Neutral Citation Number: [2012] EWHC 1896 (Admin)

Case No: CO/12131/2010 & CO/1164/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre

Date: 10/07/2012

Before :

THE HONOURABLE MR JUSTICE FOSKETT

- -

Between :

MK (1)
AH (2) — **Claimants**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

and

REFUGEE ACTION — **Intervener**

- -
- -

Martin Westgate QC and Ranjiv Khubber (instructed by **Platt Halpern**) for the **Claimants**
Samantha Broadfoot and Tom Poole (instructed by **The Treasury Solicitor**) for the **Defendant**
Mark Henderson and Alison Pickup (instructed by **the Migrant's Law Project**) for **the Intervener** made written submissions

Hearing dates: 10-11 May 2012

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Approved Judgment

MR JUSTICE FOSKETT:

Introduction

1. This case brings into focus again the tension that exists between, on the one hand, the obligation of the State to provide temporary accommodation and assistance for those seeking asylum who are or risk being destitute whilst their renewed or fresh application for asylum is considered and, on the other, the desire of the government not to incur the considerable public expense in doing so in unmeritorious cases - which many (though not all) are ultimately found to be. In 2009/2010 the cost of funding the kind of support in issue in this case was £102 million out of a total cost of providing asylum support in the same year of approximately £514 million.

2. The issue arises in the context of the cases of two men, one of whom is single and the other of whom is married with children but who had not brought his family with him to the UK, who failed initially in their claims for asylum, but who then submitted new representations.

3. It follows that it is not a case that engages directly concerns about the interests of children or other dependants for whom the asylum seeker has responsibility and any statutory provisions designed to protect their interests (see, for example, section 94(5) of the Immigration and Asylum Act 1999 - 'the 1999 Act'). I should make it clear that merely because the case does not engage those issues does not mean that they are not potentially highly important: it means simply that they do not arise directly for consideration in this case and, as I shall indicate below, I propose to focus so far as possible solely on those matters that go directly to resolving the issues that arise in the present case.

4. Refugee Action (an independent national charity, largely funded by the UKBA, that provides advice and support to asylum seekers and refugees in the UK and which is a member of the National Asylum Stakeholder Operational Forum - 'NASOF') has been permitted, on the direction of Hickinbottom J, to intervene in the proceedings and make submissions in writing. Each Claimant had, at times, received help from Refugee Action, but their present cases are, of course, advanced now by their own advisers. Refugee Action's submissions (drafted by Mr Mark Henderson and Ms Alison Pickup) deal with somewhat broader issues than those arising directly in the context of this case. Whilst the submissions are very helpful in informing the debate on the issue that lies at the heart of this case, as I have already indicated, I am proposing to confine my decision so far as possible to the way that issue is to be resolved and to that alone.

5. The general issue and related topics have been addressed by the courts on previous occasions during the last decade or so (see paragraph 62 *et seq* below). It is, perhaps, important to emphasise at the outset that the court's role is simply to review the legality of the current policy by reference to the well-established public law parameters: it is not to review or comment on the policy implications as such and certainly not upon its political implications. I venture to draw attention to what Lord Hope of Craighead said in the case of *Limbuela v Secretary of State for the Home Department* (to which I will be referring in more detail later at paragraphs 93-100) when he said this:

> "13. The question whether, and if so in what circumstances, support should be given at the expense of the state to asylum-seekers is, of course, an intensely political issue. No one can be

> in any doubt about the scale of the problem caused by the huge rise in the numbers of asylum-seekers that has occurred during the past decade due to the fact that more and more people are in need of international protection. There is a legitimate public concern that this country should not make its resources too readily available to such persons while their right to remain in this country remains undetermined. There are sound reasons of policy for wishing to take a firm line on the need for applications for asylum to be made promptly and for wishing to limit the level of support until the right to remain has been determined, if and when support has to be made available.
>
> 14. It is important to stress at the outset, however, that engagement in this political debate forms no part of the judicial function …."

6. The statutory obligation concerning accommodation and assistance in this context arises pursuant to section 4 of the 1999 Act (as amended by section 49 of the Nationality, Immigration and Asylum Act 2002) which, together with regulations made pursuant to it, is the provision that forms the backdrop to each of these applications. An asylum seeker who is yet to receive a decision on his or her initial asylum claim is entitled to support and accommodation where appropriate under section 95 of the Act if he or she would otherwise be destitute (see paragraph 50 below).

7. The policy or practice in issue in this case is, in summary, that the further submissions advanced by someone whose previous application for asylum has been rejected must be considered before the application for support under section 4 is considered unless 15 working days have elapsed and there is to be further "justifiable delay" in deciding on the further submissions. In that latter situation support under section 4 should be considered. In other words, the policy or practice (if it exists) would involve an in-built delay before any application for support or assistance is considered on its merits (see further at paragraphs 139-150 below). It is argued that this policy, which is said deliberately to institute a systemic delay of at least three weeks before an application for section 4 support will even be considered, is unlawful.

8. The issue, thus formulated, is a fairly narrow one, but there is a significant background to it to which it will be necessary to make some reference before addressing it directly.

The procedural background

9. The precise issue in this case, namely, the legality of the policy or practice summarised in paragraph 7 above has not been considered by the courts previously. However, in the period prior to the adoption of that policy or practice, judicial review claims had been advanced by various individuals arising from alleged delays between the submission of a fresh claim for asylum and the provision of accommodation by the Secretary of State pending determination of their claims.

10. That issue was raised and considered on a renewed oral permission application before Blair J on 14 October 2009 in a case which I will identify simply as '*LG*': [2009]

EWHC 3674 (Admin). (That, incidentally, was the date upon which the policy or practice the subject of the present challenge was implemented.) Either by the time the application for judicial review was considered on the papers or by the time the renewed hearing took place, each of the three claimants in that case had been accommodated and provided with assistance. To that extent it was contended on behalf of the Secretary of State in each case that the proceedings were "academic". That was the conclusion reached by the judge who dealt with the matter on the papers in '*LG*' and also that of Blair J, who gave a full judgment on the matter having heard argument from Mr Ranjiv Khubber (who, as junior counsel to Mr Martin Westgate QC, represents the Claimants in this case) and Mr Tom Poole for the Secretary of State (who also appears as junior counsel to Ms Samantha Broadfoot in the present case).

11. In due course, on 19 May 2010, having heard from Mr Westgate and Mr Khubber, Moses LJ gave permission to appeal against the decision of Blair J (see [2010] EWCA 1638), but affording the Secretary of State the opportunity to contend at the substantive hearing that the claims were indeed academic. The option of taking the matter back to be dealt with substantively by a single judge of the Administrative Court or arguing the matter at a substantive appeal against the decision of Blair J was given to the Secretary of State: [2010] EWCA Civ 977.

12. Moses LJ said that he was "concerned that there is a real dispute as to the proper legal approach to these questions of urgency under section 4 that require resolution" and that "perhaps a decision will at least assist in bringing a quietus to this problem." Mr Westgate had told him that there were at that time about 36 cases to the knowledge of his Instructing Solicitor that raised issues of this nature.

13. On the basis of the material before him, Moses LJ said that "there was prima facie delay in relation to all three of these applicants [which was] clear from the comparison between the time which the Secretary of State [set] as a target for making [the] decision and for implementation, two and then five days, and the actual number of days, which in one case amounted to two months, provision only being made after injunctions from the court."

14. As I understand it, the Secretary of State elected to have the matter determined before a judge of the Administrative Court on the assumption that she would be able to argue there that the claims were academic. The hearing was set down for 2 days on 22 and 23 March 2011. At that hearing the transcript of what took place before Moses LJ was available for the first time and I am told that it then became clear that that point could be taken only in the Court of Appeal. The matter was then stayed so that the Secretary of State could apply to the Court of Appeal. However, in the intervening period, challenges to the post-October 2009 policy were emerging, including the two cases now before me. An application for an adjournment of that hearing was made to the trial judge, Mr Christopher Symons QC, sitting as a Deputy High Court Judge, which was rejected although the claims were, as I have indicated, stayed pending the decision of the Court of Appeal.

15. The procedural situation became somewhat complicated in the period thereafter, but in September/October 2011, pending further consideration of the position by the Court of Appeal in '*LG*' on 22 and 23 November 2011, agreement was reached whereby the three cases in '*LG*' were withdrawn and the present two cases were to

proceed in which all issues could be raised on behalf of the Claimants. An order dismissing the Appellants' Notices for the three claimants in '*LG*' was made in due course.

16. Whilst at one stage it was contemplated that the hearing of the present claims would be in London, it was in due course agreed that it should take place in Manchester which is how it came before me.

17. As I have said, the basis of the agreement was that all issues could be raised on behalf of the Claimants and, accordingly, notwithstanding that each Claimant in this case had been accommodated in due course by the time the application for permission to apply for judicial review was considered (albeit after a what is said to have been an unlawful delay), it has not been contended before me by the Secretary of State that the claims are academic.

The individual cases

18. Before turning to the issues of principle that arise, it would be appropriate to record briefly the circumstances in which each of the two claimants, whom I will identify as 'MK' and 'AH' respectively, argue that they have been affected by what is contended to be an unlawful policy.

MK

19. MK is a national of Zimbabwe. He suggests that he entered the UK in December 2004 using his own passport and was granted leave to enter for 6 months as a visitor. He became an overstayer and the authorities had no record of any contact from him until he sought asylum on 27 March 2009. This was based on the claim that he feared persecution in Zimbabwe on account of his father's membership of the MDC party. He was served with administrative removal papers as an overstayer on 27 March 2009, but was not removed pending consideration of his asylum claim. This was refused on 22 October 2009.

20. In the meantime, on 2 May 2009, he applied for support under section 95 of the 1999 Act and support (subsistence and accommodation) under that provision was granted on 17 August 2009.

21. He appealed against the refusal of asylum and in February 2010 an immigration judge dismissed the appeal concluding that his story lacked credibility. His appeal rights became exhausted on 22 February 2010. His section 95 support was subsequently discontinued and came to an end on 18 April 2010.

22. On 15 October 2010 he lodged further submissions in person at the Liverpool Reporting Centre in support of a fresh asylum claim based on a new matter, not previously raised, namely, a fear of returning to Zimbabwe because of his bisexuality.

23. On 21 October 2010 UKBA received from Refugee Action Manchester an application for section 4(2) support dated 14 October on his behalf. The application form stated that he was "destitute" but did also give an address in Manchester which was said to be the address of a friend. In answer to the question "How long will you be able to stay at this address?" MK answered "5½" and on this basis it was said on behalf of the

Defendant in the Detailed Grounds of Defence that UKBA did not consider that he was imminently street homeless. Mr Westgate and Mr Khubber question whether the caseworker even directed his or her mind to the issue.

24. A duplicate faxed copy was then received on 28 October 2010 by the Solihull Asylum Support Team.

25. MK's advisers say that there was no response to the section 4 application and on 12 November 2010 Refugee Action contacted the section 4 team on his behalf. They were advised that the application had been received but no decision had been made. On the same day MK received notification that an asylum interview would take place on 17 November.

26. On 16 November MK's solicitors sent a detailed letter before action in relation to the delay in consideration and provision (if eligible) of support under section 4. They requested a response by 21 November.

27. On 17 November MK was interviewed about his fresh asylum claim and on 22 November he was granted refugee status. Status papers were issued on 24 November 2010. The decision letter informed him that he was now entitled to mainstream benefits and he was also told that his application for support under section 4(2) was refused as he was no longer a Failed Asylum Seeker (an 'FAS'): see further at paragraph 49 below.

28. It is not wholly clear precisely when MK received these communications and the relevant documents, but his legal advisers were unaware of what had happened and, given that no response had been received to the letter before action, the judicial review claim was lodged on 22 November and an application for interim relief made. The relevant judicial review bundle was received by UKBA on 23 November 2010 in which the Secretary of State was named as the first defendant in the proceedings. The application was to be handled by the Solihull Asylum Support Team. On 23 November Burton J directed an *inter partes* interim relief hearing on 24 November 2010. However, that hearing was vacated by consent on the grant of the Refugee Status papers.

29. I need not recite the chronology of the proceedings thereafter because it is subsumed sufficiently for present purposes in the history set out in paragraphs 14 and15 above.

30. It is the delay following the date upon which his application for support under section 4(2) was received by UKBA and when it was addressed (and indeed rejected) that founds the basis for MK's complaint in this claim.

31. His personal circumstances during this period are said to have been that the small flat that a friend of his permitted him to share pending receiving section 4 support was a difficult place to live given his friend's wish that he should leave, the limited amount of food he could obtain and certain painful medical problems that I will not recite in detail. He said that his constant fear was that he would be sleeping on the streets.

AH

32. AH is a national of Eritrea. On 10 April 2007 he was encountered trying to enter the UK by ferry at Stranraer without valid travel documents. He had in his possession an Asylum Registration Card that had been issued to someone else. He was arrested as a suspected illegal entrant and told the police that he entered the Republic of Ireland on 6 April by air from Sudan with the help of an agent and in due course boarded a ferry to Scotland. He immediately sought asylum after being served with illegal entry papers. He claimed he had to flee Eritrea because of his adherence to the Pentecostal faith.

33. He was charged with attempting to pervert the course of justice in connection with the registration card that did not belong to him and on 24 April he was convicted at Stranraer Sheriff's Court of offences under the Identity Cards Act and also of attempting to pervert the course of justice. He was subsequently sentenced to two months' imprisonment and recommended for deportation.

34. After he was released from Dumfries Prison on 11 May 2007 his asylum claim was routed to the Glasgow Asylum Team for consideration. On 16 May he applied for asylum support under section 95 which was granted on 31 May. The following day he was detained pending deportation, but bail was granted on 28 June by the Asylum and Immigration Tribunal.

35. On 2 August AH's asylum claim was refused on the basis that his claims to have escaped military service and his belief in the Pentecostal faith were without credibility. On 15 August he was notified of the decision to make a deportation order against him. His appeal was dismissed on 3 October 2007.

36. On 12 February 2008 the High Court granted AH's application for reconsideration, but his subsequent appeal was dismissed on 14 August 2008. The Immigration Judge concluded that he had not shown that he had left Eritrea illegally and, therefore, was not at risk on return of inhuman or degrading treatment that would violate his rights under Article 8 of the ECHR. The Immigration Judge noted that AH was then 29 years old, married and believed to be in good health. His wife and two children lived in Eritrea. He had spent most of his life in Eritrea, has no strong ties to the UK and there was nothing to suggest that his return would place the UK in breach of any of its obligations under the ECHR.

37. He applied for permission to appeal to the Court of Appeal which was refused on 5 September 2008 and his renewed application was dismissed on 5 May 2010. In consequence he became appeal rights exhausted on 18 June 2010 and his section 95 support was discontinued on 11 July.

38. On 9 September 2010 AH made what is said on his behalf to amount to a fresh claim for asylum based upon new evidence. At the time of the hearing before me no final decision on this claim had been made.

39. On 28 September, assisted by Refugee Action, he made on application for section 4 support on the basis of his fresh claim. The application requested that the claim be treated as a 'priority A' case (see paragraph 108 below) since he was said to be facing street homelessness. The basis for this was to be found in the application where he said:

> "Since my friend asked me to leave on 26/09/10 I have stayed with a person from my church until today but I am not sure if he will allow me to stay for any longer. If this is the case I am facing street homelessness"

40. No response to this application was received. In the event he was not asked to leave the place he was then staying at until 4 November 2010 when he spent two nights sleeping rough in Manchester. On 3 November his solicitors sent a pre-action protocol letter and on 8 November 2010 the judicial review claim was issued with an application for interim relief. His Honour Judge Gilbart QC, sitting as a Deputy High Court Judge, directed urgent consideration on 15 November 2010 on the basis that he was getting "some help from others".

41. A decision to provide section 4 support was made on 4 November 2010. Confirmation of this decision was sent to Refugee Action and not to AH's solicitors and, in the event, it was not until 9 November that he was accommodated in accordance with the decision made on 4 November.

42. The decision on 4 November was made 36 days after the application for section 4 support was made, although it is said on behalf of the Defendant that it "was 27 working days after he made further submissions" (emphasis added).

43. It is this delay, however it is to be characterised, that forms the foundation for AH's complaint in these proceedings.

Summary

44. In MK's case he waited a period of 27 days during which no decision on his application for section 4 support was either made or communicated to him.

45. In AH's case the equivalent period was 36 days.

The statutory context - an introduction

46. It will be necessary to look at the general policy context, including its history and indeed the relevant surrounding statutory context, in a little more detail later (see paragraph 62 *et seq*), but I should identify first the precise statutory provision that fell to be applied in each of these cases.

47. Section 4 of the 1999 Act is in the following terms:

> **Accommodation**
>
> (1) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons—
>
> (a) temporarily admitted to the United Kingdom under paragraph 21 of Schedule 2 to the 1971 Act;
>
> (b) released from detention under that paragraph; or

(c) released on bail from detention under any provision of the Immigration Acts.

(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—

(a) he was (but is no longer) an asylum-seeker, and

(b) his claim for asylum was rejected.

(3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under subsection (2).

(4) The following expressions have the same meaning in this section as in Part VI of this Act (as defined in section 94)—

(a) asylum-seeker,

(b) claim for asylum, and

(c) dependant.

(5) The Secretary of State may make regulations specifying criteria to be used in determining–

(a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;

(b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.

…

(10) The Secretary of State may make regulations permitting a person who is provided with accommodation under this section to be supplied also with services or facilities of a specified kind.

(11) Regulations under subsection (10)–

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

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

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

(d) may confer a discretion.

48. It is sub-section (2) (introduced by the Nationality, Immigration and Asylum Act 2002), together with the regulations made under sub-section (5) (see paragraph 70 below), that applies to the cases in issue in these proceedings.

49. In the everyday parlance adopted in this context each Claimant was an FAS (see paragraph 27 above) who was 'ARE' (see quoted paragraph 10 below) but who had asserted a fresh claim for asylum. The witness statement filed in these proceedings of Mr Simon Bentley, an Assistant Director in NAM+ Asylum Support in the UK Border Agency ('UKBA') with considerable experience in the field, contains a helpful summary of the expressions generally used in this context. The following paragraphs are relevant for present purposes:

> "8. … it is useful to explain the key distinction between "Asylum Seeker" and "Failed Asylum Seeker". The term Asylum Seeker in ordinary speech is used in a very wide sense, as in anyone who is seeking refugee status, regardless of where they are in the process. By contrast, it is generally used by UKBA and the Home Office to refer to a person who has made a claim for asylum which has been recorded by the Secretary of State and which has not been finally determined.
>
> 9. In the context of entitlement to support under sections 95, 98 or section 4 of the 1999 Act, there is a specific statutory definition of Asylum Seeker in section 94(1) of the 1999 Act. Section 94(5) of the 1999 Act extends that definition to include persons who have children as part of their household at the time their asylum claim is determined and provides that they will still be considered as Asylum Seekers (for the purpose of eligibility to section 95 support) while any children remain in the UK.
>
> 10. An Asylum Seeker is to be contrasted with a Failed Asylum Seeker. A Failed Asylum Seeker is a person who has had his or her asylum or human rights claim refused and has exhausted their appeal rights in the UK and the time for making an in-time appeal has expired. Such persons are referred to by the Secretary of State as "Appeal Rights Exhausted" or "ARE".
>
> 11. Failed Asylum Seekers are expected to take steps to return to their country of origin upon becoming Appeal Rights Exhausted. In some cases, Failed Asylum Seekers do not so leave and wish to assert that they have a fresh claim for asylum or human rights protection based on significant new information."

50. I mentioned section 95 of the 1999 Act in paragraph 6 above, as did Mr Bentley in paragraph 9 of his witness statement, and it will be appreciated from the recitation of the facts relating to each individual Claimant in this case that each was provided with

section 95 support during the period when his initial asylum claim was considered. Section 95 provides as follows:

> **Persons for whom support may be provided**
>
> (1) The Secretary of State may provide, or arrange for the provision of, support for—
>
> (a) asylum-seekers, or
>
> (b) dependants of asylum-seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.
>
> (2) In prescribed circumstances, a person who would otherwise fall within subsection (1) is excluded.
>
> (3) For the purposes of this section, a person is destitute if—
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.
>
> (4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together.
>
> (5) In determining, for the purposes of this section, whether a person's accommodation is adequate, the Secretary of State—
>
> (a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but
>
> (b) may not have regard to such matters as may be prescribed for the purposes of this paragraph or to any of the matters mentioned in subsection (6).
>
> (6) Those matters are—
>
> (a) the fact that the person concerned has no enforceable right to occupy the accommodation;
>
> (b) the fact that he shares the accommodation, or any part of the accommodation, with one or more other persons;
>
> (c) the fact that the accommodation is temporary;

> (d) the location of the accommodation.
>
> (7) In determining, for the purposes of this section, whether a person's other essential living needs are met, the Secretary of State—
>
> (a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but
>
> (b) may not have regard to such matters as may be prescribed for the purposes of this paragraph.
>
> (8) The Secretary of State may by regulations provide that items or expenses of such a description as may be prescribed are, or are not, to be treated as being an essential living need of a person for the purposes of this Part.
>
> (9) Support may be provided subject to conditions.
>
> (9A) A condition imposed under subsection (9) may, in particular, relate to—
>
> (a) any matter relating to the use of the support provided, or
>
> (b) compliance with a restriction imposed under paragraph 21 of Schedule 2 to the 1971 Act (temporary admission or release from detention) or paragraph 2 or 5 of Schedule 3 to that Act (restriction pending deportation).
>
> (10) The conditions must be set out in writing.
>
> (11) A copy of the conditions must be given to the supported person.
>
> (12) Schedule 8 gives the Secretary of State power to make regulations supplementing this section.
>
> (13) Schedule 9 makes temporary provision for support in the period before the coming into force of this section.

51. Sections 95 and 4 thus provide respectively the statutory basis for the power (and indeed the duty) of the Secretary of State to provide support and assistance (i) whilst any initial asylum claim is considered and (ii) during the period that new representations made by the FAS said to amount to a "fresh claim" are considered.

52. Someone who is outside the purview of those two statutory provisions, and asserts that he or she is in need of support and assistance must look to the local authority for the area where he or she is staying for support: see paragraph 63 below.

53. Section 4(5) of the 1999 Act provides the power for making regulations specifying the criteria to be used in determining whether or not to provide accommodation, or arrange for the provision of accommodation, for an applicant for section 4 support and

whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for such a person. The Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (SI 2005/930) were those made which continue to apply. I will refer to those regulations in more detail later (see paragraph 70 below).

54. As I have said, this case concerns support and assistance for those who make fresh submissions concerning a human rights or asylum claim. The test applied to such submissions is the well-known test set out in paragraph 353 of the Immigration Rules 1999, but I record it for completeness:

> **"Fresh Claims**
>
> 353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection …."

55. It is the exercise described in that rule that the Secretary of State, through her caseworker (or case-owner), must perform when presented with new submissions by an FAS.

56. Paragraph 353A of the Immigration Rules prevents the removal of an FAS who has made further submissions which are yet to be considered.

57. The practical tensions that can arise between the need conscientiously to carry through the exercise in paragraph 353 and the need, also to be carried out conscientiously, to consider whether section 4 support, where claimed by the applicant, should be granted pending the final decision on the new submissions given that in the vast majority of cases the new submissions are rejected are tolerably easy to identify without the need for a great deal of evidence to support the proposition. Given that every such applicant will already have had his or her initial asylum or human rights claim rejected and will, in many cases, have pursued all available appeal and challenge processes, the not unnatural starting-point for evaluating any apparently new claim will be one of some scepticism. One question is the extent to which, if any, such scepticism should or may be allowed to impact on any associated application for section 4 support.

58. According to Mr Bentley, in the period of approximately 2½ years between 14 October 2009 and 20 April 2012, a total of 64,916 <u>further submissions</u> (over 2100 per

month on average) were made to UKBA by previously failed asylum applicants of which 9,981 were still to be decided. Of the 54,935 decided only 7,705 (14%) met the test for a fresh claim for asylum or were granted leave to remain in the UK. This does not, of course, involve any analysis of the 9,981 still to be decided and Mr Bentley acknowledges that of those decided some of the submissions rejected as fresh claims will have been challenged by way of judicial review, but says that he has "not, however, seen any evidence that this significantly affects the figures". Given the relatively limited basis upon which the court could interfere with any such decision, that seems to me likely to be so. Precise figures are, in any event, unnecessary for the purposes of obtaining a broad sense of the actual or potential problem: it is almost certainly fair to say that the overwhelming majority of the "fresh" applications are concluded ultimately to be of no merit. However, as the Intervener correctly submits, that is a different issue from the question of whether those submissions were "abusive, manifestly ill-founded or merely repetitious" and could, accordingly, justify a refusal to provide support pending a decision on the merits. Equally, of course, it does not mean that every such "fresh" application is unmeritorious. That, of course, brings into relief the central issue in the context of the policy or practice under challenge.

59. Not every applicant making "fresh" submissions will have applied for section 4 support, but each potentially could be an applicant for such support. Mr Bentley says that in July 2010 (some 9-10 months after the new practice began) there were a total of 6,092 cases supported under section 4(2), 4,512 (74%) of which had been granted because of further submissions. Those figures, of course, deal only with those cases where section 4 support was granted and they do not distinguish between those cases where the grant of section 4 support was made by UKBA rather than on appeal against a refusal to grant it. They do not, as I understand it, deal with those cases where an application for section 4 support was made but was not considered (and thus rejected) before the final decision on the "fresh" claim was made. Equally, they do not identify the extent to which those (like both Claimants in this case) who do not have dependants in the UK are (or are not) provided with section 4 support.

60. I will turn to what Mr Bentley says has been the effect of the post-October 2009 practice on section 4 support later (see paragraphs 173-174).

61. I have endeavoured to give a broad view of the statutory framework that forms the background to this case and to the nature of the situation confronted by UKBA in responding to applications for section 4 support in the period since October 2009. However, it is not really possible to gain a clear picture of the post-October 2009 scenario without having some appreciation of what had happened before. Mr Bentley's witness statement goes into some detail about this, but I will endeavour to summarise. The summary given by Baroness Hale of Richmond in *M v Slough BC* [2008] 1 WLR 1808 (at paragraphs 18-29) is, of course, an authoritative source of guidance on the history.

The history prior to October 2009

62. Prior to 1987 any person present in the United Kingdom was essentially entitled to means-tested benefits which were paid on the basis of need. In 1987 income support was denied to illegal entrants and overstayers. Later the Asylum and Immigration Act 1996 removed the right for any asylum seeker who had not claimed asylum at the port or airport of entry to income support and to housing under the homelessness

legislation. The rationale was the belief that a *bona fide* asylum seeker could be expected to declare him or herself on arrival in the UK and an unwillingness to do so was indicative that the person later claiming asylum was in truth an economic migrant. Any such person should be discouraged from attempting to enter the UK and, if in the UK, should be encouraged to go home.

63. Those who decided to remain and who could not obtain support from relatives, friends and other similar sources claimed from their local authority an entitlement to accommodation under Part III of the National Assistance Act 1948 (a benefit from which they had not been excluded) by virtue of the provisions of section 21(1). It was argued that they had been reduced to a state where they were in need of "care and attention" by reason of "other circumstances" for the purposes of that provision. That argument was accepted by the Court of Appeal in *R v Hammersmith & Fulham ex parte M and others* (1997) 30 HLR 10 which held that all destitute asylum seekers, able-bodied as well as disabled, who were deprived of other support, were potentially entitled to assistance in the form of accommodation under section 21.

64. This provided part of the backdrop to the White Paper entitled 'Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum' (Cmnd 4018, July 1998). The Preface to the White Paper, in the name of the then Secretary of State, Mr Jack Straw, was in the following terms (the passage dealing with supporting asylum seekers being italicised):

> "Immigration control affects all of us in one way or another. When we travel abroad on holiday or business, we expect to be able to pass quickly through UK immigration control. Similarly, when our relatives or friends living abroad visit this country we expect them to be able to do so with a minimum of fuss. But we rightly expect our immigration controls to deal quickly and firmly with those who have no right to enter or remain here.
>
> Piecemeal and ill-considered changes over the last 20 years have left our immigration control struggling to meet those expectations. Despite the dedication and professionalism of immigration staff at all levels, the system has become too complex and too slow, and huge backlogs have developed. Perversely, it is often the genuine applicants who have suffered, whilst abusive claimants and racketeers have profited. The cost to the taxpayer has been substantial and is increasing.
>
> This White Paper sets out a comprehensive, integrated strategy to deliver a fairer, faster and firmer approach to immigration control as we promised in our manifesto. Fundamental to the whole strategy is the need to modernise procedures and deliver faster decisions. The Government believes that there are too many avenues of appeal in the course of a single case. There should be a single appeal right considering the case as a whole, including removal arrangements. We must also regulate unscrupulous advisers who exploit the vulnerable and profit from delays.

We must be able to plan and allocate resources more flexibly in order to minimise costs overall. In particular, that means investing to eliminate backlogs and produce a fairer and faster system – and increased effort to enforce immigration controls so that those who are refused understand that they must go.

The UK was one of the first countries to sign up to the 1951 Geneva Convention on Refugees, designed in the aftermath of the last war to ensure the humane treatment of those who had to flee their own country because of a well-founded fear of persecution. But the Convention never anticipated the dramatic changes in the speed, relatively low cost and easy availability of international travel and telecommunications. In recent years our asylum system has been under severe strain. The numbers of people claiming asylum has increased from about 4,000 a year in 1988 to over 32,000 in 1997. The Government is committed to protecting genuine refugees. Indeed, it is plainly absurd for those who have fled persecution from abroad to have to wait months, or even years, to hear they are allowed to stay. But there is no doubt that large numbers of economic migrants are abusing the system by claiming asylum. Modernising our controls and simplifying our procedures will help to tackle that problem.

The current arrangements for supporting asylum seekers are a shambles. New arrangements are needed to ensure that genuine asylum seekers are not left destitute, but which minimise the attractions of the UK to economic migrants. Those arrangements and our overhaul of the asylum system are based on recognising and fulfilling the mutual obligations – a new covenant – that exist between the Government and those seeking asylum here.

The Government's approach to immigration control reflects our wider commitment to fairness. We have moved further and faster than any of our predecessors in buttressing the rights of people in relation to public authorities. The Human Rights Bill currently going through Parliament will prove a landmark in the development of a fair and reasonable relationship between individuals and the state in this country. This is an important backdrop to the proposals in this White Paper.

The White Paper sets out a long-term strategy. It tackles the failings of the current system and addresses the challenges which face our immigration control in the years ahead. It fulfils our commitment to develop a fairer, faster and firmer approach in the interests of all our people."

"… The Court of Appeal judgment relating to the 1948 Act meant that, without warning or preparation, local authority social services departments were presented with a burden

> which is quite inappropriate, which has become increasingly intolerable and which is unsustainable in the long term, especially in London, where the pressure on accommodation and disruption to other services has been particularly acute."
>
> "The aim of the government was to ensure that genuine asylum seekers were not left destitute while at the same time containing the cost to the public purse of providing for asylum seekers. This was to be achieved by reducing the incentive provided by the availability of welfare benefits and community care provision, which was thought to attract economic migrants, as opposed to asylum seekers, to make applications for asylum."

65. In Chapter 8 the following was said at paragraph 8.23:

> "The 1948 Act will be amended to make clear that social services departments should not carry the burden of looking after healthy and able bodied asylum seekers. This role will fall to the new national support machinery."

66. The White Paper announced the introduction of a new national system of support for asylum seekers and their dependants and the creation of the National Asylum Support Service ('NASS') which was to administer the new scheme, the purpose of which, amongst other things, was to ensure that local authority social services departments should no longer carry the burden of looking after healthy and able-bodied asylum seekers. That role would be fulfilled by NASS. The 1948 Act would be amended accordingly. Mr Bentley describes the general objective as follows:

> "67. The new system took shape in the form of two distinct structures for providing asylum support both enacted through the provisions of the 1999 Act: a national scheme, which was designed to be permanent, and a local "interim scheme" which was designed to provide support during the transitional period until the national scheme was fully operational. The "interim scheme" ended on 3 April 2006.
>
> 68. The aim of the government was to ensure that genuine asylum seekers were not left destitute while at the same time containing the cost to the public purse of providing for asylum seekers. This was to be achieved by reducing the incentive provided by the availability of welfare benefits and community care provision, which was thought to attract economic migrants, as opposed to asylum seekers, to make applications for asylum."

67. Part VI of the Immigration and Asylum Act 1999 introduced this new scheme the main features of which can be summarised as follows and which remain in force:

    i) Persons from abroad including asylum seekers and failed asylum seekers were excluded from all means tested benefits and from access to local authority housing: sections 115 and 118.

ii) Section 21 of the National Assistance Act 1948 was amended (by the addition of a new section 21(1A)) to exclude from its scope those whose need for care and attention arose solely because of destitution: section 116. (See further at paragraph 68 below.)

iii) Asylum seekers became entitled to asylum support under section 95 (see paragraph 50 above). The detail of the scheme was set out in the Asylum Support Regulations 2000. Support continues until 21 days after the final determination of any appeal against an application for asylum. (At this initial stage no specific provision was included to deal with the position of someone who made a fresh application for asylum following the final determination of their initial claim: see below at paragraph 69.)

iv) Interim support pending a decision as to whether or not a person qualifies under section 95 may be provided: section 98.

v) Applicants refused support or who have it withdrawn are entitled to appeal: section 103. Appeals were dealt with by an Asylum Support Adjudicator but since 3 November 2008 the jurisdiction has been transferred to the First Tier Tribunal (Social Entitlement Chamber). An appeal must be lodged within 3 working days of the decision appealed against and the rules provide for a decision within 9 days on the papers or 12 days if an oral hearing is requested.

vi) Special provision is made for families with children by virtue of section 122. Local authorities were prevented from providing support for families with children under section 17 of the Children Act 1989, but the Secretary of State became obliged to provide support in the case of a family with children. Furthermore, families with children were deemed to continue to be asylum seekers after their claims had been determined (see, e.g., section 94(5) of the 1999 Act).

68. I have referred to the effect of section 116 in paragraph 67(ii) above. It was intended to prevent local authorities giving assistance to destitute asylum seekers (or to anyone who was subject to immigration control) if the need for care and attention arose solely from destitution or because of the physical or anticipated physical effects of being destitute. Where, however, an asylum seeker whose needs were for care and attention beyond mere lack of accommodation and funds, assistance could still be given under the 1948 Act. In *R (Westminster City Council) v NASS* [2002] 1 WLR 2956 the House of Lords confirmed that section 21 was still available to destitute asylum seekers (and failed asylum seekers) who had an infirmity which meant that their need for care and attention did not arise solely from the effects, or anticipated effects, of destitution. The House of Lords characterised the asylum support powers to provide support under the 1999 Act as residual powers to be exercised if no other support was available for an asylum seeker (see paragraph 38 of the speech of Lord Hoffman). However, section 21 applies only where a person is in need of "care and attention": if he or she has a medical condition that does not presently require "care and attention", but may do so in the future if the condition deteriorates through destitution, then the appropriate means of support is still section 95: *R (M) v Slough BC* [2008] 1 WLR 1808. That case concerned an applicant who was HIV positive but who needed a refrigerator to store his medication. It was held that s. 21(1A) did not apply to him

because he did not presently have a need for care and attention and the need may never arise if he had accommodation.

69. As I have indicated (paragraph 67(iii) above), section 4 of the 1999 Act as originally enacted made no specific provision to deal with the accommodation and general needs position of someone who had made a fresh application for asylum. Subsections (2)-(4), which do make such provision, were introduced by the Nationality, Immigration and Asylum Act 2002.

70. In order to qualify for support the applicant must meet the requirements of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 made pursuant to section 4(5) to which I referred in paragraph 53 above. Regulation 3 provides as follows:

> (1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are -
>
> (a) that he appears to the Secretary of State to be destitute, and
>
> (b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.
>
> (2) Those conditions are that–
>
> (a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;
>
> (b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;
>
> (c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
>
> (d) he has made an application for judicial review of a decision in relation to his asylum claim–
>
> in England and Wales, and has been granted permission to proceed ….
>
> (e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998.

71. The test for destitution is as set out in section 95(3) (see paragraph 50 above), namely, that the applicant does not have adequate accommodation or any means of obtaining it (whether or not his essential living needs are being met) or that he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs. I will return to the significance of this definition later (see paragraphs 93-100).

72. Section 103(2A), also introduced by the 2002 Act, conferred a right of appeal against a decision not to provide support under section 4. Inevitably, there can only be an appeal if a decision adverse to the applicant is made. There is no right of appeal until such a decision is made. This is one feature of the complaint made on behalf of the Claimants about the delay in making a decision in each of their cases and is supported by the Intervener as a general criticism of the new policy.

73. It is important to note that there is no power to provide temporary accommodation pending a decision under section 4 (unlike the position under section 95). This must be seen as a deliberate decision by Parliament. In *R (Matembera) v Secretary of State for the Home Department* [2007] EWHC 2334 (Admin), Hodge J said this:

> "15. ... the conditional duty to provide temporary accommodation under Section 4 has not yet been established. In effect, such provision is one which Parliament has deliberately chosen not to make. Essentially the scheme for provision of support for those who are in the asylum field have to be construed as a whole. Here there is a detailed scheme. There is a main duty to support asylum seekers and a less comprehensive scheme where, after an adverse asylum decision, there is a danger of destitution. There is no room for a power to provide temporary support and there is certainly nothing in the scheme which leads to a breach of Convention rights."

74. Before I turn to the competing submissions about what is or is not lawful about the practice presently adopted in dealing with these applications, it is helpful to record what Mr Bentley says about the way reliance upon this provision has developed over the years: between March 2002 and October 2005 he was a senior caseworker with NASS and also managed the team that dealt with section 4 support applications. Paragraph 33 of his witness statement was in these terms:

> "… I … recall from my own experience (managing the small team that processed cases) that the numbers of Failed Asylum Seekers applying for section 4 support and being accepted on support were very low, generally less than 10 per week in the 2003 and most of 2004. The numbers of applications for section 4 support only became significant towards the end of 2004, and most particularly after January 2005 when it was accepted that there was at that time no viable route of return to Iraq. This led to an almost immediate flood of applications from Failed Asylum Seekers from Iraq, with at one time up to 1,000 applications being made per week. It is possible that the publicity generated by this exercise served to highlight the availability of section 4 among Failed Asylum Seekers and we

> began to see more applications made on other grounds, including on the grounds of further submissions."

75. That does not, of course, indicate how many applications for section 4 support were rejected by NASS during this period and/or how many were granted following a successful appeal. However, there is no reason to doubt the suggestion that the level of applications in the early stages was, relatively speaking, light. It is, of course, clear from what is recorded in paragraph 74 above that the level of applications for section 4 support is likely to have increased considerably over the last 6-7 years, though it is equally clear from what Mr Bentley says (see paragraph 80 below) that the general policy has been designed to discourage this trend. He indicates that the post-October 2009 policy has made an impact in this regard (see paragraphs 173-174 below).

76. Before turning to that, I should indicate the practical way in which applications of this kind are handled administratively. Again, I draw largely from Mr Bentley's witness statement.

77. Dealing first with the general position of asylum claims (and thus not necessarily with applications for section 4 support), despite the commitment of the then Secretary of State to reducing the "huge backlogs" that had developed by the time of the Preface to 'Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum' in July 1998 (see paragraph 64 above), Mr Bentley draws attention to the position that had arisen by 2007. As is well known, by 2006 a very substantial number of asylum cases remained unresolved and in June 2006 the then Secretary of State made a commitment to Parliament to conclude all of these unresolved cases by the summer of 2011. Mr Bentley records that by December 2006 it was estimated that there were between 400,000 and 450,000 cases in the Case Resolution Directorate ('CRD') caseload. The CRD was established to deal with the backlog of unresolved asylum cases in which the claim had been made prior to 5 March 2007 (namely, cases where the person concerned had not been removed, granted some form of leave or had their case otherwise closed) - usually referred to as 'legacy cases'. Mr Bentley indicates that the CRD completed the review of its entire caseload in the early part of 2011 and passed what he describes as "a controlled archive of residual cases" to the Case Assurance and Audit Unit (the 'CAAU') on the 1 April 2011. The CAAU replaced the CRD from that date and became responsible for residual work on the cases that had been reviewed where the FAS was awaiting removal and those where the CRD had been unable to trace the applicant and so could not close the case. The "controlled archive", when figures were given to the Home Affairs Select Committee in November 2011, totalled 93,000 cases, consisting of 17,000 'live' cases (namely, cases which the CRD could not bring to a full conclusion and as such were passed to CAAU "to continue progress"). The remaining cases were those where active work upon them was not then possible because, for example, the whereabouts of the applicant was unknown.

78. That was the position with the cases where an asylum claim had been made prior to 5 March 2007, but had not been resolved. After 5 March 2007 <u>initial</u> asylum claims were processed under the New Asylum Model ('NAM') in which every asylum application was allocated to a single case owner who handled every aspect of the case until its conclusion. The aim of NAM was that cases should be processed from claim to conclusion within 6 months.

79. The position concerning "fresh claims" made after 5 March 2007 is that for those cases forming part of the CAAU caseload, the further submissions are considered by the relevant CAAU case owner and for those handled by NAM the individual case owner considers the submissions. Instructions were given to case owners on how they should approach an application for section 4 support in the context of a "fresh claim". I will deal with this in the specific context of the post-October 2009 approach shortly (see paragraphs 115-138 below), but again it is relevant to see how the approach developed over the preceding period.

80. Given what I understand to be the perception of those administering the applications for section 4 support in the relatively early stages Mr Bentley said this:

> "38. A way to handle the section 4 applications based upon further submissions had to be developed. It was absolutely clear to me and colleagues working in this area that many of the further submissions lacked any merit and had only been made in order to obtain section 4 support. In many cases the further submissions contained no real detail and merely asked for a reconsideration of the case. There were other cases where firms of solicitors had crafted template letters to be used for all persons of a particular nationality. These letters would often reference various documents (for example the latest US State Department Report on the particular country) but make little or no effort to set out how the documents had any bearing on the person's case. Realising that the letters were in "template" form naturally took time, as it only became apparent with experience of seeing similar letters. But overall, there was a real risk that if this trend continued persons could remain on support indefinitely by simply forwarding further submissions, however weak, as their asylum claims were finally rejected as refused. In practical terms all that happened in those circumstances was that the person would switch from section 95 support to section 4 support. I should add that this was a period when there were immense financial pressures on UKBA caused by the cost of providing asylum support. The cost in financial year 2004/4 was approximately £787 million. The cost 2009/10 was approximately £514 million.
>
> 39. For these reasons, caseworkers considering section 4 applications based on further submissions were encouraged to liaise with colleagues in other parts of UKBA, in order to see if the submissions could be answered quickly, thus obviating the need to place the person on section 4 support. In most instances this proved very difficult to achieve because of resource and other pressures. Additionally, on a practical level it was often very difficult to track down the location of the further submissions, as these were posted to different parts of the Immigration and Nationality Directorate (i.e. the predecessor of UKBA). Finally, there was the inevitable lag between receipt of

> the submissions and logging them on to the computer system and matching them to case files.
>
> 40. The introduction of NAM from March 2007 and move towards the single case ownership system provided the opportunity to improve some of the communication problems and tighten processes."

81. Whilst it would be wrong to suggest that this conveys a presumption against the validity of any "fresh claim", there can be no doubt that the scepticism to which I referred in paragraph 57 above will have played a significant part in the evaluation of the claim itself and thus the intrinsic eligibility for section 4 support. The Intervener takes issue with this view to some extent and submits that a "template letter" making standard submissions may or may not be an abusive claim depending whether it properly relates to developments that genuinely affect the individual applicant - say, because of changes to the safety of the religious group which forms the basis of the claim for asylum. However, where either a template letter has no bearing on the person's case or "the further submissions contained no real detail and merely asked for a reconsideration of the case", those are precisely the sort of submissions that can properly be identified as clearly unfounded so as to refuse support in line with *R (AW) v Croydon BC* [2005] EWHC Admin 2950 (Admin) to which I will refer in more detail in paragraphs 88-91 below.

82. It is convenient to note that case as one in which there was judicial consideration of the way the section 4 support structure was being dealt with in the relatively early stages. The first case in which issues concerning the administration of section 4 applications were raised was *R (Salih and Rahmani) v SSHD* [2003] EWHC 2273 (Admin). Each claimant asserted that he had suffered delays (of 8 and 3 weeks respectively) before his application was dealt with. At that stage the scheme was administered in accordance with internal "hard case" instructions. Stanley Burnton J, as he then was, concluded that it was unlawful for the Secretary of State not to publicise the circumstances in which section 4 support might be made available. Since then the general practice has been to give more open guidance.

83. In relation to the delays, the position of the Secretary of State was recorded as follows:

> "On behalf of the Secretary of State, Mr Giffin accepted that it would be unlawful for NASS deliberately to delay the provision of section 4 support. He submitted that there was no evidence of deliberate delay, but rather of delay resulting from the administration of the scheme by the manpower resources available for it. He submitted that the Court could not prescribe a maximum period for the consideration of applications for hard cases support and the making of accommodation available."

84. Stanley Burnton J said this:

> "65. … It may be that the evidence presented to the court has been superficial, but I have to deal with these cases on that

> evidence. Given that no investigation is made as to an applicant's individual circumstances, it is not apparent what administrative steps are being taken by NASS that involve the delays before an offer of support is made that were seen in the cases of the Claimants and which are still typical. It is by no means apparent why 5 days are then required to arrange final accommodation details and travel arrangements. The delays involved have to be scrutinised against the background that the applicants for support are *ex hypothesi* destitute and have nowhere else to turn, and against the undoubted fact that when required by the court to do so, NASS can and does arrange accommodation immediately. NASS has failed to explain why the delays that occurred in the present cases took place.
>
> 66. The court cannot however specify what resources must be devoted to administering the scheme, or what delay in general is lawful and what delay is not. A further consideration is that the court must avoid making a declaration that does not respond to changes in circumstances or the facts of individual cases. I should, I think, follow the practice of the European Court of Human Rights, which does not make declarations divorced from the facts of individual cases of the time within which public authorities must fulfil their duties; it awards damages or makes findings of infringement of Convention rights based on the facts of individual cases.
>
> 67. I appreciate that, if I do not make a general declaration concerning NASS's delays, the result may be more applications for judicial review and the attendant costs, and more applications for interim injunctions, but that is, I think, inevitable."

85. It is impossible not to observe that it rather looks as if issues similar to those arising then are arising again at the present time. However, for present purposes, I will return to this brief review of the way the issues have been dealt with by the courts prior to the present time.

86. In *R (on the application of Nigatu) v SSHD* [2004] EWHC 1806 (Admin), Collins J described section 4(2) in these terms:

> "That is known generally as the "hard case" provision, enabling the Secretary of State to ensure that at least accommodation is provided for those who otherwise would have none, and who otherwise would be effectively required to sleep rough or on the streets. It was primarily designed, no doubt, to cover cases where, for whatever reason, it proved impossible to remove from the country someone whose asylum application had failed and who therefore had to remain until means of removal were available …."

87. He also said this:

19. [Counsel for the Secretary of State] has submitted that to construe the provision in the way that Mr Khubber submits is correct, is to open the door to abuse. If it is known that the mere making of what is said to be a fresh application for asylum will trigger continuing right to support, then there will be an obvious incentive to those who merely seek to delay their removal from this country to do just that. It will always, and inevitably, take some time for the Secretary of State to deal with these so-called fresh applications. Although, of course, it is necessary and desirable that they are dealt with as speedily as possible, the reality is that one cannot expect such matters to be dealt with overnight. Of course there should be no unnecessary delay, and it is unfortunately the case that it does sometimes appear to take far too long for the Home Office to deal with these applications. If the individual is to be deprived of support in the mean time, that may put an altogether illegitimate pressure upon that individual, who may have a genuine fresh claim, to give up if the alternative is effectively destitution. Accordingly, it is important that this is not abused by the Secretary of State if the decision is that there is no fresh claim until he decides that it should be regarded as such by putting such a pressure upon individuals.

20. The safeguard lies in section 4 of the Act. This means that so long as the individual is remaining in this country, there is power in the Secretary of State to provide at least for his accommodation. This will act as a safety net and it means also that the Secretary of State would not be permitted to refuse any support if to do so would result in a breach of the individual's Human Rights. The situation becomes somewhat similar to that which applies under section 55 of the 2002 Act, and the law now stands as laid down in *Limbuela v Secretary of State* [2004] EWCA Civ 540 …. So to that extent, protection is accorded to the individual who is not automatically entitled to the continuation of asylum support.

21. It seems to me, in all the circumstances, that [Counsel for the Secretary of State's] submissions are correct and that that is the true construction of this provision. There is a real difference between the situation when an initial claim for asylum is made and that when attempts are made to prevent removal following rejection and the exhaustion of all the appeal processes of that claim. The Secretary of State is indeed entitled to consider whether the representations made can properly be said to amount to a fresh claim so as to make the individual an asylum seeker. He will record that, and the evidence before me is that he does record that, when that preliminary decision is made and that the individual in question is notified when that happens. A record is made of that decision at that time."

88. The approach adopted by Collins J in that case was accepted and developed by Lloyd Jones J in *AW* in the context of the issues that arose in that case. AW made further representations on her claim for asylum having failed in her previous application. Whilst the decision on those representations was pending she applied for section 4 support. That application was rejected by the Secretary of State on the ground that support was not necessary to avoid a breach of her human rights because she was free to leave the United Kingdom or take steps to leave the United Kingdom. She then applied to the London Borough of Croydon for assistance under section 21 of the 1948 Act. Croydon maintained that she was not eligible for support under the 1948 Act and that it had no power to provide support.

89. I need not recite the issues that arose in detail. One of the questions Lloyd Jones J was asked to consider was in the following terms:

> "If the Article 3 threshold would otherwise be met, does the making of a purported fresh claim on UN Convention on Refugees/Article 3 ECHR grounds by a failed asylum-seeker always make it necessary for support to be provided in order to avoid a breach of Convention rights, pending a decision by the Secretary of State on the representations?"

90. As part of his answer to this question he said this:

> "68. The present issue, was, in fact, touched on by Collins J in certain passages in Nigatu. There, Collins J was clearly very conscious of the risk that if an individual is to be deprived of support pending a determination on his purported fresh claim he may be subjected to altogether illegitimate pressure and forced to give up what may be a genuine fresh claim in the face of destitution. He considered that the safeguard lay in section 4 of the 1999 Act which meant that so long as the individual is remaining in the United Kingdom there is power in the Secretary of State to provide at least for his accommodation. Nevertheless, the judge accepted that there is another side of the coin and that the procedures are open to abuse. He had been referred by counsel to one case in which there had been no fewer than seven purported fresh applications; each time one was rejected, another was put forward before removal could take place. The judge observed:—
>
> "One can see that in that sort of situation and where, for example, the alleged fresh claim contained nothing that was essentially new, and only arose some time after support had been removed and when removal was due to take place, it may well be that the Secretary of State could properly refuse any further support."
>
> He then stated that it was obvious that if someone had remained in the country after his support had been removed the Secretary of State might well properly reach the conclusion that he did not need any further support either because he should not be

> regarded as destitute or because section 4 would not come to his aid. He concluded:—
>
> "Those are all matters that would have to be taken into account when considering the circumstances of any individual case. But I am satisfied that the making of what is asserted to be a fresh claim does not automatically trigger the right to continuing support as an asylum seeker. That only arises when the Secretary of State decides, obviously as soon as possible, that it can be properly regarded as a fresh claim, whether or not, as I said, in the end it succeeds." (paragraphs 25–26)
>
> 69. I respectfully agree. It seems to me that pending a decision by the Secretary of State on whether the further representations constitute a fresh claim, the Secretary of State will not be bound in every case to provide support under section 4 where the other requirements of that section are met. In my view it will be open to him, or to NASS, to decline to do so, for example on the grounds that the further representations are manifestly unfounded, or merely repeat the previous grounds or do not disclose any claim for asylum at all. In his remarks in Nigatu Collins J was addressing the provision of support under section 4 of the 1999 Act. Nevertheless, to my mind, his observations provide considerable assistance to the Defendants in their submission in the present case. A public body required to decide whether the provision of support is necessary for the purpose of avoiding a breach of Convention rights will not in every case be required to treat further submissions as a sufficient basis for the provision of support pending a decision by the Secretary of State that they do not constitute a fresh claim."

91. The Court of Appeal dismissed the appeal in *AW*: [2007] 1 WLR 3168. I do not understand it to be the case that any doubt was cast upon the foregoing analysis. It has been referred to by UKBA in the guidance to case owners since that time and is still referred to (see further at paragraphs 111 and 119 below).

92. Whether a "fresh" submission for asylum has any intrinsic merit is, of course, one feature of the question whether section 4 support should be granted. The other is whether the applicant can bring him or herself within the regulations to which I referred in paragraph 70 above. This also brings into focus the residual category of those for whom accommodation should be provided under those rules, namely, those for whom the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights: regulation 3(2)(e). I should refer briefly to the authorities on that issue because they impinge on the guidance given to case owners.

93. It is necessary to go primarily to the case of *Limbuela v SSHD* [2006] AC 396, in which the speeches of the House of Lords were delivered on 3 November 2005. That case was decided against the background of the effect of section 55 of the Nationality, Immigration and Asylum Act 2002 which itself was passed against the background of

the further White Paper entitled 'Secure Borders, Safe Haven, Integration with Diversity in Modern Britain' (Cmd 5387) presented to Parliament in February 2002. The general thrust of that White Paper on the issues of relevance to this case was that the numbers of asylum seekers remained high (there was a 13% increase in asylum applications in the year 2000 compared with 1999) and it was considered that there continued to be too much abuse of the asylum system.

94. One of the legislative measures introduced against that background was section 55, the relevant parts of which are as follows:

> **"Late claim for asylum: refusal of support**
>
> (1) The Secretary of State may not provide or arrange for the provision of support to a person under a provision mentioned in subsection (2) if—
>
> (a) the person makes a claim for asylum which is recorded by the Secretary of State, and
>
> (b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom.
>
> (2) The provisions are—
>
> (a) sections 4, 95 and 98 of the Immigration and Asylum Act 1999 … and
>
> (b) sections 17 and 24 of this Act (accommodation centre).
>
> (3) An authority may not provide or arrange for the provision of support to a person under a provision mentioned in subsection (4) if—
>
> (a) the person has made a claim for asylum, and
>
> (b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom.
>
> …
>
> (5) This section shall not prevent—
>
> (a) the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the Human Rights Act …),
>
> (b) the provision of support under section 95 of the Immigration and Asylum Act 1999 or section 17 of this Act in accordance with section 122 of that Act (children), or

> (c) the provision of support under section 98 of the Immigration and Asylum Act 1999 or section 24 of this Act (provisional support) to a person under the age of 18 and the household of which he forms part.
>
> …"

95. Section 55 applied to an applicant for asylum whose application was made on or after 8 January 2003.

96. In *Limbuela* the three claimants were asylum seekers who claimed to be destitute but had been refused support under section 95 of the 1999 Act because it was said that they had not claimed asylum as soon as reasonably practicable after their arrival in the UK within section 55 of the 2002 Act and support was not necessary to prevent a breach of their Convention rights under section 55(5). As Lord Bingham of Cornhill explained (at paragraph 3) each claimant had made a recorded claim for asylum on the day of arrival in the UK or the day after, but the Secretary of State was not satisfied that each had made the claim as soon as practicable and his conclusion on that point was not a live issue in the proceedings. If section 55 had ended there, then "it would be plain that the Secretary of State could not provide or arrange for [their] support …, even if he wished, and however dire their plight." However, section 55(5)(a) authorises the Secretary of State "to provide or arrange for the provision of support to a late applicant for asylum to the extent necessary for the purpose of avoiding a breach of that person's Convention rights". Lord Bingham observed as follows at paragraph 5:

> "… But the Secretary of State's freedom of action is closely confined. He may only exercise his power to provide or arrange support where it is necessary to do so to avoid a breach and to the extent necessary for that purpose. He may not exercise his power where it is not necessary to do so to avoid a breach or to an extent greater than necessary for that purpose. Where (and to the extent) that exercise of the power is necessary, the Secretary of State is subject to a duty, and has no choice, since it is unlawful for him under section 6 of the 1998 Act to act incompatibly with a Convention right. Where (and to the extent) that exercise of the power is not necessary, the Secretary of State is subject to a statutory prohibition, and again has no choice. Thus the Secretary of State (in practice, of course, officials acting on his behalf) must make a judgment on the situation of the individual applicant matched against what the Convention requires or proscribes, but he has, in the strict sense, no discretion."

97. The issue in the case was the extent to which the absolute prohibition in Article 3 of the ECHR from subjecting persons within the State's jurisdiction to inhuman or degrading treatment was engaged in the case of each claimant. What amounts, in this context, to inhuman or degrading treatment was the central question.

98. Lord Bingham dealt with this central issue in this way:

> "7. … Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to "your mountainish inhumanity".
>
> 8. When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.
>
> 9. It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed …."

99. Lord Hope of Craighead (at paragraph 55) said, in relation to the invocation of Article 3, that "[an] exercise of judgment is required in order to determine whether in any given case the treatment or punishment has attained the necessary degree of severity and that "[it] is here that it is open to the court to consider whether, taking all the facts into account, this test has been satisfied." In relation to the way this consideration operates in the context of section 55(5)(a) he said as follows:

> "56. The first question that needs to be addressed is whether the case engages the express prohibition in article 3. It seems to me that there can only be one answer to this question if the case is one where the Secretary of State has withdrawn support from an asylum-seeker under section 55(1) of the 2002 Act. The decision to withdraw support from someone who would

otherwise qualify for support under section 95 of the 1999 Act because he is or is likely to become, within the meaning of that section, destitute is an intentionally inflicted act for which the Secretary of State is directly responsible. He is directly responsible also for all the consequences that flow from it, bearing in mind the nature of the regime which removes from asylum-seekers the ability to fend for themselves by earning money while they remain in that category ….

57. Withdrawal of support will not in itself amount to treatment which is inhuman or degrading … [but] it will do so once the margin is crossed between destitution within the meaning of section 95(3) of the 1999 Act and the condition that results from inhuman or degrading treatment within the meaning [article 3]. This is the background to the second question which is whether, if nothing is done to avoid it, the condition of the asylum-seeker is likely to reach the required minimum level of severity. The answer to this question provides the key to the final question, which is whether the time has come for the Secretary of State to exercise his power under section 55(5)(a) to avoid the breach of the article.

58. The test of when the margin is crossed for the purposes of section 55(5)(a) of the 2002 Act is a different one from that which is used to determine whether for the purposes of section 95 of the 1999 Act the asylum-seeker is destitute. By prescribing a different regime for late claims for asylum, the legislation assumes that destitution, as defined in section 95(3), is not in itself enough to engage section 55(5)(a). I think that it is necessary therefore to stick to the adjectives used by article 3, and to ask whether the treatment to which the asylum-seeker is being subjected by the entire package of restrictions and deprivations that surround him is so severe that it can properly be described as inhuman or degrading treatment within the meaning of the article.

59. It is possible to derive from the cases which are before us some idea of the various factors that will come into play in this assessment: whether the asylum-seeker is male or female, for example, or is elderly or in poor health, the extent to which he or she has explored all avenues of assistance that might be expected to be available and the length of time that has been spent and is likely to be spent without the required means of support. The exposure to the elements that results from rough-sleeping, the risks to health and safety that it gives rise to, the effects of lack of access to toilet and washing facilities and the humiliation and sense of despair that attaches to those who suffer from deprivations of that kind are all relevant. Mr Giffin for the Secretary of State accepted that there will always in practice be some cases where support would be required-for

example those cases where the asylum-seeker could only survive by resorting to begging in the streets or to prostitution. But the safety net which section 55(5)(a) creates has a wider reach, capable of embracing all sorts of circumstances where the inhumanity or degradation to which the asylum-seeker is exposed attracts the absolute protection of the article.

60. It was submitted for the Secretary of State that rough sleeping of itself could not take a case over the threshold. This submission was based on the decision in O'Rourke v United Kingdom …. In that case the applicant's complaint that his eviction from local authority accommodation in consequence of which he was forced to sleep rough on the streets was a breach of article 3 was held to be inadmissible. The court said that it did not consider that the applicant's suffering following his eviction attained the requisite level to engage article 3, and that even if it had done so the applicant, who was unwilling to accept temporary accommodation and had refused two specific offers of permanent accommodation in the meantime, was largely responsible for the deterioration in his health following his eviction. As Jacob LJ said in the Court of Appeal … the situation in that case is miles away from that which confronts section 55 asylum-seekers who are not only forced to sleep rough but are not allowed to work to earn money and have no access to financial support by the state. The rough sleeping which they are forced to endure cannot be detached from the degradation and humiliation that results from the circumstances that give rise to it.

61. As for the final question, the wording of section 55(5)(a) shows that its purpose is to prevent a breach from taking place, not to wait until there is a breach and then address its consequences. A difference of view has been expressed as to whether the responsibility of the state is simply to wait and see what will happen until the threshold is crossed or whether it must take preventative action before that stage is reached ….

62. The best guide to the test that is to be applied is … to be found in the use of the word "avoiding" in section 55(5)(a). It may be, of course, that the degree of severity which amounts to a breach of article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage before the power in section 55(5)(a) is capable of being exercised. It is not just a question of "wait and see". The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will

> occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it."

100. It follows from the approach of the majority that, whilst every case will depend ultimately upon its own facts, street homelessness, or imminent street homelessness, caused by the positive action of the State would ordinarily amount to a breach of Article 3.

The guidance given to officials dealing with section 4 support applications

101. Guidance has been given to caseworkers in various ways over the years, but in the period prior to October 2009 (and indeed thereafter) it has been in the form of Asylum Instructions ('AIs').

Pre-October 2009 guidance

102. Prior to 14 October 2009, the extant instruction given to case owners (as they had by then become called) considering section 4 applications based on further submissions had been in place since May 2008. It is a lengthy document and I will summarise only those parts of relevance to the present issue. It reaffirms the established approach that the individual case owner has "overall responsibility for the end-to-end management of the asylum claim, with the help of their Asylum Team colleagues". In the Introduction, from which the foregoing quotation was taken, the following appears immediately thereafter:

> "This includes all asylum support issues. Case Owners will be responsible for the consideration and management of Section 4 support. They will ensure that applicants' eligibility for Section 4 support is assessed, and where granted, ensure support is reviewed and monitored."

103. It contains the following paragraph also:

> "Case Owners must familiarise themselves with the relevant legislation – particularly the Asylum Support Regulations 2000 (including subsequent amendments) and the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005, together with this AI and that on review of Section 4 support."

104. The AI continues by inviting attention to the question of whether the Applicant is an FAS before considering whether he or she is eligible for section 4 support and draws attention to the regulations I have set out at paragraph 70 above. It refers also to the effect of section 55 and directs the case owner to consider (in cases where a decision has not previously been made under section 55) whether section 55 prevents the provision of section 4 support.

105. Although nothing turns on it directly, it is, perhaps, surprising that there is no reference to the conclusions in *Limbuela* (or at least its implications so far as Article 3 is concerned) in the guidance to the case owner. Whether it is referred to in other guidance or guidance available to senior caseworkers (to whom the case owner is required to refer for the purposes of answering queries) is not clear on the papers before me.

106. At all events, that is how the guidance up to this stage in the process was given.

107. In relation to an application for section 4(2) support, the AI makes it clear that it is for the applicant to demonstrate in the application form eligibility for support. This particular part of the guidance also contains this paragraph:

> "Case owners must ensure that the application for Section 4 support is considered and where possible determined within **two working days** of receipt (or where possible sooner depending on the circumstances of the case)."
>
> (Emphasis as in the original).

108. It is common ground (and does not fall for evaluation or specific criticism in this case) that the two working days referred to were ordinarily to be applied to "Priority A" cases and a period of 5 working days was applied to "Priority B" cases. The distinction between the two categories was, as I understand it, that an "A" case involved actual or imminent destitution whereas it was more remote in a "B" case. Mr Bentley described the position thus:

> "70. There are slight differences across the UK in the way in which section 4 applications are highlighted in respect to their urgency. This reflects the regional casework structure of UKBA and the fact that we contract with different voluntary sector partners (including, for example, Refugee Action) in different areas of the UK to provide services to asylum seekers and failed asylum seekers (including helping them to make section 4 applications).
>
> 71. The most common method is for the voluntary sector caseworker to mark the application form as either a "Priority A" or "Priority B", though sometimes the terms used are "Imminent" or "Not Imminent". The general intention is to identify cases where the person is in immediate need of accommodation, as opposed to cases where the person has accommodation at the particular moment (e.g. with a friend) but expects to lose access to it in the future. There may also be other factors such as health or pregnancy."

109. The AI deals with the position of applicants with dependants and then invites the case owner's attention to the question of whether the applicant is destitute. It refers to the statutory test for destitution (see paragraph 50 above) and reminds the case owner that further information relating to the application for support may be requested in order to satisfy him or herself that "the applicant is destitute and/or satisfies one or more of the

criteria at Regulation 3(2) of the 2005 Regulations". Any such request should give "14 days within which to reply". In the meantime, the applicant's eligibility for section 4 support should not be decided.

110. The AI continues by reminding the case owner that "section 4 support is not granted solely on the basis that an applicant is destitute". If an applicant is assessed to be destitute the case owner is reminded to "go on to assess the application under Regulation 3(2) of the 2005 Regulations". It is the guidance under Regulation 3(2)(e) that is relevant for present purposes. The case owners are reminded that they must consider whether support under section 4 is necessary to avoid a breach of the applicant's ECHR rights and they are told that they "must consider applications for support under Regulation 3(2)(e) on a case-by-case basis" and that it is "for the applicant to provide evidence that a refusal to provide support would be a breach of [the applicant's] ECHR rights". Again, they are reminded that they may seek further information in writing for which they should allow 14 days for a response.

111. The guidance continues as follows:

> "An important consideration is whether the applicant can be expected to leave the UK to avoid a breach. It would not be reasonable to expect a person to leave the UK in the following circumstances (this list is not exhaustive):
>
> - The applicant has submitted to the Secretary of State further representations and these have not yet been considered. Support under Section 4 can be provided in such cases, unless it is clear that the further representations simply rehearse previously considered material or contain no detail whatsoever.
>
> - The applicant has submitted a late appeal against the Secretary of State's decision to refuse asylum and the AIT is considering whether to allow the appeal to proceed out of time.
>
> These are examples only. Other circumstances may also give rise to a breach and case owners must consider each case on its own facts.
>
> See the AI on Considering Human Rights Claim for further information.
>
> Where it would not be reasonable to expect the applicant to leave the UK and case owners consider that refusing support would breach a person's ECHR rights, case owners must grant Section 4 support. The review period will be determined by the reason why the applicant cannot leave the UK (i.e. the basis on which support was granted) and the date by when the barrier is likely to be resolved, or a 3-month period, whichever is earlier.

> If an applicant submits an application for section 4 on the basis that they have submitted further representations, the Case Owner must endeavour to assess the further representations before the application for section 4 is considered. If for some reason there will be a delay in considering the further representations, Case Owners must consider whether not granting section 4 support would breach the applicant's ECHR rights (see R (on the application of AW) v London Borough of Croydon and another [2005] EWHC 2950 (Admin) paragraph 69) and assess the application against other criteria and evidence supplied by the applicant."

112. I have already observed (see paragraph 105 above) that it is surprising that the case owners are not given express guidance on the Article 3 implications of *Limbuela*. I am simply unable to say to what extent it formed the basis of any guidance to senior caseworkers: it is not referred to at all in Mr Bentley's witness statement although it is referred to on a number of occasions in the Detailed Grounds of Defence drafted by Ms Broadfoot and Mr Poole.

113. At all events, that was the guidance given to case owners prior to 14 October 2009 and, to that extent, it reflects the policy or practice of the UKBA on behalf of the Secretary of State at that time. I will turn to the modifications made to the guidance after 14 October 2009 shortly (see paragraphs 115-138 below), but partly in anticipation that the following is to be noted:

a) Although somewhat modified in practice, there was a positive requirement ("Case Owners must ensure") that an application for section 4 support was dealt with within 2 working days of receipt;

b) when the application for section 4 support was based upon the submission of further representations, the case owner "must endeavour to assess the further representations before the application for Section 4 [support] is considered". (Emphasis added.)

114. It was the allegation that there were unjustified delays in considering section 4 support applications under this guidance that led to the judicial review applications in *LG* (see paragraphs 10-15 above).

Post-October 2009 guidance

115. The revised or new approach that took place with effect from 14 October 2009 required that any applicant making fresh representations should do so in person. The AI (which reflected the announcement made by the Secretary of State on 13 October 2009) contained a paragraph in these terms:

> "With effect from 14th October 2009, applicants whose case is being managed by the Case Resolution Directorate (CRD) will be required to make any further submissions by appointment and in person at the Liverpool Further Submissions Unit. With effect from 14th October 2009, those whose case is being managed by a regional asylum team will be required to make

> any further submissions in person at a specified reporting centre in their region. This does not apply to further submissions submitted before 14th October 2009 …."

116. The substance of the guidance given in relation to section 4 support was very similar to that which had been extant until 14 October 2009. The following paragraph was similar to the prefatory words recorded in paragraph 111 above:

> "An important consideration is whether the applicant can be expected to leave the UK to avoid a breach. It would not be reasonable to expect a person to leave the UK in the following circumstances (this list is not exhaustive):
>
> - The applicant has submitted a late appeal against the Secretary of State's decision to refuse asylum and the AIT is considering whether to allow the appeal to proceed out of time.
>
> - The applicant has submitted to the Secretary of State further submissions which are outstanding. Support under section 4 may be provided in such cases, if there is or will be a delay in serving a decision on these further submissions, unless it is clear that the further submissions are manifestly unfounded, or merely repeat the previous grounds or do not disclose any claim for asylum at all.
>
> These are examples only. Other circumstances may also give rise to a breach and Case Owners must consider each case on its own facts. See the AI on Considering Human Rights Claim for further information.
>
> Where it would not be reasonable to expect the applicant to leave the UK and Case Owners consider that refusing support would breach a person's ECHR rights, Case Owners must grant section 4 support. The review period will be determined by the reason why the applicant cannot leave the UK (i.e. the basis on which support was granted) and the date by when the barrier is likely to be resolved, or a three-month period, whichever is earlier."

117. However, there were three material (or arguably material) changes which form the basis for the challenge to the new practice.

118. In the first place, the requirement that an application for section 4 support should be considered and where possible determined within two working days (see paragraph 107 above) was deleted.

119. Secondly, following the paragraph quoted in paragraph 116 above is a paragraph (with corrections made) in the following terms:

> "If an applicant submits an application for section 4 [support] … solely on the basis that he/she has further submissions outstanding, the Case Owner must assess the further submissions before the application for section 4 is considered. If for some reason there must be a justifiable delay in serving a decision on the further submissions which can be justified to a senior manager of Grade 7 level or above, Case Owners must consider whether not granting section 4 support would breach the applicant's ECHR rights (see R (on the application of AW) v London Borough of Croydon and other [2005] EWHC 2950 (Admin) paragraph 69)."

120. Finally, under the heading "Delay in the consideration of further submissions" the following appears (which does not appear to have had an equivalent passage in the previous guidance):

> "If for some exceptional reason there will be a delay in serving a decision on the further submissions, the Case Owner should consider whether the applicant is eligible for support under regulation 3(2)(e). It should be assessed whether the applicant's ECHR rights would be breached if it were not for the provision of support. Support will not be granted if it is clear that the further submissions are manifestly unfounded, or merely repeat the previous grounds or do not disclose any claim for asylum at all.
>
> If the applicant is granted support on the basis of outstanding further submissions, subject to remaining destitute and continuing to satisfy the conditions of support, as set out under regulation 6(2) of the 2005 Regulations, his/her support is expected to continue until the UK Border Agency makes a decision on the further submissions. But Case Owners should expect to be able to justify the continued failure to get the further submissions resolved to senior managers of Grade 7 level or above."

121. In relation to the paragraph quoted in paragraph 119 above the words "must assess" are to be noted. Mr Bentley says that although this is characterised by the Claimants and the Intervener as a new policy, "it was rather a change in emphasis". I am not sure to what extent it is truly necessary to resolve that debate. However, any case owner who read the new AI would almost certainly have considered that it was now a mandatory requirement that he or she should assess the further submissions before considering the application for section 4 support rather than simply trying to do so. Bearing in mind that its predecessor spoke of trying to resolve applications for section 4 support within 2 working days (albeit in practice this requirement was relaxed in "Priority B" cases), the case owner simply reading the guidance to which I have referred would not know what would constitute a "justifiable delay" other than it must be capable of justification "to a senior manager of Grade 7 or above". Equally, the paragraph quoted in paragraph 120 above would certainly suggest to a case owner that it should only be "for some exceptional reason" that there should in any case be a delay in making, and thus serving, a decision on the further submissions. Any case

owner would know that he or she would have to "justify any continued failure to get the further submissions resolved" to a senior manager.

122. The foregoing guidance was what was published by the UKBA on its website and was thus the guidance which was available to applicants who conducted their own research into what was required and also to organisations like the Intervener that assisted asylum applicants with their applications for section 4 support.

The background to the changed guidance

123. Mr Bentley explains the background to the changed guidance and to the Secretary of State's announcement of the changes on 13 October as follows:

> "46. The change to further submissions having to be made in person was made against a background of real concern that in many cases repetitious and unmeritorious further submissions were made primarily to frustrate removal or ensure continued access to asylum support.
>
> 47. By quickly deciding the further submissions following the appointment, UKBA is attempting to close the loop-hole under which Failed Asylum Seekers are able to make unmeritorious and sometimes sequential further submissions purely as a means to access and then remain on support or to thwart removal. It is hoped that closing this loop-hole will in turn reduce the amount of asylum support paid to asylum seekers on the basis of unmeritorious and repetitive further submissions. This has the benefit of enabling UKBA to maintain and in some cases re-establish contact with Failed Asylum Seekers and encourage better engagement with the further submissions process.
>
> 48. In summary, UKBA believed that by requiring Failed Asylum Seekers to make further submissions in person and breaking the automatic link between receipt of a further submission and granting support under section 4 would discourage abuse of the system and help UKBA run a more efficient system."

124. The changes were introduced without express reference to, or consultation with, the members of NASOF (see paragraph 4 above). Unsurprisingly, this was not met with much enthusiasm by the members of NASOF (of which, as I have indicated, the Intervener was one), but nothing turns on it for the purposes of this case. The reason for not consulting as such was said by Mr Bentley to be as follows:

> "UKBA did not undertake a public consultation exercise before the new further submissions in person system was announced to Parliament … on 13 October 2009. Had such an exercise been undertaken, significant advance notice of the change would have been given and it is clear from previous experience that that would have led to an increase in the number of further

> submissions made thereby significantly exacerbating the very problems that the new system aimed to tackle. This was explained to relevant stakeholders at the first meeting of NASOF following implementation of the new system …. UKBA did, however, write and speak to a wide range of stakeholders on the day before the introduction of the new policy, and the day of its introduction, and responded to subsequent correspondence."

125. It is fair to say, on the basis of the evidence put before me by the Intervener, that there were a good many questions raised about the implications of the new system by the Intervener and others who sought to assist asylum seekers. I do not think it is necessary for me to set out in detail all the various interchanges that took place. There is no doubt that those who assisted asylum seekers, particularly in the context of applications for section 4 support, were anxious to know what delays, if any, were likely to arise from the new formulation of the guidance to which I have referred. I will draw attention to one or two of the questions raised and answers given, but the more significant feature is the internal guidance to which I will refer in paragraph 134 below.

126. According to the Intervener's evidence, at a meeting on 15 October 2009 there was an indication that under the new procedure there was no specified timescale for decisions on further submissions which would simply be made "as quickly as possible", whilst at a further meeting on 22 October 2009 the suggestion was that the decision should take no more than 20 working days from the date on which an appointment to make the further submissions was booked. At a meeting on 4 December 2009, the Intervener says that it asked for the introduction of a "fast track" process for street homeless cases which, it is said, would be considered. In January 2010 the timescale was said to be 15 days which was later clarified as "working days" though the Intervener and others felt there was confusion as to when the 15 working days started and whether it was a timescale for deciding the section 4 application or the further submissions themselves. Following a meeting on 21 January 2010, the Intervener suggests that "the voluntary sector agencies thought they had at least secured agreement that if a decision had not been made on the further submissions after 15 days, section 4 support would be "automatically triggered" on day 16", but that this was subsequently repudiated. At that meeting there was an indication that the operation of the policy would be evaluated after six months and that the Intervener and other voluntary sector organisations would be invited to participate in the evaluation and review. The Intervener raised concerns about the position of applicants who had families with children at various meetings. By September 2010, the suggestion was that the CRD had a 'priority process' for destitute and family cases although, according to the Intervener, this appeared to mean that "some cases took less than 15 days, but many cases are dealt with by day 15".

127. Whilst, as I have said, I merely record these matters to indicate the perception of the Intervener's representatives about what the new policy meant, there seems little doubt that the revelation of what can loosely be called a "15-day rule" had emerged.

128. Mr Bentley took up the story from the UKBA's point of view in the following paragraphs of his witness statement:

> "66. By May 2010, although not expressly stated in the publically available policy instruction a "reasonable time" had come to be interpreted as 15 working days. This has been communicated to corporate partners and relevant stakeholders on several occasions ….
>
> 67. In CAAU cases the 15 working days starts running from the date upon which an applicant has made an appointment to submit further submissions. In NAM cases the 15 working days starts running from the date upon which the further submissions are submitted, unless an applicant makes an appointment, in which case time starts to run from the date upon which the appointment is made as with CAAU cases.
>
> 68. Our statistics show that the average time taken to resolve section 4 applications based on further submissions was 23 calendar days in 2011 (17 working days from the date on which the section 4 application is made). This figure is distorted by a small minority of cases (89 out of 799) that took 50 or more calendar days to consider because of a variety of particular circumstances, such as further information requests to establish destitution or administrative errors. If these 89 cases are discounted the average time taken to consider the remaining 710 (89%) applications is 17 calendar days (13 working days)."

129. In paragraph 73 of his witness statement Mr Bentley says this:

> "I believe that the data held illustrates that case owners do prioritise section 4 applications where there is a need to, including applications made on the basis of further submissions. Records for 2011 show that 799 cases were placed on section 4(2) support on the basis of further submissions. 192 of these cases (24% of the total) were granted within 3 days of the date of application."

130. In order to provide a balanced account of the competing views concerning the practical implications of the new guidance, I am proposing to record the gist of what the Intervener says about what Mr Bentley has said. I do not think it is possible to resolve any differences that there may be on the basis of a consideration of the evidence on the papers alone. My view, however, is that I can decide the relatively narrow issue that falls to be decided in this case without resolving those differences although I am bound to say that it would have been more helpful to have had a clearer factual scenario than the evidence as it stands can demonstrate.

131. Mr Garratt said this in his second witness statement:

> "5. All four of our regional offices that provide a One Stop Service (which includes assisting clients to make applications for asylum support) monitored delays in making decisions on applications for Section 4 support from 1st September 2011 to

> 9th March 2012 - a period of 6 months. The four regional offices are located in Liverpool, East Midlands region, Manchester and Bristol.
>
> 6. Queries related to Section 4 UKBA support have been consistently the greatest single issue, across all offices. For the year January to December 2011 we provided advice on 8549 occasions out of which 2896 (34%) related to sessions where Section 4 support was raised as a query.
>
> 7. From 1st September 2011 to 9th March 2012 we monitored delays in Section 4 applications across our 4 regional OSS offices (Liverpool, East Midlands, Manchester and Bristol). During this period our One Stop Service offices assisted with approximately 189 applications for Section 4 support. We found that, nationally, Section 4 decisions, including but not limited to those based on further submissions, were taking an average 25 calendar days from the date of the application. Of the 169 total Section 4 decisions received, 2% (3) were made on the 19th calendar day, and just over 50% (85) were made after 19 calendar days (the equivalent of 15 working days) had passed. It is now not unusual to see applicants waiting for over 5 weeks between application and decision (36 cases or 21% of all Section 4 decisions received), with one client waiting 137 calendar days for a decision on his Section 4 application linked to further submissions, only for those further submissions to be recognised as a fresh claim, and subsequently he was granted discretionary leave to remain."

The accepted policy or practice

132. What is now accepted is that, at the time each Claimant's application for support under section 4 was made, there was a policy or working practice that a decision on their further representations should be made within 15 working days and if this was not achieved, the case owner was instructed to consider the section 4 claim on its merits. The instruction, therefore, was to determine the further representations first, and if this was not possible within 15 days, to go on to consider the section 4 application: see paragraph 49, Detailed Grounds of Defence dated 30 April 2012.

133. About two weeks prior to the hearing before me, in response to a request for disclosure made by the Intervener, the Defendant disclosed the internal guidance that had been referred to in paragraph 49 of the Detailed Grounds of Defence. This guidance was, by definition, not available publicly. The way the internal guidance was given to case owners was to provide them with a copy of the document that was available publicly (and from which the guidance summarised in paragraphs 115-122 above was derived) but with boxes inserted into the text with what constituted the "internal guidance".

134. The relevant internal guidance for present purposes appears in a box immediately below the paragraph in the otherwise publicly available guidance quoted at paragraph 119 above. Its contents was in these terms:

> "Definition of 'delay' in serving decisions on further submissions submitted at further submissions appointments or at reporting events
>
> The internal target timescales for serving decisions on further submissions submitted to the UK Border Agency at prearranged appointments is 15 working days after the arrangement of the appointment.
>
> The internal target timescales for serving decisions on further submissions submitted to the UK Border Agency at a reporting event is 15 working days after submission."

135. Reference to a "reporting event" is reference to any occasion when a foreign national is, as part of his or her conditions of temporary admission or release on bail pending removal, required to report to a designated reporting centre. It is well established that an asylum applicant may use a scheduled reporting event to submit further representations of the nature with which this case concerned.

136. I will return to that crucial aspect of the guidance shortly, but would simply observe that the internal guidance also reminds the case owner, firstly, when considering an application from an applicant with a dependent child under 18 in his or her household, to consider the particular ECHR issues, especially the rights of children, in such a situation and, second, that where he or she is minded to grant support under section 4 in any case there is a need to obtain authorisation from someone "at Grade 7 level before support is allocated".

137. The revelation of this guidance does appear to support the perceptions of the Intervener and others, and indeed to some extent what was said at various times by officials on behalf of the UKBA, that there was a 15-working day rule. I am not entirely sure how easily paragraph 66 of Mr Bentley's witness statement and an e-mail sent on behalf of the CRD to Ms Kat Lorenz, the Policy and Information Manager of the Intervener, dated 20 May 2010 (which said that "there is no case worker instruction" that could be sent to her) sit with the contents of this internal guidance. However, in fairness, the same e-mail to Ms Lorenz is quite explicit about the existence of what is referred to several times in the e-mail as the "15 working days timescale" or similar expression and Mr Bentley is entirely accurate in saying that the "publically available policy instruction" did not refer to it even though there had been discussion about something along those lines with other interested parties.

138. Whether there has been a degree of coyness about revealing the instruction, or whether there has been a reluctance (because of differing regional practices) to spell out the working practice as precisely as the Intervener and others might have wished, is difficult to judge and, again, I do not think it matters greatly for present purposes. The fact is that the instruction has now been revealed and it has not been suggested on behalf of the Defendant that it does not reflect the general policy or working practice in dealing with section 4 applications since October 2009. In so far as this case concerns the issue of whether it is a policy or practice that is unlawful, it is clearly that policy or practice that needs to be examined.

What does the policy mean in practice?

139. In the first place, what does the expression "15 working days" mean? The true length of time during which a "fresh" claim for asylum, with an associated section 4 support application, could be pending if the full 15 working days is permitted to elapse would be in the region of 20-21 calendar days simply including, where appropriate, weekends. Presumably, it would be longer if public holidays were also included.

140. It is also acknowledged that, if section 4 support is granted, there is usually a further potential period of up to 9 days before accommodation can be provided. This arises from the contractual arrangements that the UKBA has with accommodation providers.

141. It does follow that, if a case worker effectively shelves making a decision on an application for section 4 support in the context of a "fresh" claim for asylum for 15 working days, an applicant who is found to be eligible for and deserving of such support may have to wait for up to 30 days for the provision of such support.

142. There is, I should say, some evidence in the witness statements lodged by the Intervener that it can take some while before applicants who fall under the 'legacy' programme (those who originally applied for asylum before 5 March 2007), and indeed other applicants in some regions, can obtain an appointment to lodge their further submissions. It can, it is said, be very difficult to get through on the telephone booking line to make the appointment. There is, it is said, usually a further gap of between 3 and 10 working days before the appointment takes place although the evidence of Mr Bentley is that time runs from the date the appointment is booked, not when it takes place.

143. Whilst, as with the statements given by Mr Bentley, the statements given on behalf of the Intervener have not been the subject of the kind of scrutiny that might be appropriate in the trial of an action or in some other form of inquiry, what Mr Dave Garratt, the Chief Executive of the Intervener, says in his second witness statement (dated 10 April) is to this effect: comparing a survey that the Intervener carried out in 2009 with a survey carried out between September 2011 and March 2012, it could be seen that the average time to make a decision on an application for support under section 4 had increased from 12 calendar days in July 2009 to 25 calendar days and, whilst the average time for the provision of accommodation after a decision to grant it had reduced from 17 days, it was still between 5-9 days in "the overwhelming majority of cases". The overall result was that the "general delay from the date of application to the provision of section 4 support is now between 30-34 days".

144. That broad analysis does seem to fit generally with the analysis contained in paragraph 141 above. I should say that statements from representatives of the British Red Cross and the Refugee Council (both organisations that assist asylum seekers in much the same way as does the Intervener) confirm that their experience in relation to delays in decisions on section 4 applications was the same as that of the Intervener.

145. The letter that such an applicant receives after receipt by the UKBA of his or her application is exemplified by one disclosed along with the internal guidance to which I have referred above. The relevant paragraph reads as follows:

> "You will be notified of a decision in writing as soon as possible. Please note that whilst your case is under consideration you are ineligible for any support under Section 4

> … unless there is a justifiable delay in the service of your decision."

146. I should say that attached to the witness statement of Ms Jan Thompson, the Advice Services Manager at the Northern Refugee Centre in Sheffield, is a letter from the UKBA's Regional office in Leeds (which Ms Thompson says was the *pro forma* letter sent in such circumstances) dated as recently as 8 February 2012 in which the final paragraph reads as follows:

> "You will be notified of a decision in writing as soon as possible. Please note that whilst your case is under consideration you are ineligible for any support under Section 4 of the Immigration and Asylum Act 1999."

147. That letter cannot, of course, be correct. Reverting to the new practice generally, the net effect, of course, is that, where a delay occurs before the decision on the "fresh" claim is made, no decision is taken on the application for section 4 support and there is no scope for the intervention of an independent tribunal because no decision has been made which may be made the subject of an appeal (see paragraph 72 above).

148. As I have observed previously, it is not, of course, every applicant who submits a "fresh" claim that also seeks section 4 support. On that basis the issue that arises in the cases before me does not arise in every case. However, the evidence is (see paragraph 59 above) that a good number do make such an application. Whilst ultimately, the majority of the "fresh" claims are not found to amount to such for the purposes of paragraph 353 of the Immigration Rules (see paragraph 58 above), a not insignificant minority (in the region of 15%) are ultimately accepted to be "fresh" claims. Those fresh claims may, of course, ultimately not be held to afford a basis for granting asylum but, where all other conditions are fulfilled (see paragraphs 70 above), such a person, if destitute or threatened with destitution, ought to have been provided with section 4 support whilst the decision is pending. The essential issue is whether the adoption of a policy that may have the effect of not providing support in this way in these cases is unlawful.

149. Before I turn to that issue, there is one other feature of the background to which I should refer, namely, the question of whether there is any identifiable process by which cases are prioritised. For example, where an applicant claims to be street homeless or threatened imminently with being street homeless, is there guidance that encourages a case owner to give the application priority? The short answer to the question appears to be "no". Mr Bentley says that where a member of the voluntary sector helps someone making new representations to apply for section 4 support, he or she will usually identify the case as being Priority A or Priority B. That, of course, applies only where the applicant is assisted in such a way. Mr Bentley says that the application form is designed to elicit information that indicates "vulnerable cases" and says that in 2011 799 cases were placed on section 4 support of which 192 (24%) were granted within 3 days of the application.

150. That may, of course, indicate that some cases were indeed prioritised, but it does not explain how or upon what basis those cases were given priority. Given that any decision by a case owner that section 4 support ought to be provided requires authorisation from a Grade 7 senior manager (see paragraph 121 above), any guidance

available to a Grade 7 senior manager would be of interest in this context. However, I have not been shown any such guidance. The Intervener and the other bodies who assist asylum seekers have submitted evidence which suggests that, if there is any policy that does prioritise street homeless and other urgent and vulnerable cases, it does not appear to be effective. I have observed that the guidance given (i.e. the publicly available guidance), whilst referring to the concept of being "destitute" on a number of occasions, does not refer to the status of street homelessness at all.

Is the policy unlawful?

151. Leaving to one side for the moment the circumstances of the two individual claimants, it is contended by Mr Westgate and Mr Khubber (and by the Intervener) that the policy is unlawful (a) because it creates an unacceptable risk of a breach of Article 3 or because it cannot be operated lawfully and/or (b) is contrary to the Defendant's obligations under European Law in terms of The Reception Conditions Directive (*Council Directive 2003/09/EC of 27 January 2003*) (the 'Reception Directive') which lays down minimum standards for the reception of asylum seekers.

Unacceptable risk of Article 3 breach

152. Reliance is placed on *Munjaz v Merseycare NHS Trust* [2006] 2 AC 148 for the proposition that a policy that carries a significant risk of a breach of Article 3 would be unlawful. That case concerned the seclusion regime in a psychiatric hospital to which the claimant, a long-term psychiatric patient, was subjected for continuous lengthy periods. The issue was whether it was lawful. Although he did not complain of any actual Article 3 breach in relation to him, the Claimant argued that the policy was unlawful because it created a risk of such a breach, particularly because there were not sufficient reviews by a psychiatrist. The House of Lords held that the test for legality of the policy was whether it exposed the patients "to a significant risk of treatment prohibited by Article 3" (*per* Lord Bingham of Cornhill at paragraph 29). Lord Hope of Craighead put the matter thus:

> "80. I would approach this issue therefore by asking myself whether [the hospital's] policy gives rise to a significant risk of ill-treatment of the kind that falls within the scope of the article, and if there is any such risk whether it would impose a disproportionate burden on [the hospital] for it to be forced to abandon its policy so as to eliminate it.
>
> 81. The risk which must be considered is whether a patient might suffer ill-treatment of the required level of severity as a result of being kept in seclusion under [the hospital's] policy for longer than would have been the case under the Code. As Dr Davison makes clear in her report, seclusion does give rise to risks which are both physical and psychological. That is why regular medical reviews are necessary to ensure that the patient's mental and physical health does not deteriorate. Her conclusion is that [the hospital's] policy of fewer reviews after seven days increases the risks. But the evidence falls well short of demonstrating that the policy, when read as a whole and if proper weight is given to all its additional safeguards, gives rise

> to a serious risk of ill-treatment of the required level of severity. The absence of any evidence that any patient has suffered as a result of [the hospital's] policy is highly significant. So too is the absence of any evidence that seclusion is being used at Ashworth for reasons that are unacceptable. On the contrary, Dr Davison's opinion is that the initial decision to seclude Mr Munjaz was appropriate on each occasion and that there was no evidence that more frequent reviews would have made any difference in his case. The Mental Health Act Commission's suggestion that arrangements should have been considered for the alternative management of such patients has not, so far as the evidence shows, been followed up by any detailed explanation of the alternative options that are available.
>
> 82. The conclusion must be that the risk of ill-treatment is very low if full effect is given to the policy, and that in view of the safeguards which it contains and the special circumstances that obtain in its hospital it would be disproportionate for [the hospital] to be compelled to abandon the policy in favour of the Code to eliminate that risk. In my opinion the policy is not incompatible with article 3."

153. Lord Scott of Foscote agreed with Lord Bingham of Cornhill and Lord Hope of Craighead.

154. In *R (Suppiah) v SSHD* [2011] EWHC 2 (Admin), in the context of a case concerning the Secretary of State's practice of detaining families with children pending removal or deportation, Wyn Williams J said this at paragraph 137:

> "I am content to accept that as a matter of law a policy which cannot be operated lawfully cannot itself be lawful; further, it seems to me that there is clear and binding authority for the proposition that a policy which is in principle capable of being implemented lawfully but which nonetheless gives rise to an unacceptable risk of unlawful decision-making is itself an unlawful policy."

155. In arriving at that conclusion he relied upon *Regina (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219 and *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin) (Silber J).

156. I respectfully agree that the conclusion of Wyn Williams J is supported by the authorities to which he referred and indeed is consistent with the approach of the House of Lords in *Munjaz.* It does not appear that the principle was disputed on behalf of the Secretary of State before Wyn Williams J and it has not been challenged before me.

The 'Reception Directive'

157. Article 2 contains certain relevant definitions. An 'applicant' or 'asylum seeker' means "a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken" and an 'application for asylum' means an "application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention". The expression 'reception conditions' means "the full set of measures that Member States grant to asylum seekers in accordance with [the] Directive" and the expression 'material reception conditions' means "the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance".

158. Article 13 provides for the general rules on "material reception conditions and health care" and the two principal rules are as follows:

> 1. Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum.
>
> 2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.

159. Article 17 requires account to be taken by the Member State of "the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions … relating to material reception conditions and health care".

160. In *R (ZO (Somalia) and another) v Secretary of State for the Home Department* [2010] 1 WLR 1948 ('*ZO*') the Supreme Court held that a further application for asylum fell within the scope of an "application for asylum" as defined in Article 2 and, accordingly, the term "asylum seeker" as also defined in Article 2 includes a Failed Asylum Seeker (an FAS) with further submissions outstanding.

161. It is conceded that each of the Claimants was in principle entitled to expect the minimum standards laid out in the Reception Directive from the point that they made their further submissions which for MK was on 15 October 2010 and AH on 9 September 2010. This, it is submitted on their behalf, means that the duty to secure an adequate standard of living was <u>immediately engaged</u> and that delaying consideration of their applications for section 4 support until after the fresh claim submissions were considered was and is contrary to their rights pursuant to the Directive.

162. The argument of the Defendant (taken principally from the Detailed Grounds of Defence which operated also as the Skeleton Argument) can be summarised thus: first, there is no timeframe laid down within the Directive in which material reception conditions must be provided after an asylum application has been made. The obligation of the Secretary of State is, therefore, it is argued, to provide minimum standards within a reasonable time. It is contended that the current system of considering applications for section 4 support from applicants with further

submissions outstanding is lawful and adequately protects against the risk of breaches of relevant Convention rights. Second, it is emphasised that the point of the current system is to seek to identify and reject those claims that are devoid of merit and that some kind of screening process (see *per* Lord Kerr of Tonaghmore JSC, quoted at paragraph 164 below, giving the judgment of the Supreme Court in *ZO*) is "simply not an efficient use of resources … particularly when substantive consideration is in general given in a very short time". Third, since it is accepted that the Secretary of State must evaluate the extent to which provision was necessary before making accommodation available, that evaluation needs "to have regard to all relevant circumstances, including, where appropriate, the matters which are alleged to constitute a fresh claim for asylum".

163. In relation to the suggestion that there should be a screening process Mr Bentley says this:

> "63. In the majority of cases it is not possible to 'filter' submissions at the point they are made to identify those clearly without merit, or to identify those that merely repeat matters already considered, without consideration of the papers relating to the initial asylum claim. The introduction of a filtering approach that did not assess the merit of the further submissions by comparing them to the initial claim would therefore be unworkable. It would lead to many persons who make repeat or unmeritorious submissions being placed on section 4 support and would undermine the policy objective of disincentivising such submissions and persuading failed asylum seekers to make arrangements to leave the UK. Additionally, even where it is possible to identify unmeritorious further submission quickly, it is usually necessary to set out the reasons for rejecting them in some detail in order to avoid claims for judicial reviews."

164. Mr Westgate and Mr Khubber challenge these submissions and this approach. They submit that if the Directive was to be understood in this way it would deprive it of any beneficial effect in relation to applicants for asylum based upon new submissions because they would be deprived of "material reception conditions" while their applications were pending. They suggest that the substance of the argument relied upon by the Secretary of State was advanced and rejected in *ZO*. They draw attention to what Lord Kerr of Tonaghmore JSC said in the following paragraphs of the judgment of the court:

> "47. Article 16(4) requires individual attention to be given to decisions for reduction, withdrawal or refusal of reception conditions and the appellant has argued that the detailed assessment that this will entail would impose an onerous burden on the immigration authorities which would in turn limit the scope for withdrawal or reduction of reception conditions. I cannot accept this argument. There does not appear to be any reason in principle why the state should not be able to adopt what the claimants described as "the screening short-cut of accelerated determinations", particularly in view of

> the inroads which Mr Tam has told us are being made in the backlog of repeat applications. The answer to the possibility of abuse in the making of repeat applications must surely lie in the devising of streamlined procedures for identifying and rejecting promptly those that are devoid of merit.
>
> 48. This is undoubtedly what was contemplated by certain provisions in the Procedures Directive, particularly article 24(1)(a) (which empowers member states to create specific procedures to allow for a preliminary examination for the purposes of processing cases); and article 32(2) (which permits a specific procedure to be applied after a decision has been taken on a previous application). Recital 15 of the Procedures Directive is also relevant. It states:
>
> "Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige member states to carry out a new full examination procedure. In these cases, member states should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant."
>
> 49. These provisions point powerfully to the way in which the problem of unmeritorious applications should be confronted and dealt with. This is not to be achieved by disapplying the Reception Directive to all repeat applications whether or not they have merit. The problem of undeserving cases should be counteracted by identifying and disposing promptly of those which have no merit and ensuring that those applicants who are genuine are not deprived of the minimum conditions that the Directive provides for."

165. I should say that I accept the broad thrust of the submissions made by Mr Westgate and Mr Khubber which, in my judgment, are essentially consistent with the approach taken by the Supreme Court in *ZO*. The Reception Directive, as with section 4 itself, must undoubtedly be interpreted in a way that permits sensible working arrangements to be adopted in relation to applications for support whilst decisions on the renewed substantive asylum application are made: no one suggests that the instant any application for section 4 support is made such support must be given there and then. That would be unworkable and unrealistic in that it would give no opportunity to evaluate the application on its merits. Plainly, some latitude must be given to enable the applications that are "abusive, manifestly ill-founded or merely repetitious" to be identified and, of course, where there is a real issue about destitution for that issue to be resolved. I do not understand the submission of Mr Westgate and Mr Khubber to suggest otherwise. They concede that there is nothing to prevent the Secretary of State from adopting "fast track or rigorous screening procedures to ensure that weak claims are weeded out early on". However, they contend that a wholesale rejection of some kind of filtering process does not address the need for the Secretary of State to take such steps as are necessary to avoid a breach of an individual's Convention rights. I am not sure to what extent it is appropriate for me to make this observation, but it is, to my mind, surprising that the Secretary of State should feel able to characterise a

suggestion made unanimously by five members of the House of Lords to be "unworkable" and as an inefficient use of resources.

166. Mr Westgate and Mr Khubber submit that the lawful way for the Secretary of State to meet her obligations, whether under section 4 or the Reception Directive, is to have a system in place that permits a view to be taken at an early stage of whether the application is arguable (and is thus not abusive or merely repetitious): if it is, section 4 support (if it is sought) should be given until the "fresh" claim is determined. They rely upon *R (Clue) v Birmingham City Council (Shelter intervening)* [2011] 1 WLR 99 to support that proposition.

167. *Clue* raised the issue of the way in which a local authority should approach an application for assistance under section 17 of the Children Act 1989 by an applicant who claimed to be "a person with children in need" when the applicant had an outstanding claim to the Secretary of State for indefinite leave to remain on human rights grounds. The local authority refused to provide the applicant with financial support and accommodation in the United Kingdom, relying on paragraphs 1 and 7 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002, which provided that a non-asylum seeker who was in the United Kingdom in breach of immigration law was not eligible for assistance under section 17 of the 1989 Act, except to the extent necessary to avoid a breach of his or her rights under the Convention. Its assessment concluded that the applicant and her family were destitute, but also concluded that its refusal of assistance did not breach their rights under Article 8 of the because they could continue to enjoy a family life in Jamaica in respect of which it offered to pay their travel costs to Jamaica and to contribute towards their resettlement. In relation to the question of how the local authority should approach the issue of an outstanding application for leave to remain Dyson LJ, as he then was, (with whom Etherton LJ and Sir Scott Baker agreed) said this:

> "66. I conclude, therefore, that when applying Schedule 3, a local authority should not consider the merits of an outstanding application for leave to remain. It is required to be satisfied that the application is not "obviously hopeless or abusive" to use the words of Maurice Kay LJ. Such an application would, for example, be one which is not an application for leave to remain at all, or which is merely a repetition of an application which has already been rejected. But obviously hopeless or abusive cases apart, in my judgment a local authority which is faced with an application for assistance pending the determination of an arguable application for leave to remain on Convention grounds, should not refuse assistance if that would have the effect of requiring the person to leave the UK thereby forfeiting his claim. This is the approach adopted by Lloyd Jones J in R ([AW]) v Croydon London Borough Council [2006] LGR 159, paras 74–76 and Andrew Nicol QC, sitting as a deputy High Court judge, in R (B) v Haringey London Borough Council [2007] HLR 175, para 60 and Binomugisha v Southwark London Borough Council [2007] 1 FLR 916, para 53."

168. I think it is important to observe that, whilst there are some analogies between the position of a local authority in the situation in that case and the position of the

Secretary of State in the situation with which this case is concerned, there is the obvious difference that it is the Secretary of State in the present situation who makes both decisions: the Local Authority is dependent ultimately upon the decision of the Secretary of State on the immigration issue. Furthermore, the practical implications for a local authority of adopting the approach suggested by the Court of Appeal in *Clue* may be nowhere near as difficult as it would be for the Secretary of State in the situation with which cases of the kind involved in the present case are concerned.

169. I do not doubt that such an approach is one approach that could be adopted in the present situation and would be lawful. However, to consider that it is the only lawful approach is, to my mind, a step too far. At the end of the day it is not for the court to try to prescribe some means by which a statutory or other legally binding duty on the Secretary of State should be fulfilled: the court's role is merely to decide whether the policy or practice adopted is or is not lawful. If it declares it to be unlawful, it is incumbent on the Secretary of State to look again at the policy or practice and to endeavour to put one in place that is lawful.

170. These considerations, in my view, bring considerations under the Reception Directive back to the essential issue of whether the present practice involves a significant risk of breaching the Article 3 rights of an individual applicant. Whilst I would accept that the requirements of the Directive are engaged when an application is made (as is conceded by Ms Broadfoot and Mr Poole), there has to be a measure of tolerance in the process to enable relevant evaluations of the application to be made. The issue ultimately is whether an instruction of general application that sanctions a delay of 15 working days before it is necessary to consider the associated section 4 application risks to a significant degree breaching the Article 3 rights of individual applicants for section 4 support.

171. I have observed on a number of occasions, and I repeat, that, by its very nature as a judicial review application, the opportunity has not presented itself to me to see and hear the statistical evidence relied upon by Mr Bentley being tested and scrutinised – and neither have I had the evidence given by and on behalf of the Intervener subjected to similar test and scrutiny. I do regard this as something of a disadvantage. I do not know how many applications for section 4 support are made which are rejected. I do not know how many applications that are rejected are translated into a successful application by virtue of the appeal process. I do not know how those who are successful have brought themselves within the requirements of the Regulations. I simply know (and allowing for the fact that it might be a slight underestimate) that only about 15% of all "fresh" claims based upon new submissions are ultimately regarded as "fresh" claims for the purposes of Rule 353. I do not know how many of that cohort of 15% have made claims for section 4 support and of those how many were granted and how many were refused.

172. It is, however, in my view, a reasonable inference that had there been overwhelming statistical evidence to demonstrate that, whatever the real meaning of the present instruction to case owners, the reality is that all, or at least substantially all, deserving section 4 applicants are accommodated at the earliest reasonable moment, it would have been put before me. I would simply observe that the figures have not been presented in that way.

173. Mr Bentley says that the introduction of the new system in October 2009 "has resulted in significantly fewer cases being placed on section 4 support on the basis of outstanding further submissions." The available figures show that in July 2010 there were a total of 6,092 cases supported under section 4(2), 4,512 (74%) of which had been granted because of further submissions and that the equivalent figures as at July 2011 and 16 April 2012 were 2,082 and 1,025 (54%) and 1,793 and 808 (45%) respectively.

174. He analyses these figures in this way:

> "56. These figures show two things. First, the overall number of cases being supported under any part of section 4 have reduced. An analysis of why this is has not yet been carried out, but certainly part of the reason has been CRD's resolution of old cases and in addition there has been a fall in levels of asylum intake. Second, the percentage of cases being supported under section 4, as a result of further submissions, has also dropped. There may be different reasons for both of these changes, one of which is that the policy has deterred at least some of the abusive applications identified in my earlier paragraphs above."

175. Undoubtedly, the figures show a real reduction in the number of those supported under section 4. However, the true issue for present purposes is whether the other feature of that picture is that there are now more people than previously who have made new representations in respect of their asylum claims who have been street homeless or otherwise destitute whilst those representations were being considered during which period no decision on their section 4 support application was made.

176. Again, I emphasise that the evidence to which I am about to refer has not been tested in a way that would give greater confidence as to its accuracy and validity in relation to the question posed in the last paragraph. However, it has been placed before the court and I should refer to it. In his second witness statement Mr Garrett, who confirms that "the majority of [the Intervener's] clients are single men" says this:

> "19. It is clear, then, that this 15 day systematic delay is affecting a significant number of vulnerable applicants nationally. A significant proportion of our clients were street homeless whilst awaiting a decision on their Section 4 support application where they had further submissions outstanding. Many of our clients report sleeping on park benches, garages, sheds or outside our offices. One of our clients, in desperation, broke into our office in order to sleep and injured himself in the process. Our clients generally avoid other rough sleepers because they are afraid of being attacked. This means they avoid soup kitchens and night shelters too as they often can't cope with the crowded and hostile environment.
>
> 20. 6 applicants suffered illness or disability, and one applicant was receiving psychiatric care. 1 applicant (and her husband) were HIV+. 4 applicants had children (although one

> was not living with them) and 3 applicants had a pregnant wife, one of whom experienced serious complications throughout the pregnancy (and while waiting for the support decision which was delayed due to further requests for medical information), 5 applicants reported depression and stress, including one who was self-harming and 2 who had attempted suicide. 1 applicant reported fear of his community regarding his sexuality (thus impacting on his ability to find alternative means of support). A significant number of our clients are staying on the floors of others who are in receipt of section 4 support. Their section 4 support is insufficient to enable the friends to share their food with our clients and many of our clients in this position go without food for a number of days. This means that even where they may have a roof over their heads, they do not have any or anywhere near enough food to eat.
>
> 21. Our survey indicates that there is no prioritisation given to applications from street homeless people."

177. Mr Hugo Tristram, the Development Officer of Refugee Services, British Red Cross, says that a large number of those seeking the help of the Red Cross "on the basis that they are destitute do so because of delays in dealing with their section 4 support application pending consideration of further 'fresh claim' submissions". He continues thus:

> "… A significant proportion of such people (i.e. destitute with further submissions pending) are "street homeless" (i.e. people sleeping on the streets). The majority are single men, although they also include single women."

178. Mr Tristram's statement describes in some vivid, yet balanced, detail the circumstances in which those who are street homeless find themselves. I will quote two paragraphs:

> "21. Many of our street homeless clients report sleeping at bus stops, on night buses (in cities such as London which have night bus services), in train and bus stations. People can only get on night buses if they have been able to obtain a bus pass or ticket (which means that it is not an option for the overwhelming majority of street homeless asylum seekers). They also tell us they feel vulnerable and unsafe sleeping rough. Some report being attacked whilst sleeping rough and it is not uncommon for them to be subjected to racist abuse.
>
> …
>
> 25. The overwhelming majority of the people who are street homeless find the experience of being in that position frightening and hugely distressing. Most of them have never experienced being homeless and lack the necessary survival skills to cope with being homeless. Many of them will not be

> sufficiently proficient in the English language. A lot of them, even if they speak English, are educated and from professional backgrounds. The distress and humiliation they report feeling at being homeless is particularly acute given their unfamiliarity with such a way of life. They find it particularly difficult to deal with the encounters with established groups of rough sleepers (often drug and alcohol users) which are unavoidable when someone is homeless."

179. Ms Donna Covey, Chief Executive of the Refugee Council, confirms the experience of the Intervener in the delays in making decisions on applications for support in "further submissions cases" and adds this:

> "24. I have read the statement made by Hugo Tristram of the British Red Cross and can confirm that the impact of destitution on our clients is similar to that documented by the Red Cross. Our clients frequently report sleeping in bus shelters, parks and on night buses, they report fear of authorities, indignity and lack of self worth."

180. Ms Thompson, to whom I referred in paragraph 146 above, describes in detail the kind of arrangements that her organisation endeavours to make for those who are awaiting the outcome of their applications for section 4 support and concludes that section of her witness statement in this way:

> "34. It is clear to NRC that the minimal alternative support that is available means that many of its clients awaiting decisions on their section 4 support applications are going hungry and experiencing high levels of stress and anxiety. A sizeable proportion of our clients are street homeless. Some of them (including women) report sleeping at bus stops and in bus stations. Clearly this is unsafe particularly for women."

181. I do not think evidence of that nature can be ignored and no evidence has been adduced by the Secretary of State substantially to controvert it. In one sense, it would seem to be an almost inevitable consequence of the new policy.

Conclusion

182. No fair-minded person would be unsympathetic to the practical difficulties faced by the hard-pressed officials who have to deal with a large number of "fresh" asylum applications at the same time as applications for section 4 support. All judges of the Administrative Court will themselves have seen purported "fresh" submissions which are no such thing and submissions which, in their presentation, are voluminous and unfocused. I have certainly seen submissions of that nature in my judicial capacity and that is why the suggestion that only about 15% of such submissions ultimately are found to be true "fresh" submissions within Rule 353 comes as no real surprise. Equally, it would be wrong not to acknowledge that the formulation of guidance to case owners dealing with such matters must undoubtedly be a difficult task. Furthermore, the resources available to deal with these matters doubtless face the same constraints that every other publicly-funded task faces at present.

183. However, the court can deal only in what is or is not lawful. Amongst the unmeritorious cases there are deserving cases. Furthermore, recourse to statistics must never be allowed to divert attention from the fact that there are human beings behind each application made and that some (including single men) may be extremely vulnerable at the time of making the application for support, the vulnerability being exacerbated by being destitute and homeless at the time. Whilst it would probably be unrealistic to expect that any policy or practice, however tightly drafted and conscientiously observed, would always ensure that every deserving case was dealt with properly and efficiently, that can never be a justification for not endeavouring to set in place a policy that does try to achieve this objective.

184. The evidence in this case drives me to the conclusion that the blanket instruction set out in paragraph 134 above does involve a significant risk that the Article 3 rights of a significant number of applicants for section 4 support will be breached. Whether it is to be looked at purely on that basis or on the basis of a breach of the Reception Directive does not, to my mind, matter: given the test that a case like *Munjaz* (see paragraph 152 above) requires to be applied, it seems to me clear that the instruction has to be characterised as unlawful. It also has the effect of denying the applicant any independent review of the merits of his or her claim for support whilst the substantive "fresh" claim application is considered.

185. I have reached that conclusion without specific regard to the implications of section 55 of the Borders, Citizenship and Immigration Act 2009, the EU Charter of Fundamental Rights, the Public Sector Equality Duty and the other statutory provisions upon which reliance has been placed either by the Intervener or on behalf of the individual Claimants. I make it clear that I express no views on those matters.

186. The conclusion to which I have come does not, of course, mean that every application for section 4(2) support dealt with since October 2009 will have been dealt with unlawfully. Each case will depend upon its own facts. All that I have concluded is that the policy or practice reflected in the instruction is, for the reasons I have given, unlawful.

Relief and the individual cases

187. I would invite the parties to consider what, if any, relief should be granted to give effect to this judgment. I include in that an invitation to the Secretary of State to consider what her attitude is to the two individual cases. The Detailed Grounds of Defence state that in neither case was it accepted that the criteria set out in paragraph 3(1) and 3(2)(e) of the Regulations were made out. I should like to know whether that will remain the position in the light of this judgment. If so, I will address individual cases directly in a subsequent ruling.