



Neutral Citation Number: [2024] EWHC 579 (Admin)

Case No: CO/4585/2020 and AC-2020-LON-003618

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 March 2024

Before:

Deputy High Court Judge Paul Bowen KC

Between:

| | |
|---|--------------------------|
| The King (on the application of) DXK | <u>Claimant</u> |
| - and - | |
| The Secretary of State for the Home Department | <u>Defendant</u> |
| Migrant Helpline Limited (t/a 'Migrant Help') (A | |
| Charity) (1) | <u>Interested</u> |
| Clearsprings Ready Homes Limited (2) | <u>parties</u> |

Philip Rule KC and David C. Gardner (instructed by Luke and Bridger Law) for the Claimant
David Manknell, Tom Tabori and Amelia Williams (instructed by the Government Legal
Department) for the Defendant

Hearing dates: 12, 13 and 15 December 2023 with further written submissions dated 2 and 6
February, 11 and 14 March 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10.00 am on 15 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

This judgment is deemed to have been delivered in open court. There is a reporting restriction order in force in respect of this case protecting the anonymity of the Claimant and her child. Permission to publish this version of the judgment is given expressly on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the Claimant and her child must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Deputy High Court Judge Paul Bowen KC:**Table of contents**

| | |
|--|----|
| Introduction..... | 3 |
| Summary of the Court’s decision | 4 |
| Procedural background | 5 |
| The individual challenge and its successful outcome | 5 |
| The subsequent progress of the judicial review claim | 6 |
| Relevant factual background..... | 6 |
| A summary of the asylum support decision process prior to the ‘new system’ | 6 |
| Enforcement of the AASC | 9 |
| The growing pressure on the asylum support system and delays in dispersal after the first Covid-19 pandemic lockdown in March 2020 | 10 |
| Features of the asylum support system increasing the risk of delays in dispersal of PNMAS..... | 11 |
| The adverse effects on PNMAS and their infants of long-term IA and delays in dispersals to DA..... | 14 |
| DMA and the ‘duty to monitor’ | 17 |
| The SSHD’s response: the ‘new system’ | 19 |
| The Claimant’s grounds of challenge | 24 |
| The systemic grounds: Grounds 2-4 | 24 |
| The due regard grounds: Grounds 5-6 | 25 |
| Legal framework: general | 26 |
| Introduction..... | 26 |
| The 1999 Act..... | 26 |
| The HNPD Policy | 31 |
| Discussion: the systemic grounds (Grounds 2-4) | 31 |
| Legal framework on ‘systemic challenges’ following A and BF (Eritrea)..... | 31 |
| Academic issues?..... | 34 |
| Decision: systemic challenge under the 1999 Act and HNPD Policy (Ground 2) .. | 35 |
| Decision: the HRA Grounds (Grounds 3(a), 3(b) and 4(a)) | 39 |
| Decision: indirect discrimination (Ground 4(b)) | 42 |
| Discussion: the PSED Ground (Ground 6) | 44 |
| Legal framework relevant to the PSED | 45 |
| Academic issue?..... | 53 |
| Decision: the PSED Ground (Ground 6) | 54 |
| Discussion: s 55(1) BCIA children’s welfare duty (Ground 5) | 59 |
| Legal framework relevant to s 55 BCIA..... | 59 |

| | |
|--|----|
| Academic issue?..... | 60 |
| Decision: the s 55 Ground (Ground 5)..... | 60 |
| Conclusion | 62 |
| Consequential matters including relief | 62 |
| Anonymity | 63 |
| Annex: Relevant provisions of the AASC contract applying to PNMAAS | 66 |

Introduction

1. This case concerns a challenge to the lawfulness of the system of allocation of asylum accommodation provided by the Secretary of State for the Home Department ('SSHD') under s 95 and s 4(2) of the Immigration and Asylum Act 1999 (the '1999 Act') as it relates to a particularly vulnerable cohort, namely pregnant and new mother asylum-seekers and failed asylum-seekers ('PNMAS'). The asylum support system is administered, in practice, by the United Kingdom Visa and Immigration Directorate ('UKVI') through contracts with third parties known as Asylum Accommodation Support Contracts ('AASC'), but the statutory duties under the 1999 Act remain the SSHD's.
2. As the facts of this and other cases demonstrate, there have been – and continue to be – significant delays in the provision of 'dispersal accommodation' (longer-term self-contained provision) ('DA') to asylum-seekers and failed asylum-seekers who are instead inappropriately accommodated in 'initial accommodation' (usually single rooms in hotels on full or half-board) ('IA') for long periods. The evidence is that such delays have a disproportionately adverse impact upon PNMAAS: see paragraph 36, below. The SSHD's case is that these delays have been caused by an unprecedented rise in demand since the first Covid-19 lockdown in March 2020. The Claimant's case is that these delays have also been contributed to by systemic failings within the asylum support system which have been exposed by that increase in demand.
3. The Claimant's original claim challenged, first, the SSHD's failure to provide adequate asylum accommodation, specifically DA, to the Claimant under s 4(2) of the 1999 Act (the 'individual challenge') and, second, his 'failure to have in place a lawful system for allocation of [DA] to [PNMAS]' under both s 4(2) and s 95 of the 1999 Act (the 'systemic challenge'). The individual challenge (Ground 1) is no longer pursued, the Claimant having obtained the relief she sought in bringing the proceedings by a move to DA on 13 January 2021. The claim has therefore become academic as it concerns the Claimant who is barred from advancing Ground 1 by order of Jonathan Moffett KC DHCI dated 28 June 2023. However, the Claimant's reformulated Grounds 2-6 involve challenges to the lawfulness of the system as it applies to PNMAAS as a wider group. These grounds of challenge fall conveniently under two headings:
4. Grounds 2-4 (the 'systemic grounds'):
 - i) Ground 2: Systemic breaches of the SSHD's duties to provide 'adequate' accommodation to PNMAAS under s 4(2) and s 95 of the 1999 Act and his

duty to prioritise PNMAAS for DA in accordance with his own policy, the *Healthcare Needs and Pregnancy Dispersal Policy*, v3.0 (1 February 2016) (the ‘HNPD Policy’).

- ii) Grounds 3 and 4(a) (the ‘HRA grounds’): Systemic breaches of Articles 3, 8 and 14 ECHR and s 6 of the Human Rights Act 1998 (‘HRA’).
 - iii) Ground 4(b): Indirect discrimination contrary to s 19 of the Equality Act 2010 (‘EA 2010’): Ground 4(b). This challenge is closely related to the ‘systemic ground’ under Article 14 ECHR but involves a different jurisprudential analysis.
5. Grounds 5-6 (the ‘due regard grounds’):
- i) Ground 5: Breach of the SSHD’s duty to have regard to children’s welfare under s 55 of the Borders, Citizenship and Immigration Act 2009 (‘BCIA 2009’).
 - ii) Ground 6: Breach of the SSHD’s duty to have due regard to equality considerations in the discharge of public functions (the public sector equality duty or ‘PSED’) in s 149 EA 2010.
6. While the grounds are wide-ranging, the central allegation common to all of them is that the SSHD has unlawfully failed to collect and monitor relevant statistical data on the allocation of DA to PNMAAS which is necessary to ensure the discharge of his duties to this vulnerable group. The Claimant places special emphasis upon the judgment of Knowles J in *R (DMA) v. Secretary of State for the Home Department* [2021] 1 WLR 2374 (‘DMA’) in which the SSHD’s failure to collect and monitor statistical data in relation to the provision of asylum accommodation to disabled people was held to be unlawful, considered in detail at paragraph 43, below.
7. There has been much litigation concerning the ambit and application of the asylum support duties leading to a body of case-law. I will make particular reference, in chronological order, to: *DMA* (Robin Knowles J, 14 December 2020), *R (NB) v Secretary of State for the Home Department* [2021] 4 WLR 92 (Linden J, 3 June 2021) (‘NB’), *R (MQ) v Secretary of State for the Home Department* [2023] EWHC 205 (Admin) (HHJ Bird DHCJ, 7 February 2023) (‘MQ’), *R (HA) v Secretary of State for the Home Department* [2023] PTSR 1899 (Swift J, 21 July 2023) (‘HA’) and *R (SA) v Secretary of State for the Home Department* [2023] EWHC 1787 (Admin) (Fordham J, 14 July 2023) (‘SA’).

Summary of the Court’s decision

8. As I have noted, the outcome of the claim is of only academic concern to the Claimant. It is, however, of continuing relevance to the SSHD and the many PNMAAS applicants who continue to require asylum support. The Court can decide a claim as a ‘test case’ despite the fact its outcome has become of academic interest to the individual claimant where there is a public interest in doing so. That jurisdiction is to be exercised carefully and only in exceptional circumstances, however. I have concluded that the systemic grounds, including the HRA

grounds and the indirect discrimination ground (Grounds 2-4), should not be determined in the absence of a firm factual framework relating to (at least) one individual breach or anticipated breach. I therefore dismiss these grounds as academic: below, paragraph 89. The HRA Grounds (Grounds 3-4) are also dismissed because the Claimant lacks standing to bring such a claim under s 7 HRA: below, paragraph 110. The indirect discrimination ground is also dismissed for lack of standing: below, paragraph 113. However, there are exceptional grounds to justify the substantive determination of Grounds 5 and 6 (the 'due regard' grounds), which do not require any finding of breach or anticipated breach of individual duty and are less fact-sensitive: below, paragraph 143, 164. I find that the absence of statistical data monitoring is a breach of the PSD in s 149 EA 2010 (Ground 6, below, paragraph 124) but there is no separate breach of s 55 BCIA: Ground 5, below, paragraph 159.

Procedural background

The individual challenge and its successful outcome

9. The Claimant is a national of the Ivory Coast, born in 1986. She arrived in the UK on 26 September 2012 and made a claim for asylum on 16 November 2012, which was refused on 19 December 2012. Following the exhaustion of her appeal rights she absconded and remained in the UK thereafter without valid leave to remain. She lived precariously in various locations in the UK until September 2020, when she was about 7 months pregnant. The Claimant then applied to the SSHD for support under s 4(2) of the 1999 Act as a failed asylum-seeker. The application was granted on 16 September 2020. On 29 September 2020 she moved into IA at the Stonebridge Lodge Hotel in Thornton Heath on a full-board basis. She was given a single room which was said to be damp, dirty, unhygienic and infested with cockroaches and she had to share a bathroom with nine others, including men. On 7 October 2020 the Refugee Council made an urgent request to Migrant Help, the charity which contracts with the SSHD to provide advice, issue reporting and eligibility ('AIRE') services (including complaints) to those receiving asylum support (the first interested party), for her to be relocated. Migrant Help passed the request onto the contractual provider, Clearsprings Ready Homes ('Clearsprings') (the second interested party) but there was no response.
10. The Claimant instructed legal advisers who sent pre-action protocol ('PAP') letters to the SSHD on 28 October and 27 November 2020. The SSHD's response to the PAP letters on 8 December 2020 asserted that her accommodation was adequate and lawful. It also explained that at that time there was 'no timetable for dispersals, which are currently on hold due to national restrictions and guidance surrounding Covid-19'. The Claimant's legal advisers issued her claim for judicial review on the same day bringing both the individual challenge and the systemic challenge. The Claimant gave birth in hospital on 18 December 2020 and moved back to Stonebridge Lodge a few days later with her new baby. Permission to apply for judicial review and interim relief was granted by Spencer J on 21 December 2020. On 8 January 2021 the Claimant was moved to Brigstock House, which was also IA but did not require the Claimant to share a bathroom. On 13 January 2021 she was moved to longer term DA, thereby achieving the

immediate objective of the claim for judicial review. She had spent 105 days in IA.

The subsequent progress of the judicial review claim

11. From the point she was moved to DA the claim became of only academic interest to the Claimant. Her systemic challenge nevertheless continued and was listed for trial on 13-14 July 2022. On 8 July 2022 the trial was vacated by consent, the SSHD indicating his intention to introduce a new system of monitoring the allocation of accommodation to PNMA in the light of *DMA* (the ‘new system’). CMG Ockleton DHCI stayed the claim and directed the SSHD to file evidence explaining the new system. The changes that the SSHD has since made in the new system are considered in more detail at paragraphs 47, below. The Claimant’s legal advisers did not – and do not – accept that the new system is lawful. On 13 February 2023 the stay on the proceedings was lifted (by consent) by order of David Pievsky KC DHCI, with an amended timetable for the service of revised pleadings. The Claimant served amended grounds of judicial review with an application to amend. The SSHD opposed the application, which came before Jonathan Moffet KC DHCI on 28 June 2023. The judge refused the Claimant permission to advance Ground 1, because this ‘relates to the specific circumstances of DK’s case’ and was now academic. It was not necessary to pursue that ground to provide ‘context’ to the systemic challenge. He gave permission to rely on grounds 2-6, observing that ‘Ground 2 is the overarching challenge to the lawfulness of the system, of which grounds 3-6 might properly be regarded as sub-grounds’ and which were broadly reflective of the original grounds of the systemic challenge. The judge observed that in certain respects the amended grounds of judicial review ‘insufficiently particularise exactly what public law element(s) of the Defendant’s system the Claimant is challenging’, but because permission to bring the systemic challenge had already been granted this was not a basis for refusing the application to amend. The SSHD was invited instead to issue a Part 18 application for further information. The SSHD did so on 20 July 2023 to which the Claimant responded on 25 August 2023.
12. The matter then proceeded to the substantive hearing before me. I heard the claim over three days on 12, 13 and 15 December 2023. Further written submissions were made on 2 and 6 February and 11 and 14 March 2024 at my invitation. Philip Rule KC with David C. Gardner appeared for the Claimant; David Manknell (now) KC, Tom Tabori and Amelia Williams were for the Defendant. I was very grateful to all counsel for their assistance in navigating this case which is both factually and legally complex.

Relevant factual background

A summary of the asylum support decision process prior to the ‘new system’

13. I will first describe the asylum support decision process as it operated before its amendment by the ‘new system’ introduced after July 2022, which I consider from paragraph 47, below. The following summary is taken largely from the evidence filed by the SSHD or from publicly available documents. The SSHD has filed a number of witness statements from two civil servants, Chris Hennigan (dated 28 October 2021, 28 January 2022, 13 October 2023, 8 and 15 December

2023) and Jonathan Kingham (dated 24 June 2022, 1 August 2022, 8 March 2023 and 11 December 2023), both of whom have been employed within the SSHD for many years. Mr. Hennigan is a Grade 7 civil servant who was the Service Delivery Lead for the AASC contracts for London, South East, South West, East England and Wales from June 2021. Since the summer of 2023 he has been the acting head of AASC delivery. Mr. Kingham is also a Grade 7 civil servant and litigation lead for AASC contracts and has been on the AASC team since 2019. Statements were also provided by AASC contractors Clearsprings Ready Homes ('Clearsprings') (Steven Lakey, Managing Director), Mears Housing Management ('Mears') (Carola Donald, Head of Safeguarding) and Serco (Katy Wood, Business Support Director).

14. The AASC was introduced in March 2019 to replace the Commercial and Operational Managers Procuring Asylum Support Services (COMPASS) contract system. Under the AASC, three contractors operate across seven regions: Clearsprings (London, Southeast, Southwest, part of East and Wales), Mears (Scotland, Northern Ireland and the North East) and Serco (Midlands, East of England, North West). The operation of these contracts is described in detail in *DMA*, [99-120]. I will nevertheless need to consider their salient features. In addition, the SSHD contracts with Migrant Help, a national charity, to provide a helpline and support service (AIRE). Applications for asylum support and any issues and complaints concerning its provision are made through Migrant Help.
15. The procedure is as follows. An application for asylum support is made to UKVI, either directly or through Migrant Help, using form ASF1. A UKVI caseworker considers the application and applies both internal and publicly available SSHD policies and guidance including: '*Allocation of asylum accommodation policy*' (v8.0, dated 23 December 2023) for s 95 support; '*Asylum support, section 4(2): policy and process*' (v1.0 dated 16 February 2018) for s 4(2) support; '*Asylum seekers with care needs*' (v2, 3 August 2018); and the *HNPD Policy*, the last two applying to both s 95 and s 4(2) applications. The caseworker usually conducts a screening interview to obtain relevant information from the applicant, including healthcare information and whether a woman is pregnant or has a young child: *HNPD Policy*, §3.1. This information is entered into a computerised case management system called ATLAS and a decision taken whether to provide asylum support.
16. If an initial decision is made to provide asylum support the caseworker will extract the relevant information from ATLAS to send it to the relevant service provider via a secure web-based facility known as the Collaborative Business Portal ('CBP'). This generates an automatic 'Accommodation Request' (also referred to as an 'instruction to propose' or 'instruction to provider', hereafter 'ITP') to the service provider which contains information about the service user, group size, support type, accommodation requirements and timetable for the provider's response. In the case of asylum-seekers, the ITP will be issued on a temporary basis under s 98 while the person's eligibility for support under s 95 is determined. Temporary accommodation will invariably be IA, which is hotel accommodation provided on a 'full board' basis. This might be 'Core IA', which is comprised of dedicated asylum-seeker hotels often supported with a healthcare team and, in some cases, segregated by gender (for example, the SSHD has a

designated short stay IA hotel for expectant mothers at the Gatwick Airport Inn). Where demand is high and Core IA is not available, individuals will be provided with 'Contingency IA', namely hotel accommodation procured on a shorter-term basis. For failed asylum-seekers there is no equivalent of s 98 for s 4(2) support and accommodation will not generally be provided while the individual's eligibility is determined. However, s 4(2) support can be provided on an emergency basis for priority applicants, including PNMAS: *HNPDP Policy*, §4.2, 7.4.6. Mr. Hennigan explains in his third statement that it is the SSHD's policy to provide PNMAS with IA while the service user's needs are assessed which 'is most effectively done through providing hotel or hostel accommodation'.

17. After the service provider has received the ITP they must make a proposal for IA and move-in date through the CBP within the timescale stipulated by UKVI. The timetable for the response is set according to three priority categories: Category A (24 hours), Category B (48 hours) and Category C (9 days). Category A focuses on highly vulnerable individuals including families with dependent children and PNMAS, as well as those to be housed by court order. Category B is for less vulnerable but imminently homeless applicants. Category C is for all other cases. According to Home Office evidence in *DMA*, [105] this is 'an informal system and not set out in policy'. However, these deadlines are set out in an internal guide produced by the SSHD entitled *Asylum Accommodation and Support Transformation Service Delivery Guide* (January 2019) (the 'Service Delivery Guide'), at §6.2 and referred to in *DMA*, [28], although not produced in evidence before me.
18. If UKVI accept the service provider's proposal this is recorded in ATLAS and the record in the CBP is automatically updated. The service provider must then make the accommodation available for the individual within a further time scale stipulated by UKVI, usually 5 days in a Category C case. The service provider will notify UKVI once the individual has arrived or 'failed to travel' (i.e. refused the accommodation), which may lead to the withdrawal of support. If UKVI reject the proposal this is communicated through the CBP and the service provider must propose a new address and timetable.
19. Following UKVI's decision on an individual's eligibility for s 95 or s 4(2) accommodation then a further ITP will be generated for dispersal to DA. DA is longer-term self-contained accommodation with its own bathroom and kitchen. Service users have greater privacy and can store and cook their own food rather than rely on the ready meals provided in IA, receiving larger subsistence payments for that purpose. Once an ITP for DA has been generated the service provider is contractually obliged to respond with a proposal within a maximum timescale of 9 days and thereafter to provide the accommodation within a further 5 days: §A.1.1 to annex A of Sch. 2 to the AASC. The service provider is then contractually obliged to provide DA, albeit only up to an agreed volume cap (AASC, Sch. 2, §2.1.1 and 4.1.3). Prior to March 2020 an ITP for dispersal was generated automatically once eligibility had been determined, but that process has since been 'decoupled' and the ITP will only be issued once the service user reaches the top of the queue: see below, paragraph 25.
20. Both IA and DA are offered on a 'no choice' basis and a service user may be offered either form of accommodation anywhere in the country. If the service

user refuses accommodation then the SSHD may treat his duty as discharged: see below, paragraph 74.

21. The provision of IA and DA is also accompanied by subsistence payments for essential living needs: see paragraphs 71-72, below. These payments are considerably lower for those in IA because their meals are provided, whereas those in DA need to buy and cook their own food.

Enforcement of the AASC

22. The contractual obligations under the AASC are enforced in the following way. Service providers are contractually obliged to provide monthly reports setting out their compliance with performance standards set out in AASC, Schedule 2. Compliance is assessed by reference to the Key Performance Indicators ('KPIs') in AASC, Schedule 13. Of particular relevance is KPI2 ('Dispersal Accommodation'), which measures the percentage of service users moved to DA within the timescales stipulated by the ITP. The consequences of a failure to meet the KPI targets are provided for by §§3-5 of Schedule 13. §3 establishes a points-based system to quantify the level of compliance against the agreed KPI targets, known as the 'Performance Management Regime'. KPI2, for example, stipulates a contractual performance standard of 98%, with compliance below that level resulting in the allocation of 'points': compliance between 96 and 98% incurs 250 points (Level 1), with a sliding scale down to compliance of less than 88% (Level 6) resulting in 1250 points. By §4, the total points accrued during the payment period in relation to all the KPIs is reflected in a number of 'Service Credits' leading (by application of a formula) to a 'Service Credit Payment' ('SCP'). The SCP is better described as a penalty which is then deducted from the Monthly Service Payment to which the service provider is otherwise entitled. The SSHD may waive the SCP where there are mitigating circumstances for the failure to meet the KPI. 'Persistent failure' (failure to meet the same performance target for the same KPI for three consecutive payment periods) or a 'total service failure' (3000 or more points in one payment period) may be deemed a 'Provider Default' leading to a 'remediation plan' and entitle the SSHD to recover additional costs and expenses from the service provider: §5.
23. In his third statement Mr. Hennigan describes the procedure for how AASC contracts are monitored and enforced in practice. On a monthly basis each service provider must provide a report setting out detailed data to evidence its achievement of the KPIs. The SSHD has dedicated 'service delivery teams' who are responsible for scrutinising the monthly reports. These report to a Contract Management Group ('CMG') which may either agree or not agree with the monthly reports. Above the CMG sits the Strategic Review Management Board (SRMB) which carries out quarterly reviews, beyond which lies the Executive Oversight Board (EOB). Mr. Hennigan also describes the Contract Change Notice ('CCN') provisions of Schedule 16, which allows the SSHD to give effect to operational decisions through a change in the contract, including by increasing the agreed volume cap.
24. Although the SSHD has the contractual means available to enforce compliance with performance standards where these have not been met, in practice he has never done so. Mr. Hennigan explains that the SSHD's policy towards service

providers who may not be delivering on any aspect of service delivery is ‘to work with them to remove blockages, so that providers have the platform to be able to improve’. To date, the SSHD has not exercised his contractual right to recover additional costs and expenses arising from a Provider Default under §5. That is because, according to Mr. Hennigan, the SSHD ‘seeks to use less drastic measures first to maintain the relationship with the provider whilst also ensuring that the levy of punitive measures remains available’. This ‘light touch’ approach to enforcement is in part because UKVI has lacked the resources properly to enforce the contract, a problem which Mr. Hennigan says has now been addressed by the deployment of additional staff: below, paragraph 54. I address the consequences of the SSHD’s ‘light touch’ approach to enforcement at paragraph 31, below.

The growing pressure on the asylum support system and delays in dispersal after the first Covid-19 pandemic lockdown in March 2020

25. According to Mr. Hennigan, prior to March 2020 there was little, if any, backlog of applicants for DA. UKVI would issue an ITP for dispersal as soon as eligibility for s 95 or s 4(2) had been established, usually within a few days of the grant of IA. Service providers could be expected to act in accordance with ITPs and to provide DA within stipulated timescales, including urgent requests in the case of special need, in accordance with the AASC. The average time spent by an individual asylum-seeker in IA was 35 days but could be as little as 14 days: *MQ*, [82]. This evidence is endorsed by Dominic Riley, Asylum Services Manager at Refugee Action in Manchester, who states that prior to the pandemic the phenomenon of PNMAAS remaining in IA hotels for extended periods ‘was not an issue’. I note that evidence was presented to Knowles J in *DMA* which demonstrates there were significant delays in dispersal even before the pandemic: see *DMA*, [149]. Be that as it may, there is no dispute that after the Covid-19 pandemic outbreak in March 2020 the demand for DA increased significantly. Mr. Hennigan explains that on 27 March 2020, shortly after the first lockdown, the SSHD suspended his policy of withdrawing asylum accommodation from those whose asylum applications had failed (‘negative cessations’) or been granted (‘positive cessations’) as part of the ‘Everybody in’ policy to reduce street homelessness. Existing service users were therefore no longer moved on from DA and the system for dispersal ‘seized up’. Service providers became unable to respond to ITPs within the contractual timescales. The SSHD decided to ‘decouple’ the issue of ITPs for DA from the eligibility decision to grant s 95 or s 4(2) support. Indeed, it appears that dispersals were frozen altogether for a period: see the response to the PAP letter in the present case, paragraph 10 above. In addition, the number of individuals receiving asylum support increased, from 50,898 in March 2020 to 123,758 in September 2023. These developments led to a significant increase in the period spent by service users in IA before dispersal. By the time of the Claimant’s application in September 2020 the average stay in IA had risen from 35 days to 63 days. By October 2023 it had increased to 230 days. The SSHD does not keep statistics specifically for PNMAAS, but they do have figures for single mothers with children under 3. For this group the average stay in IA was 195 days by October 2023: a little shorter than the overall average, but still more than 5 times longer than before the pandemic.

26. These delays in dispersal have had significant negative impacts for those PNMAS and their infants who are accommodated in inappropriate IA for lengthy periods, the implications of which I address from paragraph 39, below. I consider the steps taken by the SSHD to respond to the pressure on the system from paragraph 47, below.

Features of the asylum support system increasing the risk of delays in dispersal of PNMAS

27. It is the SSHD's case that the delays in dispersal are the consequence of the Covid-19 pandemic and the unprecedented rise in applications for asylum support. That is only part of the story, however. It is apparent that there are aspects of the system for which the SSHD is responsible that have contributed to delays in dispersal as they affect PNMAS, at least once demand began to increase following the first lockdown in March 2020.

(1) The absence of a means of contractual enforcement in individual cases

28. The fact that the SSHD has elected to discharge his duty to provide asylum support accommodation through third party contractors means that he lacks direct knowledge of when a contractor has failed to comply with an ITP to provide accommodation in an individual case. Such a failure may constitute a breach of the SSHD's statutory duties under the 1999 Act. Some mechanism is therefore necessary to enable the SSHD both to know when such a failure arises and to ensure that accommodation is then provided. However there is no such mechanism under the AASC, as Knowles J found in *DMA*, [106, 109, 117, 144]. When a service provider fails to comply with an ITP to disperse this must be reported as part of the monthly performance report by reference to the performance indicators in KPI2 (above, paragraph 22), but there is no contractual obligation to notify UKVI in an individual case nor any enforcement mechanism by which the SSHD can ensure the discharge of his statutory duty. That is the case even where the individual is vulnerable and has an urgent need for dispersal accommodation, such as a PNMAS. It is only with the introduction of the *Vulnerability Log SOP* (below, paragraph 52) that a system has been put in place to identify when a service provider has failed to comply with an ITP to disperse a vulnerable service user and thereafter to ensure provision of suitable accommodation.

(2) The contractual volume cap

29. Service users are only obliged to provide DA in response to ITPs up to an agreed volume cap: above, paragraph 19. This factor was identified as important in *DMA*, although the evidence in that case was that the volume cap had never been reached so it played no part in the judge's findings of unlawfulness: see *DMA*, [119-120]. Mr. Hennigan explains that there is a contractual mechanism for increasing the volume cap and that in January 2023 the volume cap was increased. Notwithstanding that increase, it is apparent that in some cases the volume cap has still been exceeded and dispersal has not occurred for that reason. During the course of the hearing the SSHD, at my request, disclosed a CMG Monthly Report from Clearsprings which revealed that in September 2023 DA had been refused in 293 cases (7% of the total) because the number of ITPs had exceeded the

volume cap. Statistics have not been provided for any other period or any other provider so it is not possible to reach any conclusions as to the extent of the problem. However, the existence of volume caps and the evidence I have seen demonstrate this is a factor that further increases the risk of delays in dispersal.

(3) *The permitted level of non-performance*

30. The relevant contractual performance standard for dispersals within the timescale stipulated by an ITP, KPI2, is 98%. Service providers may therefore fail to comply with ITPs in 2% of cases without penalty, a factor that Knowles J considered significant in *DMA*, [118]: below, paragraph 33, 44.

(4) *The SSHD's 'light touch' approach to enforcement*

31. I have described at paragraph 24 above the SSHD's 'light touch' approach to enforcement. In my judgment, this approach creates a further risk of delays in the provision of DA. Enforcement by way of financial penalty is the means by which contractors are incentivised to meet their contractual obligations: see *DMA*, [144]. If the contract is not enforced then contractors are not incentivised to reach performance standards, including under KPI2, making delays in dispersal more likely. As the demand for DA has increased, service providers have failed to comply with ITPs for dispersal in a significantly higher number of cases, without penalty. For example, the CMG Monthly Report from Clearsprings for September 2023 – which was only disclosed during the course of the hearing – reveals that in every month from September 2022 to August 2023 Clearsprings failed to meet the KPI2 performance target of 98%. The worst month was October 2022 when the compliance rate was 48.1%. For 10 months performance was below 88%, the lowest level of compliance envisioned by KPI2 (Level 6). There has therefore been a 'Persistent Failure' in relation to KPI2 within the meaning of §5 AASC, Schedule 13 since December 2022 but the SSHD has not once used his contractual power to enforce the KPI2 performance standards.

(5) *The 'decoupling' of the decision on eligibility from the decision to issue an ITP*

32. I have explained at paragraph 25, above, how the SSHD responded to the increase in demand following the first lockdown by 'decoupling' the issue of ITPs for DA from the eligibility decision to grant s 95 or s 4(2) support. No policy was put in place, published or otherwise, setting out when an ITP would now be issued. The position appears to have been that unless a special request for expedition was made, and accepted, a service user would sit in a queue until DA became available, at which point an ITP would be issued: see *MQ*, [97]. This policy change may have had the effect of improving the performance of service providers in complying with ITPs but did nothing to shorten the delays service users endured before dispersal. Indeed, the policy change is likely to have increased those delays. Under the previous policy, the immediate issue of an ITP upon the determination of eligibility triggered the service provider's obligation to provide DA within the contractual timescales. Under the new policy there was no deadline by which UKVI were obliged to issue an ITP and, until the introduction of the *Vulnerability Log SOP*, no means by which vulnerable persons, including PNMAAS, were prioritised for consideration for dispersal except by means of a special request for expedition. No policy was published

setting out the availability or grounds for making a special request for expedition. The evidence from Mr. Riley of Refugee Action – who has considerable experience in assisting applicants for asylum accommodation – is that he was unaware of any such policy.

(6) The risk that PNMAS are treated less favourably under the AASC

33. The delays in dispersal caused or contributed to by the factors at (1)-(5) above may affect any service user. Without statistical data monitoring (below, (7)) it is not possible to know how many of those affected are PNMAS. However, one aspect of the AASC makes vulnerable groups, including PNMAS, at risk of being disproportionately affected by such delays. Under the terms of the AASC, contract service providers are paid a fixed amount per accommodated individual, regardless of the cost in that individual's case. This means that the greater the need of the service user the more it will cost the service provider to meet their needs, with no compensatory benefit. In *DMA*, Knowles J held that this aspect of the contract creates a risk that vulnerable service users (in that case, disabled people, but the reasoning applies equally to PNMAS) will be disproportionately affected by delays in dispersal compared to other service users: [115], [118] and [302]: below, paragraph 44, 46.
34. The SSHD accepts that there is no additional contractual incentive by way of financial remuneration for a service provider to prioritise vulnerable persons for dispersal. That, he submits, is because there is no need for it. The service provider is contractually obliged to provide accommodation at a fixed price regardless of the specific needs, and associated costs, of the service user. The additional cost for more vulnerable service users (including PNMAS) will have been 'priced in' by the provider when negotiating the contract with the SSHD. There are sufficient other incentives (and penalties) to ensure that service providers meet their contractual obligations. In my judgment, this is not a reason to reach a different conclusion from that of Knowles J in *DMA*. The SSHD's 'light touch' approach to enforcement demonstrates that the system of incentives and penalties under the contract is not operating as intended. Furthermore, in the absence of statistical data monitoring (below, (7)) the SSHD has no evidence to support his submission. He simply does not know whether vulnerable groups are disproportionately affected by the delays for which I have found he is, in part, responsible for the reasons I have given.

(7) The absence of monitoring of vulnerabilities, including PNMAS

35. For reasons I will come to at paragraph 43, below, in *DMA* Knowles J found that the SSHD was in breach of a legal 'duty to monitor' vulnerable service users (in that case, disabled people) in two respects: [239, 243, 320]. First, the SSHD did not monitor compliance with ITPs and take steps to enforce the provision of accommodation in the event of non-compliance ('individual case monitoring'). Second, the SSHD did not collect and monitor relevant statistical data on those with vulnerabilities and the length of time they spend in IA ('statistical data monitoring'). The first means that the SSHD is unaware when a service provider fails to comply with an ITP to disperse a vulnerable individual and cannot take steps to ensure that DA is provided: see (1) above. The second means the SSHD is unable to detect trends and cannot respond to an increase in delays as they affect

vulnerable groups, including PNMAAS, or to determine whether existing policies (such as the *HNPD Policy*) are effective. While individual case monitoring is now being carried out under the *Vulnerability Log SOP* (below, paragraph 52, 55), the SSHD still does not conduct statistical data monitoring: below, paragraphs 55-59. The absence of statistical data monitoring does not directly lead to delays but without it the SSHD lacks the means of knowing how vulnerable persons are affected by delays caused by other factors, whether he is discharging his duties towards them and whether the *HNPD Policy* (and, now, the *Vulnerability Log SOP*) are operating as intended, as I explain under Ground 6.

The adverse effects on PNMAAS and their infants of long-term IA and delays in dispersals to DA

The HNPD Policy

36. The adverse effects on PNMAAS and their infants of inadequate asylum accommodation and their need for early dispersal have been recognised for many years. The SSHD's *HNPD Policy* was first introduced in 2012 and is currently in its third version, introduced in 2016. UKVI caseworkers must have regard to the guidance and must follow it unless good reasons are given not to do so: per Fordham J in *SA*, [12]. The effect of that Policy is summarised at [13] of *SA*:

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

37. The general thrust of the Policy is therefore that pregnant women should be prioritised for dispersal as soon as possible. However, the Policy guidance does not establish that all pregnant women must be dispersed immediately, nor that pregnant women cannot be accommodated in IA in any circumstances. The Policy emphasises, in particular, the risks associated with dispersing pregnant asylum seekers, by reference to the NICE Guideline 'Pregnancy and complex

social factors’, September 2010 and advises against dispersal if that will adversely impact upon their maternity care: §7.4.1-7.4.2. For pregnant women who are in the late stages of pregnancy (also known as the ‘protected period’), defined in §7.4.4. as six weeks before and six weeks after the expected date of delivery, ‘dispersal ... should only be undertaken at the request of applicant or her treating medical practitioners’: §7.4.5, 7.4.6. Service providers are contractually obliged *not* to move a PNMA during this period: AASC contract, Schedule 2, Annex C, C.2.6-7. The advice not to disperse PNMA in this ‘protected period’ is of longstanding. For example, the Maternity Action and Refugee Council report *‘When maternity doesn’t matter: dispersing pregnant women seeking asylum’*, (2013), states that ‘no woman should be dispersed after 34 weeks gestation, or sooner than 6 weeks post-natally’.

38. There is nevertheless a strong presumption of early dispersal for pregnant women under the HNPDP Policy. This presumption is strongest for those who have newly arrived in the UK who are unlikely to be registered with maternity services: ‘it should be possible to disperse the women from Initial Accommodation to suitable accommodation as soon as possible’: §7.4.5. For those pregnant women who have been residing in the UK for some time, caseworkers ‘should try to ensure that she is able to continue to live in her usual residential area’ when dispersing them and ‘it may prove necessary for them to spend some time in the nearest IA if they are unable to remain in their current private accommodation until appropriate DA is to be found’: §7.4.6. However, ‘[i]f accommodation is not available within the area where the woman is registered with maternity services, *as a last resort* the options of either dispersal to another location or the deferral of dispersal should be considered in consultation with the applicant’ (emphasis added): *ibid.*

The evidence that delay in dispersal has harmful effects on PNMA and their infants

39. The Claimant’s legal team have assembled evidence from a range of sources addressing the scale and degree of the problem of PNMA left in inappropriate IA for long periods of time before dispersal, including from representatives of charities supporting asylum seekers namely Little Village, the Happy Baby Community and Refugee Action. The problems faced relate to the poor quality of the food, the lack of cooking facilities and the inability to prepare fresh food, the lack of equipment to sterilise feeding bottles, the lack of bathing and laundry facilities and access to toiletries, the lack of suitable baby clothes and cots, the lack of space to play, the long periods spent indoors in cramped conditions and lack of privacy given the need to share facilities with others, including single men. Pregnant women do not put on weight properly. Babies who stay in IA for a prolonged period may suffer from developmental delay, are below average weight, display erratic or distressed behaviours and older children have trouble socialising. For new mothers the experience may lead to a deterioration in their mental health with increased anxiety and depression, often exacerbating existing mental health conditions. Among the recommendations made by these charities are that all PNMA are dispersed to self-catered accommodation where they have space, privacy and facilities to buy and keep food and cook for themselves.
40. This evidence is supported by independent reports. Of particular relevance are, first, the report of the Parliamentary Home Affairs Select Committee, ‘Asylum

Accommodation Report' HC 673 in 2017 which recommended that 'Providers should ensure that pregnant women are relocated to accommodation suitable and appropriate for their needs by 28 weeks of pregnancy and should face penalties where this target is not met.' Second is the report of the Independent Chief Inspector of Borders and Immigration ('ICIBI') titled 'An inspection of contingency asylum accommodation' (May 2022) which concluded that long term (more than 3 months) use of hotels for families with children was inappropriate (see paras 7.56, 10.25, 9.29, 10.3). At para 10.3 the report states: 'The submissions were consistent in stating that accommodation in hotels was not suitable for families with children over prolonged periods of time. This was acknowledged by the ASC senior civil servant who said that the use of hotels was 'absolutely not appropriate for families'. On 12 May 2022, the Government published its response to the ICIBI report in which it accepted all the recommendations made in the report.

41. While the SSHD has produced evidence from each of the service providers refuting specific complaints about the standards of accommodation, facilities and food in IA for PNMA, the evidence that long term hotel IA has adverse effects on PNMA and their infants cannot be disputed by the SSHD. Home Office witnesses to the investigation conducted by the ICIBI acknowledged that the accommodation of young families in an IA was unacceptable given the impact upon service users and the SSHD accepted all of the report's findings: above, paragraph 40. It is explicit in the SSHD's *HNP Policy* that wherever possible pregnant women should be dispersed to longer-term, more settled DA rather than remain in IA. In the absence of statistical data monitoring in relation to PNMA the SSHD cannot gainsay the Claimant's evidence that delays are widespread and I have already found that PNMA are disproportionately at risk of suffering such delays: above, paragraph 33. It is sufficient for me to find that in a significant number of cases, long-term accommodation of PNMA in IA rather than DA is likely to adversely affect the physical and mental health and welfare of pregnant mothers and their unborn and newly born children. In those circumstances it is not necessary to determine the Claimant's application to admit the expert report of Peggy Osborne, dated 6 June 2023, which adds little of relevance to the material already before the court.
42. I nevertheless accept that it is not *always* inappropriate for PNMA to remain in IA during their pregnancy and thereafter. As the *HNP Policy* makes clear, where a pregnant woman has developed connections with local maternity services she should, if possible, remain in the area. The preference will be for her to be moved to DA in the area rather than remain in IA, but if that is not possible then deferral of a move to DA may be acceptable, but only as a 'last resort': above, paragraph 38. Once she has entered the 'protected period' there is a strong presumption against any move because of the risks of disrupting existing connections with maternity services. However, none of these factors undermine the conclusion that IA is generally inappropriate for PNMA and their babies. Rather, they reinforce the need – as called for by the Home Affairs Select Committee in 2017 and mandated by the *HNP Policy* – for early, swift action to disperse PNMA to DA that is adequate for their needs, and will be adequate once the baby is born, in good time *before* the protected period without disrupting any connections with maternity services.

DMA and the 'duty to monitor'

43. Of particular relevance to the present case is the judgment of Robin Knowles J in *DMA*, which was heard in July 2020 (at the end of the first lockdown) and handed down on 14 December 2020. *DMA* concerned five failed asylum-seekers who were accepted by the SSHD as eligible for s 4(2) accommodation in 2019 but who then had to wait for periods between 45 and 151 days before IA was provided to them. Each of them suffered from some form of illness or disability, variously rheumatism, heroin addiction, mental health difficulties and chronic kidney disease. While waiting for asylum accommodation they each spent significant periods either street homeless or sofa surfing with limited support from friends, churches and charities. While the SSHD sought to excuse some of the delay on the ground the claimants had 'failed to travel', that was rejected by the judge. The judge also rejected the SSHD's argument that none of the claimants had reached the threshold of suffering necessary to establish a breach of Article 3 ECHR. In each case, the SSHD had accepted they were eligible for s 4(2) support on the basis that, at the time of the decision, they appeared to be destitute and faced an imminent prospect of a breach of Article 3 within the meaning of Reg 3(2)(e) of the Failed Asylum Seeker Regulations 2005: *DMA*, [97].
44. The AASC contracts were by then in force and operated as I have described above: namely, UKVI generated ITPs to which the service providers were then obliged to propose and provide adequate accommodation within stipulated timescales. Knowles J identified a particular flaw in the system, namely that there was no procedure in place for monitoring individual cases and ensuring accommodation was provided where an ITP had been made but no accommodation had been provided by the service provider within the allotted timescales: [106, 109, 117, 144]. The process of enforcement through KPIs under Schedule 13 was not sufficient to address the problem as it did not deal with securing performance in an individual case where accommodation has not been provided: [117]. Moreover, the KPIs permit service providers a 2% rate of non-performance: [118], [241]. It was not difficult to contemplate that those cases requiring the most resources, such as accommodation for persons with disability (for which the service provider receives no extra payment) would be concentrated in that 2%: [115, 118, 302]. In any event it was 'not clear' that enforcement under the terms of the AASC contract by way of later financial penalty or by requiring a 'service improvement plan' after 'persistent failure' 'appreciates the context', namely the discharge of the SSHD's duty to provide accommodation to those who are destitute and face an imminent prospect of a breach of Article 3: [144]. Figures provided by the SSHD setting out the performance of service providers in dispersing individuals to DA showed a considerable underperformance against the relevant KPI (KPI2), the figures provided by the SSHD initially having been found to be incorrect: [149, 159]. The SSHD 'did not in practice have the means to know the true position ... because there were no proper arrangements for data capture and monitoring': [173].
45. Knowles J went on to find that the periods of delay in the claimants' cases were not reasonable and were therefore an unlawful breach of the SSHD's duty under s 4(2): [196], [333]. Those delays were not caused by the pandemic and bore 'no relation' to the periods contemplated by the SSHD for responding to an ITP of

between 24 hours (Category A) and 9 days (Category C) (above, paragraph 16): [146]. The judge went further, however, and found there were flaws in the system of provision of asylum support so that the SSHD was in breach of his duties under s 4(2) and s 6 HRA ‘in failing properly to monitor the provision of accommodation under s 4(2)’: [333]. The delays in the claimants’ cases were ‘so large that, absent an explanation, they do question the system’: [196]. The judge had rejected the SSHD’s explanation for the delay (failure to travel). It was not possible to reconcile those delays with the monitoring said by the SSHD to take place so, he concluded, ‘[t]here cannot have been proper monitoring’. The proper discharge of his duty required the SSHD to ‘capture data properly and, using that data, to monitor properly, so that the SSHD can know whether she is acting lawfully and in accordance with her duty, and can act immediately if there is a sign that either is the case’: [236]. The SSHD simply did not know that accommodation was not being provided within timescales that she had set in 36% of cases. The degree of excess time across the 36% of cases was not known, nor were the consequences for the individuals concerned, which ‘reinforces the point’: [237]. The judge continued (emphasis added):

238. *Without proper monitoring the system is without a key means by which to identify and correct failure and to inform change to enable it to meet its purpose, to be found in s 4(2). It is a systemic issue that puts all those entitled to the ‘safety net’ of s 4(2) accommodation at unnecessary risk. In the present case there is evidence of a real risk of a breach of the [SSHD]’s statutory duty in a significant number of cases.*

239. In identifying this aspect of the process, I am not to be taken as saying that there are no other failings in the system, which if not corrected will place the [SSHD] in breach of her duties. It is simply that this is the aspect that will need to change, whatever other choices the [SSHD] will make in correcting the system so that she is not placed in breach of her duties. *It is the foundation of ensuring that her duty is met.* Given the context of (present or imminent) inhuman or degrading treatment, and the real risks involved (of unlawful breach of duty), *there is no lawful system that does not capture data properly and, using that data, monitor properly.*

...

242. Seen in its proper context, at least where a system is involved, monitoring is an essential element of a minister’s strategy to deliver as Parliament intended by its legislation; to deliver as the law requires.

243. What is monitoring ‘properly’? It is not of course for the Court to provide a design, but it is appropriate for the Court to say what it means. In the present case, it is not for the Court to provide a complete list or regime, but I am prepared to say that monitoring properly in relation to section 4(2) includes these features, to which no doubt others can valuably be added: 1. it

has regard to the context, which is the performance by a Secretary of State of her accepted legal duty to claimants who are destitute, who face an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life, and who are ‘highly vulnerable’; 2. it identifies the characteristics of the individuals involved; 3. it follows the progress of each case; 4. it alerts cases that are at risk of exceeding a reasonable time in sufficient time for this to be addressed; 5. it includes a regular review of where and why cases were at a risk of exceeding a reasonable time and what were the characteristics of the individuals placed at this risk; 6. it records when a reasonable time was exceeded, and informs a case study of where and why that occurred, how long provision eventually took and what the consequences were for the individual involved; 7. it identifies where and why and with what outcome an individual applied to the Court for an order; 8. *it allows trends to be identified and addressed, including by reference to the characteristics of the individuals involved*; 9. it follows the circumstances of alleged ‘failures to travel’, including notification given of travel arrangement, reason given for not travelling, response to reason given, action taken, and the situation of the individual as a result; 10. *it reports on action of changes made to the system in light of the above and the effectiveness of those changes.*

244. It will be clear that monitoring (like the data that is needed to enable it) is not just about numbers. And of course, the monitoring must be accompanied by arrangements to secure action by reference to the information it provides. The important thing is that the action will be informed.

46. The judge went on to find the failure to monitor the numbers of disabled applicants for s 4(2) support was also relevant to the s 149 ground. ‘The economic incentives under the contract were such that the provision of accommodation for individuals with a disability will be less profitable for the provider (and even unprofitable) ... [yet] there is no monitoring to see whether those incentives are having a negative impact and to allow that to be addressed’: [302]. While there was evidence that disabled applicants should be prioritised for accommodation, plainly that system was not working and, in the absence of monitoring, ‘it cannot be fully understood why the system of priorities is not working and where, and what must be done about it’: [307]. This had particular relevance to the claim that the SSHD had been in breach of the public sector equality duty under s 149 EA 2010: [312]. I address this part of his judgment below, at paragraph 138, in the context of Ground 6.

The SSHD’s response: the ‘new system’

47. The SSHD produced evidence that he has adopted a number of measures in response, first, to the critical reports from the ICIBI and Parliamentary Committees referred to from paragraphs 40, above; second, to the growing demand for asylum support since the pandemic; and, third, to the judgment of

Knowles J in *DMA*. These are described by Mr. Kingham in his third statement of 8 March 2023 and by Mr. Hennigan in his third to fifth statements of 13 October and 8 and 15 December 2023. The SSHD also refers to a policy paper titled '*Response to the ICIBI's report: 'An inspection of contingency asylum accommodation'*', published 12 May 2022 and to an instruction issued by the SSHD to local authorities on 6 September 2022 '*Funding instruction for local authorities: Asylum Dispersal Grant 2022-2023*'. I will consider the measures taken by the SSHD under three headings: first, those taken to increase the availability of asylum support accommodation; second, those taken to prioritise vulnerable groups, including PNMAS, for dispersal; and third, those taken to introduce monitoring in response to *DMA*.

(1) Measures taken to increase the availability of asylum support accommodation

48. The SSHD has taken steps to increase the availability of asylum support accommodation both in IA and DA and to reduce the use of contingency IA accommodation in hotels and hostels. In April 2022 the government introduced a 'full dispersal model', whereby all UK local authorities were now required to accept asylum-seekers; previously fewer than 50% of authorities had done so. This greatly increased the pool of private rental accommodation for service providers to procure DA in these local authority areas. The SSHD also made available a grant of £3,500 to local authorities for each asylum-seeker housed in their area for the year ending March 2023, exercising powers under s 110 of the 1999 Act and s 31 of the Local Government Act 2003 to make awards of grant funding, and initiated a consultation process for a reformed asylum dispersal system: see *Response to the ICIBI's report: 'An inspection of contingency asylum accommodation'*, §4. Alongside this the SSHD exercised his powers under the AASC to increase the contractual volume cap for service providers using the contract change notice ('CCN') procedure. According to Mr. Hennigan, over 13,000 new bed spaces in longer term DA have been procured since March 2020. This has not been enough to reduce the backlog, however, given the supported asylum seeking population has increased by 66,500 over the same period.

(2) Measures taken to prioritise vulnerable groups, including PNMAS, for dispersal

49. The SSHD has also introduced additional measures to prioritise the dispersal of vulnerable groups, including PNMAS. Mr. Hennigan explains in his third statement that a process for identifying those with a priority need for suitable accommodation had begun after the recommendation by the Home Affairs Select Committee in 2017 that the 'monitoring and inspection process should be reformed to capture the experience of vulnerable people ... including women who are pregnant and new mothers'. The SSHD subsequently introduced new Annex G to the AASC contract, titled 'Service users with specific needs or at risk service users'. Among other things, Annex G provides that UKVI may notify and provide instructions to service providers as to any specific accommodation or support requirements the provider must provide to meet the needs of service users with specific needs or who are at risk: although, as noted at paragraph 33 above, there is no additional financial incentive for doing so. Annex G also obliges service providers to be 'proactive in monitoring and identifying service users with specific needs'. Curiously, Annex G does not mention 'pregnancy' as a specific vulnerability factor.

50. In addition, the SSHD has now introduced a ‘new system’ for the prioritisation of PNMAS for dispersal, the announcement of which led to the stay of these judicial review proceedings shortly prior to the hearing listed in July 2022. The genesis of this new system is described in the second and third statements of Mr. Kingham; the narrative is then picked up by Mr. Hennigan in his third to fifth statements. The SSHD relies on a number of initiatives, but the relevant ones are: (i) the creation of the Maternal Health Sub-Group and the so-called ‘trigger process’ for identifying PNMAS and reviewing the adequacy of their accommodation; and (ii) the ‘Accommodation Special Requirements Log’ Standard Operating Procedure (SOP) (the ‘*Vulnerability Log SOP*’) and spreadsheet.

(i) The Maternal Health Sub-Group and the ‘trigger process’ for review of accommodation of PNMAS

51. Mr. Kingham explains in his second statement how in June 2021 the SSHD and NHS jointly established a Maternal Health Sub-Group (a sub-group of a wider Healthcare and Asylum Steering Group) in order to make improvements to maternal healthcare. According to its terms of reference, this sub-group was formed in order to consider recommendations made by the National Maternity Safeguarding Network and Maternity Action following a ‘deep dive into the needs of pregnant women and mothers seeking asylum’ and those made following a Serious Case Review into the death of an asylum-seeker’s baby. The Sub-Group met five times between July 2021 and May 2022, then again on 15 November 2023. Among other things, the Maternal Health Sub-Group proposed a new system whereby the application by a pregnant asylum-seeker for a maternity grant would automatically trigger a review by the service provider of the appropriateness of her accommodation. If the accommodation was not appropriate the service provider would be under an obligation to propose suitable alternative accommodation and to secure relocation before she entered the ‘protected period’ six weeks before the due date. Mr. Hennigan explains that the ‘trigger process’ was introduced in June 2022 but was then suspended in October 2022 due to service providers’ ‘inability to effectively prioritise these cases in the manner expected’ by the SSHD. The SSHD intends to reintroduce the ‘trigger process’ but there is no timetable for doing so. This remains an aspiration rather than an implemented policy.

(ii) The ‘Accommodation Special Requirements Log’ Standard Operating Procedure (SOP) (the ‘*Vulnerability Log SOP*’) and spreadsheet

52. Mr. Kingham’s second statement also explains the steps taken by the SSHD in response to the decision in *DMA*. Following *DMA*, the Chair of the Joint Parliamentary Committee on Human Rights (‘JCHR’), the Rt Hon. Harriet Harman KC MP, wrote to the Home Office Minister, the Hon. Kevin Foster MP, asking what steps the SSHD was to take in response. The Minister replied on 12 May 2021 and said ‘We are developing the capability of our case working system (ATLAS) to identify and record vulnerability. It has been agreed the Minimum Viable Product when delivered later this year will include recording of vulnerabilities and allow for improved reporting.’ The SSHD thereafter introduced a ‘Disability & Vulnerability Process’ standard operating procedure (‘SOP’) which instructed caseworkers to identify vulnerabilities and

accommodation needs in a specific ‘Accommodation Requirements Spreadsheet’ and to communicate these clearly within the ITP to service providers. An escalation process was also to be introduced in the event that the service provider fails to make a proposal within the deadline set out in the request. This process has since evolved and is now found in the ‘*Accommodation Special Requirements Log*’ and Standard Operating Procedure (SOP) (the ‘*Vulnerability Log*’ and ‘*Vulnerability Log SOP*’) which were introduced with effect from 17 July 2023, although did not actually come into operation until 29 August 2023. The ‘*Vulnerability Log SOP*’ was exhibited to and explained in the third statement of Mr. Hennigan of 13 October 2023.

53. The *Vulnerability Log* is an excel spreadsheet that records relevant details of vulnerable service users including their name, date of authorisation of asylum support, number of family members including children, current accommodation type (IA or DA), current region and provider, any requested region together with details of any vulnerability justifying urgent dispersal and request for a particular region. The *Vulnerability Log SOP* provides UKVI case-workers with guidance on how the Log is to be completed and the information used to ensure that adequate accommodation is provided to those with specific needs and vulnerabilities. The purpose of the Log is set out in Section 1, namely:

Applicants with specific accommodation needs and vulnerabilities are to be carefully monitored to ensure that they are being accommodated in properties that meet their specific needs. The purpose of this process is to monitor the allocation of accommodation to those applicants at all stages of support. The process also provides a route of escalation, through the provider and service delivery managers (SDMs), to ensure that accommodation is being arranged in a timely fashion, and that the accommodation provided meets their requirements, avoiding a potential breach of ECHR rights.

54. Under Section 2, ‘Guidance’ the SOP refers to the SSHD’s ‘*Allocation of asylum accommodation Policy*’, which in turn refers to the ‘*HNPDP Policy*’, considered above, although makes no express mention of PNMA. Section 3 of the SOP, ‘Process and Steps’, describes a five step process of: identifying and recording vulnerabilities (Step 1), issuing ITP (Step 2), monitoring of the case to ensure the ITP is complied with (Step 3), a four stage process of escalation in the event it is not (Step 4) and a further monitoring requirement of escalations more generally (Step 5). Mr. Hennigan explains in his third statement that it was not possible to implement the *Vulnerability Log SOP* before 29 August 2023 because of its complexity involving multiple teams, staff changes and a lack of staff in the operational teams. That problem has now been addressed by additional deployment of staff. It is evident, however, that the *Vulnerability Log SOP* is in its early stages and is evolving. It is difficult to predict how successful it will be in addressing the problem of PNMA being accommodated in long term IA rather than dispersed early and before their ‘protected period’. It may undergo further change or even be withdrawn, as was the case with the ‘trigger process’, above paragraph 51. In any event, it will not be possible accurately to gauge its success

in the absence of statistical data monitoring in relation to PNMAS, for reasons I will come to under Ground 6.

(3) *Measures taken to introduce 'data monitoring' in response to DMA*

55. The *Vulnerability Log SOP* introduces a system whereby individuals with vulnerability or special needs (materially, PNMAS) are monitored to a satisfactory conclusion. This meets the first aspect of the 'duty to monitor' as explained by Knowles J in *DMA*, [239], [243] and [320], namely 'to identify and resolve the problem where accommodation, that the Secretary of State has accepted through her officials there is a duty to provide to an individual, is not being provided' ('individual case monitoring'). However, the SSHD does not currently collect and monitor relevant data on the operation of the asylum support system – at least, so far as it affects vulnerable people including PNMAS – which is the second aspect of the duty to monitor identified in [243] and [320], namely 'to see whether the system is working and where it is not, to help in the identification of solutions' ('statistical data monitoring').
56. In his first statement of 28 October 2021 Mr. Hennigan explained that Home Office systems and records do not currently allow for a statistical analysis of service providers' compliance with ITPs and overall length of stay for PNMAS. Although information regarding length of stay is measured and monitored using aggregation of daily occupancy records, these only allow for a basic breakdown of population by demographic (male vs female, single vs family), not by particular characteristics such as pregnancy. Although information regarding such personal characteristics is recorded on individual case records, it is 'not available in a reportable format'. As such, 'the conclusions that can be drawn from a statistical analysis of overall length of stay for particular sub-groups of the overall population are limited without an analysis of the individual cases with[in] a sub group.' Mr. Hennigan has since clarified that this means the SSHD does not collect and monitor statistical data relating to, materially: a) the number of PNMAS assessed as requiring accommodation under the 1999 Act; b) the timescales in which the SSHD makes ITPs for dispersal of PNMAS following a decision on eligibility for s 95 or s 4(2) accommodation; c) the timescales within which PNMAS are in fact provided with (and moved to) DA following an ITP.
57. The SSHD has, however, undertaken to introduce a capacity to capture and monitor relevant data on vulnerabilities, including PNAS, which would allow for such statistical data monitoring. I have already noted at paragraph 52, above, the Minister's letter to the Chair of the JCHR of 12 May 2021 stating his intention, following *DMA*, to improve the ATLAS computer system in order 'to identify and record vulnerability' and 'allow for improved reporting'. In Mr. Kingham's third statement of 8 March 2023 he set out the steps taken by the SSHD that he hoped 'assured' the court that 'we have and continue to take steps towards designing and implementing an effective system for data monitoring compliant with para 243 of *DMA*'. This included the introduction of what became the *Vulnerability Log SOP*, described above. 'In addition', he said at paragraph 10 of that statement, 'discussions have taken place with IT contractors to set out the additional requirements of the ATLAS case-working system in order to improve management information'.

58. These undertakings to introduce statistical data monitoring have not borne fruit, as a late flurry of contradictory statements from the SSHD demonstrate. In his fourth statement of 8 December 2023 (four days before the hearing), Mr. Hennigan referred to paragraph 10 of Mr. Kingham's third statement and said that no upgrades to the computer system have in fact been implemented or were planned. Mr. Kingham then produced a fourth statement, dated 11 December 2023 (the day before the hearing), in which he confirmed that there had been discussions about, and he had seen screenshots of, planned upgrades to the ATLAS system 'which would allow for Special Accommodation Requirements to be recorded and from which management data relating to those requirements could be drawn.' However, he went on, 'these are not yet operational and I have been informed that there are no timelines in place for them to be finalised owing to other priorities'. I inferred from this that the SSHD has no intention of introducing statistical data monitoring, but following circulation of my draft judgment the SSHD explained that was not the case, and the position was as set out in the fourth statement of Mr. Kingham. The position would therefore appear to be that the SSHD might or might not introduce statistical data monitoring at some point in the future, but has no immediate plans to do so.
59. Unless and until those changes are implemented, the position remains that there is no statistical data monitoring in relation to vulnerabilities including disability (with which *DMA* was concerned) or PNMAS and no immediate plans to introduce such monitoring. The SSHD has not honoured his earlier undertakings to introduce such monitoring. Despite serving much late evidence, he has produced none explaining why he no longer proposes to introduce such monitoring. *DMA* is clear authority that he is required to conduct statistical data monitoring in relation to the protected characteristic of disability, and the SSHD remains in breach of that obligation over three years later. Whether he is legally obliged to conduct such monitoring in relation to PNMAS is a key issue in the case which I address under Ground 6.

The Claimant's grounds of challenge

60. Against that necessarily lengthy background, I turn to consider the grounds of challenge as they have been developed. As I have explained at paragraph 2 above, this case is no longer concerned with any individual challenge. The claim was stayed in July 2022 in the circumstances described at paragraph 11 above. That stay was lifted by Jonathan Moffett KC DHCI on June 2023 (above, paragraph 11) in relation to grounds 2-6 only, Ground 1 (the individual challenge) having become academic. The grounds have since undergone some further evolution and I will address them as articulated in the Claimant's Skeleton Argument dated 28 November 2023 and as developed during the course of the hearing. It is convenient to consider them under two headings: the systemic grounds (Grounds 2-4) and the due regard grounds (Grounds 5 and 6).

The systemic grounds: Grounds 2-4

61. Ground 2: The Claimant asserts the SSHD is 'acting unlawfully because he operates a system which does not, in practice, comply with his obligations under the 1999 Act and the *HNPDP Policy* is not followed. The system simply does not work to comply with the statutory and policy obligations. This much is clear from

the extensive evidence provided by the Claimant which is not (and cannot be) refuted in the absence of a system of data collection and monitoring’. Further, ‘the system does not allow the SSHD to effectively and properly monitor or escalate cases or understand the resources he and providers require to meet his statutory and policy obligations.’

62. Ground 3(a) avers that ‘the system as operated by the SSHD does not protect against the risk of inhuman or degrading treatment [contrary to Art 3 ECHR] to the greatest extent that is reasonably practicable. In particular, the system allows for extended periods of allocation to IA for PNMAAS for an uncertain period of time and does not incorporate any monitoring data to check and take action against the extended stays that risk a violation of article 3’.
63. Ground 3(b) asserts ‘the system breaches the article 8 rights’ of PNMAAS and their infants when read in the light of Article 3 of the UN Convention on the Rights of the Child (‘UNCRC’), essentially for the same reasons as in Ground 3(a).
64. Ground 4(a) argues the ‘system’ is unlawful in that it discriminates against PNMAAS contrary to Art 14 ECHR read with Articles 3 and 8. There are ‘clear and obvious differences between the needs of PNMAAS and others who are entitled to accommodation and support under the 1999 Act’, as recognised by the SSHD in the *HNPD Policy*, to the effect that PNMAAS ‘should only be allocated to IA for a short period’. The SSHD’s ‘system and/ or practice of accommodation providers (unchecked by the SSHD) fails to properly treat pregnancy as a health care issue with specific requirements and fails to prioritise pregnant and new mother asylum seekers for DA, thus allowing for allocation to inadequate accommodation [in] IA for lengthy periods’. The SSHD ‘does not have in place the necessary system to take positive steps to ensure that the way in which accommodation is allocated properly reflects the greater need of this vulnerable class of person or the need for prioritisation’ by failing to treat them differently to the rest of the asylum estate.
65. Ground 4(b): The system is also unlawfully discriminatory contrary to s 19 EA 2010, for the same reasons as in Ground 4(a).

The due regard grounds: Grounds 5-6

66. Ground 5: The SSHD is said to be in breach of his duty to consider the best interests of children as a primary consideration under s 55 BCIA in that (a) ‘no evidence has been provided as to how service providers actively consider the duty as part of their contractual duties, either in individual cases or in their allocation system. The contracts go no further than to refer to the s 55 duty which is to simply pay lip service to the duty’. Furthermore, (b) The SSHD ‘cannot discharge that duty without collecting and monitoring data on how children are impacted by the system he operates’.
67. Ground 6: The SSHD is also alleged to be in breach of his duty to have due regard to the need to advance equality of opportunity between persons who share the relevant protected characteristic of ‘pregnancy and maternity’ and persons who do not share it under s 149(1)(b) EA 2010 in that ‘he has no system of monitoring the numbers of PNMAAS receiving asylum support, the nature of their

accommodation or how quickly they are allocated DA, together with a comparison with other asylum seekers. Accordingly he is unable to evidence the discharge of the duty and cannot have had due regard as he does not know how many persons of this class are in receipt of accommodation or what the timescales for dispersal are’.

Legal framework: general

Introduction

68. Asylum support under the 1999 Act is an essential form of social welfare provision. Asylum-seekers are not permitted to work, at least for the first year following the recording of their asylum claim.¹ They are not entitled to ordinary social welfare benefits or homelessness assistance.² Unless they have support from family, charity or the state, asylum-seekers and failed asylum-seekers are likely to be unable to support themselves and their dependants and to become destitute. The courts have recognised that where a person ‘with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life’ there may be a violation of Article 3 of the European Convention on Human Rights (‘ECHR’) and s 6 Human Rights Act 1998 (‘HRA’) triggering the state’s positive duty to provide adequate accommodation and support to prevent or bring such conditions to an end: *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 (‘*Limbuela*’), [7]. This duty is met by the 1999 Act.

The 1999 Act

69. The 1999 Act makes differing provision for the support of asylum-seekers (s 95 and 98) and failed asylum-seekers (s 4(2)). The Claimant’s Ground 2 requires the Court to determine whether, due to what are said to be systemic flaws, there will in future be inevitable individual breaches of the SSHD’s duties to both groups in a material number of cases: see below, paragraph 93. It is therefore necessary to identify the scope of these duties and the circumstances in which they may be breached. I will address only those aspects of the statutory framework necessary for me to determine the issues before me. I have derived considerable assistance from the *Migrant Support Handbook* (2023) by Shu-Shin Luh and Connor Johnston, one of the excellent handbooks produced by the Legal Action Group.

Asylum-seekers: s 95 and s 98 of the 1999 Act

70. Subject to certain statutory exclusions which are not relevant for present purposes, s 95(1) gives the SSHD power to provide, or arrange for the provision of, support for asylum seekers (as defined by s 94) or their dependants ‘who appear to the Secretary of State to be destitute or to be likely to become destitute’ within a prescribed period which, by regulation 7 of the Asylum Support Regulations 2000, is 14 days. Section 98(1) empowers the SSHD to provide, or arrange for the provision of, temporary support for asylum seekers or their

¹ And then only if the SSHD gives permission under para 360 of the Immigration Rules.

² Immigration and Asylum Act 1999, s 115 and s 118

dependants who it appears to the SSHD ‘may be destitute’ while their application for s 95 support is determined. 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’: s 95(3). The power in s 95(1) is converted into a duty in two circumstances. Section 122 of the 1999 Act requires the SSHD to provide s 95 accommodation to an eligible applicant whose household contains a dependant under the age of 18. Regulation 5 of the *Asylum Seekers (Reception Conditions) Regulations 2005/7* (the ‘Reception Conditions Regulations 2005’) has extended this duty to all applicants that the SSHD ‘thinks’ are eligible.

71. Section 96 specifies the ways in which support can be provided. These include accommodation ‘appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any)’, which I consider at paragraph 77, below. Support may instead, or in addition, be by way of subsistence payments to meet ‘essential living needs’. Subsistence payments are provided for by Regulation 10 of the *Asylum Support Regulations 2000/704* (the ‘Asylum Support Regulations 2000’). A person to whom self-contained accommodation (DA) is provided is entitled to a weekly payment in respect of essential living needs (Regulation 10(2)), currently £47.39 per person. This is reduced for those receiving asylum accommodation (IA) on a half or full board basis (Regulation 10(5)): the current payment is £9.58 per week. Additional weekly payments are made for pregnant women (£3)) and those with young children (£5 for a child under 1 year, £3 for a child between 1 and 3): Regulation 10A. In practice these payments are loaded each week onto a debit card (the Aspen Card) which can be used to make debit payments or to withdraw cash from an ATM. A one-off maternity payment of £300 is also payable to pregnant women: *Asylum support: policy bulletins instruction*, v9.0, Chapter 4. Free NHS healthcare, dental care and eyesight tests are also available: *NHS (Charges to overseas visitors) Regulations 2015/238* (‘NHS Charging Regulations 2015’), Regulation 15.

Failed asylum-seekers: s 4(2) of the 1999 Act

72. Section 4(2) of the 1999 Act provides the SSHD with a power to provide, or arrange for the provision of, facilities for the accommodation of a failed asylum-seeker (the definition of which is not material for present purposes) or his dependants. Eligibility for s 4(2) support is determined by Regulations 2 and 3 of the *Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005/930* (the ‘Failed Asylum Seeker Regulations 2005’). Two criteria must be satisfied. First, the failed asylum-seeker must appear to the SSHD to be ‘destitute’ (Regulation 3(1)(a)), which has the same meaning as in s 95(3) of the 1999 Act: Regulation 2. Second, Regulation 3(1)(b) requires that one of the conditions in Regulation 3(2) are met, namely: the applicant is either taking all reasonable steps to leave the United Kingdom or is unable to do so (Reg. 3(2)(a)-(c)); has made an application for judicial review of the refusal of asylum (Reg. 3(2)(d)); or ‘the provision of accommodation is necessary for the purpose of avoiding a breach of a person’s Convention rights within the meaning of the Human Rights Act 1998’ (Reg. 3(2)(e)). It is possible that a person may

be ‘destitute’ but in circumstances where there is no actual or imminent breach of Article 3, in which case the SSHD may refuse s 4(2) support: *Limbuela*, [62]; *R (W) v Secretary of State for the Home Department* (CA) [2020] 1 WLR 4420, [42], *R (HA) v Secretary of State for the Home Department* [2023] PTSR 1899, [57]; *DMA*, [21]. In addition, the same subsistence payments for essential living needs are made as for asylum seekers, including payments for pregnant mothers and in respect of young children. These are also loaded each week onto an Aspen card, although cash cannot be withdrawn. A maternity grant of £250 is also payable: *Immigration and Asylum (Provision of Services or Facilities) Regulations 2007/3627* (the 2007 Regulations), Regulations 6-8. Free NHS healthcare, dental care and eyesight tests are also available.

The distinctions between support for asylum seekers and failed asylum seekers

73. Several distinctions may be drawn between support under s 4(2) and s 95. Although these differences are generally ignored in practice they raise some potentially important issues of law for the purposes of Ground 2.

- i) First, s 4(2) only confers on the SSHD a power, not a duty, to provide asylum support, by contrast with s 95: above, paragraph 70. However, in *DMA*, [9], the SSHD conceded that he is under a duty to make s 4(2) provision to an eligible person ‘to promote the policy objectives’ of that provision. Mr. Manknell did not seek to depart from that position before me but I heard no submissions on the point.
- ii) Second, there is no statutory duty on the SSHD to take into account the special needs of a vulnerable failed asylum-seeker (including the fact they are a minor, pregnant woman, or a lone parent with a minor child) when considering an application for s 4(2) support, by contrast with s 95 support: below, 75. These vulnerability factors are taken into account as a matter of policy, however: below, paragraph 76.
- iii) Third, s 4(2) only refers to ‘accommodation’ rather than accommodation which is ‘adequate’, by contrast with s 95 read with s 96. On the face of it, there is no duty to provide ‘adequate’ accommodation under s 4(2). Whether s 4(2) requires accommodation to be ‘adequate’ is not a straightforward question, as the authors of the *Migrant Support Handbook* demonstrate at §6.157. I heard no submissions on this point.
- iv) Fourth, eligibility for s 4(2) support is determined by whether the SSHD considers the person *is* destitute, not whether he is ‘likely to become destitute’, by contrast with s 95. As a matter of policy, the SSHD has elected to apply the same eligibility test to s 4(2) support applicants as to s 95 support, namely that they are ‘likely to become destitute’ within 14 days: ‘*Asylum support, section 4(2): policy and process*’, page 9.
- v) Fifth, there is no express statutory power akin to s 98 to provide temporary accommodation pending a decision on eligibility for s 4(2) support. In practice, however, IA is provided for priority groups, including PNMAS, on an emergency basis: above, paragraph 16.

Asylum accommodation is provided on a 'no-choice' basis

74. By contrast with accommodation provided under homelessness legislation, accommodation provided under both s 95/ 98 and s 4(2) is provided on a 'no-choice' basis, including as to geographical location, and may be provided in any part of the United Kingdom. Section 97(2) provides that in exercising his or her power to provide accommodation under s 95, the secretary of state must not have regard to any preference to the locality in which the accommodation is provided. By Regulation 19 of the Asylum Support Regulations 2000, the SSHD may refuse or discontinue support to an applicant who fails to comply with a condition that they should reside in the accommodation to which they have been offered. Section 4(2) accommodation is also provided on a 'no choice' basis and will 'usually be outside London and the south-east of England': *Asylum support, section 4(2): policy and process*, page 6-7.

The relevance of the applicant's needs when assessing eligibility

75. This does not mean, however, that the needs of the individual are irrelevant when assessing eligibility for s 95 support or the kind of support that is required. Regulation 13 of the Asylum Support Regulations 2000 makes clear that in assessing an applicant's eligibility for s 95 support the SSHD must consider the applicant's 'individual circumstances, as they relate to his accommodation needs'. Moreover, Regulation 4 of the Reception Conditions Regulations 2005 provides that, where the SSHD is providing support, or considering whether to provide support, under s 95 or s 98 to an asylum seeker or his family member who is a 'vulnerable person' he must take into account the special needs of that individual. A 'vulnerable person' is defined as including 'a pregnant woman' and 'a lone parent with a minor child.' In addition, Regulation 3 of the Reception Conditions Regulations 2005 requires the SSHD to accommodate family members together, where possible. In determining any request for accommodation of a particular kind or location the SSHD must also comply with his duties under the HRA, the EA 2010 and the BCIA 2009 s 55(2). Any such request must also be considered in accordance with relevant policy guidance, including '*Allocation of asylum accommodation policy*' and the *Asylum seekers with care needs policy* (see paragraph 15, above) and the *HNPD Policy*, considered at paragraph 36 above.
76. As regards s 4(2) support, while there is no statutory duty to take into account a person's needs or vulnerabilities (above, paragraph 73.ii)), these are to be taken into account as a matter of policy: see, for example, the *Asylum seekers with care needs policy* and *HNPD Policy* (which apply to both s 95/ 98 and s 4(2) support and *Asylum support, section 4(2): policy and process*, pages 6-7.

'Adequate' accommodation and the relevance of resources

77. The notion of whether accommodation is 'adequate' is central to the issues under Ground 2, albeit, so far as s 4(2) accommodation is concerned, subject to the legal issue I have identified at paragraph 73.iii), above. 'Adequacy' is relevant at two stages. First, when the SSHD is determining whether a person is eligible for support, namely whether he is 'destitute', defined in s 95(3) as 'if he does not have adequate accommodation or any means of obtaining it'. This test also

applies to s 4(2) support by virtue of Regulation 2 of the Failed Asylum Seeker Regulations 2005. The second stage arises once the SSHD has determined that a person is eligible, when he may (now must) provide support under s 95 (but not s 4(2)) ‘by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any)’: s 96(1)(a). As the Court of Appeal made clear in *R (A) v NASS* [2003] HLR 24, [52], ‘The term cannot have a different meaning depending on which aspect the court is considering’. Accordingly, ‘adequacy’ is to be determined by reference to the needs of the individual and his dependants at both stages: *ibid*, [52].

78. Whether accommodation is ‘adequate’ is dependent upon the context: *R (A) v NASS*, [52]; *SA*, [7]. ‘The context for asylum seekers is the provision of accommodation which prevents such people being destitute, and which provides for their essential living needs’: *R (A) v NASS*, [53]. ‘The standard of ‘adequacy’ is a low one’: per Linden J in *NB*, [161]. Contextual factors that are likely to be relevant include the length of time that the individual is expected to remain in the accommodation: *ibid*, [54], *NB*, [159]. What is adequate for a short period may not be adequate for a longer period. Similarly, what is adequate may evolve or change over time depending on all the circumstances: *NB*, [160].
79. One issue that I raised during the hearing was whether in assessing ‘adequacy’ the scale of demand and the consequent lack of appropriate housing stock is a relevant factor. Mr. Rule rightly submitted that once eligibility is determined the duty under s 95 is absolute (*R (A) v NASS*, [59]) and the SSHD cannot avoid that duty by praying in aid the absence of resources: *R (Imam) v Croydon Borough Council* [2023] UKSC 45, [40, 52, 60]. But the point I was making was rather different; it is not whether the SSHD can avoid the duty to provide adequate accommodation at all (he cannot) but rather whether he may take into account demand and the available resources in determining what is ‘adequate’, in particular when determining how long a person can lawfully remain in IA before being dispersed. Mr. Manknell submitted that resources can be relevant at this stage. In *SA*, [27] Fordham J noted that ‘accommodation resources are limited’ without ruling on whether that was a relevant factor in determining ‘adequacy’. No other authorities on the point were drawn to my attention. I note that resources can be relevant when determining the ‘suitability’ of housing in the homelessness context: see *R (Elkundi) v Croydon CC* [2022] QB 604, [81]. Whether and to what extent resources are also relevant when assessing the ‘adequacy’ of accommodation is an important issue of law that will need determination if Ground 2 is to be substantively resolved.

The Reception Conditions Directive

80. Further meaning as to what is ‘adequate’ is to be found in European Union Directive 2003/9/EC (subsequently recast as Directive 2013/33/EU) laying down minimum standards for the reception of applicants for international protection (the ‘Reception Conditions Directive’). The Directive was implemented in the UK through, among others, the Reception Conditions Regulations 2005 (*NB*, [143]), see above, paragraphs 70, 74. The Directive remains relevant notwithstanding the United Kingdom’s withdrawal from the European Union as ‘retained law’ which confers rights that are ‘recognised’ by a relevant court in a case decided before ‘exit day’ under s 4(2)(b) of the European Union

(Withdrawal) Act 2018: per Linden J in *NB*, [157-158] and Fordham J in *R (CB) v Home Secretary* [2023] 4 WLR 28, [8]. The Directive lays down minimum material reception standards for asylum-seekers. The ‘material reception standards’ set an irreducible minimum below which it is not lawful for the SSHD to go, both as to what constitutes ‘essential living needs’ (*R (Refugee Action) v Secretary of State for the Home Department* [2014 EWHC 1033 (Admin), Popplewell J, [85-91], *R (JK) v Secretary of State for the Home Department* (CA) [2017] 1 WLR 4567, [57]) and the provision of adequate accommodation: *NB*, [154].

Provision within a ‘reasonable time’

81. Once eligibility under s 95 or s 4(2) is established there is a duty to make provision within a reasonable time: *DMA*, [178]. What is ‘reasonable’ is also context specific: *ibid*, [183]. Again, there is a question-mark over whether the demand and supply of DA is relevant when determining what is a ‘reasonable time’.

The HNPD Policy

82. The fact the individual is a PNMAAS will be an important part of the context when assessing whether accommodation is ‘adequate’ and has been provided within a ‘reasonable time’. The *HNPD Policy* will be of particular relevance to that question. That policy creates a presumption that PNMAAS will be moved to DA that is adequate to their needs, and the needs of their infant, as early as possible and (although the term is not used) before they enter the ‘protected period’ of six weeks before their due date: above, paragraph 36. UKVI case-workers must apply that policy unless there is a good reason not to do so: *SA*, [12]. However, the *HNPD Policy* allows for some exceptions. Where, for example, a PNMAAS has already developed a relationship with local obstetric services or has already entered the ‘protected period’ then it may be preferable for them to remain in IA in the local area than to be moved to DA in another area. Furthermore, the public law obligation to comply with the *HNPD Policy* allows of exceptions for ‘good reason’. What may amount to a ‘good reason’ will itself be highly context-specific and may, potentially, include the demand for, and available supply of, DA: again, this is an issue that would need to be determined if Ground 2 is to be decided substantively.

Discussion: the systemic grounds (Grounds 2-4)

Legal framework on ‘systemic challenges’ following A and BF (Eritrea)

83. A measure, administrative practice or policy guidance may give rise to successful judicial review proceedings if (a) it is applied in such a way as to cause unlawfulness in an individual case, in which case the appropriate target for challenge is the individual decision (an ‘individual challenge’); or (b) ‘it is ‘systemically’ flawed in public law terms, whether in substantive or procedural respects’: Sir Michael Fordham, *Judicial Review Handbook*, 7th ed., [32.5]. In those circumstances, a judicial review challenge may be brought to the measure, practice or policy itself (a ‘systemic challenge’), in addition to or - potentially - in the absence of an individual challenge. The law relating to systemic challenges

was clarified and restated by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 ('A') and *R (BF (Eritrea) v. Secretary of State for the Home Department* [2021] 2 WLR 3967 ('BF'). The judgments in each case were given by Lord Sales and Lord Burnett CJ, with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Briggs JJSC agreed. The Supreme Court identified a number of earlier cases, including in *BF*, in which the courts had applied the wrong legal test. There was no difference between the parties before me as to the relevant principles laid down by those cases, only as to their application. I propose to set out the relevant law in a series of statements of principle based primarily on the judgments in *A* and *BF*.

84. First, systemic challenges fall into two different categories depending on the status of the measure and the nature and importance of the right affected:
 - i) Where the most fundamental rights are engaged, a measure, practice or policy (other than a provision of primary legislation) will be unlawful if, looking across the full run of cases that go through the system, it creates a 'real risk' of a breach of such a fundamental right, whether at common law (*R (UNISON) v Lord Chancellor* [2020] AC 869, [78] (the 'UNISON principle') or under the HRA: *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, [29]; (breach of Article 3) (the 'Munjaz principle'); see *A*, [79-80].
 - ii) In any other case, such a measure, practice or policy (including a provision of primary legislation³) will only be unlawful if it is not 'capable of being operated' lawfully across the range of cases in a material and identifiable number of cases: *A*, [62-66], applying *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (the 'Gillick principle'). The *Gillick* principle applies to any form of anticipated 'unlawfulness' other than breach of the most fundamental rights, where the *UNISON* or *Munjaz* principle applies. It is 'not limited to the notion of fairness or to policies of a procedural nature: the principle is an applicable standard to judge substantive policies too': *R (ZK) v LB Redbridge* [2019] EWHC 1450 (Admin), [38]. The *Gillick* principle also applies to anticipated breaches of less fundamental common law or ECHR rights, including Article 8: see *R. (Ingold) v Secretary of State for Work and Pensions* [2023] EWHC 3207 (Admin), [94].
85. Second, a measure, practice or policy is not 'capable of being operated' lawfully for the purposes of the *Gillick* principle in any of the following circumstances:
 - i) In the case of a document laying down policy or providing guidance to others as to the nature and exercise of legal duties, if it 'authorises or approves unlawful conduct by those to whom it is directed' (*Gillick v. West Norfolk and Wisbech AHA* [1986] AC 112, 181F; *A*, [38]) or 'give[s] policy direction to recipients to do something which is contrary to their legal duty' (*BF*, [49]), or 'imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in

³ In the case of a challenge to the lawfulness of primary legislation (for example under s 4 HRA) the *Gillick* principle, not the *Munjaz* principle, applies: *R (Bibi) v Home Secretary* [2015] UKSC 68 [2015] 1 WLR 5055; *A*, [77].

an unlawful way' (A, [64]) (the '*Gillick* principle'). A distinction is to be drawn between guidance which 'authorises and approves unlawful conduct' and guidance which creates a *risk* of unlawful conduct because it is not comprehensive or is misleading so there is a risk that it will be misread or misunderstood. It is 'not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal error' by those who apply it: A, [34]. However, a lack of explanation or other omission in the guidance may, in some circumstances, be sufficiently misleading as to be unlawful. It will depend on an objective reading of the guidance, whether there is a duty to promulgate guidance and the nature of its intended audience: A, [46].

- ii) If there is otherwise some 'unfairness ... inherent in the system' (*R (Detention Action) v. First Tier Tribunal (Immigration and Asylum Chamber)* (CA) [2015] 1 WLR, 5341, [27]) so that 'a significant number of cases introduced into the system would be decided unfairly and hence unlawfully': A, [67, 68].
 - iii) If the system 'will inevitably operate [unlawfully in breach of Article 8] in a legally significant number of cases', which is consistent with the approach in *Gillick*: A, [78]. The *Gillick* approach is also to be applied to claims that the system will 'inevitably operate' unlawfully on other public law grounds: ZK, [38].
86. Third, except where the *UNISON* or *Munjaz* principle applies, a test of 'unacceptable risk' or 'real or unjustified risk' of unlawfulness is not sufficient to establish a systemic challenge. Such a test is not consistent with the *Gillick* principle, lacks clarity and risks breaching the doctrine of separation of powers between executive and judiciary: A, [65, 68].
87. Fourth, the distinction between the *Gillick* principle and the *UNISON/ Munjaz* principle has important practical consequences in terms of the approach a Court must apply in determining a systemic challenge to a written policy or guidance (category (i) in paragraph 85, above). In such a case 'the test for the lawfulness of a policy should be capable of application at the time the policy is promulgated, which will be before any practical experience of how it works from which statistics could be produced. The test for the lawfulness of a policy is not a statistical test but should depend, as the *Gillick* test does, on a comparison of the law and of what is stated to be the behaviour required if the policy is followed': A, [65]. By contrast, where the *UNISON* and *Munjaz* principles apply 'it is legitimate to have regard to evidence regarding its likely impact and the court has to make an overall evaluative assessment whether this legal standard is met or not and statistics might have a part to play in making such an assessment': *ibid*, [80].
88. Fifth, when applying the *Gillick* principle to categories (ii) and (iii) in paragraph 85, above, a distinction is to be drawn between failings which arise inevitably from an inherent flaw in the system and those which arise as a result of aberrant decision-making in individual cases, particularly where the nature of the task is complex. The Supreme Court in *A* noted with approval the observations of Laws LJ in *R (S) v DLAC* [2016] 1 WLR 4733, [18] who 'emphasised the distinction between unfairness inherent in the system itself ... and one which happens to be

operated badly so that individual instances of unlawful treatment arise under it'. The same point was made by Garnham J in *R (O and H) v Secretary of State for the Home Department* [2019] EWHC 148 (Admin) at [93], by Saini J in *R (MK) v Secretary of State for the Home Department* [2020] 4 WLR 37, [99-100, 123-125] and Edis J in *R (Sathanantham) v Home Secretary* [2016] 4 WLR 128, [67] (emphasis added):

[67] ... What has happened here is that the system which the SSHD has established is trying, but failing, to offer suitable bail accommodation to the small number of high risk bail applicants within a reasonable period of time. *The policy which she has established is not irrational or unreasonable, it is simply not working very well.* There are several reasons for this which include the *complex nature of the task* in difficult cases and *maladministration*. The complex nature of the task includes the difficulty in sourcing accommodation for asylum seekers generally in what is sometimes a hostile climate.

Academic issues?

89. Before the hearing I raised with Counsel by email the question of whether, in light of the fact the issues raised were only of academic interest to the Claimant, this is a proper case for the Court to determine. I drew Counsel's attention to the judgment of Johnson J in *R (Humnyntskiy) v Secretary of State for the Home Department* (QBD) [2021] 1 WLR 320 which contains a recent restatement of the relevant principles and their application in the context of that case. I observe, first, that in that case the issue was not academic, for reasons given by Johnson J at [192-194]. The judge set out the relevant principles at [195] by reference to the dicta of Lord Slynn in *R v Secretary of State for the Home Department ex p. Salem* [1999] 1 AC 450, p. 457A and Silber J in *R (Zoolife International Ltd. v SS Environment* [2007] EWHC 2995 (Admin) ('Zoolife'), [36], which has since been cited with approval by the Court of Appeal in *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] 4 CMLR 17, [208-210]. In summary, even where a claim is academic it may be subject to adjudication, but the discretion to decide such a claim should be exercised with caution and 'only in exceptional circumstances such as where two conditions are satisfied', namely:

- i) a 'large number of cases exist or are anticipated', or at least other similar cases exist or are anticipated; and
- ii) 'the decision in the academic case will not be fact-sensitive', for example a discrete point of statutory construction arises which does not involve detailed consideration of the facts.

90. As Silber J observed in *Zoolife*, 'if the courts entertained academic disputes ... which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs': [36]. There are other risks of the Court embarking on such claims. If determination of the issue is fact-sensitive, a ruling 'could constitute no more than obiter dicta expressed without the assistance of a concrete factual situation and would not constitute a binding precedent for the future': *R (Raw) v*

Lambeth LBC [2010] EWHC 507, [53]. In my judgment, in those circumstances the court is also more likely to make a decision that is wrong which is then treated by relevant public bodies as a precedent leading to further legal errors.

91. Mr. Rule for the Claimant submitted that the claim was not academic. He pointed out that there have been a significant number of cases before the Administrative Court arising out of delays in dispersal. The case raises discrete issues of law concerning the systemic lawfulness of the SSHD's asylum accommodation policy which are not fact-sensitive. The issues are of significant public importance, particularly given the SSHD's ongoing failure to conduct statistical data monitoring in relation to vulnerabilities, despite the judgment of Knowles J in *DMA* that the absence of such monitoring was unlawful. I understand from my own enquiries with the Administrative Court that there are at least two outstanding cases raising the same issues, one of which has been stayed pending the outcome of this claim. I also note that in *SA*, Fordham J observed that other grounds in that case, raising 'systemic issues', were to be addressed in other 'lead cases' including the present case: [1].
92. Despite my invitation, Mr. Manknell for the SSHD disavowed any submission that the systemic claim (Grounds 2-6) should be dismissed as academic. Nor did he make such a submission before Moffatt KC DHCJ when resisting the Claimant's application to amend the claim, although he resisted that application on other grounds: see the Defendant's written submissions of 8 June 2023. Certainly there is no consideration of that issue in relation to those grounds in Moffatt KC DHCJ's order of 28 June 2023: above, paragraph 11. In my judgment the systemic grounds (Grounds 2, 3 and 4) are academic so far as they concern the Claimant and there are no exceptional reasons to decide them, primarily because the issues they raise are fact-sensitive and should not be resolved without a firm factual foundation. These grounds are therefore dismissed as academic, as more fully explained below. I reach a different conclusion in relation to Grounds 6 and 5 because they are not so fact-sensitive: below, paragraph 143, 164.

Decision: systemic challenge under the 1999 Act and HNPD Policy (Ground 2)

93. Ground 2 requires application of the *Gillick* principle, as explained in *A*, to determine the following question: is the system of allocation of DA to PNMA's a measure, practice or policy that is 'not capable of being operated lawfully' for the purposes of the 1999 Act and the *HNPD Policy*? To find systemic unlawfulness the Court must be satisfied that the SSHD has either promulgated a written policy or guidance that 'authorises or approves unlawful conduct by those to whom it is directed' or that there is some other unlawfulness which is inherent in, or arises inevitably from, the operation of the system in a material and identifiable number of cases: see above, paragraph 85. I am not concerned with questions of whether there is a 'real', 'significant' or 'unacceptable' risk of unlawfulness for the reasons explained in *A*, which only applies to the Article 3 Ground, considered below. The *Gillick* principle imposes a more stringent test: see above, paragraph 86.
94. I have found that there are a number of factors for which the SSHD is responsible that increase the risk of delays in dispersal in relation to PNMA's: see paragraph 27-35, above. Whether those are failings that render the 'system' unlawful

applying the *Gillick* principle is not a straightforward question. Some of those factors arise from the terms of the AASC contract so, on their face, constitute a ‘written policy’ falling within the first *Gillick* category in paragraph 85, above. Others, such as the ‘decoupling’ of the decision on eligibility from the issue of an ITP and the SSHD’s ‘light touch’ to enforcement, may be ‘inherent’ features of the system falling within the second or third *Gillick* categories at paragraph 85. Some of the delay will undoubtedly be the result of the system being complex and difficult to administer in circumstances where demand has increased exponentially. Such failures cannot be the subject of systemic legal challenge, even if they involve maladministration or isolated acts of unlawfulness: above, paragraph 88. It is not immediately clear how the *Gillick* principle is to be applied where a range of systemic factors that are challengeable and other factors that are unchallengeable combine in such a way. As I have foreshadowed at paragraph 92 above, however, I have decided it is not appropriate to decide that issue. That is because Ground 2 is academic so far as it affects the Claimant and there are no exceptional reasons to determine it, for the following reasons.

95. First, whether any such factors are ‘systemic’ flaws that will ‘inevitably’ give rise to individual breaches of duty to provide ‘adequate’ accommodation within a reasonable time and/ or of the *HNPD Policy* cannot be determined without a firm factual framework in at least one individual case, preferably a range of cases. The mere fact that there are average delays in the generality of cases of 230 days (195 days for women with children under 3) before dispersal and that some of this delay can be attributed to factors inherent in the system of asylum support is not sufficient, of itself, to establish that there will inevitably be breaches of the SSHD’s duties under the 1999 Act or the *HNPD Policy* in relation to individual PNMAS in a material number of cases in future. Without statistical data monitoring it is not possible to know how those delays affect PNMAS, although I have found they are disproportionately at risk of suffering delays for the reason given at paragraph 33, above. However, to find any breach of the 1999 Act the Court must be satisfied that there has been a failure to provide ‘adequate’ accommodation within a ‘reasonable time’, which will depend on the specific factual context in a given case: above, paragraphs 77-79, 81. Relevant factors will include the length of the delay, the individual’s assessed need for accommodation in a particular area, the availability of such accommodation (subject to the legal question of whether resources are relevant, above paragraph 79, 81) and compliance with the *HNPD Policy*. There may be no breach of the *HNPD Policy* for an individual PNMAS to remain in IA where they have developed a relationship with a local obstetric team or they are within the ‘protected period’: above, paragraph 37. In any event, even if there is a breach of the *HNPD Policy* it will not be unlawful if there is a ‘good reason’ to depart from the policy on the facts of the case: above, paragraph 82. The pressure on the asylum support system caused by the Covid-19 pandemic and the unprecedented numbers of applicants may constitute such a ‘good reason’, although I heard no submissions on the point.
96. Without evidence going to those issues as they apply to at least one, preferably several, individual cases it is impossible, or at least very difficult, to determine that the system will ‘inevitably’ lead to breaches of the 1999 Act or the *HNPD Policy*. This is a case where to answer that question, which involves a prediction

as to the future, it is necessary to ask whether the system has been applied unlawfully in the past: see *R. (Kent CC) v Secretary of State for the Home Department* [2023] EWHC 3030 (Admin), [31] per Chamberlain J. I accept that the 105 days that the Claimant spent in IA before dispersal to DA strongly suggests a past breach of s 4(2) 1999 Act and of the *HNPD Policy*. I cannot make such a finding in relation to the Claimant, however, as the claim is now academic so far as it concerns her and the individual claim in Ground 1 was refused permission by Moffatt KC DHCJ so I heard no submissions on the question. In those circumstances, for the reasons outlined at paragraphs 90, above, it is not appropriate – even if it were possible – for me to determine whether breaches of s 4(2), s 95 and the *HNPD Policy* will arise inevitably in future in a material number of other PNMA cases as a result of any of the ‘systemic’ factors that I have identified. I note that the findings of systemic breach in *DMA*, *NB* and *SA*, and the finding there had been no breach in *MQ*, all turned on a careful analysis of the facts of the individual cases before the Court. In *DMA*, the finding of a systemic breach was based on findings of past breach in five individual cases that were ‘so large that, absent an explanation, they do question the system’: [196]. That factor is absent here.

97. Second, the Claimant received support under s 4(2), not s 95, of the 1999 Act. Even if I could make a finding of past breach of s 4(2) on the facts of her case, I could make no such finding under s 95. Nor would it be appropriate to reach any conclusions as to systemic breaches of s 95 on the basis of findings only of a past breach of s 4(2). There are significant legal differences between s 4(2) and s 95 (above, paragraph 73) and any such conclusions would in any event be *obiter dicta*.
98. Third, whether it is inevitable that there will be systemic breaches of s 4(2) or s 95 or the *HNPD Policy* may turn on one or other issues of law that would need to be determined, namely: (a) whether the SSHD is required to take into account an applicant’s vulnerability when assessing the need for accommodation under s 4(2); (b) whether s 4(2) accommodation must be ‘adequate’; and (c) whether resource considerations are relevant to the assessment of the adequacy of accommodation or the reasonableness of the timescale within which accommodation under s 95 or s 4(2) is provided or to whether there is a ‘good reason’ for departing from the *HNPD Policy*: see above, paragraphs 73, 79, 81, 82. I either heard no, or only limited, submissions on these issues and, in the absence of a specific factual framework, any conclusions I reach on these issues would be *obiter dicta*. It is not appropriate for these to be resolved other than on the concrete facts of a specific case.
99. Fourth, the ‘system’ has undergone recent significant change and is likely to change further. The *Vulnerability Log SOP* only came into operation on 29 August 2023. It is too early to tell whether it is having, or will have, the intended effect of ensuring that cases where the service provider fails to act on an ITP are identified and escalated so that dispersal accommodation is provided in good time. The ‘trigger process’ for identifying PNMA once application is made for a maternity grant was abandoned after it was introduced: above, paragraph 51. The SSHD still intends to introduce that system. In his further written submissions Mr. Manknell informed me that there have been still further changes

to the system since the hearing. Any systemic challenge should preferably be heard only once all the intended changes have been put into effect.

100. Fifth, in the absence of statistical data monitoring the benefits of any changes to the system cannot be assessed. As will be seen under Ground 6, I have concluded that such monitoring is required in order to comply with s 149 EA 2010. Such monitoring may provide powerful evidence in favour of a systemic challenge in the future. On the other hand, it may demonstrate that the system is (by then) working as intended, and so obviate the need for any such challenge.
101. Sixth, the flaws I have identified in the system are sufficiently concerning that it is not appropriate to resolve the claim by dismissing Ground 2 substantively. Dismissal of Ground 2 on the basis it is academic does not constitute a judicial imprimatur of the system and does not prevent a suitable case being brought in future.
102. Accordingly, I venture no conclusion as to whether there is systemic unlawfulness under Ground 2 which is dismissed on the basis there are no exceptional reasons for deciding the issue given it is academic so far as the Claimant is concerned.
103. That said, there are clearly aspects of the AASC contract and the SSHD's management of the contract which raise legitimate concerns. One of these, the absence of statistical data monitoring, I have found constitutes a breach of the SSHD's duty under s 149: Ground 6, below. I encourage the SSHD to continue to seek to improve the asylum support system to address the shortcomings I have identified at paragraphs 27-35, above; indeed, he is obliged to reconsider these matters as an aspect of his continuing duty under s 149 EA 2010, considered under Ground 6. I also encourage him to consider addressing the following matters that should reduce misunderstandings and further raise awareness among caseworkers and service providers of the urgent need to disperse PNMAS:
 - i) There is still some confusion among service providers as to the circumstances in which PNMAS are to be prioritised for dispersal under the *HNPD Policy*. This is apparent from the minutes of a meeting between the SSHD and service providers dated 5 December 2023 headed 'Joint provider Workshop: Pregnancy Payment Trigger Process'. The *HNPD Policy* is not as clear as it could be as to the urgent need for dispersal of PNMAS to take place before the 'protected period' (the 'late stages of pregnancy'). Further clarity might be introduced by amending the *HNPD Policy* itself.
 - ii) The *Vulnerability Log SOP* could be more emphatic as to the need to ensure dispersal of PNMAS in good time before their 'protected period'.
 - iii) Annex G could be amended to make clear that 'pregnancy and maternity' are specific categories of vulnerability and special need to which service providers must have specific regard.
 - iv) The AASC, Schedule 2, §1.1.5 could specify that service providers are obliged to comply with the *HNPD Policy*, which is not currently mentioned.

- v) The Service Delivery Guide (above, paragraph 16) could be published, in particular as it relates to the schema for prioritising ITPs.

104. Whether the SSHD chooses to accept these suggestions is a matter for him, although a failure to address them may be relevant in any future challenge.

Decision: the HRA Grounds (Grounds 3(a), 3(b) and 4(a))

Standing

105. Before I address the issue of whether the HRA Grounds should be dismissed as academic there is a logically prior issue I must decide, namely whether the Claimant has standing to bring these grounds. This point was taken by the SSHD in his detailed grounds but not in his skeleton argument or his submissions at the hearing. The Claimant made no submissions on the point at all. When writing this judgment it became clear the point is potentially determinative of the HRA Grounds so I gave the parties the opportunity to address it in further written submissions after the hearing.
106. Section 6(1) HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. By s 7(1), a person with a ‘sufficient interest’ has standing to bring proceedings alleging a breach of a Convention right as unlawful contrary to s 6(1) HRA. Section s 7(3) provides a person will only have a ‘sufficient interest’ if ‘he is, or would be, a victim of that act’ within the meaning of Article 34 of the Convention, which governs the standing of a person to bring an individual application to the European Court of Human Rights. Article 34 permits a person to bring an application if they are a ‘victim’ or, in some circumstances, a ‘potential victim’ of a breach of their human rights: *Ada Rossi v Italy*, ECtHR (Second Section), App. No. 55185/08, 16 December 2008. To establish status as a potential victim requires ‘reasonable and convincing evidence of the likelihood that a violation affecting [her] personally will occur; mere suspicion or conjecture is insufficient in this respect’: *Ada Rossi*, *ibid*. Accordingly, although a person may bring a systemic challenge to a measure, practice or policy under the HRA, that person must establish they are either a ‘victim’ or a ‘potential victim’ of such a breach. The SSHD observes that Grounds 3-4(a) are framed entirely by reference to anticipated breaches of the human rights of PNMA as a group. No claim is advanced by the Claimant that she is a victim or a potential victim herself. In any event, she cannot be a ‘potential victim’ as she was transferred to DA on 13 January 2021. The HRA Grounds should be dismissed on this basis alone. He relied on the judgment of the Court of Appeal in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] EWCA Civ 330, [2021] Q.B. 1087 (*‘Privacy International’*), at [122-129], in particular the Court’s justification for the ‘victim’ requirement in s 7 at [128]:

This is no mere procedural technicality. The factual situations that can arise in this context will be myriad. It would be an impossible task, and at all events most unwise, for a court to make generalised pronouncements in this sort of context which are divorced from an identified and specific factual framework. So to hold, moreover, does not preclude an actual victim in an

appropriate case from coming forward and advancing such a claim, depending on the actual factual circumstances that have occurred.

107. Mr. Rule argued that *Privacy International* should be distinguished, for three reasons. First, because it concerned a corporate claimant, not an individual who had actually been affected by the system under challenge; second, it involved a claim of an actual breach of human rights in an individual case, not a systemic breach; and, third, to apply s 7 in this way would leave intact a system which creates a real risk of breaches of Article 3, which is contrary to the public interest.
108. I have concluded I am bound by the decision in *Privacy International* which cannot be distinguished. First, it is irrelevant that the claimant in *Privacy International* was a corporate body rather than an individual. The Claimant in this case has only an academic interest in the case and is bringing the challenge as a public interest litigant. Second, it is irrelevant that the HRA grounds involve a systemic challenge on the basis of anticipated breaches rather than past breaches. The Claimant must still establish she is a ‘potential victim’. She does not even claim that status, let alone demonstrate it by ‘reasonable and convincing evidence’. In any event, she cannot claim to be a potential victim of the alleged systemic unlawfulness since her transfer to DA. Third, I accept that this interpretation of s 7 HRA can, in theory at least, leave in place a system that gives rise to a ‘real risk’ of breaches of Article 3. However, the need to establish ‘victim’ status is a low bar, particularly given the approach the Strasbourg Court has taken to potential victims. But it is still a bar, and careful thought must be given by those bringing such claims as to how it is to be crossed. In any event, that is not a basis for the Claimant to distinguish *Privacy International*. In that case the allegedly unlawful policy was still in force at the time of the hearing, so the risk of continuing breaches still existed but that did not prevent the Court from finding the claimant lacked standing.
109. Moreover, there are good public interest reasons for the requirement of a ‘victim’, which is not a mere ‘procedural technicality’, as the Court of Appeal made clear in the above-quoted passage from *Privacy International*, [128]. Section 7 imposes a necessary procedural rigour that ensures the Court has an evidential foundation upon which it can base any finding of breach or non-breach. If an actual or potential victim cannot be identified that may be a good reason why it should not be decided in the public interest. Furthermore, if the court cannot determine on the individual facts of the case whether the Claimant was or would be a ‘victim’ of breach it would be ‘unwise’, if not ‘impossible’, to make ‘generalised pronouncements’ as to whether the long-term accommodation of PNMAS in IA rather than DA would inevitably lead to breaches (Articles 8 or 14) or create a ‘real risk’ of breaches (Article 3) in other cases in the future. It is notable that in all other cases where the Court has considered the ECHR implications of a failure to provide suitable asylum support the Court has had a specific factual framework within which to determine the ECHR grounds: see, in particular, *DMA*, *NB* and *HA*. Without such a framework it would not be prudent for the Court to embark on that exercise.
110. Accordingly, I dismiss Grounds 3(a), 3(b) and 4(a) on the basis the Claimant does not claim that she is, or would be, a victim of a breach of her Article 3, 8 or 14

rights and she therefore lacks a ‘sufficient interest’ for the purposes of s 7(1) HRA. That does not preclude an individual claimant from bringing a claim in the future on the basis that he or she is or would be a ‘victim’ of the impugned system failings.

Academic issue

111. I also find that there are no exceptional reasons justifying a departure from the principle that the Courts should not adjudicate on the HRA Grounds which are academic so far as the Claimant is concerned: above, paragraph 89. Whether the system has breached or, applying the *Gillick* principle, would inevitably breach Article 8 alone or in conjunction with Article 14 (Grounds 3(b) and 4(a)) is a fact-sensitive issue. In the absence of findings of fact to ground a conclusion of past breach or anticipated future breach in at least one (preferably more than one) case it is not appropriate for the court to undertake that exercise in relation to notional members of the cohort of PNMA. As for Ground 3(a) (the Article 3 ground), although the bar for establishing a systemic breach (a ‘real risk’ of breach) is a lower one, that question is still highly fact-specific. This is not a case like *DMA* which concerned failed asylum-seekers who were not provided with *any* accommodation, despite being found to be eligible for s 4(2) accommodation on the basis they were destitute and at imminent risk of suffering that crossed the ‘high’ threshold of ‘inhuman and degrading treatment’ in *Limbuela*, [7]. In such a case, evidence of significant delays in the provision of IA could be equated with breaches of Article 3. In the present case, accommodation has been provided: the complaint is that the accommodation is inadequate. Evidence of systemic delays in the provision of DA cannot be equated without more with breaches of Article 3.
112. In any event, whether such delays give rise to a breach of human rights would involve a novel development of the law which it would be inappropriate to make without a firm anchorage in the facts. I was provided with no authority to support the Claimant’s case that a failure to provide dispersal accommodation is or would be a breach of any of Articles 3, 8 or 14. *DMA* is distinguishable as it involved systemic failings to provide *any* accommodation to persons at imminent risk of a breach of their Article 3 rights. In *SA*, in which Fordham J found a breach of the s 95/ 96 duty to provide adequate accommodation to a PNMA and her children where *SA* spent 15 months in IA before dispersal (by contrast with the 105 days in the Claimant’s case), no finding was made that there had been a breach of Article 3, 8 or 14. I am informed that these arguments were advanced, but refused permission at the permission stage on the basis they were better dealt with in this case. This reinforces the conclusion that the HRA claim in this context is novel. In *NB*, Linden J found that there had been no breach of either Article 3 or Article 8 despite his conclusion there had been a breach of s 95/ 96 in housing the claimant asylum seekers in ‘inadequate’ accommodation at Napier barracks: [262-268, 275-278]. In *HA*, Swift J held that the claimant asylum seekers, who were pregnant, had been unlawfully denied essential living payments under Regulation 5 of the Asylum Support Regulations 2000 while accommodated under s 95 in hotel IA, but there had been no breach of Article 3: [58-59]. I therefore venture no conclusions on those questions but dismiss the HRA Grounds as academic as well as on the basis of a lack of standing. This does not

preclude a claimant advancing the argument in another case in the light of appropriate factual evidence.

Decision: indirect discrimination (Ground 4(b))

113. Ground 4(b) involves an allegation that the system of asylum support is discriminatory contrary to s 19 EA 2010. The ground relies upon the ‘same failures’ as the Article 14 Ground, Ground 4(a). I have already ruled that ground must be dismissed, so it is necessary to look at the way in which the argument is put by reference to s 19 of the 2010 Act.
114. Section 19(1) provides that ‘A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice [‘PCP’] which is discriminatory in relation to a relevant protected characteristic’. By s 19(2), ‘for the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.’ Section 19 only defines indirect discrimination, however; it does not make it unlawful. For that it is necessary to look to one of the other provisions of the 2010 Act: *Essop v Home Office* (SC(E)) [2017] 1 WLR 1343, [5]; *R. (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin), [63]. Here, the relevant provision is s 29(6), which provides that ‘a person must not, in the exercise of a public function ..., do anything that constitutes discrimination ...’. A claim that a person has acted in contravention of the 2010 Act may be brought by way of judicial review: s 113(3)(a).
115. It is therefore open to the Claimant, in principle, to bring a claim by way of judicial review under s 19 and s 29(6) EA 2010 that the SSHD, in the exercise of his public functions under the 1999 Act, has indirectly discriminated against her or will do so in future. The relevant PCP is said to be the SSHD’s ‘failure to put in place the necessary arrangements with relevant accommodation providers to ensure the additional needs of [PNMAS]’. I assume, for the purposes of this argument, that the features of the asylum support system which contribute to delays in dispersal that I have identified at paragraphs 27-35 above are capable of constituting a PCP. The substantive question that then falls for determination is whether that PCP would put persons with whom the Claimant shares a protected characteristic (pregnancy and maternity) at a particular disadvantage when compared with persons with whom the Claimant does not share it; it puts, or would put, the Claimant at that disadvantage; and the SSHD cannot show that disadvantage to be a proportionate means of achieving a legitimate aim: s 19(2).
116. Before resolving that substantive question, an important issue of law would need to be decided. While ‘pregnancy and maternity’ are protected characteristics for the purposes of s 4 and s 149 of the 2010 Act, they are not protected characteristics for the purposes of indirect discrimination under s 19: s 19(3). The Claimant seeks to avoid the consequences of this omission by relying on the fact that discrimination on the ground of pregnancy may also be discrimination on the ground of sex, which does fall within s 19(3). She relies upon *Hardys & Hansons*

Plc v Lax [2005] ICR 1565, [13], in which the Court of Appeal held that indirect discrimination of a woman because of child-caring responsibilities was discrimination on the grounds of sex. However, that was a case concerned with discrimination under a previous enactment, the Sex Discrimination Act 1975, which contained no equivalent of s 19(3). On the face of it, the absence of ‘pregnancy and maternity’ from the protected characteristics to which indirect discrimination applies under s 19(3), by contrast with s 4 and s 149 where these characteristics are protected, must be taken to have been deliberate. However, I note that the EAT in *Chief Constable of Devon v Town* [2021] IRLR 235, an employment case, did not read s 19(3) in this way and treated indirect discrimination on the grounds of pregnancy as being indirect discrimination on the grounds of sex. This is clearly an important issue of law upon which I heard little argument.

117. I have concluded that it is inappropriate to determine either the substantive question or the issue of law, for two reasons.

Standing

118. First, I have concluded that the Claimant lacks standing to bring this ground. This point was not taken by the SSHD in the pleadings or at the hearing but, again, it became apparent while drafting the judgment that it was relevant and I therefore invited the parties to make further submissions in relation to it. The SSHD now submits the Claimant lacks standing to bring this ground. Logically, this question should be decided first.
119. A person must have a ‘sufficient interest’ to bring a claim for judicial review; without it, a claim may be refused either at the permission stage or following a substantive hearing: s 31(3) Senior Courts Act 1981; *R v Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *R. (on the application of Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin) (‘GLP’), [16-17]. In *GLP* the claimant, a private not for profit company which brings public interest litigation, was found to lack a sufficient interest to bring a s 19 indirect discrimination claim by way of judicial review because it was not the victim of the alleged discrimination. The Court ruled that the obvious person to bring such a claim was the actual or potential victim (emphasis added):

[32] ... By section 19 of the Act, indirect discrimination is defined in terms of the application by person ‘A’ of a ‘provision, criterion or practice’ to a person (referred to in the Act as ‘B’) in relation to a relevant protected characteristic of B’s (see section 4 of the Act, including race and disability) which puts B (the person with a protected characteristic) at a particular disadvantage. *The obvious person to bring legal proceedings is therefore that person B.*

120. The SSHD submits that a claim of indirect discrimination should therefore be brought by a person who claims that they are or would be indirectly discriminated against by the application of the PCP: ‘person B’. The Claimant does not complain that she has been or would be indirectly discriminated against by the

application of the PCP in her case. Her claim is that the SSHD ‘has discriminated against pregnant or new mother asylum seekers contrary to the Equality Act 2010’. The Claimant does not profess that she is or would be ‘person B’.

121. Mr. Rule, for the Claimant, submits that *GLP* is to be distinguished because the Claimant is a private individual directly affected by the matters in issue and not a public interest organisation. Furthermore, she *could* be ‘person B’. I reject that submission. First, now that the claim is academic there is no meaningful distinction between the role she is playing in pursuing the litigation and that of a corporate body such as *GLP*; they are both public interest claimants and the same test of ‘sufficient interest’ must be applied. Second, the Claimant neither pleads nor advances any case that she has or will suffer the alleged discrimination. She has been transferred to DA, so there can be no suggestion that she would be discriminated against in future. She is not and cannot be ‘person B’.
122. Again, this is not a mere procedural technicality. The reasons for the Court’s conclusion in *GLP* are closely related to those identified in the quoted dictum of the Court of Appeal at [128] of the *Privacy International* case in the context of s 7 HRA, namely the avoidance of ‘generalised pronouncements’ which are ‘divorced from an identified and specific factual framework’. At [34] in *GLP* the Court emphasised that there were ‘disputes of fact likely to be material to the outcome of any discrimination claim’ which were more appropriately to be decided by Employment Tribunal rather than the Administrative Court. At [39] the Court emphasised the inappropriateness of a claim being brought in circumstances ‘where no individual complainant has come forward’. While the absence of any claim of indirect discrimination of a specific individual may not always mean the claimant lacks standing, it does in the present case. A finding of indirect discrimination under s 19(2) is a fact-specific question, including whether any disadvantage to which the PCP puts the Claimant and other PNMA is not a proportionate means of achieving a legitimate aim. It would, moreover, constitute a novel legal development. I was shown no case to demonstrate indirect discrimination in an analogous case and, on the face of it, such a claim is barred by s 19(3). In the absence of a factual framework against which to first determine whether there has been, or would be, discrimination against the Claimant contrary to s 19(1) it would be unwise to embark upon the exercise of deciding whether PNMA, as a group, are or would be victims of such discrimination. Accordingly, I find the Claimant lacks standing to bring the indirect discrimination claim by way of judicial review.

Academic issue

123. Second, and for the same reasons, I also find that there is no exceptional justification for resolving this Ground which is academic so far as it concerns the Claimant.

Discussion: the PSED Ground (Ground 6)

124. I will deal with the PSED ground (Ground 6) before the s 55 ground (Ground 5) for reasons that will become clear. The Claimant alleges that the SSHD is in breach of his duty under s 149(1)(b) because he does not conduct statistical data

monitoring in relation to PNMAS: see paragraph 67, above. For the reasons that follow I have concluded that this ground of challenge succeeds.

Legal framework relevant to the PSED

The PSED in s 149 EA 2010

125. Section 149 provides under the heading ‘Public Sector Equality Duty’, so far as material:

(1) A public authority must, in the exercise of its functions, have due regard to the need to— (a) ... ; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) ...

...

(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)

...

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are— age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

Key case-law

126. Section 149, and its forerunners in the legislation that preceded the EA 2010 (s 49A Disability Discrimination Act (‘DDA’), s 76A Sex Discrimination Act 1975 (‘SDA’) and s 71 Race Relations Act 1976 (‘RRA’)), have been the subject of a number of authoritative court decisions. Key judgments to which I will refer are *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809 (‘*Baker*’), *R (Brown) v SSWP* (DC) [2009] PTSR 1506 (‘*Brown*’), *R (Hurley & Moore) v SS for Business Innovation & Skills* [2012] EWHC 201 (Admin) (‘*Hurley*’), *R (Bracking) v SSWP* (CA) [2014] Eq LR 60 (‘*Bracking*’), *Hotak v LB Southwark* (SC(E)) [2016] AC 811 (‘*Hotak*’), *Haque v Hackney LBC* [2017] EWCA Civ 4, [21-23] (‘*Haque*’); *R (Bridges) v Chief Constable of South Wales Police* (CA) [2020] 1 WLR. 5037 (‘*Bridges*’); *R*

(*Rowley*) v *Minister for the Cabinet Office* (QBD) [2022] 1 WLR 1179; *R (Sheakh) v Lambeth London Borough Council* (CA) [2022] PTSR 1315 ('*Sheakh*'); and *R (Marouf) v Home Secretary* (SC(E)) [2023] 3 WLR 228 ('*Marouf*'). The relevant principles are helpfully summarised in Sir Michael Fordham's *Judicial Review Handbook* (7th ed.), §55.2.

The EHRC Guidance

127. I will also refer to extracts from guidance produced by the Equality and Human Rights Commission (EHRC) in relation to s 149, entitled 'Technical Guidance on the PSED' (England),⁴ currently in its 2023 edition, replacing an earlier version from 2014 (the 'EHRC Guidance'). The relevant paragraphs are set out at paragraph 137, below. I received no submissions from the parties on this Guidance at the hearing. While drafting my judgment, however, it became apparent that the EHRC Guidance is potentially relevant to arguments that were advanced under Ground 6. I therefore invited the parties to make submissions on the EHRC Guidance after the hearing. It then emerged that there was a difference between the parties as to the legal status of the EHRC Guidance and the legal consequences of a failure by the SSHD to take it into account. I therefore need to resolve this issue at the outset.

128. The EHRC Guidance includes a summary of relevant law along with the EHRC's own expert advice and guidance and is issued pursuant to its powers under s 13 Equality Act 2006 to, among others, 'give advice or guidance (whether about the effect or operation of an enactment or otherwise)'. The EHRC Guidance is not a statutory code issued under s 14 EA 2006, but it is evidence that may be used in legal proceedings: EHRC Guidance, §1.4. The EHRC Guidance continues at §1.5 (emphasis added):

‘Showing that the guidance in this document has been followed – or being able to explain why it was not – will be relevant in demonstrating compliance with the Public Sector Equality Duty. *The courts have said that a body subject to the duty will need to justify its departure from non-statutory guidance such as this*’, citing *Brown*, [119-121] and *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin), [22].

129. Mr. Manknell submits that §1.5 is an inaccurate statement of law because the EHRC Guidance does not have the same status as the statutory codes of practice that were the subject of consideration in *Brown* and *Kaur*. In *Brown* the Court was concerned with a statutory code of practice issued by the Disability Rights Commission under s 53A(1C) of the DDA in relation to the exercise of the PSED under s 49A(1) DDA. In *Kaur*, the code of practice had been issued by the EHRC under s 14 of the Equality Act 2006 in relation to the exercise of the PSED under s 71 RRA. The statutes required these codes of practice to be published in draft, consulted upon and approved by the Secretary of State and then laid before Parliament for 40 days before coming into operation. The statutes also stipulated that, while breach of the code does not render any person liable in criminal or civil proceedings, in any proceedings a court is obliged to take any provision of

⁴ Similar Guidance has been produced for Scotland and Wales

the code into account to the extent relevant: see s 53A(8A) DDA (*Brown*, [111]) and s 15(4) EA 2006 (*Kaur*, [16]). At [119-121] the DC in *Brown* set out the following propositions as to the status of the DDA code of practice, which apply equally to a code of practice issued under s 14 of the EA 2006 such as that in *Kaur*:

First, a public authority must take the code into account when considering disability equality issues. If it decides to depart from it, cogent reasons must be given and they must be convincing. ... Secondly, if a breach of the general duty in section 49A(1) is alleged and it appears to a court that relevant guidance given by the code has been ignored, departed from, misconstrued or misapplied without cogent reason, then that may be a powerful factor that leads the court to conclude that there was a breach of statutory duty by the public authority. Thirdly, it would be for the public authority to explain clearly and convincingly the reason for the lapse. ... However, other than to [that] extent ... the code does not itself impose further duties on public authorities in addition to those set out in section 49A(1) and the 2005 Regulations.

130. Mr. Manknell points out that there a number of important distinctions between the codes of practice in *Brown* and *Kaur* and the EHRC Guidance. The EHRC Guidance does not need to be consulted upon, approved by the Secretary of State or laid before Parliament. Section 15(4) EA 2006 only applies to s 14 codes of practice so there is no statutory obligation on a court to take s 13 guidance into consideration. Accordingly, Mr. Manknell submits, §1.5 is wrong to assert that a public authority ‘will need to justify its departure from non-statutory guidance such as this’. The EHRC Guidance is merely a discretionary relevant consideration that the SSHD may take into account, but he is not obliged to do so. It follows, he submits, that he does not need to justify any departure from that Guidance. For his part, Mr. Rule submitted that §1.5 was a correct statement of the law.
131. The parties referred to a number of cases in which the EHRC Guidance has been cited but none of them assisted me in determining its legal status. I agree with Mr. Manknell that the EHRC Guidance does not have the same status as a statutory code of practice and, to the extent it invokes *Brown* and *Kaur*, §1.5 misstates the legal position. The question remains, however, whether §1.5 is correct in substance and a public authority must take the EHRC Guidance into account and justify any departure from it, as Mr. Rule submits; or whether it may choose whether to take the EHRC Guidance into account and need not justify any failure to do so, as Mr. Manknell submits. Is it a mandatory relevant consideration or a discretionary relevant consideration? The distinction between the two concepts was explained by Cooke J (as he then was) in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, approved by the House of Lords in *In re Findlay* [1985] AC 318 per Lord Scarman at pp 333F-334D. A mandatory relevant consideration is one that a statute expressly or impliedly requires to be taken into account by the authority as a matter of legal obligation. A failure to take such a consideration into account is *ultra vires* and of itself unlawful. A discretionary

relevant consideration, on the other hand, is one that may properly be taken into account, but a failure to do so will not be unlawful unless *Wednesbury* unreasonable.

132. The status of the EHRC Guidance is therefore a question of statutory construction. The EHRC is a statutory expert body upon which Parliament has conferred the equality and human rights functions in s 8 and s 9 EA 2006 and the statutory power to promulgate both s 13 guidance and s 14 codes of practice in the discharge of those functions. In my judgment, by necessary implication a decision-maker must take both s 13 guidance and a s 14 code of practice into account. Parliament cannot be taken to have left it to the discretion of decision-makers whether to even *consider* ‘advice or guidance’ promulgated by the statutory expert body under s 13. That would deprive such guidance of much of its utility and would undermine the EHRC’s statutory functions and the obvious statutory purpose of the relevant provisions. While there are clear statutory distinctions between s 13 guidance and s 14 codes of practice, these go to the weight to be given to them by the decision-maker and not their relevance. In my judgment the proper interpretation of these provisions leads to the following conclusion. A public authority exercising public functions must take into account both s 13 guidance and any s 14 code of practice. The authority is not obliged to follow either but must justify any failure to do so with cogent reasons. If a breach of the PSED is alleged, a failure to follow either s 13 guidance or a s 14 code of practice without good reason may be evidence of a breach of the underlying statutory duty. A failure to follow the provisions of the s 14 code of practice will, however, be harder to justify and will require more cogent reasons than in the case of s 13 guidance. That interpretation is consistent with the decision in *Brown*, properly reflects the different status of s 13 guidance and s 14 codes of practice and ensures that s 13 guidance has the utility that Parliament must have intended it to have. This interpretation is also consistent with the Court’s approach to determining the status of policy guidance issued by an external source in the cases referred to in Sir Michael Fordham’s *‘Judicial Review Handbook’*, 7th. Ed., §6.2.7 and *R. v North Derbyshire Health Authority ex p. Fisher* (1998) 10 Admin. L.R. 27 (Dyson J) citing *Grandsden & Co Ltd and another v Secretary of State* (1987) 54 P. & C.R. 86 (Woolf J) at p. 93-94. While there may be valid distinctions to be drawn between those cases and the present, they each support the proposition that where (as here) a public body has a power to set policy or to give guidance to another public body then the latter must take such policy or guidance into consideration. Whether they *follow* it is a matter for their discretion, provided they give cogent reasons if they choose to depart from it.

Relevant legal principles relating to the PSED

133. The principles of the PSED of special relevance to this case are as follows:
- i) There is no dispute that the PSED applies to the SSHD in the discharge of his functions in the provision of asylum accommodation under the 1999 Act or that it applies in relation to the relevant protected characteristics of ‘pregnancy and maternity’ and ‘age’: s 149(7).
 - ii) The underlying statutory purpose of the PSED in its original conception, at least in relation to s 71 RRA 1971, is explained by Karon Monaghan KC in

Equality Law, 2nd ed (2013), para 16.06, in a passage quoted with approval by the Court of Appeal in *Bridges*, [178] (emphasis added): ‘The purpose of the general race equality duty was to create a strong, effective, and enforceable legal obligation which placed race equality at the heart of the public authority’s decision making. The new duty was intended to mark a major change in the law. It represented a move from a fault-based scheme where legal liability rested only with those who could be shown to have committed one or other of the unlawful acts. Instead, the duty-bearer, the public authority, was to be *required to proactively consider altering its practices and structures to meet this statutory duty*.’ In my judgment, that is an accurate description of the statutory purpose of s 149 as it applies to all of the equality strands brought together and protected by the EA 2010.

- iii) For the purposes of the duty in s 149(1)(b), the SSHD must have due regard to the need: (a) ‘to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it’; (b) ‘to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic’ (s 149(3)(a)); (c) ‘to 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’ (s 149(3)(b)); (d) in each case, which ‘may involve treating some persons more favourably than others’: s 149(6).
- iv) The duty to have ‘due regard’ applies both to the formulation of policy and its implementation in individual cases: *Bracking*, [59].
- v) The duty is a continuing one: *Bracking*, [28(5)].
- vi) ‘[T]he PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect’: *Bridges*, [176]. To similar effect is §2.31 of the EHRC Guidance: ‘Compliance with the duty should result in: better-informed decision making and policy development; a clearer understanding of the needs of service users, resulting in better quality services which meet varied needs; more effective targeting of policy, resources and the use of regulatory powers; better results and greater confidence in, and satisfaction with, public services...’
- vii) The duty is not simply to ‘have regard’ to the relevant aims. The regard must be ‘due’. This requires ‘a proper and conscientious focus on the statutory criteria’ (*Bracking*, [26(8)]), although it is ‘not possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment’: *Hotak*, [74]. What constitutes ‘due regard’ is, however, context-specific. ‘The greater

the relevance and potential impact, the higher the regard required by the duty’: EHRC Guidance, §2.40. Thus, ‘where large numbers of vulnerable people, very many of whom fall within one or more of the protected groups, [are affected] the due regard necessary is very high’: *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin), [62]. The same will be true if the adverse impact of the policy is very high albeit it affects a smaller group of people: EHRC Guidance, §5.45. As Lady Rose observed in *Marouf*, [45] the duty is a ‘flexible one’, citing with approval the Court of Appeal’s dictum in *Sheakh*, [56]: ‘The authorities show that the concept of ‘due regard’ is highly sensitive to facts and context. How intense the ‘regard’ must be to satisfy the requirements in section 149 will depend on the circumstances of the decision-making process in which the duty is engaged. What is ‘due regard’ in one case will not necessarily be ‘due regard’ in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth.’

- viii) A decision-maker must have due regard to the need to obtain relevant information in order for him properly to discharge his s 149 duty, considered separately under the next heading.
- ix) A decision-maker should be able to evidence the discharge of the duty: *Bracking*, [28(2)].
- x) A Policy Equality Statement (‘PES’) can be evidence of compliance with the PSED, including on a continuing basis, but it must do so in substance. The mere existence of a PES is not enough: *Hurley*, [75].
- xi) The question whether a decision-maker has had ‘due regard’ to the relevant aims is for the Court to determine for itself on judicial review. However, provided the decision-maker has had ‘due regard’ to the relevant aims, the weight which he attaches to any relevant factors, including any countervailing factors, and his assessment as to what specific steps to take to achieve those aims, may only be challenged if the assessment is *Wednesbury* unreasonable: *Baker*, [34], *Bracking*, [82]; *Hotak* [75].

The duty to obtain information (‘equality evidence’) under s 149

134. The proposition that s 149 brings with it a duty to consider the need to obtain relevant information is derived from Aikens and Scott Baker LJ’s dictum in *Brown*, [85], cited with approval by the DC in *Hurley*, [89-90], the Court of Appeal in *Bracking*, [26(8)] and by Knowles J in *DMA*: [313]. The passage in *Brown* reads (emphasis added): ‘To do both of these things, the public authority concerned will, in our view, have to have *due regard to the need to take steps to gather relevant information in order that it can properly take steps* to take into account disabled persons’ disabilities in the context of the particular function under consideration. We emphasise once again, however, that the duty is to have due, i.e. proper, regard, to ‘the need to take steps.’”

135. In *Hurley* the DC referred to the extract from *Brown* with approval, although noted that the gathering of relevant information is not necessary ‘if the public body properly considers that it can exercise its duty with the material it has’: [90]. In *Bracking*, having cited the passage from *Brown* the Court of Appeal stated at [26(8)]: ‘the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (‘*Tameside*’) and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision’ and ‘[if] the relevant material is not available, there will be a duty to acquire it’. This duty was termed a ‘duty of inquiry’ by the Court of Appeal in *R (TW) v Hillingdon LBC* (CA) [2019] PTSR. 1738, [71] and, in *Rowley*, [40], Fordham J referred to ‘the recognised virtues of ... evidence-based thinking; and ... legal sufficiency of enquiry’ embodied in s 149. There is a helpful analysis of this duty of inquiry in an article by Professor Joe Tomlinson and colleagues titled ‘*Judicial Review of public data gaps*’ JR 2023, 28(2), 69-77.
136. While Mr. Manknell is correct that the duty to gather information under s 149 is akin to the common law *Tameside* duty, that is to say it is reviewable according to the *Wednesbury* standard (citing Foster J in *R(AI) v LB Wandsworth* [2023] EWHC 2088 (Admin) [90]), that is not the end of the matter. The duty derives by necessary implication from the statutory duty to have ‘due regard’, albeit informed by common law, as is apparent from [26(8)] of *Bracking*. The discretion as to what information should be obtained is not at large; it is conditioned by the nature of the s 149 duty and its statutory objective and any relevant s 14 code of practice or s 13 guidance, including the EHRC Guidance, as well as the facts of the particular case. All of these factors may narrow the decision-maker’s margin of discretion so as to justify the court’s intervention in a failure to obtain equality evidence when an application of orthodox *Tameside* principles alone may not. As Lord Steyn observed in *R (Daly) v SSHD* [2001] 2 AC 532, [28], ‘the intensity of review in a public law case will depend on the subject matter in hand ... [i]n law, context is everything’.
137. As to the EHRC Guidance, this emphasises at §§5.15-5.25 the duty under s 149 includes obtaining what it terms ‘equality evidence’. Of particular relevance are the following passages (emphasis added):

5.15 In order to give proper consideration to the aims set out in the general duty, a relevant body *will need to have sufficient evidence of the impact its policies and practices are having, or are likely to have, on people with different protected characteristics*. Such information is referred to in this guidance as equality evidence.

...

5.17 *Adequate and accurate equality evidence, properly understood and analysed, is at the root of effective compliance with the general equality duty. Without it, a body subject to the duty would be unlikely to be able to have due regard to its aims.*

5.18 By ensuring it has a reliable evidence base a body subject to the duty will be better able to: understand the effect of its policies, practices and decisions; consider whether further research or engagement is necessary; *consider whether there are ways of mitigating any adverse impact identified*; *decide whether to modify or reconsider a policy, practice or decision*; identify equality priorities; for listed authorities this includes developing equality objectives; monitor their progress against these objectives.

5.19 *Monitoring the progress of policies and decisions will enable the body subject to the duty to address the continuing nature of the general equality duty.* It will need to decide *how to review progress proportionately so it is aware of circumstances which could require it to consider reviewing a current policy or decision.* For example, equality evidence could show that the community it serves has changed; the context in which the body operates has changed; or that the policy is having a potentially discriminatory effect in practice.

...

5.22 The requirement to have sufficient evidence *does not imply that a body subject to the duty needs, in every instance, to have hard statistical data.* A relevant body can also use more qualitative sources such as service user feedback. Where a body subject to the duty does not have sufficient information in-house it can also use external sources, for example information available from the Commission; local or national representative groups etc.

The decision in DMA: breach of s 149

138. In *DMA* (above, from paragraph 43), the claimants submitted that there had been a breach of s 149 because ‘there is a fundamental obstacle preventing the [SSHD] being able to have ‘due regard’ to [the s 149(1) aims] ... That follows from the simple failure to undertake any form of monitoring of disabled [individuals] accessing the system’: [311]. The judge observed, ‘In my judgment, this goes to the heart of things’. He then cited the passage from *Brown*, [85] at [313]. At [320] he stated that in a s 149 context ‘monitoring’ had two purposes (emphasis added):

320. ... First, to identify and resolve the problem where accommodation, that the Secretary of State has accepted through her officials there is a duty to provide to an individual, is not being provided. *Second, to see whether the system is working and where it is not, to help in the identification of solutions.* Where a system for section 4(2) accommodation will take longer for a person with a disability than a person without, the system requires examination to understand why and, where appropriate, to address the position.

139. The judge then considered, but rejected, the SSHD’s argument that the problems in the system were practical ones which could be readily detected (emphasis added):

324. The difficulty with this argument is that the problems, and their impact on those with a disability, cannot in fact be readily detected because there is no monitoring (*including collection of data and evaluation*) that would enable that.

140. He went on to find at [325] there had been a breach of s 149 because of the failure to monitor the provision of section 4(2) accommodation to disabled persons:

325. ... I have no alternative but to find that the Secretary of State is in breach of the public sector equality duty in failing, once she has reached a decision that she has a duty to accommodate under section 4(2) of the 1999 Act, to monitor the provision of that section 4(2) accommodation to individual who have a disability. In this respect the Secretary of State has not, in the exercise of her functions, had due regard to the need to eliminate discrimination and to the need to advance equality of opportunity between persons who share the protected characteristic of disability and persons who do not share it.

141. The judge made a declaration to that effect at [333(3)].

142. *DMA* has since been endorsed by Fordham J in the context of the provision of DA to PNMA in *SA*, [5]: ‘The Home Secretary therefore has an important duty to monitor provision of accommodation (see *DMA*)’.

Academic issue?

143. Notwithstanding my conclusions on the systemic challenge grounds, I do consider there to be sufficiently exceptional reasons to determine Ground 6 (the PSED Ground), notwithstanding it is otherwise academic so far as concerns the Claimant. I have heard full argument, I am invited by the SSHD to resolve the issue, it is clearly of sufficient public interest and it affects other cases. Crucially, by contrast with Grounds 2-4, Ground 6 does not require the Court to find that there are systemic flaws in the system of asylum support provision which will either (a) inevitably lead to breaches of individual duties in a material number of cases, (b) create a ‘real risk’ of breach of Article 3, or (c) will unlawfully discriminate against PNMA. As the passage quoted by the Court of Appeal in *Bridges* from *Equality Law* demonstrates (above, paragraph 133.ii)), the PSED involves a move away from ‘a fault-based scheme where legal liability rested only with those who could be shown to have committed one or other of the unlawful acts’. The court’s focus is on whether the public authority has discharged the PSED so as to meet the statutory objective to ‘*proactively consider altering its practices and structures.*’ While this does require some fact-finding, the exercise is not as fact-sensitive as that required for the systemic challenge grounds or the indirect discrimination ground in Grounds 2-4. The absence of any claim that the SSHD has or would breach any of the Claimant’s individual rights or has or would discriminate against her does not preclude consideration of

the PSED Ground. I am also satisfied that the Claimant has standing to bring this ground, essentially for the same reasons, and the SSHD did not argue otherwise.

Decision: the PSED Ground (Ground 6)

144. In my judgment, the SSHD is in breach of his duty under s 149(1)(b) for the following reasons.
145. ‘Pregnancy and maternity’ and ‘age’ are protected characteristics under s 149(7). As the *HNPDP Policy* explicitly acknowledges, PNMAAS and their infants have a need for DA that is not shared by, and suffer greater disadvantage as a result of delays in dispersal than, other asylum seekers and failed asylum seekers who do not share either protected characteristic. In order to discharge his duty ‘to have 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’ under s 149(1)(b) the SSHD needs to have due regard to the need to take steps to meet the differing needs of PNMAAS for DA (s 149(3)(a)) and how to minimise or remove the particular disadvantages that delays in dispersal cause them (s 149(3)(a)). This may include treating PNMAAS more favourably than other asylum seekers and failed asylum seekers (s 149(3)(a)) by, for example, prioritising them for dispersal: above, paragraph 133.iii).
146. The *HNPDP Policy* represents the primary means by which the SSHD seeks to achieve that objective. That policy was introduced in 2012. Prior to March 2020 there was relatively little need, in practice, to prioritise PNMAAS for dispersal given (a) the SSHD’s policy of issuing ITPs for all asylum support applicants immediately following determination of their substantive applications for s 95 or s 4(2) support, and (b) service providers could be expected to comply with those ITPs. As a result, all service users spent an average of only 35 days in IA before being moved to DA.
147. There has been a significant increase in delays in dispersal since the first Covid-19 pandemic lockdown in March 2020. The statistics that the SSHD collects show that delays in dispersal are endemic and have increased significantly: from an average of 35 days in March 2020 to 230 days in October 2023 (195 days for families with children under 3): above, paragraph 25.
148. Much of that delay arises from factors outside the SSHD’s control following the first Covid-19 pandemic lockdown. There are, however, a number of factors inherent in the AASC contract system and the SSHD’s operation of that system which make it more likely that delays will occur and that vulnerable groups, including PNMAAS, are affected by those delays: above, paragraphs 27-35. Some of these factors were identified in *DMA* in relation to disabled persons and I have found that they also affect PNMAAS. Two further, significant factors contributing to the increase in delays are the SSHD’s ‘light touch’ approach to enforcement and his policy change ‘decoupling’ the decision on eligibility from the issue of ITPs for dispersal: above, paragraphs 31-32. Moreover, in the absence of statistical data monitoring the SSHD lacks the means of knowing how vulnerable persons are affected by such delays, whether he is discharging his duties towards

them or whether the *HNPD Policy* (and, now, the *Vulnerability Log SOP*) are operating as intended: above, paragraph 35.

149. PNMAAS have been disproportionately adversely impacted by these delays compared to other asylum seekers and failed asylum seekers: above, from paragraph 36. This conclusion is consistent with the *HNPD Policy* and is supported by independent reports of interested bodies, including the ICIBI, which the SSHD has accepted. Given this evidence, and in the light of the judgment of Knowles J in *DMA*, the SSHD was obliged proactively to consider whether the *HNPD Policy* was sufficient to achieve its s 149(1)(b) objective or whether he needs to change any practice or policy, the PSSED being a continuing duty: above, paragraphs 133.v).
150. The due regard duty in this context – including to consider the need for equality evidence - is particularly intense given the numbers of those affected and the significant impact upon PNMAAS caused by the lengthy delays in dispersal: see above, paragraphs 132, 133.vii).
151. The SSHD has accepted the need to reconsider his policy as he has taken steps to address these delays as they affect vulnerable groups, in particular by the introduction of the *Vulnerability Log SOP*. However, while that initiative allows for the monitoring of individual cases to ensure compliance with the duties under the 1999 Act and the *HNPD Policy*, it does not involve statistical data monitoring in relation to PNMAAS: above, paragraph 56.
152. Knowles J in *DMA* identified statistical data monitoring as a legal requirement to comply with s 149(1) in the context of the provision of IA under s 4(2) to disabled failed asylum-seekers: above, paragraph 138-141. That conclusion was endorsed by Fordham J in *SA* in relation to PNMAAS: above, paragraph 142. Unless those cases can be distinguished I should follow them as a matter of judicial comity: *R v Greater Manchester Coroner ex p Tal* [1985] QB 67, 81A-B, *per* Goff LJ; *Huddersfield Police Authority v. Watson* [1947] KB 842, 848, *per* Lord Goddard C.J. In my judgment they cannot be distinguished in any of the ways suggested by Mr. Manknell:
 - i) Mr. Manknell argued that statistical data monitoring lacked the same utility in the present context as it had in *DMA*. Data concerning the length of delays in the provision of accommodation to failed asylum seekers under s 4(2) is useful because evidence of significant delays closely maps onto breaches of Article 3. Data concerning delays in the dispersal of PNMAAS lacks such utility because evidence of significant delays does not demonstrate breach of any duty, because whether there is a breach is highly fact-specific. I reject that argument for two reasons. First, evidence of delays in the dispersal of PNMAAS is plainly relevant to the discharge of the SSHD's duty under s 149(1)(b) for the reasons given in *DMA*, [239] and [320] and as I have outlined above, in particular to detect trends and the effectiveness of the SSHD's own policies, materially the *HNPD Policy* and the *Vulnerability Log SOP*. Second, it is contradicted by the SSHD's own evidence. The minutes of the Maternal Health Sub-Group highlight the need to collect and monitor statistical data concerning PNMAAS. For example, on 24 September 2021 'PB', wanted 'to raise with the data sub-

group lead the identification on HO systems or recording of vulnerability information and to develop a meaningful dashboard to assess the health of the system in relation to maternal health'. On 17 November 2021 'AW', the 'Data Hub Lead' explained 'the IT limitations in this space', in response to which 'RR' 'queried how success from the policy review would be tracked in the absence of relevant data'. I also note the undertakings given by the relevant Minister and by Mr. Kingham to introduce statistical data monitoring: above, paragraph 56. Although such monitoring has not been introduced, it is evident that the SSHD has previously accepted that such monitoring has a utility in the present context.

- ii) Mr. Manknell also argued *DMA* could be distinguished on the basis that it was concerned with actual or imminent breaches of Article 3 when the present case is not. I agree that the passages in *DMA* referred to by Mr. Manknell at [144, 151, 183, 239, 243(1), 329] all emphasise the specific context of an imminent breach of Article 3 where accommodation is not provided to homeless failed asylum-seekers. That is a context that imposes a particularly weighty duty to have 'due regard' to the equality objectives in s 149. But so does the present context. The impact on PNMA's and their unborn and new-born children of long term accommodation in IA is very grave, given the numbers involved, the evidence of risks to maternal health during pregnancy and the adverse impacts on the physical and mental health of mothers and young children of being accommodated for long periods in IA.
 - iii) Mr. Manknell also seeks to distinguish *DMA* on the basis that neither individual monitoring nor statistical data monitoring were being carried out at the time of *DMA*, whereas individual monitoring has now been introduced by the *Vulnerability Log SOP*. His premise is that individual monitoring was considered more important than statistical data monitoring in *DMA*: 8 of the 10 features of a monitoring system identified in *DMA* at [243] were concerned with individual monitoring, only two (numbers (8) and (10)) involved statistical data monitoring. From this premise he makes the submission that the absence of statistical data monitoring *alone* is not unlawful. However, I do not accept the premise or the submission: as Knowles J made clear at [320] and [324], *both* individual monitoring and statistical data monitoring are necessary to the discharge of the s 149 duty, and there is nothing to suggest that he did not consider them to be equally relevant.
153. Accordingly, I conclude that *DMA* cannot be distinguished in so far as it identifies a duty under s 149 EA 2010 to collect and monitor statistical data relating to the allocation of asylum accommodation to vulnerable service users and I should follow it. As for Fordham J's endorsement of the 'duty to monitor' in *SA*, Mr. Manknell submitted that was given without the benefit of any argument that *DMA* was distinguishable. That is true, but I have rejected the distinctions that the SSHD seeks to make so Fordham J's endorsement adds to the weight I give to Knowles J's conclusions in *DMA*.

154. Furthermore, in my judgment the SSHD has failed to have due regard to the need to collect and monitor statistical data in order to achieve the equality aim in s 149(1)(b), for three reasons.

- i) There is no evidence that the SSHD has given active consideration to whether statistical data monitoring is necessary for the discharge of his s 149(1)(b) duty. In particular, there is no evidence that he has considered the guidance on obtaining equality evidence in the EHRC Guidance or whether it was necessary to obtain ‘hard statistical data’: §5.22 of the EHRC Guidance set out at paragraph 137, above. Although §5.22 stipulates that the collection of such data is not required ‘*in every instance*’, by necessary implication it is necessary in some cases. The SSHD simply has not grappled with the question whether it is necessary in this case. He has not addressed the EHRC Guidance either in form or substance. The EHRC Guidance is a mandatory relevant consideration and failure to take it into account, at least in substance, without good reason is itself evidence of a breach of s 149: above, paragraph 132. In any event, I find that the failure to take the EHRC Guidance into account, in the absence of any explanation, is *Wednesbury* unreasonable: above, *ibid*.
- ii) Following Knowles J’s judgment the SSHD undertook to introduce a system of statistical data monitoring of persons with vulnerabilities and, during the course of these proceedings, undertook to introduce such a system for PNMA: above, paragraph 57. It is evident that the SSHD, and the experts advising him, considered such statistical data monitoring is likely to assist him in discharging his statutory duties: above, paragraph 58. The SSHD’s position, as set out in Mr. Kingham’s last statement, is that there are now no plans to introduce such monitoring: above, paragraph 59. He has therefore decided not to honour his undertakings, but without evidence to explain why: above, paragraph 59.
- iii) There is a particular need for statistical data monitoring in the present context. Equality evidence, including ‘hard statistical data’ is at ‘the root of effective compliance with the general equality duty’: EHRC Guidance, §5.17, §5.22. Statistical data is the ‘key means by which to identify and correct failure and to inform change’ and ‘the foundation of ensuring that [his] duty is met’: *DMA*, [238-9]. Without statistical data the SSHD cannot detect trends or assess whether the *HNPDP Policy* or, now, the *Vulnerability Log SOP* are having their intended effect of prioritising PNMA for dispersal: *DMA*, [243]. He cannot ‘see whether the system is working and where it is not, to help in the identification of solutions’: *DMA*, [320]. He therefore cannot ‘proactively consider altering [his] practices and structures’, contrary to the statutory purpose of s 149 identified in *Bridges*, [176, 178] and §2.31 (above, paragraph 133.vi) and §5.18 of the EHRC Guidance (above, paragraph 137), namely to ‘consider whether there are ways of mitigating any adverse impact identified’ and ‘decide whether to modify or reconsider a policy, practice or decision’. This is of particular relevance here because, as Knowles J found, the economic incentives under the contract are such that the provision of accommodation for individuals with a vulnerability (in that case, those with a disability, but I have found

this impacts equally upon PNMAS, above paragraph 33), are ‘less profitable for the provider (and even unprofitable) but there is no monitoring to see whether those incentives are having a negative impact and to allow that to be addressed’: *DMA*, [302]. The issue remains, as in *DMA*, that ‘the problems, and their impact on those with a disability’ – and, I would add, on PNMAS – ‘cannot in fact be readily detected because there is no monitoring (*including collection of data and evaluation*) that would enable that’: [324] (emphasis added).

155. That does not mean that statistical data must always be collected by a public authority in order to discharge the PSED. In all cases, however, they must *consider* what equality evidence they need to collect; in some cases, that will require ‘hard statistical data’, and this is such a case.
156. The mere fact that the SSHD has completed a Policy Equality Statement (‘PES’) does not discharge this aspect of the s 149 duty: above, paragraph 133.x). Whether it is necessary to obtain equality evidence, in particular statistical data, in relation to PNMAS is not considered in the PES either in its original form (March 2019) or its revised form (September 2020): see above, paragraph 133.x), which contain no mention of the EHRC Guidance. The PES makes no reference to the need to prioritise PNMAS for dispersal under the *HNPD Policy*. The updated version makes no mention of the impact of the Covid-19 pandemic and the SSHD’s ‘Everybody in’ policy, the logjam in dispersals to DA, the consequent policy decision to ‘decouple’ the process of making ITPs once eligibility is determined and the significant rise in the delays in dispersal of PNMAS from IA. The PES does not evidence any regard has been had to the need to obtain equality evidence to determine how those delays impact on those with protected characteristics, in particular PNMAS, or whether existing policies are adequate to address that impact. Moreover, the PES has not been updated since September 2020, notwithstanding it states on its face that reviews should take place annually. Accordingly, it has not taken into account crucial further developments such as the ICIBI report.
157. In the light of all these factors, I am driven to the conclusion that the SSHD is in breach of the PSED in failing, once he has reached a decision that he has a duty to accommodate under s 4(2), s 98 or s 95 of the 1999 Act, to collect statistical data on the provision of that accommodation to PNMAS and to monitor that data to determine: the number of PNMAS requiring accommodation under the 1999 Act; the number and proportion of PNMAS who are dispersed from IA to DA before the beginning of their ‘protected period’; the average period between the UKVI’s decision on eligibility for s 95 or s 4(2) accommodation and the making of an ITP for DA in relation to PNMAS; the average period between the making of an ITP for DA and dispersal by the service provider in relation to PNMAS; and the average period between the grant of IA and dispersal of PNMAS. Without such information he cannot discharge – and is therefore in breach of – his continuing duty under s 149(1)(b) to have due regard to the need to advance equality of opportunity between PNMAS and their infants, who share the protected characteristics of pregnancy and maternity and age, and persons who do not share those characteristics.
158. The claim is therefore allowed on Ground 6.

Discussion: s 55(1) BCIA children's welfare duty (Ground 5)

159. Ground 5 avers that the SSHD is also in breach of his duty to consider the best interests of children as a primary consideration under s 55 BCIA on the two bases alleged, namely the lack of (a) evidence as to how contractual service providers discharge the duty; and (b) statistical data monitoring: see above, paragraph 66. For the reasons that follow this ground is dismissed.

Legal framework relevant to s 55 BCIA

160. Section 55 imposes a positive duty on the Secretary of State in the following terms, under the heading 'Duty regarding the welfare of children':

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

(2) The functions referred to in subsection (1) are (a) any function of the Secretary of State in relation to immigration, asylum or nationality; (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer; (c) any general customs function of the Secretary of State; (d) any customs function conferred on a designated customs official.

161. The meaning and effect of s 55 has been considered by the Supreme Court in a number of cases, including *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690 and *R (MM (Lebanon)) v Secretary of State for the Home Department (Children's Comr intervening)* [2017] 1 WLR 771. The provision imposes a similar duty to that owed by other public bodies (local authorities, NHS trusts, police forces, prison governors) in the discharge of their functions in s 11(2) Children Act 2004 which has also been authoritatively considered, notably in *Nzolameso v Westminster City Council* (SC(E)) [2015] PTSR 549.
162. There is no dispute that the SSHD's asylum support functions under the 1999 Act are 'functions' within the meaning of s 55(2) and that the duty therefore applies in the present context.
163. The relevant legal principles relating to s 55 were summarised by the Court of Appeal in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2021] 1 WLR 3049 at [70]. The following summary is taken from that paragraph unless otherwise indicated.
- i) Section 55 was enacted to give effect in domestic law, as regards immigration and nationality, to the UK's international obligations under

article 3 of the 1989 United Nations Convention on the Rights of the Child ('UNCRC'): [70(i)].

- ii) The duty applies not only to the making of decisions in individual cases but also to the function of making subordinate legislation and rules, and the giving of guidance: [70(iii)].
- iii) 'The best interests of the child are a primary consideration, not the primary consideration, still less the paramount consideration or a trump card. This does, however, mean that no other consideration is inherently more significant than the best interests of the child. The question to be addressed, if the best interests point to one conclusion, is whether the force of other considerations outweigh it': [70(iv)].
- iv) 'This in turns means that Secretary of State must identify and consider the best interests of the child or, in a case such as the present, of children more generally and must weigh those interests against countervailing considerations': [70(v)].
- v) Section 55 is a 'process duty and does not dictate any particular outcome in a case': *R (FA) v SSHD (CA)* [2021] 4 WLR 22, [71].

Academic issue?

164. I consider it is appropriate substantively to resolve Ground 5 notwithstanding it is otherwise of academic interest to the Claimant for the same reasons I have given in relation to Ground 6 at paragraph 143, above. In particular, as with s 149 EA 2010, a challenge under s 55 BCIA does not depend on any finding of breach or anticipated breach of individual duties. There is therefore not the same need for a firm factual framework in relation to a specific individual or individuals as there is for Grounds 2-4.

Decision: the s 55 Ground (Ground 5)

165. This ground is nevertheless dismissed on both the bases advanced.

Lack of evidence as to how contractual service providers discharge the duty

166. The Claimant avers that 'no evidence has been provided as to how service providers actively consider the duty as part of their contractual duties' save a bare reference to s 55(1) which only pays 'lip service' to the duty. In my judgment this aspect of the complaint is not made out. The AASC contract obliges service providers to discharge the s 55(1) duty both in form and substance. §1.1.3 of Sch. 2 states that providers 'shall comply with the duties imposed on them by section s 55(1) ... and the children's duty to safeguard children from harm and promote their welfare'. §1.2.3.4 requires them to ensure their staff are aware of the s 55(1) duty and the need to take into account the SSHD's guidance on the duty. §4.1.3(d) states that service providers must allocate accommodation with due regard to its duties under s 55. Other contractual provisions which discharge the duty in substance are set out in the Annex to this judgment. The PES refers to the s 55(1) duty and references contractual duties that will ensure, for example,

‘that the provider accommodates families with children of school age in DA which allows them easy access to school places’ and ‘baby-specific items’ are to be provided. Further evidence for the discharge of the s 55(1) duty includes the subsistence payments paid in respect of children, the *HNPD Policy* (which service providers are obliged to comply with) and the *Vulnerability Log SOP*.

167. As Chamberlain J observed in *R. (Kent CC) v Secretary of State for the Home Department* [2023] EWHC 3030 (Admin), [36], the s 55(1) duty ‘is not breached simply because (in the view of the court) the relevant functions could have been exercised in a way which better safeguards and promotes the welfare of children’; the question for the court is ‘whether the Home Secretary made arrangements for ensuring that, when the functions were exercised, the persons exercising them had regard to the specified need.’ In this case, the documents recording the SSHD’s decision-making in relation to the provision of asylum support in the PES, the AASC contract, the *HNPD Policy* and the *Vulnerability Log SOP* shows that the relevant decision-makers thought that what they were doing was sufficient to safeguard and promote the welfare of children. There is, therefore, no evidence to support a breach of s. 55 BCIA.

Lack of statistical data monitoring to enable the duty to be discharged

168. This part of the complaint has the same or a similar factual premise as that under Ground 6, namely that the SSHD cannot discharge the s 55(1) duty ‘without collecting and monitoring data on how children are impacted by the system he operates’. I was referred to no authority for the proposition that the proper discharge of s 55(1) requires the SSHD to obtain adequate information. I would accept that he is under the ordinary *Tameside* duty to gather information that he reasonably considers necessary relevant to the discharge of this duty. Whether that duty has the intensity and granularity of the duty to obtain information under s 149 EA 2010, as amplified by the EHRC Guidance, I do not need to decide. Even if such a duty does exist, I reject the complaint. That is for three reasons. First, the SSHD does collect statistical data concerning children, including the numbers of unaccompanied child asylum-seekers (who are not the focus of these proceedings) and females with infants under the age of 3. Mr. Hennigan’s third statement explains that on any given day there are approximately 1200 supported women in contingency IA with infants under the age of 3, which is why it is possible to calculate the average number of days they have spent in such accommodation (195, although the figures are ‘volatile’). Second, the Claimant does not explain the necessary link between the need for statistical data on children and the discharge of the s 55(1) duty. There is no equivalent to the link between statistical data on PNMA and the discharge of the SSHD’s duty to prioritise PNMA for dispersal under the *HNPD Policy*, which underpins the necessity for collecting such data under s 149(1) for the reasons I have explained at paragraphs 125-157 above. Third, to the extent the purpose of collecting such information is the same as that which underpins the duty to do so in relation to PNMA under s 149(1), namely to protect the welfare of unborn and newly born infants, the invocation of s 55(1) is unnecessary and duplicative given my conclusions under s 149(1).

169. Accordingly, I dismiss Ground 5.

Conclusion

170. For the reasons I have given:

- i) Grounds 2 to 5 are dismissed.
- ii) Ground 6 is allowed.

Consequential matters including relief

171. A copy of the judgment was circulated to the parties in draft on 1 March 2024 inviting them to propose corrections, to agree a form of order and to provide brief written submissions on any issues of relief upon which they could not agree. The final version of the judgment has taken into account the comments and submissions made by counsel and contains further changes that I have considered it appropriate to make by way of clarification in accordance with CPR Part 40 and *R (Mohamed) v Foreign Secretary (No 2)* (CA) [2011] Q.B. 218, p. 315, [3]. These changes do not affect my conclusions or the outcome in any way.
172. In view of my draft judgment the parties agreed that a declaration should be made that the SSHD has failed to comply with his duties under s 149 EA 2010 concerning the allocation of accommodation under the 1999 Act in regard to PNMAS. For the reasons I have given I make that declaration. Agreement was also reached that the SSHD will pay 60% of the Claimant's reasonable costs of the claims from 8 July 2022, to be assessed if not agreed. I so order.
173. A dispute arose as to whether a mandatory order should also be made compelling the SSHD to introduce a suitable system for statistical data monitoring within a specific timetable. The Claimant averred this was necessary in view of the SSHD's failure to introduce such a system following the decision in *DMA* and the fact the SSHD has rowed back from his undertakings to introduce such monitoring at an earlier stage in the proceedings. The SSHD opposed such an order on the basis that the duty identified by the Court may be met in a number of ways and a mandatory order would impose an unjustified fetter on the SSHD's freedom to discharge his public functions in the public interest, citing Lord Sales' judgment in *Imam*, [44, 64].
174. In my judgment a mandatory order is necessary in this case. A declaration is usually a sufficient public law remedy where unlawfulness has been demonstrated. Although a declaration has no coercive effect, it is binding on the parties and as a matter of constitutional convention the executive may be expected to comply with its terms: see *R (National Council for Civil Liberties) v. SSHD* (DC) [2019] QB 481, [51-53] per Singh LJ and the cases cited in Sir Michael Fordham's *Judicial Review Handbook* (7th ed.), §10.1.16. In the present case, however, the SSHD has not remedied the unlawfulness declared by Knowles J in *DMA* to have occurred in relation to disabled people, namely a lack of statistical data monitoring (what he termed the 'collection of data and evaluation' [324]) in order to 'see whether the system is working and where it is not, to help in the identification of solutions': [320]. The SSHD has also resiled, without explanation, from an undertaking to this court to introduce such monitoring in relation to PNMAS: above, paragraph 59. In those circumstances a mandatory

order should be made. The terms of that order reflect my conclusion in paragraph 157, above, and read:

The Secretary of State, once he has reached a decision that he has a duty to accommodate under s 4(2), s 98 or s 95 of the 1999 Act, shall collect statistical data on the provision of that accommodation to PNMAS and shall monitor that data to determine: the number of PNMAS requiring accommodation under the 1999 Act; the number and proportion of PNMAS who are dispersed from initial accommodation to dispersal accommodation before the beginning of their ‘protected period’; the average period between the UKVI’s decision on eligibility for s 95 or s 4(2) accommodation and the making of an instruction to provider (‘ITP’) for dispersal accommodation in relation to PNMAS; the average period between the making of an ITP for dispersal accommodation and dispersal by the service provider in relation to PNMAS; and the average period spent by PNMAS in initial accommodation before dispersal.

175. This order sets out the minimum requirements necessary to ensure the fulfilment of the SSHD’s duty under s 149(1)(b). The order imposes no fetter on the means by which the SSHD is to collect and monitor that data which are entirely a matter for him and his officials. I do not consider it appropriate to impose any deadline by which such a system must be introduced which will depend on many factors outside the knowledge of this Court. The SSHD may be expected to introduce such a system as soon as it is reasonably practicable.

Anonymity

176. The Claimant was made the subject of an anonymity order preventing the publication of any details leading to her or her child’s identification under CPR 39.2(4) by UTJ Allen on 10 August 2021. The proceedings are now concluded. Given that no reasoned decision was given for the original order and the potential public interest in the outcome of this claim, it is appropriate to reconsider whether such an order should be made on a final basis without limit of time in the court’s inherent jurisdiction by making an order under CPR 39.2(4) or s 11 Contempt of Court Act 1981 (‘CCA’) or both. The Claimant submits I should make an anonymity order without limit of time. The SSHD is neutral. No objection has been made by the media. However, the absence of any objection from a party or the media does not relieve the court of the duty to consider whether a derogation from the principle of open justice is necessary: *X v Dartford and Gravesham NHS Trust* (CA) [2015] 1 WLR 3648, [26].
177. An anonymity order is a restriction on media reporting which operates *contra mundum* with potentially draconian penalties for breach. It is therefore appropriate for the court to invite submissions from the parties before, and to give a short judgment when, making such an order: *X v Dartford and Gravesham NHS Trust*, [35]. Generally it is good practice for the media also to be given an opportunity to make representations before an order is made *contra mundum*: see e.g. *R (Warandi) v Westminster Magistrates’ Court* [2023] 2 Cr. App. R. 15, [69]. I do not consider that to be necessary in this case as the anonymity order has been

in place for over 2 ½ years without any expression of media interest. This is a case where it is sufficient that, pursuant to CPR 39.2(5), ‘a copy of the court’s order shall be published on the website of the Judiciary of England and Wales’ and ‘[a]ny person who is not a party to the proceedings may apply ... to set aside or vary the order’: see *Executor of HRH Prince Philip, Duke of Edinburgh (Deceased) v Attorney General (CA)* [2023] 1 WLR 1193, [18] per Vos MR.

178. CPR 39.2(4) provides:

The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.

179. Section 11 CCA provides:

In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.

180. The relevant principles for the Court to apply when determining an anonymity application are these:

- i) ‘The starting point is the common law principle of open justice’ as stated in *Scott v Scott* [1913] A.C. 417; *Warandi*, [43(1)]. As a rule, ‘[t]he public has a right to know, not only what is going on in our courts, but also who the principal actors are’: *R. (C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] UKSC 2; [2016] 1 W.L.R. 444 at [36] (Baroness Hale). Other legal principles falling within the open justice principle are the right to a ‘public hearing’ under Article 6 ECHR and the common law and Article 10 rights of freedom of expression, to which the Court is to have ‘particular regard’ by virtue of s 12(4) HRA.
- ii) Any derogation from the open justice principle such as an anonymity order is only justified where this is necessary in pursuit of some legitimate aim: *Warandi*, [43(3)].
- iii) The legitimate aims which may justify derogation from the open justice principle include a person’s private life interests under Article 8 and, exceptionally, their rights under Articles 2 and 3 if publication risks more serious harm. The proper administration of justice may also justify a derogation, for example if anonymity is necessary to enable a party or witness to effectively participate in legal proceedings: *XXX v Camden Borough Council (CA)* [2020] 4 WLR 165, [19-20].
- iv) There is a threshold question before derogation may be considered, namely whether publication would amount to an interference with a person’s legitimate interests. Where Article 8 is invoked, that requires proof that the

effects would attain a ‘certain level of seriousness’ which requires ‘clear and cogent evidence’: *Warandi*, [43(4, 6)].

- v) The next stage is to conduct the balancing exercise between the open justice principle and the legitimate aim relied upon to justify derogating from that principle by reference to the particular facts of the case: *Warandi*, [43(5)].
 - vi) Having carried out the balancing exercise the Court addresses the ultimate question of whether a derogation from the open justice principle is a *necessary* and *proportionate* means of achieving the legitimate aim relied upon. Under CPR 39(2)(4) the question is whether ‘non-disclosure is *necessary* to secure the proper administration of justice and in order to protect the interests of that party or witness’: *XXX v Camden Borough Council* (CA) [2020] 4 WLR 165, [19-20]. Under s 11 CCA the question is whether an anonymity order is *necessary* for the purpose that justified the court from withholding the information from the public in the first place (here, as a result of UTJ Allen’s order of 10 August 2021).
181. In the present case the Claimant maintains that anonymity is necessary to protect her and her child’s Article 8 rights. Identification of the Claimant will lead inevitably to the identification of her child, the interests of whom carry particular weight. Each of them may be exposed to hostility due to their status as asylum-seekers and their involvement in the case. The Claimant has an outstanding fresh claim for asylum and is at risk on return to her country of origin if identified and ultimately returned.
182. On the other hand, there is a clear public interest in publication of the subject matter of the claim. However, that public interest may be satisfied without the need to identify the Claimant or her child. While in some cases the public interest in media reporting cannot be served without publication of an individual’s name (see *Re. Guardian News and Media Ltd* [2010] 2 AC 697, [63-76]), this is not such a case. The Claimant is not accused of any wrongdoing. While she brought the case in the first instance for her own benefit, she achieved her objective over two years ago and the claim has only continued to trial because it raises issues of wider public importance as it concerns the treatment of PNMAS more widely. The issues raised by the claim may be reported upon, understood and discussed without the Claimant’s name also being known.
183. I am satisfied that the publication of the Claimant’s name would constitute an interference with the Article 8 rights of both the Claimant and her daughter. Those interests outweigh the public interest in naming the Claimant in these proceedings. Open justice in this case can be met sufficiently by publication of this anonymised judgment. I am satisfied that an anonymity order both under CPR 39.2(4) and s 11 CCA without limit of time is a necessary and proportionate derogation from the open justice principle in order to protect the Claimants and her child’s Article 8 rights.

Annex: Relevant provisions of the AASC contract applying to PNMAAS

184. AASC, Sch. 2 ('Statement of Requirements') makes detailed provision as regards, among others: the services an accommodation provider must provide in IA as part of a 'full board' service, including to PNMAAS; dispersal; identifying and meeting needs of service users with specific needs or who are at risk; establishing co-operation with other support organisations; the standard of accommodation to be provided; mechanisms for feedback and complaints by service users, and maintaining records. Relevant provisions of Schedule 2 for present purposes include the following:

- i) §1.1.1: a service provider 'shall ensure that it complies with all relevant mandatory and statutory requirements and the Authority's rules, guidance, instructions and policies' ('Relevant Law') and that where there is any conflict between the requirements of the Schedule and Relevant Law then the latter shall prevail. The wording of the provision is clearly broad enough to include the *HNPD Policy* although it is not expressly mentioned.
- ii) §2.3.5: where IA is provided on a 'full board' basis, the provider must also provide the services defined in para 4.1.4, including, (i) food and drink, specifically: three daily meals, a beverage service with each meal, 'a food service for babies and small children' enabling 'babies and small children to be fed whenever necessary', options which cater for special dietary, cultural or religious requirements, and additional food/meals 'as required to meet the nutritional needs of Service Users for whom three daily meals may be insufficient.' The provider must ensure that 'each varied menu is validated by a suitably qualified nutritionist or health professional as being appropriate to the dietary needs of Service Users'; (ii) additional support items, including 'baby care equipment and disposable nappies' and 'personal toiletries and feminine hygiene products.'
- iii) §2.3.6: 'the full board service shall comprise complete and adequate provisions for pregnant women, nursing mothers, babies and young children, for whom three daily meals may not be sufficient, and people who need special diets...'
- iv) Annex A: relates to dispersal and states, inter alia, that: 'The Authority expects that the substantial majority of dispersals shall take place within fourteen (14) Calendar Days of the Provider receiving the relevant ITP. The Authority may, however, at its discretion; set out in the ITP that dispersal shall take place within a specified number of Calendar Days which may be fewer than within fourteen (14) Calendar Days of the Provider receiving the relevant ITP.'
- v) Annex B: the service provider must ensure that 'all Accommodation used to accommodate Service Users under this Contract at all times meets the required standards set out in Schedule 2' as well as any statutory housing standards applicable in the contract region and licensable accommodation has been licensed (§B.1.2-B.1.4). The accommodation provided must be 'safe', 'habitable' and 'fit for purpose' (B.1. See also paras §§1.1.2 and 2.1.1). There is then detailed stipulation in Annex B regarding the required

standard as regards each of these. Section B.12 – under the heading ‘Fit out Appropriate to Full Board accommodation’ – states that the provider ‘shall provide, where applicable, childcare equipment including cots and high chairs, and ensure that sterilisation equipment is available for children under the age of one year’ (§B.12.2).

- vi) Annex C: contains criteria for the sharing of accommodation and states, inter alia, that the provider must not accommodate certain service users, including pregnant women who are within six weeks of their due date, in the same sleeping quarters with other unrelated adults (§C.1.7.2). §C.2.6 prohibits the relocation of a pregnant service user during the protected period (6 weeks before due date and six weeks after birth) unless relocation is necessary to assure the safety and wellbeing of the service user or their unborn child.
- vii) Annex D and para 4.4.6 state that the accommodation must provide direct support to service users in obvious and urgent need of medical care, including ‘pregnancy complications, including but not limited to, labour pains.’ D.1.6.5 requires the service provider to assist a pregnant service user in registering with a GP.
- viii) Annex G. UKVI will notify a service provider and provide instructions on any specific accommodation or support requirements the provider is to provide to meet the needs of the service user (§G.4) and the service provider must be ‘proactive in monitoring and identifying service users with specific needs’ (§G.5).