generous level of support and in that context the 1999 Act provides that the Secretary of State may make provision for "essential living needs" of asylum seekers. I agree with Popplewell J that subject to the minimum standard required by the Reception Directive being achieved, it is a matter for the judgment of the Secretary of State what needs are to be regarded as "essential living needs". She may decide that a particular need is an essential living need, even though it would not be necessary to ensure a dignified standard of living. Provided that the minimum objective standard required by the Directive has been achieved, the judgment of the Secretary of State as to what needs constitute essential living needs is only open to review on well-established public law grounds, such as if the decision made is irrational or *Wednesbury* unreasonable…..Likewise, in my judgment, once the minimum standard is achieved, the EU law principle of proportionality does not come into play…."

I agree with those observations. It respectfully seems to me that the Reception Directive is to ensure "minimum" standards for the reception of asylum seekers, which will "normally suffice" to ensure a dignified standard of living and is "adequate" for the health of applicants and capable of ensuring their "subsistence": see recital 7 of the preamble and Articles 1 and 13.2. Leaving aside questions of provision in excess of the minimum required by the Reception Directive, in my view the standard it required is a "minimum" or subsistence standard.

[111] This also accords with the observations of the Court of Justice of the EU ("the CJEU") in *Federaal agentschap voor de opvang van asielzoekeers* v *Selver Saciri* (Case C-79/13)

("Saciri"), in which it is stated that the financial aid granted must be sufficient to ensure a standard of living adequate for the health of the applicants and capable of ensuring their subsistence (at para 37) and that the "material reception conditions" included housing, food and clothing" (at para 38, and which simply reflects Article 2(j) of the Reception Directive). It is transposed (in part) by the 1999 Act and is expressed as the provision of "essential living needs" in section 95. The provision of essential living needs must be interpreted in accordance with the minimum reception conditions required by the Reception Directive. It follows that I also agree with Flaux J's conclusion in *SG* (at para 160), that "'essential living needs' are concerned with a low threshold, in effect of subsistence".

[112] There is no guidance from the Court of Justice as to what is necessary to achieve those minimum standards, and accordingly, the court has to make its own assessment: see *SG* at para 282. In common with Flaux J, I also agree with Popplewell J that subject to the minimum standard required by the Reception Directive being achieved, it is a matter for the judgment of the Secretary of State what needs are to be regarded as "essential living needs" and that, provided that the minimum objective standard required by the Directive has been achieved, the judgment of the Secretary of State as to what needs constitute essential living needs is only open to review on well-established public law grounds, such as *Wednesbury* unreasonableness. It is for that reason that in respect of the kind of challenge as is made in these proceedings to asylum support, it is nonetheless necessary to consider that form of support in the context of the other provision (noted above) provided by the state to asylum seekers in the UK. I note that this also reflects Article 2(j) in which "reception conditions" means the full set of measures of support provided by the member state in accordance with the Reception Directive.

[113] It did not appear to me that Mr McBrearty seriously disputed that the language of the 1999 Act (providing for "living needs" that are "essential") and of the Reception Directive imposed no more than a subsistence-level standard of support. He did not put the matter precisely this way but, essentially on his approach, the same phrase "essential living needs" was to be given a different content when applied to child asylum seekers. This was the "heightened" standard Mr McBrearty advanced. At bottom, this was not really advanced as an available interpretation of the words used, so much as a standard derived from higher level instruments such as the CFR and the UNCRC, and said to operate alongside or to augment the standard in the Reception Directive. I turn next to consider that argument, in the context of the unlawfulness challenge.

The Bests Interests Duty and Welfare of Children: the Unlawfulness Challenge

[114] I have summarised above the many legal instruments cited by Mr McBrearty in support of a heightened duty of the relevant provisions insofar as applied to children. In broad terms, there were two strands to the argument for a heightened standard. The first line of authority was the child-centred holistic approach enjoined by the UNCRC and the other similar materials (eg the two UN General Comments Nos 14 and 17) Mr McBrearty preyed in aid. Article 24 of the CFR and Article 3 of UNCRC, especially, were said to constitute fundamental legislation and were relied on as requiring a higher, welfare standard for child asylum seekers in the application of the Reception Directive and of "essential living needs" in sections 95 and 96 of the 1999 Act. Central to this approach was to start with the bests interests of the child as a primary consideration, and which, allied to issues of welfare, resulted in an irreducible welfare standard, which it was said regulations 10(2) and 9(4) breached. In like fashion, the second strand of this argument

was based on section 55 of the 2009 Act, read together with the ECM Guidance, and which was said to indicate a welfare standard that was higher than subsistence provision.

[115] Mr Johnston resists the contention that the best interests duty imposed a heightened standard in respect of child asylum seekers. Mr Johnston does not challenge the petitioners' reliance on the Reception Directive, on section 55 of the 2009 Act or on the ECM Guidance *per se*. However, he does challenge the petitioners' reliance on, among other things the UNCRC and similar materials; and he resists the petitioners' contention that there is a higher standard in the Reception Directive, and in the domestic provisions insofar as applied to dependent children of asylum seekers.

[116] I have already indicated above that in my view the standard of support required by the Reception Directive and the 1999 Act (providing support for essential living needs), imposes a relatively low level of support, ie of subsistence. I do not accept that the Reception Directive provides for a different and higher standard for child asylum seekers, at least as a matter of interpretation. In my view, Articles 13.2 (the general rule on material reception conditions) and 17 (the general provision for persons with special needs) cannot be construed in this way. On a proper reading of it, the Reception Directive does not support a differentiation between the standards applicable to child and to adult asylum seekers. While there is reference to the bests interests of the child (in Article 18.1), had the intention been to require a different, higher standard for children, this could easily have been provided. It wasn't. The Reception Directive requires that the member state have regard to the best interests of the child as a primary consideration (Article 18), but the standard to be met is that in Article 13.2, which I have considered above. Indeed, Article 13.2 of the Reception Directive expressly provides that the standard "is met in the specific situation of persons who have special needs in accordance with Article 17".

Article 17 sets out the "general principle" for Part IV of the Reception Directive (applying to persons with special needs, "after an individual evaluation of their situation": Article 17.2), and which includes minors. The stipulation that the best interests of the child are a primary consideration is stated in Article 18.1. In respect of children, therefore, the Reception Directive requires that the same standard (in Article 13.2) as is applied to adults is met, with the proviso that that standard is met in their specific situation as falling within the class of persons who have special needs. Accordingly, the standard of support is the same, in respect of both child and adult asylum seekers, whether derived from the Reception Directive or section 95 of the 1999 Act, which is to ensure a dignified standard of living, adequate for the health and ensuring the subsistence of child dependents of asylum seekers. Mr McBrearty advanced the unlawfulness challenge on the premise that subsistence and welfare (or the best interests of the child duty) were necessarily dichotomies. The Reception Directive requires, perhaps, a more nuanced understanding. The standard in the Reception Directive (set out above) takes account of and therefore encompasses the best interests of the child (in Article 13.2). In other words, in this context, the requirement to treat the best interests of the child as a primary consideration is woven into the very fabric of the Reception Directive. This is inimical to an approach, as contended for by the petitioners, that resorts to the best interests duty as an external factor requiring a different ("heightened") standard.

[117] Even reading the Reception Directive (as a form of delegated legislation) compatibly with the CFR, as Mr McBrearty argued, this is in my view of no avail to the petitioners. The reference to human dignity in Article 1 and the reference to a right of asylum in the CFR are already reflected or given effect to in the Reception Directive (see eg recital 5). Unless it is the case that the prohibition in Article 21 of the CFR against

discrimination necessitates an equivalence between payments to asylum seekers and the payment of mainstream benefits to those settled in the UK (which I will address, below), this does not advance matters. What then, of Article 24 of the CFR, on which Mr McBrearty placed so much weight? This states that the best interests of the child must be a primary consideration. The problem for Mr McBrearty is that so, too, does Article 18.1 of the Reception Directive. Accordingly, nothing in Article 24 (or the other parts of the CFR relied on) adds to what is contained in and required by the terms of the Reception Directive itself.

[118] In relation to Mr McBrearty's reliance on the UNCRC, I accept as correct Mr Johnston's submission that there is no legal basis for invoking the UNCRC, as an international treaty and to the extent that it is not incorporated into domestic law. *A fortiori* is this the case for the two UN General Comments Nos 14 and 17: see Lord Reed's observation to this effect in *SG* v *The Secretary of State for Work and Pensions* [2015] 1 WLR 1449 ("*SG* v *SSWP*") at paragraph 82 and his reference to paragraph 23 of *ZH(Tanzania)* v *SSHD* [2011] UKSC 4. In the light of the observations of the Supreme Court in *SG* v *SSWP* (at para 90), I also accept that the question of whether a domestic legal provision is vitiated by an erroneous interpretation of the UNCRC (or other international instrument not incorporated into domestic law) is not justiciable in the UK courts. (I do not express any view as to whether either of these instruments nonetheless imposes an interpretative imperative.) Even if regard is had to its provisions, these are, in the main, expressed at such a level of generality (eg the recognition in Article 27 to "the right of every child to a standard of living adequate to the child's physical, mental, spiritual, moral and social development") as to provide no assistance to the question of what is the irreducible minimum standard required by the Reception Directive. In any

event, part of Mr McBrearty's argument was to contend for a heightened reading of the Reception Directive based in part on Article 3(1) of the UNCRC, or which requires parity with the children of those in the UK in receipt of mainstream benefits. I am persuaded that the UNCRC affords no basis for this argument, for the reasons set out in *SG* at paragraphs 246ff.

[119] Turning to the passages of the ECM Guidance, I am not persuaded that these materials do require a different content for, or interpretation of, the Reception Directive or the phrase "essential living needs" in the 1999 Act than that I have set out above. The ECM Guidance is statutory guidance to which regard must be had: section 55(3) of the 2009 Act. The ECM Guidance, however, appears to me to contain much that was not relevant to the questions argued before me (eg they are directed to face-to-face interactions of UKBA staff and asylum seekers: eg para 1.13ff) or to constitute high level guidance (eg about line-management responsibility for children's welfare (see para 1.9(a) to (h)) or general principles (see eg paras 1.4, 1.17, 2.6), and which (as explained in the Bentley Affidavits) was already taken into account by the Secretary of State in her formulation of the Amending Regulations. In any event, I accept Mr Johnston's submission that the ECM Guidance cannot create obligations that exceed those in the 2009 Act (which was the thrust of Mr McBrearty's argument).

[120] Turning to section 55 of the 2009 Act, in my view, the terms of section 55(1) and (3) recognise a general duty to safeguard and promote the welfare of children but they do not impose a duty to achieve a specific result. Even accepting that this wording of the 2009 Act is understood as incorporating the spirit of Article 3 of the UNCRC (*per ZH* at para 23 and cited in *SG* v *SSWP*), it does not extend matters beyond the recognition of the best interests of the child as a primary consideration; but, as discussed above, this is already

embodied in the Reception Directive. The substantive right is that the decision-taker must take into account the best interests duty as a primary consideration (not, *pace* the CEHR submission "the" primary consideration), which in my view the Secretary of State demonstrably has done. This conclusion also accords with the decision of Flaux J, at paras 251 to 259, and with whose decision and reasoning I agree.

[121] It follows that I accept Mr Johnston's submission that there is no warrant for imposition of a heightened standard in respect of children beyond what the Reception Directive itself requires, and as expressed in domestic law as essential living needs. In particular, I accept his submission, and the cases he cites, that the best interests duty does not require the provision of a higher standard of asylum support to child asylum seekers or one that is equivalent to the level of benefits payable in respect of children of settled adults in the UK.

[122] Nothing in the materials or submissions presented to me persuade me that the present level of asylum support breaches section 95 of the 2009 Act or the standard in the Reception Directive. In my view, in the provision of asylum support at the present level, in combination with the other forms of support provided to asylum seekers in the UK, the Secretary of State has complied with the objective minimum standard required under the Reception Directive in respect of asylum seekers and their dependent children. In reaching this conclusion, I am fortified by the careful, thorough and cogently reasoned decision of Flaux J in *SG*, including his treatment of the heightened standard argument. Building on Popplewell J's analysis, he concluded that there was "no question of the Secretary of State not having complied with the objective minimum standard required under the Reception Directive in respect of asylum seeker children" (*SG*, paragraph 289). Nor do I accept the petitioners' argument that this analysis is flawed.

[123] As noted above, at paragraph [10], the petitioners' challenge to regulation 9(4) (ie the excluded items) was advanced on two of the same grounds as their challenge to regulation 10 (ie the unlawfulness challenge), specifically the duty to treat the best interests of the child as a primary consideration.

[124] I note that the lawfulness of the excluded items was considered in the *Refugee Action* case and in *SG* and, in respect of each of the excluded items, this was found to be compatible with the minimum standard required by the Reception Directive. The exclusion of toys was dealt with in *Refugee Action* at paragraph 102 (quoted at para 227 of *SG*) and in *SG* at paragraph 284; the exclusion of computers and of entertainment expenses (in context, "wider socialisation costs") was dealt with in *SG* at paragraphs 284 and 286, respectively. I find this reasoning persuasive. In any event, it was not specifically suggested that that treatment itself was wrong, rather that, more generally, the exclusion of these items repeated the unlawfulness in not applying the heightened standard contended for. Similarly, in respect of wider socialisation costs (the compendious phrase used to cover communication), I accept as correct that the Reception Directive requires free access to recreation, not payment for it (as it was aptly put by Flaux J at the end of para 286) and that free access is provided as part of universal services, including free school trips and internet access via free libraries. I do not accept that the exclusion of the excluded items from regulation 9(4) of the 2000 Regulations constituted a breach of the standard required by domestic provisions or the Reception Directive.

Were the Amending Regulations Promulgated Without Reference to Best Interest of the Child as a Primary Consideration?

[125] It may be convenient here to deal with the petitioners' contention that the

Amending Regulations were promulgated without regard to the best interests duty. The basis for this contention is that the petitioners find no reference to this in the methodological materials. However, this, it respectfully seems to me, is to ignore the terms of paragraph 7.8 of the Explanatory Memorandum, which states:

> "In taking this decision full consideration has been given to the **legal duty** to have regard to the need **to safeguard and promote the welfare of children**. The changes involve reductions in the cash payments to families, but ensure that sufficient funds continue to be available to enable parent **to care for their children safely and effectively and to provide for their health and development**." (Emphasis added.)

I also accept the statements in the Bentley Affidavit 1 at paragraphs 187 to 191 concerning these matters. I place reliance in particular on Mr Bentley's statement at paragraph 191 (which was also made to and accepted by the court in *SG* at para 279) that:

> "The package of support available, both before and after the changes to the payment rates, ensures that the children of destitute asylum seekers are provided with stable and safe accommodation and with adequate provision for their ordinary everyday essential needs. I do not consider that the reduction in the amount of cash provided to the parents therefore has an adverse effect on their safety or the quality of the care they receive from their parents or their general health".

[126] There is no reason to doubt this statement. In any event it is supported by Mr Bentley's further explanations as to how these needs were addressed in the context of each of the five categories of expenditure. These matters were canvassed in length in *SG*. In the context of the methodological challenge, Flaux J set out the parts of the 2015 review concerning these five categories (from paras 72 to 86), the parties' submissions thereafter, and his determination of these matter (at paras 154 to 168). These five categories of expenditure were also referred to in the context of the additional criticism that there was a failure to have regard to the best interests duty when assessing what expenditure was necessary: see the submissions at paragraph 194 to 234. He concluded that there was no

error in the assessment of the essential living needs of children (see paras 246 to 291). The submissions and information provided to me was materially the same as that considered by Flaux J. I agree entirely with his analysis. Given the identity of the arguments presented in that case and here, and the fact that my conclusions and reasons are the same as those of Flaux J, I need not repeat the detailed consideration he gave to the individual categories of expenditure. I accept that the Secretary of State gave appropriate consideration to what was in the best interests of children in the setting of the rate of asylum support and in her determination of the matters that fell to be excluded from essential living needs, for the reasons given. I also accept that the Secretary of State was not required to ensure equivalence between payments made in respect of asylum seeker children and the children of settled adults in receipt of various forms of state benefit. It follows that neither the reduction *per se* nor the equalisation of the rate as between adult and child asylum seekers (the petitioners' "flat-lining") is unlawful on any of the grounds advanced.

[127] I turn to consider the methodological challenge, which was framed as a *Wednesbury* challenge.

The Methodological Challenge

[128] The petitioners did not rely on all of the criticisms made in the Charlesworth Report. They also eschewed reliance on the comparisons she drew (in section 6) with fostering allowance.

[129] While Mr McBrearty drew attention to Ms Charlesworth's phrase of "pick and mix", I did not understand him to be adopting her criticisms that it was inherently inconsistent to use ONS data for some categories of expenditure, and to use Home Office

or market research for others. At its highest, she suggested that it was "more reasonable" to use a single method to determine the rate rather than different methods for different items of expenditure: see paragraph [18(4)], above. These criticisms, at least, may be within her area of expertise of statistical analysis. In any event, I regard this criticism as ill-founded. Disagreements about methodological approaches or data sources, without more, do not satisfy the *Wednesbury* test.

[130] There was a degree of inconsistency in the Charlesworth Report in its criticism of the reliance by the Secretary of State on ONS data, on the one hand, and the criticism of the use of research other than from the ONS. Like Flaux J, I accept the explanation as to why different sources of information were used, or adjusted, for different categories of expenditure. I agree with the conclusion of Flaux J that it was permissible for the Home Office to conduct its own research. I also accept the explanation provided for the use of lower figures than the ONS data disclosed for certain categories of expenditure (such as clothing, communications and travel), on the basis that the ONS data of the lowest decile exceeded what was "essential" expenditure on such items. I reject the suggestion in the Charlesworth Report (eg see para [18(4)], above) that this demonstrated manipulation of the material or that this was driven by budgetary concerns. I note that Flaux J also rejected the similar contention that the 2014 or 2015 reviews involved "reverse engineering": see paragraphs 148 and 149.

[131] Turning to the specific criticisms that were advanced on the strength of the Charlesworth Report, in relation to the reliance on the lowest decile of the ONS data, if the gravamen of the criticism was that the expenditure of the lowest decile of the ONS was insufficient to meet the essential living needs of an asylum seeker, there is no support in the material before me that this was the case. Rather, the Home Office analysis of the

expenditure of the lowest decile disclosed discretionary expenditure, ie considerable expenditure on non-essential items. There is no question, therefore, of the ONS data of the lowest decile being insufficient for the purposes of assessing the essential living needs of an asylum seeker, as is posited in the Charlesworth Report (see para [18(8)], above). There is nothing, therefore, in her criticism that the asylum rate was only 53% of the lowest decile on the ONS figures (see para [18(6)], above). The critical question is whether the new rate meets the statutory obligation to provide for essential living needs, notwithstanding that the new rate is significantly lower than the prior rate. In any event, on the basis of the explanation offered in the Bentley Affidavits, I accept that the Secretary of State did not "premise her entire methodology" on the assumption that the lowest decile was sufficient to meet the essential living needs of an asylum seeker. The ONS data was supplemented by Home Office market research.

[132] I also accept the submissions on behalf of the Secretary of State about the absence of an "accepted" correlation between low income and health. This was no more than a matter of assertion in the Charlesworth Report (the excluded items "will have a bearing" on the welfare of children: see para [18(8)], above), notwithstanding that its author professed no expertise in child nutrition. As the Bentley affidavits disclose, the Secretary of State has had regard to information (the 2014 Survey already referred to) in respect of the nutritional and calorific needs of children of different ages. As the petitioners' criticism is a failure to have regard to this material, not one based on the irrationality in the consideration of it, this criticism also fails.

[133] In relation to the reliance on economies of scale with the consequence, it was said, of double-counting, this was one of the features of the 2015 review most criticised. I note that this criticism was considered in detail (at several points in *SG*) and rejected by Flaux J.

He set out the 2014 and 2015 reviews comprehensively (at paras 52 to 85, especially at paras 72ff). Flaux J also fully set out the evidence in *SG* relating to the specific categories of expenditure: see, eg, paragraphs 78 to 86, 108 to 111, I do not here repeat them. His own conclusions are set out at paragraphs 154 to 168, although he returns again to the issue of economies of scale at a later point in *SG* (eg at para 256). Essentially the same material that he considered was also presented in these proceedings. I agree with his analysis and his conclusions that this did not instruct any error or unreasonableness on the part of the Secretary of State. Furthermore, in the light of the explanation provided by Mr Bentley, at paragraphs 34 to 46of Bentley Affidavit 1, I accept that the Secretary of State did not proceed in the manner the petitioners assert. Mr Bentley explains (at para 41) that an adjustment was made to the ONS data, to correct for the allowance in that data for economies achieved by multiple-person households. This was cross-checked with the data in ONS Table 3.3 (for single-adult non-retired households in the lowest 20% income group). I accept this explanation and that there was no double counting. For completeness, I note that it was this factor that led Flaux J to reject the allegation of double-counting: see paragraphs 254 to 255 of *SG*.

[134] I also note that reliance on economies of scale was a feature of the assessment of support made by some of the other EU member states. Indeed, as Flaux observes (at para 256), Mr Bentley explained that the Home Office did not adopt a diminishing amount for additional members of a family (ie a lesser sum than £36.95 for the third,, fourth or additional member of a family), such as was done in some other EU countries. I am not persuaded that by the Secretary of State's use of economies of scale as part of the methodology, she erred in law or acted unreasonably in a relevant sense.

[135] At the heart of the petitioners' criticisms about reliance on economies of scale,

"flat-lining" and the assessment of individual categories of expenditure, was the contention that the asylum support provided constituted a breach of the Reception Directive, and that the standard it required, at least in relation to children, was one of welfare and not mere subsistence. This argument overlaps with the best interests of the child argument, which I have already considered. If this argument was predicated on the contention in the Charlesworth Report (recorded at para [18(5)], above), that it was "unreasonable to presume" that the duty toward children could be met through the economies of scale of a multi-person household, I would reject that basis. Leaving aside whether the subject matter of this assertion is outwith her expertise, it is not borne out by the material presented to me. The material discloses a careful and detailed consideration of those needs in the context of the different categories of expenditure. The criticism of the use of economies of scale is, in my view, unjustified.

[136] The petitioners rely on S4S and state benefits as part of their discrimination argument. They also referred to the marginal difference between S4S and the asylum support rate as suggestive of a breach of the heightened standard contended for in respect of children. (I did not understand the petitioners to argue for the purposes of this argument that the asylum support had necessarily to be linked to state benefits. This restraint is well judged, given the comments at para 169 of *SG* as to the fallacy of that argument.) The respondents' reply, which I accept, is that the small difference between S4S and asylum support did not assist in ascertaining whether S4S was too high or asylum support too low. Rather, the support under section 95 fell to be assessed on its merits and whether it met the objective minimum standard laid down in the Reception Directive and as transposed into domestic legislation. I agree with this submission and that, in the present context, a comparison with S4S, at least where asylum support was greater than

S4S, did not advance the argument.

[137] In relation to the specific criticisms comprising the methodological challenge, I am satisfied that these are unjustified for the reasons advanced by Mr Johnston under reference to the passages in the Bentley affidavits that he identifies.

[138] Stepping back from these particular criticisms, the argument was also made that collectively, these errors meant that the methodology was wholly inadequate and so flawed as to justify reduction of the provisions sought. However, I am satisfied that the inquiry conducted for the purposes of the 2015 review was sufficient to enable the Secretary of State to make an informed and rational judgment as to how much was necessary to meet the essential living needs of asylum seekers. This is what the law requires; namely, did the Secretary of State "take reasonable steps to acquaint [herself] with the relevant information to enable [her] to answer [the correct question] correctly": *per* Lord Diplock in *SS for Education and Science* v *Tamseside Metropolitan Borough Council* [1975] AC 2014 at 1065B. While there may be other ways to carry out researches, I am not persuaded that the Secretary of State acted irrationally or failed to have regard to a relevant factor when conducting the review that led to the Amending Regulations. I am satisfied that the asylum rate set after the 2015 review was arrived at after careful consideration of all the relevant factors; and that it met the minimum standard of the Reception Directive. Furthermore, it is not *Wednesbury* unreasonable or demonstrative of error that the level of asylum support is different from, and lower than, the rate in previous years.

Other Challenges to the Charlesworth Report

[139] Given that I am not persuaded by the Charlesworth Report considered on its

merits, I do not need to address in any detail the other criticisms the Secretary of State made about Ms Charlesworth's status as an expert or the fact that her report was premised on the wrong statutory provision (section 17 of the Children Act). I accept the broad criticism made by the Secretary of State that the Charlesworth Report is based on the wrong statutory test. It was not suggested that the statutory formulation in section 95, of "essential living needs", did not correctly reflect the obligations in the Reception Directive. Notwithstanding this, the Charlesworth Report proceeds on the basis that this may be equiparated with the standard under section 17 of the Children Act or, in Scotland, section 17 of the Children (Scotland) Act. However, I accept as correct the conclusion of Flaux J, that the tests under these other statutory provisions are not the same and are irrelevant to the consideration of essential living needs for the purpose of the Reception Directive as transposed into domestic law. As this conflation of different legal tests is a *leit motif* running through the whole of the Charlesworth Report, its conclusions are at the very least rendered suspect for the purpose of the petitioners' methodological challenge. In relation to the challenges to her expertise, I would be inclined to accept these criticisms as well-founded. Notwithstanding the acknowledged limits of her own expertise, Ms Charlesworth nonetheless strayed beyond those limits (eg as noted above, in para [132]). In areas that were within the field of her experience, of statistical analysis, her report did not support a relevant legal challenge. As noted above, disagreements about methodology, or a contention that another approach would have been "more reasonable", do not constitute relevant grounds of challenge.

Discrimination

[140] Under this argument, the petitioners' principal contention is that the difference in

payments made in respect of children in asylum support as compared with mainstream benefits payable in respect of children of settled adults is discriminatory, contrary to Articles 14 and 8 of the ECHR read together with Article 21 of the CFR.

[141] There are five issues in this ground of challenge: (i) whether there is an analogy as between children of asylum seekers and children of settled adults, (ii) whether the children of asylum seekers are the correct comparator; (iii) whether there is any discrimination; (iv) if there is, whether it is proportionate and, (v) in answering that question, what is the correct test for justification.

[142] In relation to (i), in *Blakesley* v *Secretary of State for Work and Pensions* [2015] 1 WLR 3150, the Court of Appeal in that case provided reasons (at para 65), which I find cogent, as to why, for the purpose of Article 14 of the ECHR, there is no analogy between asylum seekers and settled adults in need of social assistance. This is because it is not known whether an asylum seeker has any entitlement to remain in the UK. Any entitlement to asylum support for them and their dependants derives from legislation passed to comply with the UK's obligations under the Receptions Directive. Those adults settled in the UK and who need social assistance receive mainstream benefits for themselves and their children under an entirely separate statutory regime. The two positions simply are not comparable. The claimant's claim in *Blakesley* for state benefit (in the form of income support) pre-dating the determination of their status as a refugee with an entitlement to remain in the UK therefore failed. For completeness, I note that Flaux J followed *Blakesley*: see para 236. While he may have been bound to do so, I am content to do so as I find its reasoning persuasive.

[143] In relation to (ii), Mr McBrearty contends that Article 21 of the CFR requires to be read consistently with Article 14 of the ECHR. He does so in part, as I understand it, to

argue that immigration status falls within the scope of "other status" such as to bring Article 14 ECHR into play. I did not understand Mr Johnstone to contest this. Rather, the parties join issue on whether the children of asylum seekers and the children of settled adults in receipt of state benefits are the correct comparator. Mr McBrearty contends (either on the basis of an extended reading of "victim" status or an expansive understanding of concept of the comparator for Article 14 ECHR purposes, based on *AL (Serbia)* v *SSHD* [2008] UKHL 42 at para 24) that it is of no moment that the benefit is payable to the parent asylum seeker and not directly to the child. Mr Johnston argues that this factor is critical.

[144] The matter was dealt with shortly in parties' submissions, and in *SG* (at para 237), where Flaux J accepted the argument on behalf of the Secretary of State. I agree with his conclusion that the correct comparator is the parent with the right to the payment in question, and not the child. The starting point is that the right of the relevant benefit is of the parent, not the child. If that is correct, the only ECHR right or rights in play (having regard to the reference to A1P1 in the submission of the CEHR) are those of the parent. The correct comparator, therefore, is of the adult asylum seeker and the settled adult in receipt of state benefit. I note, too, that the Supreme Court in *SG* v *SSWP* (at para 146) rejected a similar argument; namely, that in a case concerning the A1P1 rights of women, and their associated derivative right not to be discriminated against, it was impermissible to argue that any aspect of the UNCRC (ie rights concerning *children*) could inform their rights. If it is correct that the difference in treatment is as between adult asylum seekers and settled adults in receipt of state benefit, then resort to the UNCRC and the other child-centred instruments relied on (such as section 55 of the 2009 Act, the ECM Guidance or the CFR) are not relevant.

[145] In relation to (iii), in the light of my determinations of issues (i) and (ii), there is no scope for discrimination or for any justification (issue (iv)), or the question of the correct test for justification (issue (v)). Again, issue (iii) was taken very shortly in submissions, as the main argument was focused on issue (v). In relation to (v), for completeness, I record that I do not accept the test advanced by the petitioners. I accept the submission that, as the cases of *Bah* (at para 37), *MA* (at para 32) and *Humphreys* (at paras 15 to 19) make clear, where general measures of economic or social policy are involved, the test is that of "manifestly without reasonable foundation". While the petitioners relied on a different formulation (of Lord Mance in para 52 of *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016), I accept the submission for the Secretary of State that that case was not concerned with a general measure of economic or social policy, but with a restriction on the private economic rights of insurers. This accords with Lord Toulson's observation in *MA* (at para 32) that choices about welfare systems involve policy decisions on economic and social matters, and which are "pre-eminently matters for the national authorities". This echoes the observations of Jackson LJ in *Blakesley* (at para 66), concerning the claimant refugee's unsuccessful claim to back-dated state benefits, that in this sphere (of entitlement to state benefit) it is "for the legislature and the executive to determine how national resources should be allocated".

[146] Nothing in *Bah* or the other cases imposes on the state an obligation to provide the same support to adult asylum seekers as is provided to settled adults in receipt of state benefit. This was also the conclusion in *SG* (at para 238, having recorded the parties' submissions at para 177ff). The European Court of Human Rights has consistently applied that test in cases of socio-economic policy. The present proceedings concern policy assessments of this kind. Like Flaux J, I can see no justification for diluting that test or

imposing a more stringent one in the case of children, based on the unincorporated UNCRC, in circumstances where the European Court of Human Rights has not done so. Nor, in my view, does reliance on Article 21 of the CFR assist the petitioners, standing this test. It follows that I accept the submission on behalf of the Secretary of State on this issue.

[147] Accordingly, for the purposes of issue (iv), if it were necessary to justify a difference in treatment between asylum seekers (and their dependant children) and settled adults (and their dependent children) in receipt of state benefits, in my view the Secretary of State can justify that difference on the basis that she sought to do; namely, that there is a legitimate purpose in the setting of the asylum support rates (following the 2015 review and the Amending Regulations) to discourage economic migration and to ensure that limited financial resources are not expended on providing asylum support which is in excess of the UK's obligations under the Reception Directive. A difference in treatment is in any event permissible, in my view, having regard to the fact that asylum seekers and their dependents do not have an established right to remain in the UK: see *SG* at paragraphs 241 to 242, and the observations of Jackson LJ in *Blakesley* (at para 66), finding that there was an objective justification for different treatment of the same two groups as we are here concerned with, that "[a]sylum seekers are a large group of people, an unknown proportion of whom have no entitlement to be here. Their entitlement to welfare support derives from international instruments, which do not apply to British citizens". In my view, there was no unlawful discrimination on any of the bases the petitioners contended for. Further, any difference in treatment was justified, on the application of the correct test. It was not manifestly without reasonable foundation. This ground of challenge also fails.

PSED

[148] The premise underlying the petitioners' challenge under this head is that the vast majority of single-parent households in the UK are headed by women and that the needs of single-parent households are different from two-parent households. The PSED is engaged on the issue of gender. Accordingly, as this argument runs, in the absence of express consideration of the particular needs of single-parent households headed by female asylum seekers, the PES is flawed and the PSED is breached.

[149] The submission on behalf of the Secretary of State that the PSED is not a duty to achieve a result but only to have regard to achieve the goals identified in section 149(1) of the 2010 Act (ie that it was concerned with process and not result), was not really disputed by the petitioners. Accordingly, the court may only interfere in circumstances where the approach of the public authority, here the Secretary of State, is perverse or unreasonable. The thrust of the submission on behalf of the Secretary of State was that the petitioners' argument was misconceived, as their principal concern was really about the needs of the children and not the sex of the parent.

[150] I start by adopting the principles derived from the case law and set out at paragraphs 329 to 331 in *SG*, and which I do not here repeat. I also accept Mr Bentley's evidence that the PES was prepared for the purpose of compliance with the PSED (see Bentley Affidavit 1 at para 192); that the PES concluded that the Secretary of State had complied with the duty and that due regard had been given *inter alia* to the need to eliminate unlawful discrimination and to advance equality. I also accept his evidence (Bentley Affidavit 1 at para 199), that, on the basis of the PES, the Secretary of State had been satisfied that there would be no disproportionate or unique impact arising solely on the grounds of sex/gender insofar as lone parents tend to be women.

[151] I am satisfied that the PES was adequate, in the *Hotak* sense (at paras 73 to 75), namely, that the Secretary of State engaged in a "proper and conscientious focus on the statutory criteria". In my view, Mr Johnstone is correct in his submission that the petitioners' core complaint is that lone parents need more money for their children. I also accept as well-founded his submission that the PES looked at the needs of children carefully and that lone parents, whatever their sex, did not need more. The obligation of due regard was discharged and, as it was put at paragraph 333 of *SG* dealing with essentially the same argument, "section 149 did not require a more detailed consideration by the Secretary of State to a problem which had not been demonstrated to exist". It follows that the petitioners' challenge on the basis of breach of the PSED also fails.

The CEHR Submission

[152] It remains for me to address the articulate and subtle submission of the CEHR. There was considerable overlap between the petitioners' arguments and the points offered for consideration by the CEHR and they fall to be disposed of in the same manner. In relation to the criticism that the methodology adopted by the Secretary of State failed to consider the child's welfare, I have already addressed this argument. However, their submission raised two additional points, namely Articles 3 and A1P1 of the ECHR.

[153] In relation to Article 3, standing my conclusion that there was no breach of the minimum standard provided for in terms of section 95 of the 1999 Act or required by the Reception Directive, it follows that their expression of concern about a possible breach of Article 3 is unwarranted. There is simply no basis for a conclusion that the overall package of support results in treatment of the petitioners or their children that is inhuman or degrading. The case they refer to, of *R(Limbuela)* v *SSHD* [2006] 1 AC 396, where a

similar question was considered, concerned claimants who were entirely excluded from receiving asylum support. That is manifestly not the position here.

[154] The other additional point raised by the CEHR was the prospect of a separate ground of discrimination under Article 14, but in respect of A1P1 rights of the petitioners. The Secretary of State accepts for present purposes that asylum support (by analogy with social security benefits) may be possessions for the purpose of A1P1. She contends, however, that this ground of discrimination should fail for the same reasons as that advanced under reference to Article 8 in combination with Article 14. There was no discrimination between the two categories of parents and, even if there were discrimination, this was justified (on the application of the manifestly without reasonable justification test). I accept as entirely correct the submission on behalf of the Secretary of State. It follows that, as with the other Convention Right relied on, there was no unlawful discrimination arising from Amending Regulations of any rights of the petitioners under A1P1.

The Court of Appeal in JK

[155] As noted above, leave was sought from the Court of Appeal to appeal some of the grounds of the decision of Flaux J in *SG.* In an extended decision, leave was refused. I have considered parties' oral and written submissions made in respect of the Court of Appeal decision. In short, the Court of Appeal decision did not cause either party to change their position. On balance, I did not find that these materially develop the arguments I had already heard. Nor was it helpful to discuss these through the somewhat distracting lens of whether the Court of Appeal decision was itself correct (as the Secretary of State contends) or not (the petitioners' position). I therefore do not trouble to record those submissions, though I am

grateful for the additional work that went into their preparation.

[156] It remains for me to thank Counsel for their able, thorough and well researched oral and written submissions, to thank Solicitor Advocate, Christine O'Neill, for her very helpful submission on behalf of the CEHR, and to thank the parties' Agents for the well-ordered volumes of productions and the several the lever arch files of the principal authorities. I shall put the matter out By Order to discuss the terms of the interlocutor as well as any ancillary matters.