Neutral Citation Number: [2014] EWHC 1033 (Admin)
Case No: CO/8523/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2014

Before:

THE HON. MR JUSTICE POPPLEWELL

- -

Between:

The Queen on the application of Refugee Action	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Dinah Rose QC, Alison Pickup and Ben Silverstone (instructed by **the Migrants' Law Project, Islington Law Centre**) for the **Claimant**
Clive Sheldon QC and Deok-Joo Rhee (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 11, 12, 13 February 2014

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Judgment

The Hon. Mr Justice Popplewell:

Introduction

1. This is an application for judicial review of the Defendant's decision, announced to Parliament on 6 June 2013, that the level of support provided in cash to meet the essential living needs of asylum seekers for the financial year 2013/2014 should remain frozen at the rates which had applied since 2011. Such support is provided pursuant to sections 95 to 98 of the Immigration and Asylum Act 1999

("the 1999 Act"). The weekly amounts are set out in Regulations 10(2) and 10A of the Asylum Support Regulations 2000 ("the AS Regulations 2000").

2. The claim is brought in the interests of all asylum seekers by the Claimant, which is a charity established in 1981 to support and work with refugee communities in order to facilitate the successful resettlement in the UK of refugees and asylum seekers. In recent years it has been funded predominantly by the Defendant in order to provide advice and assistance to asylum seekers at regional centres, with the remainder of its income coming from charitable grants and individual donations.

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

4. Judicial review is sought on the following grounds:
   (1) The Defendant's decision that the current rates of asylum support are sufficient to meet the essential living needs of asylum seekers is incompatible with her obligations under EU law and in any event is irrational. No sufficient investigation has been conducted into the level of support necessary to meet essential living needs. In taking the decision the Defendant has taken account of irrelevant considerations and/or material errors of fact, and has failed to take account of relevant considerations.

   (2) The Defendant has breached her public sector equality duties ("PSED") under s. 149 of the Equality Act 2010.

   (3) The Defendant has breached her duty towards children under s. 55 of the Borders, Citizenship and Immigration Act 2009.

5. A rolled up hearing of the application for permission, with the substantive hearing to follow immediately if permission is granted, was ordered by Kenneth Parker J on 23 August 2013.

An overview of support for asylum seekers

6. Unaccompanied children seeking asylum are supported outside the regime of the 1999 Act and are not the subject matter of this challenge. This case is concerned with support for adult asylum seekers and their dependant children.

7. Section 115 of the 1999 Act excludes asylum seekers and their dependants from entitlement to most social security benefits, including income support, disability related benefits, social fund payments and child benefit. Asylum seekers are ordinarily prohibited from working while they are waiting for a decision on their claim; they may apply for permission to work if they have been waiting for 12 months or more for an initial decision from the Defendant; if permission to work is granted, it is restricted to employment in one of the Defendant's list of shortage

occupations and they are not permitted to engage in business or self-employed activities (paragraphs 360-360B of the Immigration Rules HC395).

8. Asylum support is limited to those who are "destitute", defined in s. 95 of the 1999 Act as those who do not have any adequate accommodation or means of obtaining it and those who cannot meet their essential living needs. Support is provided to those who apply for it and who are determined by the Defendant to meet the eligibility threshold of destitution.

9. Such asylum seekers are eligible for support under the 1999 Act throughout the period for which they are in this country, but a different regime applies before the determination of their asylum claim to that which applies after determination. If the determination grants refugee status, or they are otherwise given leave to remain, they are normally eligible for mainstream benefits. If the determination rejects their asylum claim, after exhaustion of rights of appeal, they may receive support under s. 4 of the 1999 Act for so long as they remain in the country as failed asylum seekers, but only if there is some good reason why they are unable immediately to leave the UK. Section 4 support for failed asylum seekers is set at a lower rate than the amounts provided pursuant to sections 95-98 to those awaiting a decision. Those lower s. 4 rates for failed asylum seekers are not within the scope of the present challenge, which, with one qualification, is confined to the support provided whilst asylum claims are awaiting determination. The qualification arises by reason of s. 95(4) of the 1999 Act which provides that failed asylum seekers who have dependant children under the age of 18 continue to receive support under the s. 95 regime rather than at the lower rate pursuant to s. 4. Therefore the asylum seekers whose support is under consideration in this case are adults and dependant children awaiting final determination of their asylum claims, and additionally failed asylum seekers who still have dependant children under 18, for so long as they remain within the country. I shall use the slightly inaccurate epithet "asylum seekers" to refer to both categories.

10. Although this support for asylum seekers is temporary, it is often required for a substantial period. On 27 February 2013, Mark Harper MP, then Minister for Immigration, gave the average time which asylum seekers spend on s. 95 support as 525 days. The most recent statistics I was given were that, of the 13,412 asylum applicants who came off s. 95 support in 2013, about 42% had been on it for less than 6 months, 15.5% for 6 to 12 months, 15% for 1 to 2 years, and 27.5% for over 2 years.

11. When an asylum seeker first applies for support, as a general rule full board accommodation is provided in Initial Accommodation Centres (pursuant to s. 98 of the 1999 Act) while there is a consideration of the support application. Once a decision has been made to grant support under s. 95, the person is then dispersed to accommodation. All accommodation provided under the 1999 Act is provided on a "no choice" basis. Accommodation of families with children is normally provided in separate houses or flats, whilst single adults, couples, and in some cases lone parents, are accommodated in shared houses. Utility bills and council tax are met by the accommodation provider. The accommodation includes the provision of basic furniture and household equipment such as a cooker, washing machine, refrigerator, cooking utensils, crockery and cutlery. Cots and high chairs

are provided for young children, and sterilising equipment for babies under 12 months.

12. In addition the asylum seeker receives weekly cash payments to meet additional living expenses such as food and clothing in the amounts set out in Regulation 10(2) (and Regulation 10A where applicable) of the AS Regulations 2000. Where accommodation is provided which includes provision of some meals, weekly cash payments may be reduced accordingly: Regulation 10(5) of the AS Regulations 2000. It is these cash payments whose amount is the subject matter of the present challenge. It is important to emphasise, however, that this is only one part of the support which is provided to asylum seekers by the State. In addition to the accommodation support provided in kind, asylum seekers are also provided with access to healthcare, education and other community care support, pursuant to powers and duties conferred on local authorities and other organs of the State. For example, asylum seekers have free access to primary healthcare and are exempt from charges for secondary care in the NHS (Regulation 4(1)(c) of the National Health Service (Charges to Overseas Visitors) Regulations 1989. Those in receipt of asylum support are automatically issued with HC2 certificates entitling them to free prescriptions, reasonable costs of travel to and from hospital for scheduled appointments under the care of a consultant (and certain other medical appointments requiring an additional journey) where they have been referred by a doctor or dentist, and free dental treatment and sight tests. I shall return to the scope of the support which falls outside the 1999 Act later in this judgment.

13. When originally enacted, s. 95 of the 1999 Act gave the Defendant a power to provide support to destitute asylum seekers, but imposed no duty to do so, although s. 122 imposed a duty to provide support where a destitute asylum seeker's household included a child who did not have adequate accommodation or the means of meeting his essential living needs. However, following Council Directive 2003/9/EC which laid down the minimum standards for the reception of asylum seekers ("the Reception Directive"), the UK came under an obligation to provide a minimum level of support to all asylum seekers and their dependant children. It gave effect to this obligation in part by converting the power under s. 95 into a duty, by Regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005 No 7) ("the AS Regulations 2005").

14. Regulation 10 of the AS Regulations 2000 applies where the Secretary of State has decided that asylum support should be provided in respect of the essential living needs of a person. Regulation 10(2) sets out in a table the weekly amount of cash which "as a general rule may be expected to be provided" in respect of essential living needs. The current amounts are:

Single adult	£36.62
(other than a small legacy remnant of over 25s who have been on support since 2009 who receive £42.62)	
Qualifying couple	£72.52
Lone parent aged 18 or over	£43.94

16 & 17 yr olds	£39.80
Children under 16	£52.96

15. In addition to the Regulation 10(2) payments, additional cash payments are made to pregnant women and children under the age of three:

    (1) Under Regulation 10A, added by amendment in 2003, additional weekly amounts to be paid to pregnant women and children under the age of three are as follows:

Pregnant women	£3
Babies under the age of one	£5
Children aged one and two	£3

    (2) Pregnant women are granted a maternity payment (for each pregnancy) of £300 which is payable in the period from 8 weeks before the estimated delivery date to 6 weeks after birth.

16. Regulation 11 formerly provided for the making of single additional payments of £50 to those who had been in receipt of asylum support for at least six months, where the delay in determining the asylum claim was not the applicant's fault. That Regulation was revoked on 4 June 2004, to reflect the change made in April 2002 to provide all s. 95 payments in cash rather than vouchers.

17. The history of the weekly cash payment rates set under Regulation 10(2) and 10A is as follows:

    (1) The rates originally laid down in Regulation 10(2) in 2000 were set at 70% of Income Support rates for adults, and 100% of the Income Support rates for children. The justification for setting the adult rates at 70% of Income Support was that (1) asylum seekers were provided with furnished and equipped accommodation with all utility bills paid and (2) asylum support was intended to be a measure of last resort provided on a short-term basis. This involved adopting two different rates for single adults, one for those aged 18 to 24 and a higher rate for those aged 25 and over, because such a differentiation was (and still is) drawn in Income Support rates.

    (2) Until 2008, increases to the Regulation 10(2) rates were made on an annual basis and broadly in line with increases to income support, save in the case of 16 and 17 year olds.

    (3) In 2008 the link to Income Support was broken and for 2009 the separate rate for single adults aged 25 and over was removed: a unitary rate for all single adults was introduced, based on the lower sum previously paid to those aged 18 to 24. Those aged 25 and above who were receiving support at that time

were allowed to stay on the higher 25 plus rate. There are now very few asylum seekers left in this 25 plus legacy category.

(4) The amounts were increased by the Consumer Price Index rate of inflation ("CPI") each year for 2010/11 and 2011/12 (except for the legacy 25 plus group on the old rates). No increase was made for 2012/13 or 2013/2014. The current weekly amounts remain those introduced for the 2011/2012 financial year.

(5) The effect of decoupling the rates from Income Support and freezing them has been that they have increasingly become a smaller proportion of the amount payable for Income Support (which was not frozen but increased by CPI of 5.2% for 2012/13 and a further 1% for 2013/2014). For 2013/2014 the Regulation 10 payments to asylum seekers represent the following percentages of the relevant Income Support rates:

Single adult 25+	51%
Single adult 18-24	64%
Qualifying couple	64%
Lone parent	49%
16-17 yr old	61%
Under 16	81%

(6) The Regulation 10A supplementary payments for pregnant women and children under three have not been increased since their introduction in 2003.

The legislative framework

18. Part VI of the Immigration and Asylum Act 1999 includes the following relevant provisions:

> "95.(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 [14 days]
>
> ……..
>
> (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.

……

(7) In determining, for the purposes of this section, whether a person's other essential living needs are met, the Secretary of State—

(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.

96. (1) Support may be provided under section 95—

(a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any);

(b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any);

(c) to enable the supported person (if he is the asylum-seeker) to meet what appear to the Secretary of State to be expenses (other than legal expenses or other expenses of a prescribed description) incurred in connection with his claim for asylum;

(d) to enable the asylum-seeker and his dependants to attend bail proceedings in connection with his detention under any provision of the Immigration Acts; or

(e) to enable the asylum-seeker and his dependants to attend bail proceedings in connection with the detention of a dependant of his under any such provision.

(2) If the Secretary of State considers that the circumstances of a particular case are exceptional, he may provide support under section 95 in such other ways as he considers

necessary to enable the supported person and his dependants (if any) to be supported.

97. (4) When exercising his power under section 95 to provide essential living needs, the Secretary of State—

(b) may not have regard to such other matters as may be prescribed for the purposes of this paragraph.

122. (1) In this section "eligible person" means a person who appears to the Secretary of State to be a person for whom support may be provided under section 95.

(2) Subsections (3) and (4) apply if an application for support under section 95 has been made by an eligible person whose household includes a dependant under the age of 18 ("the child").

(3) If it appears to the Secretary of State that adequate accommodation is not being provided for the child, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, adequate accommodation for the child as part of the eligible person's household.

(4) If it appears to the Secretary of State that essential living needs of the child are not being met, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, essential living needs for the child as part of the eligible person's household.

(5) No local authority may provide assistance under any of the child welfare provisions in respect of a dependant under the age of 18, or any member of his family, at any time when--

(a) the Secretary of State is complying with this section in relation to him; or

(b) there are reasonable grounds for believing that-

(i) the person concerned is a person for whom support may be provided under section 95; and

(ii) the Secretary of State would be required to comply with this section if that person had made an application under section 95.

> (6) "Assistance" means the provision of accommodation or of any essential living needs.
>
> (7) "The child welfare provisions" means-
>
> (a) section 17 of the Children Act 1989 (local authority support for children and their families)…."

19. Regulation 9 of the AS Regulations 2000 identifies particular items and expenses as prescribed matters for the purposes of s. 95(7)(b) and s. 97(4)(b), with the result that the Secretary of State is not entitled to treat them as being essential living needs. Those items and expenses are listed in Regulation 9(4) as:

> (a) the cost of faxes;
>
> (b) computers and the cost of computer facilities;
>
> (c) the cost of photocopying;
>
> (d) travel expenses [except to initial accommodation];
>
> (e) toys and other recreational items;
>
> (f) entertainment expenses.

20. The Reception Directive (Council Directive 2003/9/EC) includes the following

> "Whereas:
>
> (1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.
>
> ……
>
> (4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.
>
> (5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.
>
> ……..

(7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

……..

(9) Reception of groups with special needs should be specifically designed to meet those needs.

……..

(12) The possibility of abuse of the reception system should be restricted by laying down cases for the reduction or withdrawal of reception conditions for asylum seekers.

……..

(15) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.

….

Article 1

Purpose

The purpose of this Directive is to lay down minimum standards for the reception of asylum seekers in Member States.

Article 13

General rules on material reception conditions and health care

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. Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17, as well as in relation to the situation of persons who are in detention.

Article 14

Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

(a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border;

(b) accommodation centres which guarantee an adequate standard of living;

(c) private houses, flats, hotels or other premises adapted for housing applicants.

2. Member States shall ensure that applicants provided with the housing referred to in paragraph 1(a), (b) and (c) are assured:

(a) protection of their family life;

(b) the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees (UNHCR) and non-Governmental organisations (NGOs) recognised by Member States.

Article 17

General principle

1. Member States shall take into account 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 of Chapter II relating to material reception conditions and health care.

2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation."

21. Article 1 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) (the Charter") provides that "Human dignity is inviolable. It must be respected and protected." Article 18 requires that the right to asylum be guaranteed in accordance with the Geneva Convention.

22. The Directive was implemented in the UK in part through existing health, education and community care provisions, with amendments to policy, and in part through the AS Regulations 2005. Regulation 5 makes the provision of support under s. 95 mandatory to all eligible persons who apply for it. Regulation 4 requires the Secretary of State to take into account the special needs of an asylum seeker or his family member who is a vulnerable person when providing support or considering whether to provide support, provided that an "individual assessment" of the person's vulnerability and needs is supplied. A vulnerable person is defined in Regulation 4(3) in line with Article 17 of the Reception Directive as:

> (a) a minor;
>
> (b) a disabled person;
>
> (c) an elderly person;
>
> (d) a pregnant woman;
>
> (e) a lone parent with a minor child; or
>
> (f) a person who has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence; who has had an individual evaluation of his situation that confirms he has special needs.

23. Section 149 of the Equality Act 2010 sets out the public sector equality duty in the following terms:

> "149(1) A public authority must, in the exercise of its functions, have due regard to the need to-
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant

> protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> ……
>
> (7) The relevant protected characteristics are-
>
> age;
>
> disability;
>
> gender reassignment;
>
> pregnancy and maternity;
>
> race;
>
> religion or belief
>
> sex;
>
> sexual orientation."

24. Section 55 of the Borders Citizenship and Immigration Act 2009 ("the 2009 Act") imposes a duty on the Secretary of State in relation to the welfare of children in the following terms:

> "55 (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

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

The Decision

25. Mr Bentley, an Assistant Director in the Operational Policy and Rules Unit in the Home Office, explains in his witness statement that a review into asylum support rates was conducted by the department from late 2012 to April 2013.

26. In a letter of 5 June 2013 the Defendant informed the Deputy Prime Minister of her decision not to increase levels of support (for both s. 95 and s. 4 rates) in the following terms:

> “I am writing to inform you, of my decision not to change the amount of support provided to those asylum seekers and failed asylum seekers who are supported by the Home Office, for the coming year. Having considered a range of comparators including rates of mainstream benefits paid, the asylum support payments made by EU member states, and evidence from partners, I have concluded that the packages of support provided under section 95 and section 4 of the Immigration and Asylum Act 1999 are sufficient, and meet the statutory requirement to provide for recipients’ essential living needs.
>
> The provisions in the 1999 Act were introduced to reduce significantly the burden faced by Local Authorities and DWP who were then responsible for housing and supporting asylum seekers. The provisions enable the Home Office to support asylum seekers while their application to remain in the UK is determined, and failed asylum seekers if they are temporarily unable to return home. For both groups, fully furnished and equipped housing is provided free of charge with no bills to pay, and modest rates of financial support are paid to meet recipients’ other essential living needs.
>
> I have carefully considered whether those rates of financial support are adequate, whether they meet the requirement set by Parliament that they provide the essential living needs of recipients and their dependants if they would otherwise be destitute, and whether they are coherent when compared to changes in the mainstream benefit system.
>
> I have looked at the approach for setting the rates in comparison to other European countries. That has not identified a better model: most use an accommodation centre model (with only a ‘pocket-money’ allowance paid). There is reasonably significant variation in the rates of support paid. Many pay a higher rate to the principal applicant, but with lower rates generally paid to children than in the UK.

> I have concluded that the system of support is reasonable and consistent with our statutory obligations, as are the rates of financial support paid. They are rightly lower than rates of mainstream benefits given their temporary nature, the different statutory framework, and the value of non-cash support provided in furnished and equipped housing, and assistance with transport for the disabled or infirm.
>
> Over the last 5 years, rates of asylum support have risen by 11.5% almost the same as private sector wages. We need to demonstrate fairness to the taxpayer, and I am not persuaded that asylum support rates need to rise to meet the statutory test that was set by Parliament nor our obligations under EU law "to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence".
>
> The asylum support system is intended for the able-bodied destitute, not those with complicated disability or health problems. Support for asylum seekers or failed asylum seekers who have more complicated needs is provided by Local Authorities following the conduct of a needs assessment under powers in the National Assistance Act, and may be equivalent to that available to permanent residents.
>
> Critics have asserted that the rates of support are insufficient, especially for children, and leave families unable to afford sufficient food. I do not accept that. Under current rates a family of four awaiting the outcome of their asylum application would receive more than £175 per week to pay for their food, toiletries and clothing. Additional funds are paid to pregnant women, and to young children and assistance with the costs of transport and telephone calls are provided where needed. We pay higher rates of asylum support to children than many of our EU contemporaries; and data from the Office for National Statistics shows that support rates are on a par with families' spending on essential items for those households with basic but regular income from employment. Whilst modest, the rates are not ungenerous or insufficient.
>
> We will of course keep the adequacy of the rates under review in accordance with our annual review cycle and against the statutory test."

27. The decision was accompanied by a Policy Equality Statement dated 4 June 2013 ("the PES"). Mr Bentley's evidence was that this reflected the PSED considerations which had been taken into account in the course of the departmental review. However it was confirmed by Mr Sheldon QC during the hearing that the document had not been seen by the Defendant before making her decision. The PES provided:

> "Summary of the evidence considered in demonstrating due regard to the Public Sector Equality Duty.

Support rates will not be changed for all who receive asylum support, regardless of the following protected characteristics:

- Age
- Disability
- Gender reassignment
- Pregnancy and maternity
- Race this includes ethnic or national origins, colour or nationality
- Religion or belief this includes lack of belief
- Sex
- Sexual orientation

Age:

While there already exists a difference in support rates for children and adults this is to protect the best interests of children, whose living needs include clothing to replace outgrown items, school equipment and other additional expenses unique to their age group. Moreover, young children and infants receive additional payments to ensure their living costs are met.

Consideration has been given to the specific needs of older recipients who may have higher travel costs, for medical appointments for example, and who are more susceptible than younger adults to the effects of cold: weather. However there is existing provision which allow for this outside of the asylum support rates. Assistance with travel costs are made available, and all utility bills are paid.

It is also noteworthy that 16 and 17 year olds receive a slightly lower rate of support than children aged 15 and under. This difference is based on the fact that their overall living needs become similar to adults, making a step-change in allowance appropriate.

Consideration has been given to the implications of the rates being frozen and it has been concluded that the rates for both children and adults are sufficient and as they will be frozen for all, this will have no negative impact on the basis of age.

Disability:

> Consideration has been given to whether the decision to freeze rates will have a negative impact on the grounds of disability. While it is acknowledged that it is possible some individuals, such as those with learning difficulties or minor mental health issues, may find it more difficult than others in adjusting to a stricter budget (given inflationary pressures), those with serious vulnerabilities will be in the care of local authorities, and fall outside the scope of this decision.
>
> Those who are within scope of this decision have been deemed to be able to care for themselves on a day-to-day basis including in matters of monitoring household budgets. Though it may be harder for some to adjust than others, it is considered that the decision to freeze rates is not so harsh as to make it impossible for some currently receiving support to meet their essential living needs.
>
> Pregnancy and maternity:
>
> Pregnant and new mothers receive additional financial support in the form of a maternity grant to cover the additional costs of having a child. Those in asylum support accommodation are also provided with necessary equipment. Corporate Partners have put to us difficulties faced by pregnancy women in travelling to health appointments. Assistance with travel is provided separately to the support rates. None of the factors above will be affected by the rates freeze and as such, we do not consider that the decision will have a disproportionate impact on the basis of pregnancy and maternity.
>
> Race:
>
> Consideration has been given on the ground of race. It has been noted that claimants of some nationalities are likely to have larger volume families. However, given that families receive support for each child it is not considered that the rates being frozen will have any impact in this regard.
>
> Consideration has been given to all other protected characteristics including gender reassignment, religion, sex and sexuality, however no impact on these groups has been found
>
> In light of the consideration above the present decision not to change the rates will not impact proportionally on one group more than another."

28. Mr Bentley's evidence as to the content of the departmental review and the matters taken into account by the Defendant in reaching her decision was as follows:

"48. As part of the review, visits were made to asylum accommodation to understand better the context and whether concerns about housing quality that had been flagged by stakeholders should be taken into account in the review as to rates. The intention was not to carry out a detailed review of accommodation provided but simply to gain an indicative understanding, based on the accommodation visited. I understand that the choice of accommodation was led by accommodation providers (though it was varied, and I understand that they attempted to show the best and the worst by way of example). Visits were carried out in London (Green Lanes) (at the end of 2012), and in the Greater Manchester area (on 24 January 2013). In total around a dozen properties were visited – some houses of multiple occupation: studios, flats, houses; occupied by families, single parents, and single people. The impression that had been gained from the London visits was to a large extent discounted - as there were such overt signs of relative wealth - eg large flat screen TVs, Sky boxes, multiple electronic computer games, smart phones, laptops and such like. (From those visits it was impossible to conclude that the inhabitants only lived on their asylum support payment.) The impression gained from visits in the Manchester area were less distorted, and more in keeping with the working hypothesis about the likely living standards of asylum seekers. Kitchens were well-stocked with food, homes were clean and well kept, there was personalisation of living space, shoes, coats and toys were in evidence. On visiting HMOs for single men in London, there was some concern about the dirty state of shared areas. However, on closer inspection, the availability of cleaning supplies were in evidence. In Manchester, cleaning services were provided by the accommodation provider. Whilst in those HMOs there was less food clearly on display, there was refuse on display that showed relatively expensive food had been consumed recently (eg takeaway pizza boxes, beer cans).

49. As part of the review, a number of specific options were put forward for consideration: (i) making no changes to rates (ii) increasing support rates by 1% each year up to 2015 and (iii) linking all rates explicitly to Income Support levels,

50. The findings of the review took into account the requirement under EU law to ensure that asylum seekers have a standard of living 'adequate for their health and to enable their subsistence', and the domestic law requirement to provide support to enable asylum seekers to meet their 'essential living needs'. Account was also taken of Article 3 ECHR (prohibition against torture/inhumane treatment) and for children, the duty under section 55 of the Borders and Citizenship Act 2000. By reference to these considerations, it was considered that the

minimum, or 'floor', requirements would be met if arrangements were made to provide the following:

- safe, furnished accommodation with all utilities;
- sufficient food to keep those on support in health and to avoid illness or malnourishment;
- essential toiletries (or means to pay for them);
- access to Primary Healthcare and immediately necessary or urgent secondary treatment;
- the means to travel to appointments where they are out of reach;
- some means of communication with emergency services;
- access to education for children as well as a contribution to wider socialisation costs to promote their development; and
- for those in receipt of asylum support for any length of time, the provision of suitable clothing to avoid any danger of illness.

51. The review concluded that:

(1) the current rates of support, though lower than those on Income Support, met the legal requirements, on the basis that section 95 (and section 4) support is intended to be temporary and those receiving Income Support will have more bills to pay and greater costs associated with furnishing and equipping their homes:

(2) for children, the section 95 support rates are relatively generous against all comparators;

(3) for vulnerable people, it was acknowledged that they are more likely to wait for a decision, more likely to have additional costs of travel and may find it hard to manage their spending appropriately if they have poor mental health. However, it was considered that this did not merit a rise in support levels. In particular, due account was taken of the fact that the asylum system is already responsive to the needs of vulnerable people e.g. in the way that accommodation is provided for the disabled.

52. In assessing the appropriateness of the levels, a range of comparators was used in the assessment. As already explained, whilst the level of Income Support has been a useful

comparator, this was not considered to reflect the temporary nature of asylum support, the fact that utilities are paid or the economies possible in household spending. Income Support also provides for a higher standard of living than is necessary to meet the statutory requirements of asylum support. Other important comparators considered were ONS survey data about average household spending for lowest income groups (SB11) and the rates of support paid by EU partners. It was also noted that the Red Cross provides food and toiletries parcels to destitute persons (valued at around £10 per week).

53. In particular, a detailed analysis was undertaken comparing the support received by those on mainstream benefits with the support made available under section 95. When comparing asylum seekers and those on mainstream benefits, the review explained that for those on mainstream benefits utilities are not provided, or deductions are made from benefits paid if utilities are included in rent. It was also acknowledged that council tax was 'usually provided' for those on mainstream benefits. (I should add however that this can no longer be assumed due to changes in the council tax regime…….

…….

- account was also taken of average UK household spending per person (both the median expenditure - £205.40 per household per week, and expenditure for those for the poorest 10% of the UK - £134.80 per household per week). In looking at these figures (which are of course higher than the amounts provided by way of asylum support) it was recognised that non-asylum seeking households will have more income, but a greater proportion of it would he spent on more discretionary items and not essential living needs (spending on recreation added up to £63.90 per week for the median expenditure and £18 per week for the poorest 10%; spending on hotels and restaurants added up to £39 per week for the median expenditure and £9.80 for the poorest 10%),. The data showed <u>that the poorest 10% of the UK spend only around £37 per week per household (of 1.3 persons) (ie some 16% of their Gross Income) on essential items (ie food and non-alcoholic drink, clothing).</u> Therefore the value of other costs met by those households, and not essential for those receiving asylum support, are significant in determining how much support a person actually requires. (*emphasis in original*)

- in terms of support rates paid by other EU states, data taken from information requested via the European Migration Network was taken into account: exhibited as SB12. It was found that other EU systems are not directly comparable because EU law allows for a wide variation in practice. In

> summary it was found that there is a reasonably significant variation in the rates of support paid (where recipients are not housed in reception centre) and there is some variation in what the host country expects the recipient to pay for - some include the cost of recreation and socialisation. Many pay a higher rate to the principal applicant, with a slightly lower rate paid to subsequent adults in a household. In general, slightly lower rates of support are paid to children than in the UK. In addition, the manner of support provided, the variable cost of living in other countries, and currency fluctuations reduce the value of comparing actual amounts……
>
> - inflationary considerations were also taken into account. However, the majority of items that make up general measures of inflation (as a percentage value) fall outside of the items that are most likely to be necessary as essential living needs. Furthermore, it was considered that measures of inflation do not reflect economies that households are able to achieve by reducing spending on non-essential items, or by selecting lower cost alternatives. The basket of goods used to calculate food inflation (2% in September 2012 and 4.2 % in January 2013), for example, includes most commonly purchased items, some of which will not be essential, and will not be the cheapest choice. Prices of clothing and footwear went down by 0.5% in September, and was up by 0.2% in January 2013.
>
> 54. Furthermore, express consideration was given to the position of 16/17 year olds, whether the rates for this group should be increased to the rate paid to children under 16. However, the conclusion was that the rate currently paid for those aged 16/17 was sufficient to meet their essential living needs. In particular it was considered that it was right to stagger the support received by this group who are transitioning to adulthood. Furthermore, whilst they may have some higher costs (than an adult) if attending college (e.g. transport. stationery and possibly uniform) it was also recognised that post-16 education is not compulsory for recipients of asylum support) (that is, education after the year in which the child attains the age of 16), and they will have lower clothing costs given the reduced rates of growth (as evidenced by WHO child growth charts)."

The First Ground

29. The first ground of challenge raises a compendium of arguments: that the decision was unlawful, by reference to both European and domestic law; that the process was flawed by considerations wrongly taken into account, or wrongly not taken

into account; and that it was *Wednesbury* unreasonable. In order to unpick these arguments, it is convenient to identify and address the two separate questions which the Secretary of State had to answer in reaching her decision, namely:

(1) What are the essential living needs for which she is obliged to provide support under section 95?

(2) What amounts are sufficient to meet those needs?

30. The Claimant submits that the Secretary of State fell into error at each stage:

(1) Ms Rose QC addressed two lines of argument that the Secretary of State fell into error in identifying the needs for which support had to be provided. The first was that she erroneously identified the group of persons whose needs fell to be considered as restricted to the able bodied, whereas the needs of disabled and vulnerable groups also fell to be provided for. The second was that there are particular needs which qualify as essential living needs which the Secretary of State did not identify and treat as such.

(2) At the second stage the argument was that the factors relied on by the Secretary of State were irrelevant and/or the evidence misunderstood; that the Secretary of State failed to take into account available evidence which she should have taken into account; and that she failed to conduct the necessary investigation and inquiry, and apply an appropriate methodology, so as to collect material capable of supporting a rational decision to freeze rates. Accordingly the decision making process was flawed and/or there was no rational basis for reaching the decision that the amounts were sufficient. Further, the material before the Court demonstrated that the amounts were insufficient, such that the decision was *Wednesbury* unreasonable.

31. On behalf of the Defendant, Mr Sheldon QC submitted:

(1) At the first stage, the Secretary of State was correct to identify the group of persons whose needs fell to be considered as confined to the able bodied destitute; and there were no needs which the Secretary of State was obliged to treat as essential living needs which she had not so treated.

(2) At the second stage, the decision was one for the judgment of the Secretary of State on the advice of her department; the investigation and inquiry was adequate; the factors taken into account were relevant and sufficient to support the decision which was within the wide range of responses which were reasonably open to her; the materials relied upon by the Claimant are anecdotal and/or flawed and/or irrelevant; they are not such as to fulfil the high threshold of demonstrating the irrationality of the decision.

32. The issues on the first ground of challenge may therefore be expressed thus:

(1) Was the Secretary of State in error in treating the group of persons whose needs fell to be addressed in setting the level of cash support under s. 96(1)(b) as limited to the able bodied destitute?

(2) Did the Secretary of State fail to identify and take account of particular needs which were essential living needs for which provision had to be made in setting the level of cash support under s. 96(1)(b)?

(3) Was the assessment of the amounts necessary to meet the essential living needs, by way of cash support to be provided under s. 96(1)(b), flawed on the grounds advanced by the Claimant?

Issue 1: Needs confined to those of the able bodied destitute

33. The distinction between able bodied and infirm asylum seekers goes back to the genesis of the 1999 Act itself and the perception that as a result of the pressing into service of section 21 of the National Assistance Act 1948, local authorities had come under a burden to house and support asylum seekers which ought to be borne by central government. The history, which I will not repeat here, is set out in the speeches of Lord Hoffmann in ***R (Westminster City Council) v National Asylum Support Service*** [2002] 1 WLR 2956 at [19]-[31] and Baroness Hale in ***R(M) v Slough Borough Council*** [2008] 1 WLR 1808 at [7]-[22]. The new burden placed on local authorities to accommodate asylum seekers fell particularly heavily on the few local authorities in whose area asylum seekers arrived. Paragraph 8.23 of the 1998 White Paper "Firmer, Fairer, Faster - A Modern Approach to Immigration and Asylum" provided that "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". The statutory means by which this was sought to be achieved was to amend s. 21 of the 1948 Act so as to exclude from the local authorities' accommodation responsibility those asylum seekers whose only need for care and attention arose from destitution (s. 21A inserted into the 1948 Act) and to place the accommodation responsibility for destitute asylum seekers on the Secretary of State under s. 95 of the 1999 Act in those cases in which it did not rest on a local authority (s. 95(3) and Regulation 6(4)). This was confirmed by the House of Lords in ***Westminster v NASS*** as drawing a dividing line between what were labelled the able bodied destitute and the infirm destitute, with the central government agency NASS responsible for accommodating the former under s. 95 of the 1999 Act and local authorities responsible for the latter under s. 21 of the 1948 Act. But what has been described as the "inverted and unseemly turf war between local and national government" (James A Sweeney, "The Human Rights of failed Asylum Seekers in the United Kingdom" [2008] PL 277, 285) did not end there, and the following years have been filled with decisions on where the dividing line for accommodation responsibilities falls, not only for adults, but also for children, for whom local authority accommodation responsibilities arise not under the 1948 Act but under s. 17 of the Children Act 1989. I shall have to return to where the demarcation is left by the current state of the authorities. But before doing so it is important to set the issue within the context of the present challenge.

34. The present claim is a generic challenge to the level of asylum support provided by way of weekly cash payments to asylum seekers as a group under s. 95 and s. 96(1)(b) of the 1999 Act and the AS Regulations 2000. The Court is not directly concerned with accommodation. Nor is it directly concerned with any services provided in kind. Nor is it concerned with the particular circumstances of an

identified individual or family. This claim is not brought by any individual asylum seeker who contends that his or her particular living needs are inadequately supported by the cash payments received.

35. Leaving aside for the moment any of the vulnerability characteristics, asylum seekers will be a group having disparate individual needs. For example, some asylum seekers may arrive from a warm climate with only the clothes they stand up in; others may arrive from a climate similar to that of the UK with a more plentiful stock of clothing. The former will need greater provision for clothing.

36. The framework put in place by the Secretary of State to meet her obligations includes the payment of the amounts under the AS Regulations 2000 "as a general rule". This is pursuant to s. 96(1)(b), which provides that one of the ways in which the s. 95 duty may be fulfilled is by "providing….the essential living needs." In addition there is a power under s. 96(2), if the Secretary of State considers that the circumstances of a particular case are exceptional, to provide support under s. 95 in such other ways as she considers necessary. This is not a power to provide in exceptional circumstances for needs which are not essential living needs, because it is expressed to be the provision of "support under s. 95" which can only be for non accommodation needs if they are essential living needs (cf ***R (Ouji) v Secretary of State for the Home Department*** [2002] EWHC 1839 Admin per Collins J at [15]-[16]). Although s. 96 is concerned with *ways* in which the s. 95 support may be provided, s. 96(1)(b) is not confined to any particular method of meeting essential living needs, whether in cash or in kind, so that it is difficult to treat s. 96(2) as confined to some different *method* of providing support from that in s. 96(1). I see no difficulty in interpreting s. 96 as the Secretary of State does, so as to permit cash payments to be made pursuant to s 96(1)(b) to meet essential living needs "as a general rule", and allowing for the possibility of further cash payments or other support in kind under s. 96(2) in exceptional circumstances.

37. In reaching her decision on the general level of support for the group of asylum seekers as a whole under s. 96(1)(b), the Secretary of State does not have to provide sufficient support for exceptional cases, which fall to be dealt with on a case by case basis under s. 96(2). In setting the s. 96(1)(b) rates, she is not bound to take into account every conceivable need of every single individual asylum seeker. Rather in considering the essential living needs of asylum seekers as a group for the purposes of s. 96(1)(b), and in setting the level of cash support under the AS Regulations 2000, the disparate needs of all individual asylum seekers must be taken into account to the extent that they are such as can reasonably be contemplated as arising in the normal course of events. This reflects Recital (7) of the Directive which sets out standards which will "normally" suffice for the stated objective. It is only if an individual's needs are exceptional, in this sense of falling outside the scope of what can be anticipated as being normal for the cohort as a whole, that they can be ignored in setting allowances to meet essential living needs for the group as a whole. Because the Secretary of State has chosen to provide cash support by reference to categories of asylum seeker in Regulation 10 and 10A (lone parents, children etc.), the relevant needs are those that may be anticipated as normal for each category as a whole.

38. Asylum seekers with the vulnerability characteristics identified in Article 17 of the Directive may fall either side of this divide. The normal needs of children or pregnant women will not be exceptional, whereas the needs of individual asylum seekers with particular physical or mental disabilities may well be. In the clothing example given above, there are sufficient asylum seekers who arrive with no more than the clothes they are wearing, and which are inadequate for the UK climate, that essential living needs must take account of the clothing needs of this sub group of asylum seekers in fixing the general level of support for the group. No asylum seeker in this category could establish that his circumstances were exceptional. By contrast an HIV positive mother who required additional resources might properly be regarded as an exceptional case: see ***R (T and S) v Secretary of State for Health and Secretary of State for the Home Department*** [2002] EWHC 1887 (Admin) per Sir Edwin Jowitt at [64]-[65].

39. Moreover the EU law obligations imposed by the Directive do not fall solely on the Secretary of State. They may be fulfilled by other organs of the State. Healthcare, education and other community care and support is provided in this way. In addressing the general level of support to be provided under s. 96(1)(b), the Secretary of State is entitled and required to take into account any other support which is, or may reasonably be expected to be, available from other organs of the State: Regulation 12(3) of the AS Regulations 2000. In doing so she can rely in particular on essential living needs being provided for by local authorities under section 21 of the National Assistance Act 1948 or other legislation, if that is what may reasonably be expected. Her duty to make provision to avoid destitution is a duty of "last resort" (see ***R (L) v Westminster City Council (MIND and another intervening)*** [2013] 1 WLR 1445 at [9]).

40. Accordingly in considering whether there was any error of law in the Secretary of State addressing herself only to able bodied asylum seekers in fixing the s. 96(1)(b) levels of support in Regulation 10 and 10A of the AS Regulations 2000, it is important to keep in mind that she was not obliged by that mechanism to provide for:

    (1) needs which are exceptional for the normal cohort of asylum seekers; and

    (2) needs which could reasonably have been expected to be provided for by other organs of the State, including local authorities.

41. I have not lost sight of the Claimant's argument that the Government's policy documents provide no detailed guidance as to the circumstances in which the exceptional cases power under s. 96(2) will be exercised; nor have I overlooked the evidence of Mr Garratt, the Claimant's Chief Executive, in paragraph 57 of his witness statement that in the Claimant's experience applications for additional support under that section are rarely successful. Decisions by the Secretary of State not to treat a particular request for support as exceptional, as falling outside the scope of the general support provided for by the Regulation 10 and 10A payments, may be open to challenge in individual cases. The case of the asylum seeker who lost all his belongings in a fire, to which Mr Garratt refers, might well be one. But that is not an issue before the Court on the present generic challenge, and would require consideration of the particular circumstances of the asylum seeker/dependant and the grounds for the individual decision. The Secretary of

State's decision that the Regulation 10 and 10A payments are aimed at the able bodied is itself a consideration which will inform a decision on whether to treat the circumstances of a particular case as exceptional. But on this challenge to the general level of support for all asylum seekers, I am not concerned with exceptional cases.

42. I should also record that Ms Rose QC argued in this context that the support rates would be unlawful if they gave rise to *an unacceptable risk* that asylum seekers would not be able to meet their essential living needs, relying on ***R (Refugee Legal Centre) v Secretary of State for the Home Department*** [2005] 1 WLR 2219, ***R (Suppiah) v Secretary of State for the Home Department*** [2011] EWHC 2 (Admin) and ***MK v Secretary of State for the Home Department*** [2012] EWHC 1896 (Admin). The concept of unacceptable risk was invoked in those cases in a procedural or policy context, which is different from that which I am currently considering. I do not consider that the concept of unacceptable risk has a useful part to play in the Secretary of State's duty to identify and meet the essential living needs of asylum seekers. But if it does, it does not lead to any different conclusion. Those who fall within an acceptable risk of not having their needs met under s. 96(1)(b) can be equated with those whose needs are exceptional and fall to be met under s. 96(2).

43. So far as concerns local authority provision of services, the argument on the present issue developed in a somewhat unsatisfactory way. In the skeleton arguments served prior to the hearing, the debate focussed on the scope of the local authorities' accommodation responsibilities under s. 21 of the 1948 Act, which is only concerned with adults. In the course of argument, Mr Sheldon QC submitted that there is a range of other statutory provisions under which local authorities or the National Health Service might provide services to vulnerable or disabled adults and children, without attempting a comprehensive survey. Ms Rose QC dealt with the submission in reply primarily by a written note, to which the Defendant responded in a note served following the conclusion of the hearing. A further note was provided by each side in response to a query of mine after the hearing. The upshot was that I was not provided with what purported to be a comprehensive analysis of all relevant local authority powers and duties; nor in relation to those which were powers rather than duties, with clear evidence about when and how they were currently exercised so as to form services which the Secretary of State might reasonably expect to be provided by local authorities and so fall to be taken into account in fixing the level of support provided by her by reason of Regulation 12(3). This was no doubt the result of the general nature of the present challenge, which led in the course of argument to hypothetical examples of particular individual circumstances giving rise to particular needs. Such hypothetical examples would have been easier to address on a case by case basis with the assistance of the specific applicable powers and duties of local authorities, and, importantly, evidence of how they were applied as a matter of policy and practice. Local authorities might have wished to be heard on some aspects. The result is that the following analysis has been undertaken on a less well informed basis and at a higher level of generality than I would have liked, and than would have been possible in a challenge by an individual whose personal circumstances were in evidence.

44. It is convenient to consider the position of adults and children separately.

Adults

45. Local authorities have an obligation under section 21(1) of the National Assistance Act 1948 to provide accommodation to adults who by reason of age, illness or disability, or any other circumstances, are in need of care and attention which is not otherwise available to them. By subsection (1A), such provision may not be made by the local authority for asylum seekers where such needs arise solely because they are destitute, or suffering the physical effects of destitution. As I have mentioned, this was introduced with the intention of dovetailing with the obligation falling on the Secretary of State to provide the accommodation needs of destitute asylum seekers. Section 21(1A) of the 1948 Act excludes from a local authority's obligation to provide accommodation under s. 21(1) only those asylum seekers whose need for care and attention arises *solely* because they are destitute; it does not exclude those whose needs arise additionally from some other criterion; in particular it does not exclude the local authority's responsibility to provide accommodation for those whose needs arise because they were infirm as well as being destitute. In ***Westminster v NASS*** [2002] 1 WLR 2956, Lord Hoffmann, giving the leading speech, characterised the excluded category as "the able bodied destitute" (see [35]), and concluded that because Regulation 6(4) required the Secretary of State to take account of support which could reasonably be expected to be available from local authorities, who remained responsible for those who needed care and attention by reason of both infirmity and destitution, the Secretary of State had no power under s. 95 to provide accommodation for infirm asylum seekers: see [40], [41], [49]. This led to the division of asylum seekers into two categories, the "able bodied destitute" and "the infirm destitute": see ***R (O) v Haringey LBC and the Secretary of State for the Home Department*** [2004] HLR 788 per Carnwath LJ, as he then was, at [22] and ***L v Westminster*** per Lord Carnwath at [14]. The latter include asylum seekers whose need for care and attention arises from destitution (lack of accommodation and funds) but is rendered more acute by some vulnerable circumstance, such as age, illness or disability, so that they fall outside the Secretary of State's accommodation responsibility under s. 95 (see ***R v Wandsworth London Borough Council ex parte O*** [2000] 1 WLR 2539 per Simon Brown LJ at 2548 and ***L v Westminster*** at [47]). In the language of practitioners these are referred to as the "destitute plus".

46. Section 21(1) of the 1948 Act is concerned with the obligation to provide accommodation. The accommodation obligation arises "for those who are in need of care and attention which is not otherwise available to them". Both aspects of this threshold criterion have given rise to difficulty in treating s. 21 as importing a simple binary and mutually exclusive division between the able bodied destitute, for whom the Secretary of State bears accommodation responsibility under s. 95, and the infirm destitute who fall within the local authority's accommodation responsibility under s. 21.

47. Authoritative guidance on what was meant by a person being "in need of care and attention" was given in ***M v Slough.*** Baroness Hale said at [33]:

> "I remain of the view which I expressed in *R (Wahid) v Tower Hamlets London Borough Council* [2002] LGR 545, para 32,

> that the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded."

Lord Neuberger agreed, adding, at [56]:

> "As for 'care and attention', while again it is right to caution against the risks of reformulating the statutory language, it appears to me that Hale LJ was right to say that 'in this context', the expression means 'looking after' and that 'ordinary housing is not in itself "care and attention"': see *R (Wahid) v Tower Hamlets London Borough Council* [2002] LGR 545, para 32. I do not consider that 'care and attention' can extend to accommodation, food or money alone (or, indeed, together) without more. As a matter of ordinary language, 'care and attention' does not, of itself, involve the mere provision of physical things, even things as important as a roof over one's head, cash, or sustenance. Of course, if a person has no home or money, or, even more, if he has no access to food, he may soon become in need of care and attention, but, as already explained, that is beside the point."

48. Until recently, it was thought that the decisions of the Court of Appeal in ***R v Wandsworth LBC ex parte O*** (sup) and ***R (Mani) v Lambeth London Borough Council*** [2004] LGR 35 had effectively prevented any gap in the allocation of accommodation responsibility between local and central government. The law was taken to be that all destitute asylum seekers were divided into two mutually exclusive classes, the able bodied and the infirm; that all members of the first class are covered by the Secretary of State's accommodation obligation under s. 95 and all the latter by the local authority's accommodation obligation under s. 21; and that there is no third class, no "undistributed middle": see Laws LJ in ***L v Westminster*** in the Court of Appeal [2012] PTSR 574 at [35] to [36]. But the Supreme Court held in that case that the duty on a local authority under s. 21(1) only applies where the care and attention needed is more than merely monitoring, because it takes its colour from the obligation to provide accommodation: see [44]. It must be of a kind which is accommodation related, and the section does not apply where the need is for care services which would arise irrespective of the accommodation provided: see [48] to [49]. In this respect the Court of Appeal had taken a wrong turning in ***ex parte O*** and ***Mani***; and accordingly there was a category of the infirm destitute who fell into a gap, what Laws LJ had referred to in that case as an "undistributed middle", because their needs were not accommodation related and so fell outside s. 21(1): see [47].

49. The argument before me did not seek to draw any distinction between the care and attention needs necessary to engage the local authority's accommodation duty under section 21, and the needs which are catered for by the provision of accommodation if the section is engaged. Accommodation is widely defined in s. 21(5). Where the section is engaged, what has to be provided is not merely housing but a wider range of services which I shall call accommodation services. As we shall see, accommodation services, although widely defined, do not include all essential living needs. There is also a distinction, at least in theory, between the accommodation services which have to be provided if s. 21 is engaged and the "care and attention" needs of a person which constitute the threshold criterion which engages the section in the first place.

50. Ms Rose QC gave as examples of relevant needs of this undistributed middle:

    (1) A fridge for a person who is HIV positive but whose only needs are for medication and a refrigerator in which to store it (as in ***M v Slough***). The medication is the responsibility of the National Health Service (which the local authority is not allowed to provide under s. 21(8)), but the fridge is not a need for "care and attention" at all.

    (2) A person suffering from mental illness who needs stability and support, including regular meetings with a care co-ordinator, attendance at counselling groups and the support of a befriender (as in ***L v Westminster***). Such a person falls outside s. 21 because the care and attention can be provided independently of accommodation.

    (3) A person with mobility difficulties or who is elderly, who is able to care for themselves within their home or has a family member who can do so, but is unable to walk even a short distance to do their shopping or visit the GP. Again such a person falls outside s. 21 because the care and attention can be provided independently of accommodation.

51. I did not find the focus on an undistributed middle helpful in resolving the issue presently under consideration. Section 21 and the above authorities are concerned with the division of responsibility for providing residential accommodation, which is primarily aimed at housing, although it is not confined to that. This case is not a further battle in the turf war; I am not concerned with the division of responsibility between central and local government for providing accommodation but with the sufficiency of the cash support provided pursuant to s. 96(1)(b) in addition to accommodation. I am only concerned with those whose circumstances are not exceptional. This challenge is not an appropriate vehicle for considering the hypothetical accommodation needs for an individual or group of individuals whose existence and scope is speculative. Whatever the theoretical gap of an undistributed middle, I had no evidence that housing is not in fact being provided by local authorities for some destitute plus asylum seekers; or that where it is, local authorities have taken a narrow view of the accommodation related services required by s. 21(5) so as to exclude any of the care and attention needs which engaged the s. 21 duty.

52. As to the examples given by Ms Rose QC, there is no evidence that there is any HIV positive asylum seeker who lacks a fridge in his accommodation in which to

keep his medication; or that there is anyone like ***L*** whose needs are not in fact being provided for by the local authority. If there were, they might fall for consideration as an exceptional case under s. 96(2). So far as concerns those with impaired mobility getting to the shops or the GP, I consider such a class below.

53. Although accommodation is widely defined in section 21(5) of the 1948 Act, it does not extend to all living needs. The position was explained by Carnwath LJ in ***O v Haringey***:

> "53 Before Ouseley J. the argument concentrated on the question of accommodation. It seems to have been assumed that, if the authority were required to accommodate the mother and the children under s.21, other living expenses would automatically be included. This no doubt was in reliance on s.2l(5), which provides that references to "accommodation" are to be construed as including "references to board and other services, amenities and requisites provided in connection with the accommodation." In the course of the argument I raised the question whether this would extend to expenses unrelated to the provision of accommodation, such as clothing for the parent and the children.
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> 54 Mr Harrop-Griffiths was able to refer us to a very recent decision of this Court which deals with this precise point: *R. (Khan) v Oxfordshire CC* [2004] EWCA Civ 309. Mrs Khan challenged the decisions of the council to refuse to provide her with accommodation under s.21(1)(a) of the 1948 Act, and to refuse to give her financial assistance under s.2 of the Local Government Act 2000. At the relevant time she was an asylum seeker, and therefore not entitled to normal benefits. Section 2 of the 2000 Act is a general provision giving authorities a wide range of powers including powers for the provision of financial assistance to individuals, but it is subject to the general restriction that it does not enable a local authority to do anything which they are "unable to do by virtue of any prohibition, restriction or limitation on their powers" (contained in any other Act). The Court held that the provision of accommodation was prohibited by s.21(1A). However it was argued on behalf of Mrs Khan that that prohibition had no impact on the giving of financial assistance which was not covered by the s.21(1)(a) power. In this context Dyson L.J., giving the leading judgment, referred to s.21(5) which he accepted gave "accommodation" a very wide meaning. He said:
>
> > "So it includes food, and other things which are necessary in connection with the accommodation. There must be a link between what is provided and the physical accommodation or premises. In my view it is clear that the definition of accommodation, wide though it is, does not extend to all of a person's essential living needs. An obvious example is clothes. It is not possible to say that, if

> provided, clothes would be services, amenities or requisites provided in connection with the accommodation. They have nothing to do with the accommodation."

55 In answer to this Mr Knafler first referred to s.22 of the 1948 Act, which provides for charges for accommodation provided under s.21, but in doing so takes account of the ability of the claimant to pay and her need to meet other personal expenses. That does not appear to throw any light on the means available to the claimant to meet her essential living needs. He also sought to rely on the wide power to provide assistance under the 2000 Act, as discussed in the *Oxfordshire* case. I am doubtful that it would be right to rely on an Act passed in 2000 to resolve an issue as to the scheme of the 1999 Act. In any event, the 2000 Act is far from providing any duty on the authority to meet living needs. Accordingly I do not see how the possibility of assistance under that Act can be said to amount to support "available" to the claimant for the purposes of deciding whether she is destitute.

56 The more convincing answer made by Mr Knafler is that, if the only shortfall in relation to the support necessary for the family is the money required to pay for clothing, then that is something which could be provided by the NASS scheme as in effect a "top-up" payment under reg. 12. That appears to me a sensible approach. However, it does not assist the appellant's case in relation to the issue whether the applicant is "destitute". For that purpose it is not enough that the family has adequate accommodation or the means of obtaining it, if it does not have the means of meeting other essential living needs. Once it is accepted that the means of providing for clothing are not available, then it must follow that the family is destitute and within the NASS scheme, even if the support derived directly from the scheme is limited to topping up living expenses.

The statutory scheme

57 Indeed, the "living expenses" issue to my mind provides some general assistance in understanding the statutory scheme. The threshold for inclusion within the NASS scheme is a low one. Any deficiency in essential living needs, whether of accommodation or living expenses, is sufficient to bring the asylum seeker within the scheme. The fact that some part of those needs (even as important a part as accommodation) is met from other sources does not prevent the claimant being treated as "destitute" for the purpose of s.95. On the other hand, once she is within the scheme, the availability of other resources is taken into account in deciding what provision is required from NASS itself. The "care and attention" required for the mother will still be the responsibility of the local authority under s.21.

> As has been seen, for that purpose the authority cannot avoid responsibility by relying on the availability of asylum support."

54. The upshot is that the Secretary of State has the residual responsibility for the essential living needs of the disabled and destitute plus, for whom the accommodation responsibility falls on local authorities under s. 21(1), if and insofar as such needs fall outside the scope of the accommodation related services included within the wide definition of "accommodation" in s. 21(5). But the Secretary of State need only provide for these needs insofar as they may not reasonably be expected to be provided for by the local authorities or some other organ of the State in exercise of *any* of their powers or fulfilment of *any* of their duties: Regulation 12(3). This is the context in which the other powers and duties of local authorities fall to be considered. The critical question on the present challenge is whether there are any such cases which would not properly be regarded as exceptional.

55. Although there was reference to a number of local authority powers and duties (for example the duty under paragraph 3 of Schedule 20 of the National Health Service Act 2006 to provide home help and laundry services for households which include a person who is ill, pregnant, aged or handicapped), the principal provisions relied on were section 29 of the National Assistance Act 1948 and section 2 of the Chronically Sick and Disabled Persons Act 1970 ("the 1970 Act").

56. Section 29 of the 1948 Act provides:

> "(1) A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall, make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged eighteen or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged eighteen or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister."

57. As the Supreme Court noted in ***R (KM) v Cambridgeshire County Council*** [2012] PTSR 1189 at [11], the Secretary of State has given wide-ranging approvals, but relatively limited directions, pursuant to this subsection: see Appendix 2 to the Local Authority Circular issued by the Department of Health numbered LAC (93) 10. In enacting section 2 of the 1970 Act, Parliament's purpose was to elevate the functions of the local authorities in relation to disabled people under s. 29 of the 1948 Act to duties in specific circumstances (***KM v Cambridgeshire*** at [12]).

58. Subsection 2(1) of the 1970 Act sets out a list of eight categories of services which the local authority must provide where it is satisfied that it is necessary to provide them to meet the needs of a person who falls within s. 29 of the 1948 Act. It includes the provision at (a), of practical assistance in the home; at (b), of radio, television, library and other recreational facilities; at (c), of lectures, games, outings or other recreational facilities outside the home; at (d), of facilities for

travel for specified purposes; at (e), of assistance in carrying out works of adaptation in the home; at (f), of facilities enabling holidays to be taken; at (g) of meals; and at (h) of a telephone. Those awaiting a decision on an asylum claim are not excluded from the scope of these provisions by section 54 of, and Schedule 2 to, the Nationality, Immigration and Asylum Act 2002.

59. The way in which local authorities determine whether, following assessment, it is "necessary" to provide any of the specified services to meet the needs of a particular person is by the application of "eligibility criteria". This is a system which allocates specific needs to one of four "bands": low, moderate, substantial and critical. It is for local authorities to decide which of these bands they will meet. In doing so they are permitted to take into account their resources: see ***KM v Cambridgeshire*** at [15]-[18]. The definition of each band is set out at paragraph 54 of "Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care" published by the Department of Health on 25 February 2010. This is the relevant statutory guidance made under section 7(1) of the Local Authority Social Services Act 1970. According to a document relied on by the Claimant which was produced by Age UK relating to the year 2011-2012, three Councils provide social care to people falling within all eligibility criteria bands, 25 Councils provide for those with moderate needs and above, 119 Councils provide for those with substantial needs and above, and 5 Councils provide only for those with needs in the critical band.

60. Ms Rose QC submits that there are the following "gaps" in local authority care for needs of vulnerable adult asylum seekers, which therefore need to be met from the s. 96(1)(b) weekly cash payments:

    (1) Support for people who fall outside the pool of vulnerable people defined in section 29 of the 1948 Act. These include:

        (a) Those whose illness or injury does not give rise to substantial and permanent handicap, such as those with hepatitis or glandular fever, or those temporarily handicapped by an injury such as severe lower back pain or a broken limb, from which they will eventually recover; and sufferers of long-term diseases who are not substantially and permanently handicapped by that disease, such as HIV.

        (b) Those whose special needs do not arise from the disability criteria set out in section 29(1) of the 1948 Act. These include groups such as torture survivors, lone parents and elderly people, who are within the scope of Article 17 of the Reception Directive, but who are not mentally disordered or substantially and permanently handicapped by illness, injury or congenital deformity.

    (2) Needs which do not fall within the scope of s. 2(1) of the 1970 Act. In particular, travel assistance is available only in relation to journeys to and from "services" provided by the local authority under arrangements made pursuant to section 29 of the 1948 Act (or services which are "similar" to these) (subsection 2(1)(d)). Thus those who are unable to walk to the shops or to the GP cannot obtain travel assistance under this provision.

(3) Adults within the area of the five local authorities who only provide for those whose needs are critical but who nevertheless may therefore have needs which will give rise to the following consequences (taking the criteria from the "substantial" band as defined in *Prioritising Need*):

- there is, or will be, only partial choice and control over the immediate environment; and/or
- abuse or neglect has occurred or will occur; and/or
- there is, or will be, an inability to carry out the majority of personal care or domestic routines; and/or
- involvement in many aspects of work, education or learning cannot or will not be sustained; and/or
- the majority of social support systems and relationships cannot or will not be sustained; and/or
- the majority of family and other social roles and responsibilities cannot or will not be undertaken.

61. The evidence does not establish that there are any such cases where needs which can be contemplated as normal for the group of asylum seekers as a whole would not be met. Insofar as there may be gaps, they would be likely to arise only in exceptional cases. In particular:

(1) In relation to those suffering from temporary illness or debility, the alleged gap is wholly or largely filled by accommodation related services under s. 21 of the 1948 Act and/or by the National Health Service Act 2006, Schedule 20, paragraph 2 of which, following approval by the Secretary of State, gives local authorities a power to provide services for the "purpose of the prevention of illness, for the care of persons suffering from illness and for the after-care of persons who have been suffering from illness". This would allow services to be provided to persons suffering from the effects of long-term illnesses which do not result in substantial and permanent handicap. I had no evidence of the extent to which these powers were or were not exercised in individual cases. There is therefore no evidence that there is a class of such persons with such needs which the Secretary of State could not reasonably expect to be met by local authorities or other organs of the State, and which form a group whose needs are properly to be regarded as normal for the group as a whole.

(2) To the extent that lone parents, torture survivors and the elderly have vulnerabilities which fall outside the scope of section 29, and which can properly be regarded as normal for the cohort of asylum seekers, they have not been excluded by the Secretary of State from the scope of support under s. 96(1)(b) by her treating the cash support as aimed at the "able bodied" destitute. The letter to the Deputy Prime Minister draws a distinction between the able bodied destitute and "those with complicated disability or health problems". Those with more minor physical or mental health problems are treated within the target cohort as the able bodied, as appears from the Disability section of the PES. As to each of the three categories:

(a) Lone parents are not a category whose vulnerabilities stem from not being able bodied, in the sense used by the Secretary of State in targeting the s. 96(1)(b) support, and their particular needs are addressed by Regulation 10

treating them as an individual category receiving more than single adults, and where applicable the additional Regulation 10A amounts for pregnant women and mothers of young children.

(b) So far as concerns torture survivors, the traumatic effect of different experiences of torture will vary for different individuals. For some it will be such that they fall within s. 29. Those with more minor mental health problems are within the Secretary of State's s. 96(1)(b) target of "able bodied". It remains to be seen whether the level of cash support can be challenged as insufficient to meet their needs other than in exceptional cases. But this is not a category which undermines the lawfulness of the Secretary of State's decision on the level of cash support to be provided under s. 96(1)(b) on the grounds that she addressed it to the needs of the able bodied destitute.

(c) The category of "the elderly" may have within it those whose age gives rise to particular frailties or needs of an exceptional nature. Such a person might fall outside the description "able bodied". If so, their needs are likely to be provided for as accommodation related services under s. 21, and to the extent that they are not, that would be the exception, at which s. 96(1)(b) is not aimed. Again, this is not a category which undermines the lawfulness of the Secretary of State's decision on the level of cash support to be provided under s. 96(1)(b) on the grounds that she addressed it to the needs of the able bodied destitute.

(d) So far as concerns travel assistance for those who are unable to walk to the shops or the GP, this category was introduced as the exemplar of needs for those who did fall within the protection of s. 29, but whose needs fell outside the scope of s. 2 of the 1970 Act. Only a sub category of these will fall outside the scope of assistance under s. 21, which should be available for those whose mobility impairment also affects their accommodation needs. The needs of such a residual sub category are more conveniently addressed under Issue 2 below when considering whether the Secretary of State has failed to take account of a particular category of "needs". For the reasons there set out, any need for such assistance would only fall to be met in what could legitimately be regarded as exceptional cases. Again, this is not a category which undermines the lawfulness of the Secretary of State's decision on the level of cash support to be provided under s. 96(1)(b) on the grounds that she addressed it to the needs of the able bodied destitute.

(3) Reliance by the Claimant on the Age UK 2011-2012 document appended to its note in reply, in relation to the then practice of 5 out of 152 Councils, is in my view misplaced on an application such as the present. There is no proper evidential basis for the current practice of Councils, nor even for the 2011-2012 practice of what is in any event said to have been that of a small minority of Councils. There is no evidence of whether this has in fact impacted on any asylum seeker and if so in what circumstances. Such a hypothetical possibility is not the proper subject matter of speculation on a generic application challenging the level of cash support to asylum seekers as a whole. I am unable to say that there is any asylum seeker who fulfils one or more of the

> alleged "substantial" criteria who is having to survive on the cash support provided pursuant to s. 96(1)(b), let alone that such person would not properly be regarded as an exceptional case.

62. Mr Sheldon QC also relied upon the Localism Act 2011, under which a local authority has power to do anything which a natural person can do. The power is subject to not being able to do "anything which the authority is unable to do by virtue of a precommencement limitation" (section 2(2)(a)), defined as a "prohibition, restriction or other limitation expressly imposed by a statutory provision'"(section 2(4)). Thus, a local authority could not use the general power of competence to provide accommodation to asylum seekers for those who do not fall within section 21(1)(a) of the 1948 Act. The Localism Act merely confers a power, and there was no evidence of whether or how local authorities exercise this power in respect of asylum seekers in a way relevant to the Secretary of State's duty under s. 95 of the 1999 Act so as to be something of which she could take account under Regulation 12(3).

63. My conclusion, therefore, is that so far as adults are concerned, the Secretary of State is entitled to treat the s. 96(1)(b) cash support as aimed at the able bodied destitute in the way she did. There has not been identified any class of infirm adult asylum seeker whose additional non accommodation related essential living needs could not reasonably be expected to be met by local authorities and whose relevant circumstances would be normal for the group as a whole.

Children

64. I am not concerned with unaccompanied asylum seeking children. The needs here under consideration are those of dependant children of adult asylum seekers.

65. Section 122 of the 1999 Act always imposed a duty on the Secretary of State in relation to the accommodation and essential living needs of destitute children of asylum seekers. By section 122(4) her essential living needs duty arises "if it appears to the Secretary of State that the essential living needs of the child are not being met". She is therefore entitled to take account of essential living needs which are provided for by local authorities or other organs of the State, in the same way as for adults.

66. In ***O v Haringey*** Carnwath LJ explained how local authority responsibility for accommodating children fell to be dealt with differently from that relating to adults under s. 21 of the 1948 Act, which is now in terms confined to adults. He said at [20]:

> "A further important change to the scope of s.21 came with the Children Act 1989. The 1989 Act amended s.21(1)(a) so as to limit the duty to persons "aged 18 or over". This was the corollary of the comprehensive provision dealing with "local authority support for children and families" contained in Pt III of the 1989 Act. Since then, it is quite clear that the authority owes no direct duty to children under s.21. As Hale L.J. said in *R. (Wahid) v Tower Hamlets LBC* 5 C.C.L.R. 239 (having analysed the scope of s.21 in terms commended by Lord

> Hoffmann in the *Westminster* case, para [26]), the local authority's duty is to the claimant "and not to the other members of his family" (para.[34])."

67. Ms Rose QC submitted that the distinction drawn in ***Westminster v NASS*** between the able bodied destitute and infirm destitute was of no application in relation to the needs of children. In ***R (Ouji) v Secretary of State for the Home Department*** [2002] EWHC 1839 (Admin), Collins J was concerned with the family of an asylum seeker whose daughter had significant physical disabilities which gave rise to greater needs than those of able bodied children in relation to diet and clothing. The Secretary of State declined to provide additional support, over and above the rate provided to families with able bodied children, contending that the needs fell to be met by the local authority. Collins J held that the Secretary of State's decision should be upheld. His essential reasoning was that the logic of the distinction drawn between the able bodied and infirm destitute (at that time drawn by the Court of Appeal in ***Westminster v NASS*** 4 CCLR 143) meant that the needs of disabled children of asylum seekers fell to be met by the local authority.

68. The decision was followed by Keith J in ***R(A) v National Asylum Support Service and another*** [2003] EWHC 1402 Admin, [2003] All ER 371 which concerned a Turkish asylum seeker with two sons who were severely disabled as a result of a progressive degenerative neurological condition. The family were housed by the local authority in accommodation which was unsuitable for the sons' needs. Although an application was initially made to NASS, accommodation was temporarily supplied by the local authority in Walthamstow, as a result of which the s.95 application was not considered. In due course NASS accepted that it was responsible for providing accommodation but was only prepared to do so in accordance with its policy of providing accommodation in areas where there is a ready supply. The issue for decision was whether the duty in s. 122 of the 1999 Act in relation to children was engaged, and in particular whether the condition in s. 122(3) was met, namely whether (as it appears to the Secretary of State) adequate accommodation is not being provided for the child. Keith J followed the reasoning in ***Ouji*** to hold that the adequacy criterion was adequacy for an able bodied child, not a disabled child, so that the accommodation provided for a disabled child of a destitute asylum seeker is adequate if it would have been adequate for the child if the child were not disabled; and accordingly the s. 122 duty was not engaged: see [34] to [38].

69. The Court of Appeal upheld the result on the grounds that, on the particular facts, the accommodation was adequate as a temporary measure: [2004] 1 WLR 752. But it rejected the reasoning of Keith J which was not supported by any counsel, including Mr Robert Jay QC, as he then was, on behalf of the then Secretary of State. Waller LJ said:

> "2. In the instant case Keith J [2003] EWHC 1402 (Admin) followed what he perceived to be the reasoning in the *Westminster* case as applied by Collins J in *R (Ouji) v Secretary of State for the Home Department* [2003] Imm AR 88. In the *Ouji* case Collins J was concerned to interpret s122(4) of the 1999 Act relating to "essential living needs". Keith J and Collins J reasoned that basic support and basic essential needs

> by reference to non-disabled asylum seekers would be provided by the Secretary of State under the 1999 Act, but that any additional support needed as a result of disabilities would be provided by local authorities under section 21 of the 1948 Act. Keith J thus held that adequacy under the 1999 Act fell to be tested by reference to able-bodied children and not disabled children. On that basis he held that the accommodation offered to the A family in the instant case was adequate.
>
> 3. No counsel supported Keith J's conclusion or reasoning. It was submitted by all counsel, including Mr Jay for the Secretary of State, that the ruling in this case and in the *Ouji* case, in so far as they suggested that the 1999 Act took no account of the disability of a dependant child in assessing either the adequacy of accommodation or essential living needs, could not stand…
>
> *[Waller LJ then set out Keith J's reasoning in relation to Article 8 ECHR]*
>
> 5. I can say at the outset that it seems to me that the judge's reasoning in the two respects identified cannot be supported..."

70. Waller LJ explained the errors in the approach of Keith J and Collins J to section 122, as follows:

> "21. The reason why disabled children of asylum seekers do not fall under section 21 is that that provision applies only to those over 18. The corresponding provision for disabled children would be section 17 of the Children Act 1989. However that section is expressly excluded by section 122(5) and (6) of the 1999 Act. There is thus no provision other than section 95 under which a disabled child of an asylum seeker can be provided with accommodation. It is for this reason that Keith J was by common consent wrong to hold that adequacy had to be tested by reference to able-bodied children of asylum seekers as opposed to disabled children of asylum seekers. It was in any event to misread the effect of the *Westminster* case to suggest that there was a division of responsibility as between NASS and a local authority, NASS being responsible for the normal accommodation and a local authority for that which related to disability in relation to any individual asylum seeker. The *Westminster* case demonstrated that an adult disabled asylum seeker fell outside the 1999 Act altogether. This also casts doubt on the reasoning of Collins J in the *Ouji* case. It is right to say that the order of Jackson J in this particular case (see para 48 below) seems to have divided the responsibility as between the local authority and NASS in a way consistent with the reasoning of Keith J and Collins J but again before us it was accepted that that should not have happened."

71. ***A v NASS*** was concerned with accommodation. It establishes that in relation to accommodation and accommodation related services, the distinction between able bodied and disabled asylum seekers drawn for adults by the House of Lords in ***Westminster v NASS***, and its reasoning, does not apply to children. The Secretary of State remains responsible for providing accommodation under s. 122 for the needs of disabled children of asylum seekers who would otherwise be destitute. Section 21 of the 1948 Act applies only to adults, and the equivalent section for children is section 17 of the 1989 Act which is excluded in relation to the accommodation of children of asylum seekers by s. 122(5) and (6) of the 1999 Act. There is no other provision under which the local authority has power to provide for the accommodation of such disabled children, so that responsibility falls on the Secretary of State. This is now well established: see ***A v NASS*** above per Waller LJ at [21]; ***O v Haringey*** per Carnwath LJ at [23(ii)]; ***R (VC) v Newcastle City Council*** [2012] 2 All ER 227 per Munby LJ at [53] and [56].

72. I am concerned, however, with the scope of support given other than by way of accommodation. The obligation to provide accommodation to meet the needs of disabled children of asylum seekers is not directly in issue in these proceedings. The issue in this case is whether such children have some essential living needs which are not met by accommodation and which can not reasonably be expected to be provided by local authorities or other organs of the State.

73. Mr Sheldon QC argued that Collins J had been right in ***Ouji*** to exclude from what fell within the scope of "essential living needs" under s. 95 any needs other than those of a normal able bodied child. He submitted that at least outside the realm of accommodation, s. 17 of the Children Act 1989 required local authorities to make such provision. The argument was that section 122 of the 1999 Act does not prohibit local authorities from providing children with assistance under section 17 of the Children Act 1989. The prohibition on the use of section 17 powers applies only where the essential living needs are being met by the Secretary of State, or it is reasonably expected that they will be met by her. A disabled child's essential living needs, as provided for by the Secretary of State, do not include any 'special features'. In those circumstances, therefore, local authorities will be empowered to provide additional support for children, including cash support, under section 17, where they have been assessed as being "in need" (s.17(10) of the 1989 Act). This approach is consistent with the legislative scheme, and in particular, by reference to the following considerations:

    (a) where an individual requires support specific to his or her needs – such that an individual needs assessment is a necessary pre-requisite – the statutory scheme envisages that those needs assessments are carried out by the local authority and not the Secretary of State;

    (b) this reflects the in-principle division of responsibilities between the able-bodied and the destitute plus;

    (c) so far as relates to the payment of cash support, rather than accommodation, the system is not designed to cater for individual needs of asylum seekers (which may differ from case to case). Essential living needs (within the meaning of s.96(1)(b)) is to be read as meaning the needs of the normal asylum seeker;

(d) if the Claimant's construction is correct, then the position will be that either the Secretary of State will be required to carry out individual needs assessments in all these cases, or instead be required to raise the general rates of support to ensure that these classes of supported persons have their specific needs met through the provision of cash support. This is not what the statutory scheme requires. In particular, the UK legislation clearly provides that any needs assessment is for the local authority – as a precursor to the provision of necessary support by them.

74. I am unable to accept Mr Sheldon QC's argument that local authorities retain responsibility for essential living needs of disabled children of asylum seekers under section 17 of the 1989 Act. The exclusion in section 122(5) of the 1999 Act is not concerned solely with accommodation. It expressly extends also to the power of the local authority under section 17 to provide assistance to meet essential living needs: section 122(6). The exclusion applies wherever the Secretary of State would be required to provide support under s. 95. The fact that the essential living needs of destitute plus children may be greater, sometimes very considerably greater, than the essential living needs of able bodied children does not stop them being essential living needs. The exclusion in s.122 (5) of the local authorities' powers under section 17 of the 1989 Act applies to those essential living needs of destitute plus children.

75. ***A v NASS*** supports the view that the local authorities' section 17 duty is wholly removed by s. 122(5) of the 1999 Act in relation to essential living needs, just as it is relation to accommodation. Although ***A v NASS*** was concerned with accommodation, ***Ouji*** was not, and Waller LJ treated Collins J's reasoning in ***Ouji*** as flawed because it took no account of s. 122(5). Moreover ***A v NASS*** was treated as so deciding by Carnwath LJ in his summary of the law in ***O v Haringey*** at [23]:

> "23 Following the *Westminster* case, certain matters are now clear and common ground:
>
> i) The single able-bodied destitute is the responsibility of NASS. This is because any need for "care and attention" under section 21 arises "solely" from his destitution, and he is therefore excluded from that section by section 21(1A).
>
> ii) The same applies to an able-bodied destitute who has dependant children even if the children are themselves disabled. This was decided by this Court in *R (A) v NASS and Waltham Forest LBC* [2003] EWCA Civ 1473. Furthermore in such a case any responsibility of the authority for the children under section 17 of the 1989 Act is excluded by section 122(5) of the 1999 Act."

It is apparent from paragraphs [53] to [63] that Carnwath LJ had in mind in that case not just accommodation support but also other essential living needs, and this is the context in which the statement of principle in the last sentence of [23(ii)] must be understood.

76. Practical considerations do not require a different approach. The requirement to make an individual needs assessment would arise equally in relation to accommodation and accommodation related services, yet they must be provided by the Secretary of State for the special needs of disabled children. There is no reason why this assessment, or the assessment of special needs of disabled children for the purposes of determining essential living needs, should present a practical difficulty: s. 99 enables the Secretary of State in either case to fulfil her obligations by making arrangements with local authorities to provide the support. As Carnwath LJ observed in ***O v Haringey LBC*** at [62], it is an inherent part of the scheme of the legislation that the responsibility of the Secretary of State may in practice be discharged by arrangements with local authorities or other bodies rather than by direct provision.

77. That is not to say that a local authority has no residual duty to provide care for the infirm dependants of asylum seekers under s. 17 of the 1989 Act. What is excluded is the duty insofar as the care is to meet an essential living need. Beyond that, the power remains to meet needs which are non essential in fulfilment of the duty to assess those in need within the wider criteria of s. 17(10). There is no error in the approach reflected in the Government's Policy Bulletin 82, in which it is said at paragraph 3.7 that

> "where an asylum seeker has a dependant child who has a care need, the UK Border Agency will provide accommodation and support adequate for the needs of the child, and the local authority must assess whether any additional care support is necessary and provide that care support under the Children Act 1989".

78. The fact that local authorities do not have the duty to provide accommodation or other essential living needs for infirm destitute children of asylum seekers is not, however, an end to the question currently under consideration, which is whether it was unlawful for the Secretary of State to aim the cash support under s. 96(1)(b) at families with able bodied children. In answering that question it is to be assumed that the accommodation needs of disabled children are being met, including accommodation related needs. The Secretary of State retains the duty to provide for other essential living needs. But it is a duty of last resort. It arises under s. 122(4) only where the needs cannot reasonably be expected to be met by the local authorities exercising *any* of their powers or fulfilling *any* of their duties, which are wider merely than the duty imposed by s. 17 of the 1989 Act. So there remain the two relevant questions in relation to the essential living needs of infirm children: the first is whether there is a "gap" of essential living needs of infirm children, other than accommodation or accommodation related needs, which the Secretary of State can not reasonably expect to be met by local authorities or other organs of the State. The second is whether, if so, they arise only in exceptional circumstances, such that they would fall to be dealt with under s. 96(2) rather than under the cash support provisions payable as a general rule under s. 96(1)(b).

79. As with the argument in relation to adults, the principal local authority power relied on by Mr Sheldon QC, other than s. 17 of the 1989 Act, is section 2 of the 1970 Act. Section 29 of the 1948 Act only applies, on its wording, to adults. Section 2 of the 1970 Act therefore cannot apply to children on the face of the

wording of that section, because it is couched in terms of rendering the powers under s.29 of the 1948 Act mandatory. But s. 28A of the 1970 Act (inserted by Schedule 13 para 27 of the Children Act 1989) provides that "This Act applies with respect to disabled children in relation to whom a local authority have functions under Part III of the Children Act 1989 as it applies in relation to persons to whom section 29 of the National Assistance Act 1948 applies." Section 122(5) of the 1999 Act only excludes the local authority's responsibility under s. 17 of the 1989 Act, not all its functions under Part III of that Act. And even in relation to section 17 it only excludes its powers in relation to essential living needs, not all needs which may fall within the definition in s. 17(10). So for example the local authority retains an obligation in relation to the children of asylum seekers under section 18 of the 1989 Act, which provides (at subsection (1)) that "Every local authority shall provide such day care for children in need within their area who are (a) aged five or under; and (b) not yet attending schools, as is appropriate". It follows that disabled children of asylum seekers are "disabled children in relation to whom a local authority have functions under Part III of the Children Act 1989", so that the duties imposed by section 2 of the 1970 Act are engaged in relation to such children.

80. In ***A v NASS*** the Court of Appeal must have had section 2 of the 1970 Act in mind; there is a reference to it in ***Ouji*** by Collins J at [24]-[27], by Keith J at first instance at [11] and by Waller LJ at [35]. There is nothing in the decision to suggest that the Court of Appeal regarded the scope of local authority responsibility which was excluded by section 122 as going beyond s. 17 of the 1989 Act, or as extending to the duties under s. 2 of the 1970 Act.

81. Ms Rose QC did not seek to identify for children any "gaps" in the scope of local authority services available under section 2 of the 1970 Act in the way she did for adults, and in particular did not identify any gaps which applied particularly to children. The main submission was that the section did not apply at all to the disabled children of asylum seekers, a submission I have rejected. At one point she gave as an example of someone who was left insufficiently provided for, by the support being aimed at able bodied children, the case of an HIV positive child who needed a high nutrition diet to obtain the benefits of drug therapy. If there were such a case in which the costs could not reasonably be expected to be met from elsewhere, it could properly be treated as exceptional.

82. Accordingly there is no evidential basis on the current generic challenge for concluding that there are infirm children of asylum seekers whose additional non accommodation related essential living needs are not being met by local authorities and whose circumstances are not to be categorised as exceptional. It follows that the Secretary of State is not required to include them within the normal cohort of asylum seekers and their dependants at which the s. 96(1)(b) cash support is aimed.

Issue 2: Particular needs not identified

Who defines "needs"?

83. The first question which arises is whether what amounts to an essential living need is to be objectively defined by the Court, or subjectively judged by the Secretary of State.

84. Sections 95(1) (eligibility and provision) and 96(1)(b) (means of provision in cash) are framed by reference to what "appear to the Secretary of State" to be the essential living needs of an applicant. Mr Sheldon QC submitted that this permits a value judgment to be made by the Secretary of State as to what constitutes a need which falls within the criterion of being essential, as well as in respect of the amount to be provided to meet such needs; that it is not for the Court to define what living needs are essential as a matter of objective construction of the 1999 Act; and that her judgment on what are or are not essential needs is only open to challenge by meeting the high threshold of *Wednesbury* unreasonableness.

85. I am unable to accept this argument in its full width. The *Marleasing* principle requires national legislation to be interpreted in a manner which is consistent with and gives effect to EU Directives. The content of the duty imposed upon the Secretary of State, by a combination of section 95 of the 1999 Act and Regulation 5 of the AS Regulations 2005, is informed by the European law obligations imposed by the Reception Directive. Provision for essential living needs must therefore be interpreted as including, as a minimum, provision of the minimum reception conditions required by the Directive. The minimum standard of living for which provision is required by the Directive is not a matter for the Secretary of State's subjective judgment but an objective standard. To this extent it is not open to her to treat essential living needs as having a lesser content than the objective minimum required by the Directive. Section 95 and 96 must be interpreted in such a way as to place such a view outside the range of reasonable judgments in order to be compatible with and give effect to the Reception Directive. If the Secretary of State were to make a judgment which treated essential living needs as something less than the minimum standard of living required by the Directive, it would be both irrational and unlawful.

86. In ***C-179/11 CIMADE and another v Ministre de l'Interieur, de l'Outre-mer, des Collectivites Territoriales et de l'Immigration*** [2013] 1 WLR 333, the Court of Justice observed at [42] that:

> "The provisions of Directive 2003/9 must also be interpreted in the light of the general scheme and purpose of the Directive and, in accordance with recital (5) in the Preamble to the Directive, while respecting the fundamental rights and observing the principles recognised in particular by the Charter. According to that recital, the Directive aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter."

87. Thus the Reception Directive requires that:
    (1) asylum support be set at a level which promotes, protects and ensures full respect for human dignity, so as to ensure a dignified standard of living: Recitals (5) and (7) and Article 1 of the Charter;

    (2) asylum support be set at a level which seeks to promote the right to asylum of those who are refugees within the meaning of the Geneva Convention: Recital (5) and Article 18 of the Charter;

    (3) asylum support be provided which is adequate to ensure asylum seekers can maintain an adequate standard of health and meet their subsistence needs: Article 13.1 of the Directive; and

    (4) the special needs of vulnerable people are provided for so as to meet this minimum standard of living: Article 13.2 and Article 17 of the Directive.

88. These requirements of the Directive contain the minimum content of the essential living needs criterion under the 1999 Act. The Secretary of State must make provision under s.95 and 96 which is sufficient to meet this minimum standard of living, if and to the extent that such provision is not otherwise being made by another organ of the State. In assessing whether the levels of asylum support allow asylum seekers to maintain this standard of living, the length of time which they spend on asylum support, and the uncertainty of that period, is potentially relevant. It is one thing to spend a short period coping with severe poverty, another to have to cope with it for an uncertain period of years. But that is not a material distinction in the context of the current delays in the determination of asylum claims in the UK, averaging almost 18 months and running into years in a significant number of cases.

89. For similar reasons, the prescribed items enumerated in Regulation 9 of the AS Regulations 2000 fall to be construed against the minimum content of the obligation under the Reception Directive, and the language read down in a way which makes them compatible with the minimum standard of living required by the Directive.

90. Although that is the minimum content of the statutory obligation under the 1999 Act, it is not necessarily the full extent of the obligation. As Recital (15) of the Directive recognises, it is open to Member States to provide for a more generous level of support to asylum seekers. In that respect the wording of the 1999 Act makes clear that the Secretary of State may make provision for what appear to her to be the essential living needs of asylum seekers. Subject to the minimum required by the Directive, it is a matter for her decision what needs are properly to be regarded as essential living needs. She may decide that some particular needs are essential living needs although they would not be necessary to ensure a dignified standard of living or meet subsistence needs. What is "essential" is a criterion on which views may differ widely. The concept of "needs" is also inherently imprecise, as Lord Nicholls observed in ***R(G) v Barnet LBC*** [2004] 2 AC 208 at [30] in the context of the duty to provide for children's needs under

section 17 of the Children Act 1989. As Lord Hoffmann observed in ***Westminster v NASS*** at [20]: "Need is relative, not absolute. Benefits which in prosperous Britain are regarded as sufficient only to sustain the bare necessities of life would provide many migrants with a standard of living enjoyed by few in the misery of their home countries."

91. An assessment of what is essential and the extent to which something is a need involves a value judgement. The function of making that value judgement is conferred by Parliament on the elected government, in the person of the Secretary of State. Subject to compliance with the minimum content required by the Directive, her judgment on whether goods or facilities constitute a need which is essential is only open to review on the high threshold of *Wednesbury* unreasonableness or other established public law grounds.

92. Against this background I turn to address the individual categories of needs which formed the battleground on this issue. The Claimant submitted that asylum support rates must at a minimum be sufficient to meet the following needs (in addition to support which is provided in kind in the form of furnished accommodation with all utilities, and access to healthcare and to education):

    (1) enough food, including fresh fruit and vegetables, to maintain an adequate standard of health;

    (2) clothing, including shoes, warm clothing during the winter months and school uniform for children;

    (3) essential household goods such as washing powder, cleaning materials and disinfectant;

    (4) essential toiletries and sanitary items including sanitary protection for women;

    (5) nappies, formula milk and other special requirements of babies and children;

    (6) sufficient books, games and toys to promote the development and welfare of children;

    (7) non-prescription medication such as painkillers, cold and flu remedies, plasters;

    (8) essential travel costs, including travel to attend medical and counselling appointments where this is not covered by the NHS travel scheme and to attend appointments with legal advisors where this is not covered by reimbursement by way of legal aid;

    (9) telephone calls to maintain contact with families and legal representatives, and for necessary communication to progress asylum claims, such as with legal representatives, witnesses and others who may be able to assist with obtaining evidence in relation to the claim;

(10) writing materials where necessary for communication and for the education of children;

(11) childcare facilities to enable parents to attend essential appointments, particularly for lone parents;

(12) the opportunity to maintain interpersonal relationships and a minimum level of participation in educational, social, cultural, religious and political life, including by means of transportation to activities of this type.

93. The equivalent list of needs identified by the Defendant for the purposes of the decision under challenge, taken from paragraph 50 of Mr Bentley's statement, are:

(1) sufficient food to keep those on support in health and to avoid illness or malnourishment;

(2) for those in receipt of asylum support for any length of time, the provision of suitable clothing to avoid any danger of illness.

(3) essential toiletries;

(4) the means to travel to appointments where they are out of reach;

(5) some means of communication with emergency services;

(6) access to education for children as well as a contribution to wider socialisation costs to promote their development;

94. The items in dispute are:

(1) clothing;

(2) essential household goods such as washing powder, cleaning materials and disinfectant;

(3) nappies, formula milk and other special requirements of new mothers, babies and very young children;

(4) books, games and toys for children;

(5) non-prescription medication;

(6) travel;

(7) telephone access;

(8) writing materials where necessary for communication and for the education of children;

(9) childcare;

(10) the opportunity to maintain interpersonal relationships and a minimum level of participation in educational, social, cultural, religious and political life, including by means of transportation to activities of this type.

(1) Clothing

95. School uniform grants are often provided by local authorities but all other clothing for asylum seekers and their dependant children has to be paid for out of the s. 96(1)(b) cash support. To the extent that school uniform is not provided in a particular case, this would fall for consideration as an exceptional case and does not have to be catered for in the general level of support given to all asylum seekers under s. 96(1)(b).

96. The Claimant submits that the Secretary of State's view that the need is only for such clothing as will "avoid danger of illness" misunderstands the essential purpose of clothing which is to keep a person warm, dry, decently covered and clean, and that such an error is bound to lead to an underestimate of the essential clothing need. This may be an unduly semantic criticism of what was intended as a reference to clothing to keep a person clean and warm enough. But even taken on its own terms, I am unable to accept the Claimant's argument. Here, as elsewhere, there are value judgements at play, for example in the adjective "warm". If a person's clothing is sufficient to keep him warm enough to avoid any danger of illness, it may legitimately be considered as meeting the essential need in that respect, even if it leaves the person at times colder than the majority of us would choose for comfort. If the clothing is sufficient to avoid any danger of illness, its deficiencies, as to warmth or hygiene, are no more than a matter of comfort rather than health, and harsh though it might appear to some, perhaps to most, it is within the legitimate range of views of the Secretary of State to treat that as falling outside the concept of essential needs. Ms Rose QC submitted that being clothed to a standard which left the person cold or their clothes dirty was inconsistent with the Reception Directive requiring as a minimum a dignified standard of living. But "cold" and "dirty" are relative terms. Mr Sheldon QC accepted that washing powder was an essential living need, so that a minimum standard of cleanliness is catered for. If there is no risk of danger to health, a person who is cold and whose clothes are not pristine is not in my view being denied a standard of living in breach of Article 1 of the Charter. Whether they have a need for greater warmth and cleanliness which is essential is a matter within the value judgment to be made by the Secretary of State, not the Court.

97. The Claimant also submitted that the Secretary of State's clothing needs criterion does not address the needs of those who arrive with no more than they are wearing, and which is inadequate for the English climate and to keep them clean or dry. The evidence suggests this is not uncommon. The Defendant's response is that the allowance is set so as to include an element for the purchase of clothing, both initial and replacement. This is not a need which the Secretary of State has failed to treat as such. In my judgment the Claimant's argument under this head is properly characterised as one that the amount of the cash support is insufficient to meet the clothing needs of this subgroup of asylum seekers, rather than that the Secretary of State has not recognised their clothing needs.

(2) Essential household goods such as washing powder, cleaning materials and disinfectant

98. Apart from a brush and a mop, asylum seekers are not provided with any cleaning materials for the purposes of maintaining standards of cleanliness and hygiene in their accommodation, for which they are responsible (save in full board accommodation).

99. Mr Sheldon QC accepted that washing powder and cleaning materials were essential living needs. There is no mention of this category in Mr Bentley's list of the needs identified in the review and decision making process. Mr Sheldon QC submitted that Mr Bentley's categories were "headline" categories; that household goods of the kind here under consideration, were "marginal" and there was room within the overall allowance to meet these needs. The same was said in respect of item 5 (non prescription medication).

100. This is not to my mind a satisfactory response. These are now accepted to be essential living needs which require to be provided for by the cash support under s. 96(1)(b). But the evidence suggests that they were not considered by the Defendant in the review or decision under challenge. Mr Bentley's witness statement introduces his list of needs as those which if met would ensure that the minimum or floor requirements of EU and domestic law would be met. He does not identify them as headline categories. Moreover it is apparent that the £37 per week comparator taken from the ONS data for the lowest 10% of UK households did not include the relevant amount for these categories. Nor does Mr Bentley say that there is a margin in the amount set to allow for unidentified "marginal" needs. Unless such needs are identified, it is difficult to see how the Secretary of State could have come to a decision on a rational basis as to how much "margin" to include, so as to allow for them in the level of support. I would not readily assume, in the absence of evidence, that the level was set with an unspecified margin of allowance sufficient to meet essential living needs which were not identified during the process. That would be a surprising approach to an exercise which is concerned with a bare minimum or floor requirement, to use Mr Bentley's words. What is meant by "marginal" in this context is not de minimis: the ONS data for the lowest 10% of households recorded average weekly expenditure on cleaning materials of £1.10 per week (for a 1.3 person household). That alone is not an insignificant sum for someone whose entire needs have to be met from less than £37 per week. Non prescription medicines involve another real cost which is not in this context de minimis. Taken together, their cost is significant by reference to the sums provided to asylum seekers for subsistence level living.

(3) Nappies, formula milk and other special requirements of new mothers, babies and very young children.

101. Cots, stair-gates and sterilising equipment are provided with accommodation. The maternity grant of £300 is available for other costs such as a pram or buggy, children's bedding and initial baby clothes. The Claimant identified a number of needs of babies and new mothers which were not specifically referred to in Mr Bentley's formulation of the relevant need, including nappies, baby clothes and shoes which need to be replaced regularly, baby wipes, creams, soap and shampoo

suitable for babies, formula milk, bottles and teats. Mr Sheldon QC submitted that the additional cost of such items, to the extent that it exceeds what is necessary to support a child who is not below the age of three, is addressed by the additional payments under Regulation 10A. But Mr Bentley's witness statement says that the Regulation 10A payments are intended to cover the purchase of extra healthy food for those within its scope, i.e. pregnant women and new mothers and babies up to the age of three. This appears to be an example of an essential living need for a particular group where it is recognised that additional costs are involved (e.g. for nappies) but where the need has erroneously been identified as met by the Regulation 10A payment which is said to be designed to cover a different need, namely nutrition. That results in what are now recognised as essential living needs for this group being left out of account by the Secretary of State in setting the level of support for them.

(4) Books, games and toys for children

102. Children have access to local authority education, and school transport (except for 16 and 17 year olds whose position I address as a separate category below). All three and four year olds, and from 1 September 2013 two year olds, receive early education arranged by local authorities, usually comprising 15 hours a week for 38 weeks a year. Children have access to parks, playgrounds, libraries and other services offered by local authorities. Ms Rose QC suggested that such access was only possible where they were within walking distance because the level of support made no allowance for transport in this respect. I am not prepared to assume without evidence that such facilities are, other than in exceptional cases, so far away that public transport is essential to access them. I address below the position of vulnerable persons in relation to walking to the GP or the shops, and similar considerations apply here. So far as books, toys and games are concerned I detect no error in the approach of the Secretary of State, who not only takes account of the provision of full time education for those aged 5 and above and early education for 2-4 year olds, and access to libraries and other services offered by local authorities, but also includes within her definition of needs of children "a contribution to wider socialisation costs to promote their development". There is a differential rate for children provided for in Regulation 10, and the evidence on behalf of the Secretary of State is that the proportionate weighting in favour of children is greater in the UK than generally amongst other EU Member States whose structure involves more for adults but less for additional dependant children. The exclusion of toys by Regulation 9 of the AS Regulations 2000 is not incompatible with the minimum content required by the Reception Directive.

(5) Non prescription medication

103. I have dealt with this above. It is now acknowledged to be an essential living need, and was not taken into account in setting the level of support.

(6) Travel

104. Regulation 9(4)(d) of the AS Regulations 2000 precludes travel expenses as an essential living need (save for the initial journey to accommodation), but travel costs for secondary healthcare and for education are generally provided by local authorities, and there is statutory power to pay for some travel expenses connected

with the asylum process in s. 96(1)(c)-(e) and s. 103(9). The Government's policy on reimbursing travel expenses for asylum seekers is set out in Policy Bulletin 28. Ms Rose QC identified the following categories of travel whose cost is not covered and which she contended ought to constitute essential living needs:

(1) Travel to the shops for those unable to walk. The Secretary of State is entitled to treat the cohort of asylum seekers for whom support is provided under s. 96(1)(b) as the able bodied. These may reasonably be expected to be able to walk to and from shops. The infirm who have mobility problems will often be the responsibility of the local authority under s. 21 of the 1948 Act and/or s. 2 of the 1970 Act. Those within the vulnerable categories identified in Article 17 of the Directive may to differing degrees and for different reasons find walking to the shops a real struggle although not physically impossible. It may be a real struggle, for example, for some lone parents with very young children, or those of advancing age, or with significant but less serious physical debilities. But I am not persuaded that public transport for them is something which the Secretary of State was bound to treat as a need which is essential other than in exceptional cases. It is within the range of judgments open to her that unless walking is not reasonably practicable, the cost of transport is not an essential living need. That is not incompatible with the minimum standards of health or dignity required by the Reception Directive, and there is no reason to read down Regulation 9(4)(d) in this respect. If there are any individual cases where the distances involved and personal circumstances of the asylum seeker's household make walking to the shops an unreasonably impractical proposition, and for whom assistance is not provided by local authorities, their transport needs will be exceptional and outside the scope of support by the cash provided as a general rule to all asylum seekers under s. 96(1)(b). Accordingly there is no error of law in the Secretary of State excluding from essential living needs the cost of public transport to and from shops.

(2) Travel to and from a GP. The NHS does not cover the cost of such travel. The Defendant's response is that GP surgeries are generally within walking distance. The same considerations apply here as to travel to the shops.

(3) Travel to appointments with Freedom from Torture. I was told that such travel costs are normally paid for those living outside the Greater London area (the London centre is near Finsbury Park). No payments are made for those within the Greater London area, but the evidence is that accommodation is not usually provided to asylum seekers in the London area. These are exceptional cases and therefore fall for consideration as such; the cost of this category of travel is not a need which has to be provided for in the cash support under s 96(1)(b) to all asylum seekers.

(4) Travel to attend appointments with legal advisors, where this is not covered by reimbursement by way of legal aid. Under Policy Bulletin 28 travel costs are paid for journeys over three miles to attend asylum interviews, appeal hearings, bail hearings and asylum support appeal hearings. This is pursuant to the powers in s. 96(1)((b)-(d). But this does not cover any attendance on legal advisors for the purposes of pursuing the asylum claim or pursuing any incidental applications or appeals, the travel costs for which are paid out of

public funds, if at all, by legal aid. Regulation 9(4)(d) of the AS Regulations 2000 precludes the Secretary of State from providing such travel expenses under s. 95. I was told that legal aid will only cover appointments at which advice is given, and so will not cover appointments which involve, for example, the advisor updating the asylum seeker on the process, or the collection of information and documentation by the advisor from the asylum seeker for the purposes of progressing the claim. To the extent that such travel expenses are a necessary cost for an asylum seeker in being able to communicate effectively with a legal advisor for the purposes of seeking to establish his status as a refugee, the prohibition in Regulation 9(4)(d) might well be inconsistent with the Reception Directive, and in particular its objective of promoting the application of Article 18 of the Charter, whose purpose is to ensure that asylum is granted to those who are refugees within the meaning of the Geneva Convention. If asylum seekers were by reason of destitution denied the ability to communicate effectively with a legal advisor for the purposes of seeking to establish their status as a refugee, there is a powerful argument that this would fundamentally undermine their rights under the Convention and Article 18 of the Charter. That raises the question whether the payment of travel expenses for non advice appointments is necessary for the effective pursuit of asylum claims in the normal, non exceptional case. This was not explored in the evidence, and it would be wrong for me to seek to draw on my limited judicial experience of asylum claims to express any concluded view. Since the outcome of this challenge is that the decision will fall for reconsideration by the Secretary of State, this is a matter which will call for informed consideration by her. Also for consideration will be whether the prohibition in Regulation 9(4)(d) is in this respect inconsistent with Article 14.2(b) of the Reception Directive. My view is that it is not, because Article 14.2 is concerned with access not funding: see below.

(7) Telephone calls to maintain contact with families and legal representatives, and for necessary communication to progress asylum claims, such as with legal representatives, witnesses and others who may be able to assist with obtaining evidence in relation to the claim.

105. The only communication needs recognised in Mr Bentley's list were some means of communication with emergency services. It was suggested during argument that telephones are provided in accommodation if requested, but this was not covered in the evidence and the position remained unclear. The real battleground, however, was over cost, not access i.e. whether the Secretary of State was bound to treat the cost of telephoning for the purposes identified in this category as an essential living need. Ms Rose QC argued that such costs were a minimum need required to be met by reason of Article 14.2 of the Reception Directive, which it will be recalled provides:

> **"Modalities for material reception conditions**
>
> 1. Where housing is provided in kind, it should take one or a combination of the following forms:

> (a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border:
>
> (b) accommodation centres which guarantee an adequate standard of living:
>
> (c) private houses, flats, hotels or other premises adapted for housing applicants.
>
> 2. Member States shall ensure that applicants provided with the housing referred to in paragraph 1(a), (b) and (c) are assured:
>
> (a) protection of their family life:
>
> (b) the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees (UNHCR) and non-Governmental organisations (NGOs) recognised by Member States."

106. In my judgment Article 14.2 is concerned solely with access, not cost, for the following reasons. Article 14.2 only applies where accommodation is provided in kind in one of the forms provided for in 14.1(a), (b) or (c). It is therefore of no application where a Member State may choose to fulfil its accommodation obligations to destitute asylum seekers by funding accommodation of their own choosing. In the latter case there is no obligation in relation to the specified forms of communication. This indicates that the obligation is related to the accommodation provided in kind, i.e. access, rather than cost which on any view is not covered for those who are state funded to find their own accommodation.

107. Article 14.2(b) assures "the possibility" of communicating with the identified categories of communicant. If it is concerned with access, this is capable of clear practical implementation, because physical access is an essentially binary concept. It is easily determinable whether such access is or is not "possible". The cost of communication is, however, a quantitative concept which is potentially open ended. An obligation to fund indeterminate communication costs is not appositely framed as an obligation to ensure a possibility. This is well illustrated by the fact that the list of communicants includes relatives. It is one thing for a State to be required not to keep an asylum seeker incommunicado from relatives. It is quite another to impose upon it an obligation to fund communications to an indeterminate extent with a group of potentially large and indeterminate size. Such an obligation would go far beyond the stated purposes of the Directive as set out in the Recitals.

108. Thus the scope of the Article is reflected in its heading. It is concerned with modalities, that is to say the practicalities of the method by which the minimum reception conditions are to be achieved.

109. As to the provision of telephones in accommodation to enable the means to communicate, the current practice was not clear on the evidence before me. The contractual Statement of Requirements for Accommodation Providers only requires that the accommodation has a line installed or is capable of having a line installed. Mr Sheldon QC asserted that telephones were provided on request, but this was disputed by the Claimant. I cannot resolve such dispute on the present challenge, save to record my view that Article 14.2 does apply to telephonic access and therefore requires access to a phone in or sufficiently close to the accommodation to provide such access.

110. There remains the question of whether the cost of communicating with the identified categories of communicant is an essential living need under s. 95 of the 1999 Act, by reference to the minimum obligation imposed by the Directive in relation to health, dignity, or asylum status or the Secretary of State's reasonable decision on what constitutes an essential need. "Communication with families" is expressed too broadly for the costs of all such communications to fall within a definition of an essential living need. If and insofar as some degree of such communication may be regarded as an essential element in maintaining a dignified social life, it falls within the considerations which I address below under (10). The main focus of this category is telephone costs incurred in connection with pursuing the asylum claim: the cost of telephone communications with family, legal representatives, witnesses and others who may be able to assist with obtaining evidence in relation to the claim. As with the costs of travel to appointments with legal advisors, it is the rights under Article 18 of the Charter which may here engage the relevant minimum level of support mandated by the Directive. To the extent that such telephone communication by the asylum seeker is necessary in order to be able to pursue and establish the right to asylum effectively, such costs are capable of falling within the essential living needs requirement. Whether and to what extent they do so is for the Secretary of State to decide by reference to evidence which is not before the Court. Since the outcome of this challenge is that the decision will fall for reconsideration by the Secretary of State, this is also a matter which will call for informed consideration by her.

(8) Writing materials where necessary for communication and for the education of children

111. This category is defined in circular terms by reference to what is necessary, and lumps together two aspects of need, communication (with an unidentified class of communicant) and the education of children. Mr Sheldon QC did not accept that there was any need for such materials, and submitted in the alternative that if there were, the cost was "marginal". I do not consider this category to be sufficiently well defined to be capable of affording a ground of challenge to the Secretary of State's decision making process. Nevertheless the success of the challenge on other grounds will enable her to consider whether in her reasonable judgment some cost of some writing materials for communication with someone, or for use in educating children, should be regarded as an essential living need.

(9) Childcare

112. The Claimant identifies the relevant deficiency as being the absence of childcare for those under three causing a problem for lone parents when having to attend essential appointments. It will be a rare case when it is impossible for a lone parent to take babies or very young children to an appointment, and although it may be far from ideal for such appointments to be conducted with babies or toddlers present, it is within the Secretary of State's legitimate range of judgments to take the view that childcare for such occasions is not an essential living need.

(10) The opportunity to maintain interpersonal relationships and a minimum level of participation in educational, social, cultural, religious and political life, including by means of transportation to activities of this type.

113. In relation to this category of "needs", Ms Rose QC placed particular reliance on the decision of the German Federal Constitutional Court in BVerfG, 1 BvL 10/10, 1 BvL 2/11, 18 July 2012. The Court declared that the level of support provided to asylum seekers in Germany under its domestic legislation, which had not increased for almost 20 years, was incompatible with Article 1 of the German Basic Law, which reflects Article 1 of the Charter declaring human dignity to be inviolable and requiring all state authorities to respect and protect it. The most important passages in the judgment are:

> "89. Art. 1 para. 1 of the Basic Law declares human dignity to be inviolable and requires all state authorities to respect and protect it. If persons do not have the necessary material resources to ensure a dignified existence, because they are not available either from employment income or from their own assets or through third-party grants, the state is required, within its mission to protect human dignity and in fulfilling its remit to provide a social state, to ensure that the material conditions for the needy are available (cf. BVerfGE 125, 175 <222>). As a human right, this fundamental right is available to German and foreign nationals resident in the Federal Republic of Germany alike. This objective obligation under Art. 1 para. 1 of the Basic Law is matched by an individual entitlement to benefits, because the fundamental right must protect the dignity of every individual (cf. BVerfGE 87, 209 <228>) and in such difficulties it can only be secured through material support (cf. BVerfGE 125, 175 <222 f.>).
>
> 90. The immediate constitutional entitlement to benefits in order to secure a decent minimum level of subsistence extends only to those resources which are essential to maintaining a dignified existence. It guarantees the entire minimum level of subsistence through a uniform fundamental right which covers both the physical existence of a human being, i.e. food, clothing, household items, shelter, heating, sanitation and health, and the opportunity to maintain interpersonal relationships and a minimum level of participation in social, cultural and political life, since a human being as a person

> necessarily exists in social relationships (cf. BVerfGE 125, 175 <223> with further references)."

114. The Court observed at [93] that what was to be regarded as necessary in Germany for a decent life was to be determined based on German standards of living, not those in the home country of the needy person or other states; and at [118] that the temporary nature of the benefit (in fact in Germany often payable for six years or more) did not derogate from the minimum provision of support.

115. Mr Sheldon QC submitted that the decision is irrelevant and driven by its own very different facts, in particular by reference to the high number of asylum seekers in Germany and the level of support historically provided. However it is of direct relevance to the category of need I am currently considering, which arises as much under s. 95 of the 1999 Act, whose minimum content is informed by Article 1 of the Charter, as it did in the German domestic context of Article 1 of its Basic Law, which is in materially identical terms. For my part I would agree with the proposition expressed in paragraph 90 of the judgment that the maintenance of a minimum standard of dignity involves some opportunity to maintain interpersonal relationships and a minimum level of participation in social and cultural life. So too is a minimum opportunity to participate in religious life, which engages the spiritual aspect of human dignity. The temporary nature of asylum support in England is no justification for failing to provide this minimum level of support, given that the average period is some 18 months and in some cases significantly longer. However I do not consider that the minimum standard of dignity requires an opportunity for political engagement for a group whose right to come to, and remain in, the country remains undetermined.

116. However what is involved in practice in affording asylum seekers an opportunity for a minimum level of participation in social, cultural, and religious life, is a different question. So too is the question what, if any, financial support it requires. What is meant by "minimum"? What activities are covered by "participation"? What costs, if any, are necessary to enable such minimum participation? Whether in practice the minimum level of opportunity requires an element of cash support for travel for these purposes depends both on evidence I do not have and value judgments which it is not for me to make. They are judgments for the Secretary of State. They are ones which she has not yet made, because on her behalf it is contended, in my view erroneously, that this is a category of need which does not require consideration. In this respect the decision making process was flawed.

Conclusion on Issue 2

117. The Secretary of State has erroneously failed to take into account in reaching her decision the following categories of essential living needs which fall to be taken into account in setting the level of cash provided pursuant to s. 96(1)(b). They are those which have subsequently been acknowledged to be essential living needs or which I have held to be such. Fulfilling the need may not in each case require an increase in the level of cash support, but that is a matter for consideration by the Secretary of State which has not yet occurred. The needs are:

(1) Essential household goods such as washing powder, cleaning materials and disinfectant.

(2) Nappies, formula milk and other special requirements of new mothers, babies and very young children.

(3) Non-prescription medication.

(4) The opportunity to maintain interpersonal relationships and a minimum level of participation in social, cultural and religious life.

118. She has also failed to consider whether the following are essential living needs, which I have held are capable of having to be treated as such, and which will need to be addressed when she reconsiders her decision:

(1) Travel by public transport to attend appointments with legal advisors, where this is not covered by legal aid.

(2) Telephone calls to maintain contact with families and legal representatives, and for necessary communication to progress their asylum claims, such as with legal representatives, witnesses and others who may be able to assist with obtaining evidence in relation to the claim.

(3) Writing materials where necessary for communication and for the education of children.

119. That is sufficient for the present challenge to succeed. But it is right that I should consider Issue 3 in case it be of assistance to the Secretary of State in the reconsideration of her decision.

Issue 3: Assessment of the amounts sufficient to meet the needs

120. The Secretary of State was under a duty to carry out an inquiry which was sufficient to enable her to make an informed and rational judgment of how much was necessary to meet the essential living needs of asylum seekers. This reflects the second element of Lord Diplock's formulation in ***Secretary of State for Education and Science v Tameside Metropolitan Borough Council*** [1975] AC 1014, 1065B:

> "Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

121. The scope of investigation required for any given decision is context specific. The decision in this case was as to what was sufficient to keep about 20,000 people above subsistence level destitution, a significant proportion of whom are vulnerable and have suffered traumatic experiences. This of itself mandates a careful inquiry. The Claimant submitted that there were two further factors which meant that a particularly rigorous inquiry was required to justify a decision to freeze rates as being sufficient for that purpose. The first was the erosion of rates, in absolute and real terms, since 2007. The second was a body of evidence about

the experience of asylum seekers, comprising surveys and other materials, which was said to paint a compelling picture of the insufficiency of the amounts provided. It is convenient to address these two features at this stage.

Erosion of rates

122. It is relevant to take 2007 as a starting point for consideration of the erosion of rates, because in paragraph 66 of Mr Bentley's witness statement he says that since 2007 the increase in s. 95 rates for adults and children has been 11.5%, a figure which reflects the passage in the Secretary of State's letter to the Deputy Prime Minister of 5 June 2013 explaining her decision ("Over the last 5 years, rates of asylum support have risen by 11.5% almost the same as private sector wages").

123. The rates for single adults from 2007 to 2013 are as follows:

2007: 18-24 yr olds: £32.80; 25 plus: £41.41

2008: 18-24 yr olds: £33.39; 25 plus: £42.16

2009: all (other than legacy 25 plus): £35.13

2010: all (other than legacy 25 plus): £35.52

2011: all (other than legacy 25 plus): £36.62

2012: all (other than legacy 25 plus): £36.62

2013: all (other than legacy 25 plus): £36.62

124. The 11.5% increase referred to by Mr Bentley and the Secretary of State is derived from a comparison between the current figure (£36.62) and the figure for 18-24 year olds in 2007 (£32.80). This is not, however, the sole or main comparison which is relevant. The evidence I was shown suggests that of the group of single adult asylum seekers (who themselves make up the majority of asylum seekers) the majority are 25 or older. For them the relevant comparison is with the 25 plus rate in 2007, which has *decreased* in absolute terms by some 11%. Moreover the rationale for having a different rate for under 25s in the Income Support rates, which was carried over into asylum support rates prior to 2009, was identified by Mr Bentley as being that "young people in this age range tended to live at home and therefore continue to receive family support and should be encouraged to do so." The same rationale does not apply to asylum seekers, so that it is the 25 plus rate in 2007 which provides a more meaningful comparison for all ages of adult asylum seeker.

125. The 11.5% figure is therefore an erroneous and misleading figure to apply to single adult asylum seekers. Moreover the 11.5% figure was expressed as applying to all asylum seekers, which compounded the error because the increase for lone parents was 6.1%.

126. Mr Sheldon QC submitted that Mr Bentley's reference in his witness statement to the 11.5% increase, coming as it did in a different section from that explaining the

course of the review, should not be taken as evidence that the Secretary of State relied on this figure in her decision making. This prompted an application by the Claimant for further disclosure of the materials which went from the department to the minister, made at the end of the second day of the hearing, which I refused on the grounds that it was too late. But in the absence of further evidence from the Defendant, I infer from the express reference to, and reliance upon, this figure in her letter to the Deputy Prime Minister, that it was indeed a factor relied on by her in reaching her decision. This is reinforced by the fact that paragraph 34 of the Defendant's Grounds rely upon the point to support the rationality of the decision.

127. The Secretary of State has in this respect relied upon a "fact" which is misconceived, and which is of sufficient potential significance to have influenced the outcome. That is itself sufficient to vitiate the decision.

128. To set the remainder of the arguments in context, it is necessary to keep in mind not only the decrease in absolute terms for single adult asylum seekers, but also the erosion in real terms for all categories. An analysis of the effect of inflation on 2007 rates for all the Regulation 10 categories was made by Mr Hirsch of the Centre for Research in Social Policy at Loughborough University. Three measures of inflation were used. One was CPI, which increased from April 2007 to April 2013 by 20.5%. One was the food and catering element of RPI, which increased by 31.7% over that period. The third was an index of the cost of a basket of essential goods and services designated the "Minimum Income Standard" ("MIS"), a measure used in a research project which under the auspices of the Rowntree Foundation published data, from 2008 onwards, on how much households needed in order to be able to afford what was characterised as a minimum acceptable standard of living. The relevant increase in the cost of MIS goods and services between 2007 and 2013 was 30.2%. Taking the lowest of these (CPI) there was a real decrease in the value of the s.95 support in all categories from the 2007 level as follows:

Qualifying couple	7.4%
Lone parent	11.9%
25 plus single adult	26.6%
18-24 single adult	7.3%
16 &17 yr olds	7.4%
Children under 16	7.4%

129. The Regulation 10A payments to pregnant women and mothers of babies and young children have not increased since their introduction in 2003, and have therefore eroded in value by 10 years worth of inflation.

130. It must be remembered that the Secretary of State's evidence was that in previous years the levels had been set at the minimum required to meet essential living needs. Moreover s.95 contains the relevant power as well as the duty. The Secretary of State has power under section 95 to meet only what he or she

considers to be essential living needs; any more would be ultra vires. As a matter of logic there is no necessary error in rates being set at what is lower, in real terms, than what was previously regarded as necessary to meet essential needs, because the latitude afforded to the Secretary of State in this value judgment means there is a range within which both figures might fall. But I accept the Claimant's argument that the significant reduction in real terms from what was previously regarded as the bare minimum level necessary to avoid destitution requires justification by a careful investigation if it is to be defended as rational.

131. The erosion of rates in real terms is also a significant factor which the Secretary of State was bound to take into account when reaching her decision. I return below to the question whether she did so.

Other surveys and materials

132. The Claimant relies in particular on:

(1) The submissions made by a number of organisations to the Home Affairs Select Committee Inquiry into Asylum ("the HASC Inquiry") in April 2003 expressing serious concerns about the inadequacy of asylum support to meet asylum seekers' essential living needs.

(2) The conclusions of a cross party Parliamentary Inquiry into Asylum Support for Children and Young People published in January 2013, which found that "the current levels of support provided to families are too low to meet children's essential living needs... [and] do not enable parents to provide for their children's wider needs to learn, grow and develop".

(3) The findings of the Claimant's own research conducted through interviews with asylum seekers receiving asylum support in late 2012 and completed in May 2013, which was in part provided in evidence to the HASC Inquiry and was further explained in the witness statements of Mr Garratt and Sile Reynolds, the Claimant's former Policy and Information Manager, in this application. This included statistical analysis of the answers of those surveyed and also examples, based on the Claimant's work, of particular difficulties faced by asylum seekers in accessing healthcare; problems faced by pregnant women; the need for warm clothing; the lack of informal networks of assistance and support; problems caused by inability to use public transport; and lack of childcare.

(4) The witness statements of five individuals who have been granted asylum or leave to remain by the Defendant following a period of time spent on asylum support, all of whom describe an inability to meet their essential needs.

(5) A report produced by Freedom from Torture ("FFT") in July 2013, "Poverty Barrier: the Right to Rehabilitation for Survivors of Torture in the UK", supplemented by a witness statement of its researcher, Jo Pettit, which explains in detail the findings of FFT's research with torture survivors about their ability to meet their essential needs while living on asylum support.

(6) Evidence from the Helen Bamber Foundation ("HBF"), a specialist organisation working with survivors of torture, war, genocide, human trafficking, gender based violence and domestic violence, detailing the findings of research carried out with its client group regarding their ability to meet their essential needs on asylum support.

133. This body of material, and other witness statements served on behalf of the Claimant, provided evidence that:

(1) Many of the asylum seekers who were interviewed by the Claimant, FFT and HBF respectively said that they regularly had to miss meals and parents had to prioritise feeding their children over themselves.

(2) Women may be unable to afford adequate sanitary protection.

(3) Pregnant and nursing mothers, particularly those who are single parents, are unable to afford adequate food to eat a healthy balanced diet recommended to them as essential for the health of their child.

(4) Asylum seekers struggle to buy adequate clothing, particularly during the winter months, or to replace items of clothing and shoes when they wear out.

(5) Many asylum seekers struggle to buy adequate toiletries or household cleaning products, and non-prescription medications.

134. Mr Sheldon QC advanced a number of criticisms of this evidence and the weight to be attached to it. I keep firmly in mind that my own assessment of the weight to be attached to this evidence is not what matters on this application, subject to one qualification. The qualification is that if the material were to demonstrate that the sums paid to asylum seekers are so obviously insufficient for their essential living needs that any other conclusion could not rationally be sustained by reference to any other evidence, the very high threshold of *Wednesbury* unreasonableness would be met. But in my view the evidence falls short of this threshold in an area so laden with value judgments. Whilst not accepting Mr Sheldon QC's pejorative characterisation of all this evidence as anecdotal, it is a partial body of relevant evidence, in both senses of the word. It can not properly be regarded as conclusive. The Claimant's survey was based on the responses of a relatively small group and did not paint a homogenous picture. None of the material could be treated as demonstrably representative or beyond doubt. None of the sources or groups interviewed, nor the five individuals who made witness statements, identified exactly what they spent their weekly allowance on. There was to my mind some force in the criticism advanced by Mr Sheldon QC that in the considerable body of evidence advanced by the Claimant to demonstrate the insufficiency of the sums provided, there was not a single instance of an asylum seeker explaining exactly what the weekly allowance was spent on, and how and where it fell short in respect of a particular need. The views expressed in the reports and witness statements were based on the authors' own perceptions of adequacy or minimum standards, which were not the statutory criteria under s. 95 and/or were necessarily laden with their own value judgments. The material was

sometimes addressed not solely to s. 95 support, but also to s.4 support for failed asylum seekers which is set at a lower level. Moreover a significant proportion of the material postdates the decision under challenge and was not available to the Secretary of State at the time.

135. Accordingly I treat this body of evidence as of relevance only insofar as it informs the other grounds of challenge, which are (1) that the Secretary of State took into account irrelevant or erroneous information; or (2) that she failed to take into account relevant information, either by failing to make a sufficient investigation to collect the evidence upon which a rational decision could be based, or by ignoring relevant available information.

(1) Taking into account irrelevant or erroneous information

136. Mr Bentley's evidence, and the letter to the Deputy Prime Minister explaining the decision, identify essentially six categories of material which the Secretary of State took into account:

(a) inflationary considerations;

(b) Income Support rates;

(c) ONS survey data about average household spending, in particular the expenditure for the lowest 10% of households in the UK;

(d) rates of support paid by EU partners;

(e) the value of Red Cross food parcels given to destitute persons;

(f) evidence acquired on visits to asylum seeker accommodation.

(a) Inflationary considerations

137. I have already identified that the Secretary of State based her decision in part on the erroneous footing that asylum support rates had increased in absolute terms since 2007 by 11.5%.

138. She also failed to take account of the extent of the erosion of rates in real terms, on the basis of the most conservative measure of inflation used by Mr Hirsch (CPI). The erosion of rates in real terms is a significant factor which the Secretary of State was bound to take into account when reaching her decision.

139. Paragraph 53 of Mr Bentley's witness statement, quoted above, states that inflationary considerations were taken into account, but that the majority of items that make up general measures of inflation (as a percentage value) are not items that are most likely to be necessary as essential living needs; and that it was considered that measures of inflation do not reflect economies that households are able to achieve by reducing spending on non-essential items, or by selecting lower cost alternatives.

140. This approach does not sit very happily with the decision of the Defendant to use CPI as the measure by which to increase rates in 2008/9, 2009/10 and 2010/11. It

is in any event flawed. Essential items are subject to inflationary increases just as non essential items are. There is no logical basis for assuming the inflation rate is lower for essential items. The evidence of Mr Hirsch suggests the contrary. Moreover, the rational response to the fact that there may be different rates of inflation for essential items and non essential items is to seek to identify what the relevant inflationary rate is, not to assume that it is nil. Nor is there any relevance or logical force in the suggestion that measures of inflation do not reflect an ability to make economies: asylum seekers only have their essential needs provided for, from which they are not in a position to economise.

(b)Income Support Rates

141. Paragraph 51(1) of Mr Bentley's witness statement gives two reasons for the level of asylum support being less than the amount paid to those receiving Income Support. The first is that asylum support is intended to be temporary. Whatever the best intentions of the Secretary of State, however, it is clear that asylum support is required for periods which average almost 18 months, and in a significant number of cases will be measured in years. It is not "temporary" in a sense which justifies any meaningful distinction from the position of those on Income Support, save that it justifies the provision of furnished and equipped accommodation which is part of the second ground of distinction. The second ground of distinction is that those on Income Support, unlike asylum seekers, have to meet the costs associated with furnishing and equipping their accommodation and pay for utilities. That is an important distinction, which was the basis for setting asylum at 70% of the rate for Income Support for adults before the rates became decoupled in 2009. But it affords no rational explanation for the increasing gap between asylum support rates and Income Support rates caused by freezing the former whilst increasing the latter. Accordingly a comparison with Income Support rates is not supportive of a freeze in asylum support rates for either of the two reasons identified. The reliance placed on the comparison with Income Support rates was in this respect flawed.

142. In saying this I should not be understood as suggesting that asylum support rates must be tied to Income Support rates, as the Claimant and other organisations have been seeking to persuade the Government should happen since the decoupling of rates in 2009. There is a different legal criterion for each of the two types of support. Income Support may legitimately provide for a higher standard of living than essential living needs. Income Support can also take into account factors relevant to those who have an established right to remain in the country such as integration, whether by employment or otherwise. But this is not the basis identified in paragraph 51 of Mr Bentley's witness statement for why asylum rates should fall further behind Income Support rates, although the decision letter to the Deputy Prime Minister does refer to "the different statutory framework" (in the context of s4 and s95 rates). The critical point is that if Income Support rates were to provide any useful assistance in setting asylum rates, which the Secretary of State must have thought they did by taking them into account, it was necessary to apply some rational criteria to quantify and justify the discrepancy between the two. Otherwise they could do no more than identify a ceiling for asylum support rates, and could not assist in identifying the correct level below that ceiling at which to fix the rates.

(c) ONS data

143. This seems to have been the most important comparator; the letter to the Deputy Prime Minister says that asylum rates are "on a par" with what the ONS data shows is spent on essential needs by those households with basic but regular income from employment. Mr Sheldon QC placed the greatest emphasis on this factor in seeking to support the Secretary of State's decision. The underlined passage in paragraph 53 of Mr Bentley's witness statement identifies that the aspect of the ONS data relied on as most relevant and significant was that it showed that the poorest 10% of UK households spend only around £37 per week per household on essential living items, based on the cost of food and non alcoholic drinks and clothing. The ONS data figures "per household" are reported statistically for a household of 1.3 persons, so that the relevant figure per person should be reduced accordingly. The underlying data is at Table A6. The figure for food and non-alcoholic drink (item 1) is £29.20 and for clothing and footwear £6.80 (item 3), which is a little less than the £37 referred to by Mr Bentley.

144. Ms Rose QC submitted that this figure underrepresented an appropriate comparator for asylum seekers for a number of reasons, the following of which I regard as well founded:

(1) The figure of £29.90 for food does not comprise all food costs included in the ONS data. Further food costs are identified in item 11 for eating out or takeaways, which amount to another £7.10 per week. Even on the basis that such food needs for asylum seekers should be met by cooking and eating in, an increase to the £29.90 figure for food is required.

(2) No allowance is made for household cleaning materials (£1.10: item 5.6.1); for medicines and healthcare products (£1.20: item 6); or for personal care items such as toiletries, toilet paper, soap (c. £3: item 12.1 with some reduction).

(3) The figures are 2011 figures which would require to be increased for inflation.

(4) The clothing costs assume a significant wardrobe, for which these figures represent the cost of routine replacement; whereas destitute asylum seekers not infrequently arrive with no more than the clothes they stand up in so that the asylum support has to provide for an initial stock of sufficient clothing and footwear for the English climate.

145. Mr Sheldon QC was concerned to emphasise that the ONS data had not been treated as determinative, but merely as one of a number of comparators. That is so, but it appears to have been treated as an important one. It is therefore of importance that the data should have been extracted and applied accurately and without relevant omission. In the respects identified above, it was misleading to use a figure of £37 as the relevant comparator per household for the lowest 10% of UK households. In argument, Mr Sheldon QC sought to advance a recalculation, making allowance for these deficiencies, leading to a figure of £45.77 per household (£35.21 per person). There was room for controversy about these figures, but more importantly they did not form part of the decision making process. This is not a minor difference and it is impossible to say that the use of the incorrect figure did not affect the outcome. The £37 per household figure

actually used by the Secretary of State, in reaching the conclusion that levels for asylum seekers were "on a par" with those for the lowest 10% of households, was understated to a significant extent. This appears to have been the most important of the comparators used in reaching her decision. It is impossible to say that the decision would have been the same had a significantly larger figure been used.

(d) Comparison with other EU member states.

146. It was common ground that a comparison with rates paid to asylum seekers in other EU member states was of very limited assistance in setting the s.95 rate for the UK, for the reasons given in paragraph 53 of Mr Bentley's witness statement quoted above, including variations in the packages of support provided, differences in the cost of living and currency fluctuations.

(e) Red Cross parcels

147. The way in which reliance was placed on the cost or value of Red Cross food parcels is not easy to discern. Paragraph 52 of Mr Bentley's witness statement says that it was "also noted" that the Red Cross provided such parcels and that they were valued at around £10 per week. Paragraph 62 of the Defendant's Grounds stated that this was "an indication of what the cost of lifting someone out of destitution could be". If this had been treated as what was necessary for the weekly needs in respect of food and toiletries of a destitute person, that would clearly have been an error. Such parcels are not intended or expected to do more than alleviate destitution and are not intended or expected to provide for all such needs for a week. It is unlikely that the Secretary of State did treat them in this way because the £10 value (itself controversial) is several times less than the amount of asylum support for a single adult. But it remains unclear from the evidence or submission on behalf of the Secretary of State exactly what use was made of the content of the food parcels as a useful comparator. I can see that at least in theory such content might inform a decision about what kind of basic foodstuffs or toiletries could be regarded as sufficient for essential living needs, although even for that purpose the short term nature of the alleviation intended might falsify a judgment which translated it to a budget needed for a balanced diet over a period of 18 months or more. But however that may be, the absence of any explanation as to how the cost or content of the parcels was translated into something by reference to which to set the rate of asylum support makes it impossible to treat this as a comparator which can provide rational support for the decision.

(f) Visits

148. These were, in Mr Bentley's words, "simply to gain an indicative understanding". The resulting evidence is anecdotal and impressionistic. It provides little assistance. Mr Sheldon QC put it very low down in the hierarchy of information justifying the decision and was obviously right to do so.

(2) Failing to take account of relevant information; inadequate investigation or ignored material

149. I have already explained why a decision to set rates at a level which involves a reduction in real terms from what was regarded in 2007 as the bare minimum level necessary to avoid destitution requires justification by a careful investigation if it is to be defended as rational.

150. In my judgment the information used by the Secretary of State to set the rate of asylum support was simply insufficient to reach a rational decision to freeze rates. No account was taken of the erosion of rates in real terms by reference to CPI, nor any attempt made to identify a more appropriate inflationary measure to apply. Income Support rates could legitimately be regarded as a ceiling, such that the asylum support rates should be lower; but unless the two were to be linked, Income Support rates could not help to address the question how much lower asylum support rates should be, especially when the two relevant distinguishing criteria, temporariness and accommodation costs, were flawed and unidentified respectively. Although Mr Bentley says at paragraph 53 of his witness statement that "a detailed analysis" was undertaken comparing the support received by those on mainstream benefits with the support made available under section 95, there is no detail of this analysis or how it was used to set the level of asylum support; the only relevant aspects of the analysis which he identifies are that asylum seekers do not pay for utilities or for council tax which is (or rather was) usually provided to those on mainstream benefits, but he does not suggest that figures were produced stripping out the cost of utilities or council tax, still less that the resulting figures were used in any way to set the asylum support rates, and if so how. The ONS data was not a definitive benchmark, and in any event the analysis of that data as applicable to asylum seekers was superficial and flawed. Red Cross parcels, and the practice in other European states, provide no significant assistance. Evidence from visits to some asylum accommodation was no more than anecdotal and insufficient for any meaningful analysis. The evidence from "partners" was to the effect that an increase was necessary.

151. It is not for the Claimant, or me, to set out the exact parameters of the inquiry and investigation which would be sufficient. What the Claimant has established is that the Secretary of State has failed to take reasonable steps to gather sufficient information to enable her to make a rational judgment in setting the asylum support rates for 2013/2014.

152. Mr Sheldon QC argued that the scope of such inquiry is limited by the fact that there had been no challenge to the lawfulness of the decision to freeze rates for 2012/13; that the court must assume that such decision was lawful; that all that was required was justification for maintaining the rates at the 2012/2013 level; and therefore that all that was required was a commensurately narrow inquiry. I am unable to accept that argument. The lawfulness of the decision for 2012/2013 or any earlier year is not to be assumed in the Secretary of State's favour in these proceedings. It has simply not been addressed. Moreover the decision for 2013/14 falls to be judged on its own procedural merits. It was, in the result, a decision to freeze the rates at the level granted the previous year, but it was in law and in substance a decision in purported fulfilment of the duty under s. 95 to determine the amount necessary to meet the essential living needs of asylum

seekers for 2013/2014. As such the scope of the inquiry required does not proceed from some artificial a priori assumption about previous decisions. The Secretary of State can only fulfil her duty under s. 95 by making periodic reviews. She may rely on evidence or investigations which have informed previous decisions, to the extent relevant to the decision in hand. If reliance were placed on inquiries made for decisions in previous years, which remained relevant, that would of course be relevant to whether the investigation and inquiry made by the Secretary of State for the subsequent decision were sufficient. But that would involve invoking the nature and extent of the former inquiry, not, as Mr Sheldon QC would have it, assuming an irrebuttable presumption that there had been a sufficient inquiry simply from the absence of any previous challenge or previous judicial decision on the question.

153. Given the conclusions I have reached, I see little utility in going on to address specific evidence or material which the Claimant suggests was available to the Secretary of State and which she wrongly failed to take into account. A considerable body of material has been marshalled and put before the Court. Some of it was available, or drawn specifically to her attention, before the decision under challenge, but much of it was not. Since the decision will fall for reconsideration, no useful purpose would be served in my seeking to identify such parts of the evidence as were in existence at time of first decision and addressing those which the Claimant contends should have been taken into account prior to the decision.

154. I should however address a discrete argument which affects the decision in relation to the amount paid to 16 and 17 year olds.

16 and 17 year olds

155. The Defendant's justification for paying a lower amount to this age group than to younger children is that:
(1) they "are transitioning to adulthood";
(2) while those who attend college may have higher costs than adults due to the costs of transport, stationery and possibly uniform, education is not compulsory for post-16 year olds; and
(3) they "will have lower clothing costs given the reduced rates of growth (as evidence by WHO child growth charts)".

156. As to the first of these, paragraph 75 of the Defendant's Grounds sought to justify this difference in treatment on the basis that "a bright-line demarcation between those under 18 and those 18 and over might be challenged as being too artificial…" But this is the bright line demarcation drawn by domestic law, both in s. 105(1) of the Children Act 1989 and s. 55(6) of the 2009 Act. The UN Convention on the Rights of the Child 1989, and Article 24 of the EU Charter also draw the line between childhood and adulthood at 18 years. The Secretary of State must have regard to her duties under s. 55 to safeguard and promote the welfare of all children, which applies as much to 16 and 17 year olds as to under 16s. She may legitimately take into account respects in which older children have different needs from younger children. But the mere fact that they are closer to becoming adults than other children cannot form a rational ground for paying

them less than other children, and is inconsistent with the Secretary of State's section 55 duty.

157. The second ground for distinguishing 16 and 17 year olds also involves an error of law. At the time of the decision, attendance at school or other education was compulsory in England and Wales under s. 8 of the Education Act 1996 until 30 June in the school year in which a child turned 16. There would therefore be a considerable number of 16 year olds in compulsory full time education. Moreover by reason of the Education and Skills Act 2008 Part 1, brought into force on 28 June 2013, education or training became compulsory for all 17 year olds with effect from September 2013. It is accepted on behalf of the Secretary of State that when she made the asylum support decision on rates for 2013/14 it was within her reasonable expectation that these changes would be brought into force for the 2013/2014 school year. The Defendant has therefore misdirected herself as to the legal position: the majority of 16 and 17 year olds would be subject to compulsory full time education for the school year 2013/2014.

Conclusion on Issue 3

158. The Secretary of State's decision was flawed in that:

(1) She erroneously treated the rates as being increased by 11.5% from their 2007 levels.

(2) She failed to identify and take into account the extent of the decrease in rates in real terms since 2007.

(3) She misunderstood or misapplied information which she treated as important in reaching her decision, namely:

(a) a comparison with Income Support rates; and

(b) a comparison with costs in the lowest 10% of UK households according to the ONS data.

(4) She failed to take reasonable steps to gather sufficient information to enable her to make a rational judgment in setting the asylum support rates for 2013/2014.

(5) She misdirected herself as to the legal position in relation to 16 and 17 year olds.

Second Ground: PSED

159. I have already dealt with the position of particular vulnerable groups so far as relevant to the First Ground. What remains of the Second Ground resolves itself into two submissions:

(1) The PES applied the wrong test to those suffering from disability in saying that "the decision to freeze rates is not so harsh as to make it impossible for some currently receiving support to meet their essential living needs."

(2) The PES was not considered by the Secretary of State prior to her decision, but was a tick box exercise after the event; her decision was not informed by any personal consideration of her PSED duties. The process failed to comply with the principles summarised by McCombe LJ in ***R (Bracking) v Secretary of State for Work and Pensions*** [2013] EWCA Civ 1345 at [26].

160. As to the first, this only arises on what is to my mind an incorrect reading of the PES. The full passage is to be read (with my interpretative interpolation in square brackets) as follows:

> "Those who are within scope of this decision have been deemed to be able to care for themselves on a day-to-day basis including in matters of monitoring household budgets. Though it may be harder for some to adjust than others, it is considered that the decision to freeze rates is not so harsh as to make it impossible for [those] some [who find it harder to adjust than others] currently receiving support to meet their essential living needs."

161. As to the second point, it was accepted that the Secretary of State had not personally considered the PSED duties, but it was submitted on her behalf that it was sufficient that they had been taken into account by the department in the review for the purposes of making the recommendation which she accepted. Mr Sheldon QC relied upon the decision in ***R (FDA) v Secretary of State for Work and Pensions*** [2012] 3 All ER 301 and in particular the passage in the judgment of Elias LJ at [89].

162. A decision on this issue involves seeking to reconcile potentially conflicting decisions of two courts of which Elias LJ and McCombe LJ were in each case members. In the light of my other conclusions it is not necessary for me to do so, and I prefer to leave the question for a case in which it requires resolution.

Third Ground: s. 55 of the 2009 Act

163. By the conclusion of the hearing it was apparent that no separate point arose under this ground, save for the position of 16 and 17 year olds which I have addressed above under Issue 3.

Conclusion

164. Permission is granted. The application succeeds. The decision is quashed and falls for reconsideration in the light of this judgment.