



Neutral Citation Number: [2021] EWHC 1690 (Admin)

Case No: CO/1613/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2021

Before:

MR JUSTICE CHAMBERLAIN

Between:

THE QUEEN
on the application of
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Claimant

- and -

FIRST-TIER TRIBUNAL (SOCIAL
ENTITLEMENT CHAMBER)

Defendant

- and -

AM, HO, MP, MC and MT

Interested
parties

ALAN PAYNE QC, JACK ANDERSON, SAARA IDELBI and HAFSAH MASOOD
(instructed by Government Legal Department) for the Claimant
SIMON COX, DANIEL CLARKE, and DONNCHADH GREENE (instructed by Deighton
Pierce Glynn and Greater Manchester Law Centre) for HO, MP, MC and MT

Hearing dates: 10-11 June 2021

Approved Judgment

Mr Justice Chamberlain:

Introduction

- 1 In this case, the claimant is the Home Secretary (“the Secretary of State”). She invokes the judicial review jurisdiction of the High Court to challenge a tribunal decision made on 26 April 2021, which she submits was wrong in law.
- 2 The decision was made by Principal Judge S.H. Storey (“the Principal Judge”) in the First-tier Tribunal (Social Entitlement Chamber – Asylum Support), previously known as the Asylum Support Tribunal. I will refer to the Tribunal as the “AST”.
- 3 The decision concerned AM, a 29-year old national of Afghanistan who is a “failed asylum-seeker”, i.e. a person whose asylum claim has been rejected and whose appeal rights are exhausted. When he made his application, AM said that he was street homeless and therefore “destitute”. There was nothing stopping him from leaving the United Kingdom, with help if necessary, but he had taken no steps to do so. Nor, however, had the Secretary of State taken any steps to remove him.
- 4 AM relied on expert evidence about the risks posed by the COVID-19 pandemic to those who are street homeless or forced to live in overcrowded conditions. It was submitted that members of the public were also at risk of contracting COVID-19 from homeless destitute failed asylum-seekers.
- 5 The Principal Judge decided that, in the light of these risks, the Secretary of State was legally obliged to continue to provide accommodation for AM until step 4 on the Government’s *Roadmap out of lockdown* (“the Roadmap”) is reached, when the remaining legal restrictions imposed to tackle the COVID-19 pandemic are to be lifted. At the time of her decision, that was anticipated to be on 21 June 2021, though the Government has recently announced that the date is to be put back to 19 July 2021.
- 6 The decision of the Principal Judge binds the Secretary of State in AM’s case. Because it was designated as a “lead case” under the AST’s rules, it was also binding on 41 other cases which were stayed behind it, unless the parties in those cases applied for a direction to the contrary. All of these cases have since been determined against the Secretary of State. The decision has been followed by AST judges in other cases too.
- 7 If the Principal Judge’s reasoning is correct, the health risks associated with the pandemic are such that the Secretary of State is legally required to provide accommodation and support not only to AM, but also to all destitute failed asylum-seekers, until step 4 on the Roadmap is reached. The Secretary of State has brought this claim to challenge that reasoning.
- 8 The Secretary of State submits that the Principal Judge’s reasoning was wrong for these reasons:
 - (a) Article 8 of the European Convention on Human Rights (“ECHR”) imposes no positive duty to accommodate all those who lack accommodation, whether generally or in the circumstances of the pandemic as they were at the time of the decision (Ground 1).

- (b) Even if there was a positive duty to take some steps to protect AM and other members of the public, the decision not to accommodate AM (and other failed asylum-seekers who choose not to leave the UK) was not a disproportionate interference with their rights under Article 8 (Ground 2).
 - (c) The refusal of support was not incompatible with Article 14 read with Article 8 (Ground 3).
 - (d) The Principal Judge misunderstood, or acted inconsistently with, one of her own previous decisions, made on 23 October 2021: *PA & MA* (Ground 4).
- 9 AM played no part in these proceedings. Four of the 41 individuals whose stayed claims were determined on the basis of the Principal Judge’s reasoning did, however, participate.
- 10 Directions were given for an expedited, rolled-up hearing, which took place on 10-11 June 2021, with the legal teams in court and others observing through a video-conferencing platform. I heard submissions for the Secretary of State from Alan Payne QC. In accordance with the usual practice, the AST was not represented. Submissions for the four interested parties were made by Simon Cox.

The Secretary of State’s powers and duties

- 11 The Immigration and Asylum Act 1999 (“the 1999 Act”) confers two relevant sets of powers on the Secretary of State.
- 12 First, s. 95 confers powers to provide or arrange for the provision of “support” to “asylum-seekers”, i.e. those who have made claims for asylum which have not been determined or whose appeals are outstanding. Support can include (*inter alia*) accommodation and provision of essential living needs: s. 96.
- 13 Second, s. 4 confers power to provide accommodation to failed asylum-seekers. Section 4(5) empowers the Secretary of State to make regulations specifying the “criteria” to be used in determining whether to provide or continue to provide accommodation. Section 4(10) authorises the making of regulations permitting a person provided with accommodation under s. 4 to be supplied with services or facilities of a specified kind.
- 14 The criteria are set out in reg. 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (SI 2005/930: “the Accommodation Regulations”). The failed asylum-seeker must be destitute. By virtue of reg. 2, which applies the definition in s. 95(3) of the 1999 Act, this means that:
- “(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”
- 15 In addition, he must satisfy one or more of the conditions in reg. 3(2), materially that:

“(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;

(b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;

(c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;

(d) he has made an application for judicial review of a decision in relation to his asylum claim... and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998...

(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person’s Convention rights, within the meaning of the Human Rights Act 1998.”

The provision of accommodation to asylum-seekers and failed asylum-seekers during the pandemic

Decisions to cease providing accommodation and support to those in receipt of it

- 16 The following facts are derived from witness statements from Simon Bentley and Philomena Creffield prepared in response to a claim for judicial review (CO/3986/2020) by QBB, another failed asylum-seeker. Mr Bentley works in the Asylum and Family Policy Unit at the Home Office and has lead responsibility for policy relating to support arrangements for asylum seekers and failed asylum seekers. Ms Creffield is a Deputy Director in the Resettlement, Asylum Support and Integration Directorate of the Home Office.
- 17 In March 2020, the Secretary of State decided that “in line with the government’s aim of ensuring people remained in their homes,” she would not require people to leave accommodation provided under s. 95 when their asylum claim or appeal was finally determined. She also decided that failed asylum-seekers in receipt of accommodation and support under s. 4 could remain in their accommodation “even though they may have ceased to be eligible to receive it”.
- 18 On 15 September 2020, the Secretary of State decided to resume decisions to cease to provide accommodation and support under ss. 4 and 95 to those who no longer qualified for it (“cessation decisions”).
- 19 Two failed asylum-seekers in respect of whom cessation decisions were made appealed to the AST. In a decision handed down on 23 October 2020 – *PA & MA* – the Principal Judge said this:

“47. In respect of the generality of cases, I am satisfied that for those who reside in Tier 1 or Tier 2 locations and who are appeal rights exhausted, it remains reasonable to require them to take steps to leave or place themselves in a position in which they are able to leave the UK. This includes contacting the Home Office

VRS [voluntary returns service] for help to facilitate their departure. Alternatively, they have the option to qualify for support by bringing themselves within other regulation 3(2) conditions.

48. However, it seems to me unreasonable to discontinue support to persons in receipt of section 4 support who reside in Tier 3 areas subject to very high alert. These areas are subject to the toughest restrictions with households banned from mixing indoors and outdoors, in hospitality venues or private gardens, and advised against travelling into or out of the area, much like the position in March 2020, when the respondent implemented her policy to safeguard the public and the communities in which they live. On that basis, I find that in areas now subject to very high alert and the same tough restrictions on movement, ending support to persons in receipt of section 4 support may again place them and others in their communities at greater risk of harm in breach of their Convention rights. That risk to health and wellbeing applies to everyone, whatever their immigration status. It cannot however, apply to PA and MA because at the date of decision (22/23 September 2020) and at the date of hearing (16 October 2020), their home towns were still in Tier 2 high alert areas.

49. Irrespective of whether such discontinuances would engage the high thresholds of Articles 2 and/or Article 3, they would certainly engage Article 8 in that any assessment of proportionality must have regard to the public interest, including public health considerations and in any assessment of proportionality the weight to be attached to such considerations would be very high.”

20 At [52], the Principal Judge said that she was satisfied that the Secretary of State’s policy of continuing to provide support had been lawfully withdrawn from PA and MA. At [53] she continued:

“It cannot, in my judgement, be right that a person who has remained unlawfully in the UK for 13 years, who has wilfully refused to mitigate the consequences of being left without accommodation by not taking all reasonable steps to leave the UK, can nevertheless require the Secretary of State to support him under the ECHR simply by refusing to leave.”

21 The Principal Judge noted that pre-action letters had been served threatening judicial review proceedings to challenge the withdrawal of the March 2020 policy. For that reason alone – and applying the reasoning in *R (NS) v First-tier Tribunal* [2009] EWHC 3819 (Admin) – she held that the provision of accommodation was necessary for the purpose of avoiding a breach of ECHR rights within the meaning of reg. 3(2)(e) of the Accommodation Regulations.

22 The Secretary of State never challenged that decision in judicial review proceedings.

23 On 30 October 2020, the resumption of cessation decisions was challenged in *R (QBB) v Secretary of State for the Home Department*. The main ground of challenge was that, by putting failed asylum-seekers on to the streets or forcing them to move in with others in overcrowded conditions, the policy would give rise to a risk to public health and so would be contrary to the human rights of members of the public.

- 24 On 2 November 2020, Fordham J granted an interim order restraining the Secretary of State from ceasing to provide accommodation and support to those already in receipt of it under s. 4 of the 1999 Act. Fordham J made directions for a hearing to decide whether this relief should be continued. The hearing never took place. On 11 November 2020, the Secretary of State adopted a new policy pursuant to which the continuing eligibility of failed asylum-seekers to accommodation under ss. 4 and 95 would not be reviewed for the time being. Fordham J’s order remained in force.
- 25 A new policy was finalised in March 2021. On 8 March 2021, the Government issued an equality impact assessment (“EIA”) in relation to this policy. It noted that a decision had been taken on 27 March 2020 temporarily to suspend cessation decisions. The practical consequences of this were said to be that:
- “1. Those supported under section 95 of the Immigration and Asylum Act 1999 but who were later refused asylum and had exhausted their appeal rights and had no children in their household, would not, contrary to normal practice, have their support discontinued after a notice period of 21 days. The group instead continued to receive support under section 4(2) of the 1999 Act.
2. No decisions were made to discontinue the support provided to anyone receiving it under section 4(2), including the group already supported under the provision as at 27 March 2020.”
- 26 This was a clear statement that those being accommodated from 27 March to 15 September 2020 and from 11 November 2020, were receiving support “under section 4(2) of the 1999 Act”.
- 27 On 1 April 2021, the Secretary of State issued a new policy to resume cessation decisions once step 2 in the Roadmap was reached (i.e. not before 12 April 2021). On 23 April 2021, Fordham J’s order was discharged and on 5 and 6 May 2021, Garnham J heard the rolled-up judicial review claims of QBB and three others. One of the issues was whether the Secretary of State had power to provide accommodation to failed asylum-seekers under s. 4(2) of the 1999 Act if none of the criteria in reg. 3 of the Accommodation Regulations was met. She submitted that she had no such power. On 6 May 2021, Garnham J asked her counsel under what power failed asylum-seekers had previously been accommodated. Her counsel could not answer that question, so Garnham J granted the Secretary of State’s application for an adjournment to enable an answer to be given.
- 28 The answer was never given. Instead, with effect from 14 May 2021, the Secretary of State withdrew the new policy and agreed not to resume cessation decisions until step 4 on the Roadmap was reached, which was then anticipated to be on 21 June 2021. The claims of QBB and three others were withdrawn.

Decisions to grant support under ss. 4 and 95

- 29 The position for those not already in receipt of accommodation and support was different. There was never any general policy to provide support to destitute failed asylum-seekers not in accommodation at the date of application.

- 30 *PA & MA* concerned individuals who had previously been in receipt of s. 4 support. However, the reasoning in it was applied by other AST judges in cases involving new applicants. In a series of decisions taken in January and February 2021, they applied the dicta in *PA & MA* and found that the refusal of support would be contrary to Article 8 ECHR given the lockdown restrictions applicable from January 2021, which, they observed, were more stringent than those in force in Tier 3 in the autumn of 2020.
- 31 This reasoning did not persuade the Secretary of State. She did not, however, challenge any of the AST’s decisions by bringing claims for judicial review. Instead, she continued to make decisions refusing applications for s. 4 support, forcing disappointed applicants to appeal. The appeals were obviously likely to succeed, but the Secretary of State did not concede them.
- 32 Under the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685: “the Procedure Rules”), the AST has a power to bar a respondent from taking part in the proceedings where it considers that there is no reasonable prospect of her case succeeding: see r. 8(3)(c) and (7). Before it does so, it must give the respondent a chance to make representations: r. 8(4). The AST repeatedly issued notices of intention to bar the Secretary of State from taking part on this ground. In the decision under challenge here, the Principal Judge recorded at [71] that the Secretary of State “has consistently failed to respond to Tribunal directions, to make timely submissions or request an oral hearing of an appeal when issued with notice of intention to bar her from taking further part in proceedings”.
- 33 Mr Payne pointed out that there had been attempts to engage with the tribunal, and requests to list oral hearings, in some cases. He did not, however, dispute that there had been failures to respond to AST directions in a substantial number of cases.
- 34 Because the AST has no jurisdiction to grant interim relief, the effect of this practice of non-engagement was that applicants for s. 4 support whose appeals were obviously likely to succeed were left without support for several weeks, in winter and early spring 2021, while their appeals were considered. Some of these are likely to have been street homeless.
- 35 This gave rise to judicial review proceedings challenging the difference in treatment between those already in receipt of s. 4 support and those applying for it – and an application for interim relief on a class basis: *R (KMI) v Secretary of State for the Home Department* [2021] EWHC 477 (Admin).
- 36 In a judgment on interim relief on 3 March 2021, the Divisional Court (Lewis LJ and Garnham J) held that there was a serious issue to be tried as to “whether in the light of the health emergency facing the UK, it was a rational and proportionate decision for the Secretary of State to limit the provision of accommodation to those who happen already to be accommodated and not to extend it to those who are not”, at [47]. The merits of the claim were not, however, overwhelming and there were reasons not to grant interim relief on a class basis: see [49]-[55].
- 37 The Divisional Court then considered whether interim relief might be appropriate on a narrower basis. It said this:
- “57. In normal circumstances, judicial review of a refusal of s. 4 support would not be an appropriate remedy as there would be an alternative remedy available

in the form of an appeal to the AST. The AST is treating *PA and MA* as providing authoritative guidance not only in cases where s. 4 support is discontinued, but also where fresh applications for such support is refused. Whilst asserting that those decision are wrong, the Secretary of State has chosen thus far not to challenge them and not even to challenge decisions that she is debarred from responding to the appeals. The result is that such appeals are almost bound to succeed at present.

58. The difficulty is that those appeals take three or four weeks to be heard. During that period, appellants are likely to be homeless. Each appellant is likely to have strong grounds for seeking mandatory injunctive relief that the Secretary of State provide s. 4 support during that period (as was the case with the Claimant in this case). In those circumstances, judicial review with a view to seeking interim relief may be appropriate. However, that would require the individual to bring a claim for judicial review and also to make an urgent application for interim relief. We recognise that that may pose additional difficulties for individuals and create burdens for the courts.”

- 38 The Divisional Court accordingly devised a special procedure for individual interim relief applications to be made and determined on an expedited basis: see [59]-[60].
- 39 KMI was later granted permission to apply for judicial review, but the proceedings were withdrawn after the Secretary of State announced her new cessation policy on 1 April 2021.

The Principal Judge’s decision

- 40 AM claims to have entered the UK on 21 December 2017. He applied for asylum on the next day. His claim was refused on 4 October 2019. He appealed to the First-tier Tribunal (Immigration and Asylum Chamber), which dismissed his appeal on 22 November 2019. Applications for permission to appeal were refused by that Tribunal on 13 January 2020 and by the Upper Tribunal (Immigration and Asylum Chamber) on 30 June 2020. His appeal rights were exhausted on 22 July 2020.
- 41 On 19 October 2020, AM applied to the Secretary of State for accommodation on the basis that he was street homeless. This was refused on 21 October 2020. AM did not appeal. On 3 February 2021, he made a further application, which was refused on the same day. This time, he appealed.
- 42 On 16 March 2021, a judge of the AST designated AM’s case a “lead case” under r. 18 of the Procedure Rules. The effect of the designation was that 41 other appeals were stayed in which (a) the appellant had applied for the provision of accommodation pursuant to s.4, which had been refused by the respondent; (b) the appellant was a failed asylum-seeker; and (c) the appellant was destitute.
- 43 There was a hearing before the Principal Judge on 21 April 2021. AM did not attend to give evidence. The written evidence included an expert report from Professor Richard Coker, Emeritus Professor of Public Health at the London School of Hygiene and Tropical Medicine (for AM) and a witness statement from Mr Bentley (for the Secretary of State).

- 44 The Principal Judge gave her decision allowing the appeal and substituting a decision that AM satisfies reg. 3(2)(e) of the Accommodation Regulations on 26 April 2021. On 29 April 2021, she gave her reasons. She noted that *PA & MA* was a “landmark judgment” (a technical term referring to a decision on an issue of general application, often by the Principal Judge) but did not formally bind other judges: [46]. She then said as follows:

“52... I have not revised my view of *PA and MA* but will await the judgment of the Administrative Court. I will, however, address the arguments on public health in relation to Articles 2, 3 and 8 ECHR, as these are entirely new points.”

- 45 Under the heading “Articles 2, 3 and 8”, she continued:

57... During the last 12 months, the UK has been in lockdown on three occasions. The first from March – July 2020; the second from November – December 2020; and the third from January 2021 and continuing. On each occasion, the UK Government has felt compelled to take drastic measures in the face of what it perceives as a real and immediate risk to life from COVID-19 and the message conveyed nationally to everyone who resides in the territory of the State has been to, ‘Stay home. Protect the NHS. Save lives. Anyone can get it. Anyone can spread it.’

58. The UK Government knew the risks; knew the priorities and knew the financial cost of imposing lockdown. It elected to shut down shops, pubs and offices; furloughed much of the country’s workforce; paid for government employees to stay and work from home; and accommodated a very large proportion, of its failed asylum seeker community, (if they were already in receipt of support at the start of the first lockdown). In so doing, the State acknowledged and proceeded to discharge its positive obligations to protect all those present in the UK, at considerable expense, both in terms of financial cost apparently a loss of over £250 billion to the UK economy - but also the loss of 127,480 lives.”

- 46 The Principal Judge noted that the preamble to the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (SI 2021/364: “the Health Protection Regulations”), which had come into force on 29 March 2021, recorded that they had been made “in response to the serious and imminent threat to public health which is posed by the incidence and spread of [COVID-19]”. She continued:

“60. The UK Government would not have taken such draconian steps as to shut down the country on three separate occasions had it not been persuaded, on the available evidence, that COVID-19 presented a real, immediate and serious risk to everyone. In my judgment, that is powerful evidence. The State’s positive obligation is to protect everyone in its territory. This includes, for example, those lawfully detained in prisons but also, failed asylum seekers with no lawful basis to remain in the UK, who should return to their countries of origin once they have exhausted their appeal rights, but who have not done so. Based on Professor Coker’s expert findings, persons of Black or Asian ethnicity (as most asylum seekers and failed asylum seekers tend to be) are at greater risk from COVID-19, and that risk is magnified when they are forced to live in overcrowded

accommodation, in homeless shelters or on the streets due to being refused section 4(2) support.

61. I note that the Strasbourg Court has recognised in the Article 8 context that adverse consequences for health and human dignity that effectively erode the core of private life and the enjoyment of a home can also trigger a State's positive obligations, depending on the specific circumstances of the case and their level of seriousness: see e.g. *Hudorovic and Others v Slovenia* [at 116, 145 -146 and 158].

62. The issue in this case, is not the practicality of providing such protection, but only of ensuring that no section of the public is excluded from such protection. There is an obvious and proportionate measure that the SSHD is able to take to avoid a breach of her positive obligations to protect, namely providing section 4 support so as to ensure that the appellant, a failed asylum seeker, is not made street homeless and thereby unable to avoid exposure to the virus in the same way as persons living in accommodation. The public interest considerations referred to by [counsel for the Secretary of State] in her submissions, namely the maintenance of effective immigration control and providing accommodation to persons who are lawfully present in the UK, do not outweigh the factors weighing in the appellant's favour. Predominantly, a failure to accommodate the appellant would, in my judgment constitute a disproportionate interference in his Article 8 right to respect for private life, and not to be exposed during a pandemic and national lockdown to street homelessness. Street homelessness includes the risk of living in a homeless shelter regarding which Professor Coker has written (see paragraph 25 above) that:

‘[a]ny policies that likely result in increasing the likelihood that people will congregate more, that is fail to socially distance, whether that be in detention centres, nursing homes, cruise ships, homeless shelters etc could and should have been seen to increase the risk to both individuals and the wider public health.’”

63. There is also an Article 14 dimension read with Article 8 ECHR. Given that the State identifies the virus as a threat to public health, it cannot be said that there is an objective justification for excluding failed asylum seekers like the appellant from the category of the public.”

47 At [65], the Principal Judge rejected the submission that the focus should be on the Article 8 rights of AM. It was also necessary to consider the impact of the pandemic on the community. At [66], she said this:

“The available evidence demonstrates that the UK Government has taken and continues to take measures that are within the scope of its powers (*Osman* at 116) and its priorities and resources (*Cevrioglu*, at 50) to discharge its positive obligations to protect the public from the real, immediate and serious risk of harm from COVID-19. I acknowledge that there are positive signs of improvement with the number of deaths reducing daily; with over 34,000 people having received the first vaccination dose; and over 14,000 people having received both doses. But the Country remains in lockdown until at least 21 June

2021, when the government hopes to remove all legal limits on social contact. However, that is still some seven weeks away. Until then, the current threat to public health requires that section 4 accommodation should be provided to the appellant.”

- 48 The cases referred to were *Osman v United Kingdom* (2000) 29 EHRR 245 and *Cevrioğlu v Turkey*, App. No. 69546/12, judgment 4 October 2016, both cases about the positive obligation to protect life under Article 2.
- 49 The Principal Judge concluded at [74] by saying that AM was entitled to support under reg. 3(2)(e) of the Regulations, because there was “no objective justification for excluding failed asylum seekers who were not already accommodated from the category of the public”. However, his entitlement to support would cease “[o]nce lockdown comes to an end”.
- 50 The Principal Judge concluded by saying that, under r. 18(3) of Procedure Rules, the decision would be binding on each of the 41 appeals stayed behind AM’s case, absent a direction to the contrary. The AST would send a copy of the decision to the parties and would aim to determine each case as soon as reasonably practicable.
- 51 The Secretary of State did not apply for such a direction and all, or almost all, of the 41 stayed appeals have now been determined against her. (It appears that in a few cases the decisions may have been withdrawn.) Although the decision is not technically binding on appeals lodged subsequently, it has been followed in all such appeals to date.

Procedural matters

The procedural history of this case

- 52 The present claim was issued on 4 May 2021 with an urgent application for interim relief “preventing the AST decision being applied to the 41 appeals stayed”. The appellants in these 41 cases were not, however, served as interested parties.
- 53 The claim was considered by Andrew Baker J on the following day. He refused interim relief, directed that the claim be served on the appellants in the 41 stayed appeals and gave directions for a highly expedited rolled-up hearing.
- 54 At a hearing before Swift J on 19 May 2021, the directions were varied and the rolled-up hearing set down for 10-11 June 2021.
- 55 On 27 May 2021, the interested parties asked a number of questions as requests under CPR Pt 18. One of these took as its starting point the question posed by Garnham J at the hearing in *QBB* on 6 May 2021 (and not answered in the course of that case):

“As regards the Claimant’s practice, adopted on 14 May 2021, of continuing to provide accommodation under s4 to all DFAS until step 4:

- a. Can the Claimant state the legal basis for the provision of that accommodation?
- b. If the answer to (a) is not “No”, what is the legal basis?

c. Can the Claimant state a reason why that legal basis cannot also be a legal basis for providing accommodation, until step 4, to persons who were in the position of AM and the Interested Parties before their appeals were allowed by the AST (i.e. in “refusal cases”)?

d. If the answer to (c) is not “No”, what is the reason?

e. Does the Claimant accept that the AST may now consider the ECHR article 14 arguments for which Mr KMI was granted permission to claim judicial review in CO/209/2021 (see para 33 of the Grounds of Claim) in appeals to the AST in refusal cases?”

56 The Secretary of State responded that these questions were irrelevant to the issues in this case, which concerned a particular individual, AM.

57 At the hearing, I indicated that I did not accept that response. The EIA indicated that the Secretary of State had been continuing to accommodate destitute failed asylum-seekers under s. 4 of the 1999 Act. Her own case before the AST was that accommodation could only be provided under that provision if one of the criteria in reg. 3(2) of the Accommodation Regulations were satisfied. Given that the decision had been taken to accommodate all those currently accommodated, the only candidate appeared to be reg. 3(2)(e). If the Secretary of State were accommodating others whose circumstances were materially similar to AM’s under reg. 3(2)(e), that would be relevant to the Secretary of State’s case here, particularly given that one of the arguments advanced was that the Principal Judge had failed to give any or any adequate weight to the Secretary of State’s own judgment as to the conditions under which support was required.

58 In response, Mr Payne told me, on instructions, that the Secretary of State’s position was that the continuation of accommodation for those who already had it was now understood to be lawful under the Royal prerogative, not under s. 4(2) of the 1999 Act. She did not consider that the ECHR imposed any obligation to continue to provide accommodation. During the course of the hearing, I invited the Secretary of State to set out her position in writing. This was done in a letter from the Government Legal Department on 15 June 2021, which indicated materially as follows:

“(i) 27 March 2020 until 15 September 2020 a policy was adopted pursuant to which the continuing eligibility of failed asylum seekers to accommodation under section 95 and/or section 4(2) of the Immigration and Asylum Act 1999 (‘1999 Act’) was not reviewed. This action has been conceptualised as the exercise of the prerogative power.

(ii) From 11 November 2020 a policy was adopted pursuant to which the continuing eligibility of failed asylum seekers to accommodation under section 95 and/or section 4(2) of the 1999 Act was not reviewed. No review decisions have been made since then apart from a period between 23 April 2021 and 25 May 2021 when some decisions were taken to cease providing accommodation to those found ineligible to receive it under section 95. This action has been conceptualised as the exercise of the prerogative power.”

59 The interested parties complain that this formulation is incoherent. I agree that it is infelicitously drafted, but its essential meaning seems to me to be clear. The last sentence of paragraphs (i) and (ii) confirm that the Secretary of State *now* considers that the prerogative conferred power to offer continued accommodation to asylum-seekers and failed asylum-seekers. The letter does not say when she formed that view, but the implication of the chronology I have set out is that the “conceptualisation” referred to was recent. The inability to answer Garnham J’s question on 6 May 2021 suggests that, up to that time, no consideration had been given (and certainly no clear view had been reached) as to the power under which accommodation was being provided.

The scope of the issues for determination

60 The parties were not agreed about the scope of the issues for determination in this claim. This turned in part on a dispute about how the Principal Judge’s judgment should be read.

61 Mr Payne submitted that the Principal Judge had based her conclusions that there was a duty to accommodate all destitute failed asylum-seekers until step 4 was reached on Article 8 alone; and that if Article 8 did not give rise to that duty, I should not go on to consider whether the same duty could be spelled out of Article 2 or 3.

62 Mr Cox submitted that the Principal Judge based her conclusion as to the duty on Articles 2, 3 and 8; and that, since the Secretary of State had not challenged her conclusions under Article 2 or 3, those conclusions stand, with the consequence that any error in her reasoning under Article 8 was immaterial. The consequence was that permission to apply for judicial review should be refused under s. 31(3D) of the Senior Courts Act 1981 (“the 1981 Act”).

63 The authorities indicate that there is a substantial overlap between the positive obligations imposed by Articles 2, 3 and 8. The Principal Judge considered case law and submissions about all of them. For reasons I shall give later, I read the Principal Judge as basing her conclusions on all of them.

64 I do not, however, accept Mr Cox’s submission that I should refuse the Secretary of State permission to apply for judicial review because the Statement of Facts and Grounds contains no challenge to the reasoning on Article 2 or 3. It would not be helpful or efficient to refuse permission on that basis, because the issue would then have to be determined by the AST and might well be the subject of fresh judicial review proceedings brought by one side or the other. That would cause needless delay.

65 I proceeded on the basis that, subject to Mr Cox’s other objections to the grant of permission, I should determine the issues arising under Articles 2, 3 and 8 if it was possible to do so fairly. At the hearing, Mr Payne and Mr Cox both made full submissions about the case law under Articles 2, 3 and 8. I am satisfied that both sides had ample opportunity to address me on whether any or all of Articles 2, 3 and 8 gave rise to the positive obligation identified by the Principal Judge. I am also satisfied that I am not required to refuse permission under s. 31(3D) of the 1981 Act, for these reasons:

- (a) That provision requires the court to refuse permission if it is “highly likely that the outcome for the applicant would not have been substantially different” if the conduct complained of had not occurred, unless (see s. 31(3E)) it is appropriate to disregard this requirement for reasons of “exceptional public interest”. The conduct complained

of means “the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief”: s. 31(8).

- (b) Mr Cox reads this latter phrase as referring to the alleged error of law in relation to Article 8. If that were correct, s. 31(3D) would require me to refuse permission because the Principal Judge’s conclusions under Articles 2 and 3 have not been directly challenged, even if (after hearing argument from both sides on the case law under Articles 2, 3 and 8) it could be seen that those conclusions are wrong.
- (c) For the reasons I have given, this would be an undesirable outcome. In my judgment, it is not required on a proper reading of s. 31(3D). In the context of this case, “the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief” has a broader meaning than Mr Cox contends for. It refers to the Principal Judge’s conclusion that the Secretary of State is under a positive duty to accommodate all destitute failed asylum-seekers until step 4 on the Roadmap is reached. That is, in reality, the “conduct” which the Secretary of State is challenging. The source of the duty does not matter for the purposes of s. 31(3D).
- (d) The consequence is that s. 31(3D) might have applied if (for example) the Principal Judge had found that, irrespective of any positive duty owed to all destitute asylum-seekers, AM’s particular circumstances justified the imposition of a duty to accommodate him. But she did not make any such finding. If she was wrong to recognise a general positive duty owed to all destitute failed asylum-seekers, it cannot be said that, even without the error, it is highly likely that the outcome would not have been substantially different.

Is there an alternative remedy?

- 66 Mr Cox’s second ground for opposing permission was that quashing the decision would not lead to the cessation of support for AM, or for the interested parties, because they have all been accommodated and cessation decisions have been paused until step 4 of the Government’s Roadmap is reached. In other cases, the decision was not binding – and the Secretary of State was not treating it as such.
- 67 In my judgment, it is obvious that a decision of a judge of the AST on an issue of general application is likely to be of strong persuasive authority before other judges of the AST. That is why the Divisional Court described as “surprising” the Secretary of State’s decision not to challenge by judicial review any of the decisions allowing appeals against refusals of s. 4 support on the basis of the reasoning in *PA & MA*: see *KMI*, [17].
- 68 I would go further. I have described at [29]-[34] above the practice adopted by the Secretary of State earlier this year. There was not just one but a series of AST decisions applying the reasoning in *PA & MA* in appeals from decisions to refuse support to applicants not already in receipt of it. There was a consistent line of AST case law. The proper means for challenging the reasoning in this line of case law was by judicial review in this Court. But instead of bringing judicial review proceedings, the Secretary of State chose to continue making refusal decisions in materially identical cases. When, as was inevitable, the AST sent notice of its intention to bar her from taking part in the appeal, in a significant number of cases she disengaged from the process and failed to respond to the direction. It must have been obvious that by doing this: (i) the Secretary of State would in due course lose the appeal

and be required to provide accommodation; but (ii) this would take three or four weeks, during which time the applicant would be homeless.

- 69 In my judgment, this practice not only failed to respect the process of a lawfully constituted tribunal, but was also systematically unfair to applicants for support. It is an axiom of public law that like cases are to be treated alike. To refuse applications which would be very likely to succeed on appeal, and then to disengage from the appeal process, meant that the applicants would inevitably be treated for a period less favourably than others in the same position. Even if the Secretary of State considered the stance of the AST to be wrong in law, it was not appropriate to allow that situation to continue without bringing the matter promptly before the High Court.
- 70 In this case, however, the decision was made on 26 April and the reasons for it were given on 28 April 2021. These proceedings were issued on 4 May 2021 and an application for expedition was made. So, whatever may have been the position in the early part of this year, the procedure adopted in relation to the decision now under challenge was proper. It would not be appropriate to refuse permission on the basis that the points now argued could be made to the AST. That would be to encourage a practice of repeating the argument rejected by one judge of the AST to other judges of that tribunal – in circumstances where the argument would be very likely to fail.

The Secretary of State’s compliance with the duty of candour and the interested parties’ application to adjourn

- 71 Mr Cox’s third ground for opposing the grant of permission was that the Secretary of State had failed to identify the power under which the Secretary of State was continuing to accommodate destitute failed asylum-seekers currently in accommodation; and this was a breach of her duty of candour. When Mr Payne indicated, in response to my question, that a prerogative power was being used, Mr Cox applied for an adjournment of the hearing. His submission was that the Court would need to know not only the legal source of the power but also the reasons why it had been exercised. These reasons might be relevant to the extent of the risk to destitute asylum-seekers and to the public, both matters which informed the decision under challenge. The interested parties were also entitled to understand these reasons so that they could see whether there was good reason for treating them differently from those being accommodated.
- 72 Mr Payne opposed the application to adjourn. He submitted that neither the source of the power nor the reasons for its exercise were relevant to the issues in this claim, which was a challenge to the decision taken in AM’s individual case. In any event, at the time of the decision under challenge, the Secretary of State had resumed cessation decisions, so there was no question of those currently in accommodation being treated differently from those applying for it. If the decision is quashed and remitted, it will be open to AM – and to anyone else appealing to the AST – to argue that the difference in treatment between those currently in accommodation and those applying for it contravenes Article 14, read with Article 8.
- 73 I have considered carefully whether to adjourn the hearing to require the Secretary of State to provide a fuller explanation of the reasons why the Secretary of State decided to continue to accommodate those currently accommodated under what she now says were prerogative powers. I have decided not to do so, because I do not believe that any further explanation of those reasons would make any difference to the outcome of this case.

- 74 It is obvious from the evidence already filed by the Secretary of State that the decision to continue to accommodate destitute failed asylum-seekers already in accommodation was taken for public health reasons. Mr Bentley's witness statement in the *QBB* case makes that clear by saying in para. 4 that the original decision, in March 2020 was "in line with the government's aim of ensuring people remained in their homes". In para. 8, Mr Bentley makes clear that the aim of resuming cessation decisions was "complicated" by changes to the "lockdown" restrictions in November and December 2020. The EIA shows that the policy of resuming cessation decisions was informed by the Roadmap.
- 75 The interested parties are entitled to refer to all of this in support of their argument that the ECHR rights of AM and of the public generally required the Secretary of State to accommodate him. It is very unlikely that a fuller explanation of the reasoning process would open up any arguments not already available.
- 76 It should also be borne in mind that, at the time of the decision under challenge, the Secretary of State had indicated her intention of resuming cessation decisions. AM was therefore unable to advance any argument that the difference in treatment between those who were and those who were not currently accommodated was unlawful; and the Secretary of State filed no evidence responding to it. In those circumstances, the difference in treatment between the two groups was not one of the matters considered by the Principal Judge. It would be wrong in principle for this Court to entertain the argument in those circumstances.
- 77 Now that cessation decisions have been suspended again, however, the argument will be available to appellants in the AST. If the argument is made, the AST will have to consider whether the difference in treatment fell within the ambit of Article 8 (or any other ECHR right); if so, whether it is discrimination on the ground of "other status" within Article 14; if so, whether the two groups are in relevantly analogous situations; and, if so, whether the discrimination is justified: see *R (Parkin) v Secretary of state for Work and Pensions* [2019] EWHC 2356 (Admin), [84]. It is also possible that these questions – and the related issue of whether the difference in treatment is irrational – might arise in judicial review proceedings (as they did in *KMI*, where permission to apply for judicial review was granted).
- 78 If these points are taken, either before the AST or in judicial review proceedings, the Secretary of State may well have to provide a fuller explanation of why she considered it appropriate to act as she did under what she now says were prerogative powers. It is common ground, however, that this particular Article 14 argument did not and does not arise in this case. In those circumstances, there is no need for a fuller explanation here of the reasons for the decision to suspend cessation decisions.

Permission to apply for judicial review

- 79 Public authorities, including tribunals, must act within the powers conferred on them by law. Where a public authority takes a decision which arguably exceeds those powers, and the decision is of general application and likely to affect a large number of cases, there is a strong public interest in its being subject to review by the senior courts. That is so whether the party invoking the Court's jurisdiction is an individual, company or association, a public interest group or (as here) a Minister. In this case, there is no appellate route to the senior courts, so judicial review is in principle appropriate.

80 Mr Cox did not oppose the grant of permission on the basis that the Secretary of State's challenge was unarguable. In my view, he was right not to do so. I have considered the three grounds on which Mr Cox submitted that I should refuse permission in the exercise of my discretion. For the reasons I have given, none of them is compelling.

81 I shall therefore grant permission to apply for judicial review.

The proper interpretation of the Principal Judge's decision

82 In my judgment, on a fair reading of her decision, the Principal Judge based her decision on Articles 2, 3 and 8, rather than exclusively on Article 8:

- (a) AM's case before the AST included reliance on Articles 2, 3 and 8: see para. 23(a) of AM's submissions of 9 March 2021.
- (b) The Secretary of State's response engaged with that submission and referred specifically to the case law under Articles 2, 3 and 8: see paras 21-27 of the Secretary of State's skeleton argument and paras 55-56 of the Principal Judge's reasons.
- (c) The Principal Judge said at [52] that she was addressing "the arguments on public health in relation to Article 2, 3 and 8", which were new arguments not considered in her earlier decision of *PA & MA*.
- (d) The relevant section of the Principal Judge's reasons was headed "Articles 2, 3 and 8": see the heading above para. 55.
- (e) Although at [62] the Principal Judge said that "[p]redominantly" a failure to accommodate would constitute a disproportionate interference with AM's right to respect for private life, she referred at [66] to passages in two cases (*Osman* and *Cevrioğlu*), both of which were concerned with the positive obligation under Article 2.

Submissions for the Secretary of State

83 For the Secretary of State, Mr Payne's submissions under his four grounds of challenge were as follows.

84 **First**, the Principal Judge erred in concluding that Articles 2, 3 or 8 imposes on the Secretary of State a positive duty to provide AM and all destitute asylum-seekers with accommodation. She failed to identify any legal basis for such a positive duty or any authority supporting it.

85 The starting point is that neither Article 8 nor any other provision of the ECHR imposes any obligation on the State to accommodate failed asylum-seekers at public expense. Article 3 may impose such a duty in respect of asylum-seekers who were "exercising their vital right to claim refugee status and meantime entitled to be here": *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396. But once an asylum claim is rejected and appeal rights are exhausted, a failed asylum-seeker can be expected to leave the UK, with Government assistance where necessary.

86 For this last proposition, Mr Payne relied on the decision of the Court of Appeal in *R v (Kimani) Lambeth London Borough Council* [2003] EWCA Civ 1150, [2004] 1 WLR 272, at [49], where Lord Phillips MR (giving the judgment of the Court of Appeal) said:

“We do not consider that either article 3 or article 8 imposes a duty on the state to provide the claimant with support... A state owes no duty under the Convention to provide support to foreign nationals who are permitted to enter their territory but who are in a position freely to return home.”

87 The Health Protection Regulations were implemented in order to regulate social interaction with a view to managing the public health risks arising from the COVID-19 pandemic. They were not intended to and do not vindicate individual rights to protection from the State. The fact that restrictions have been imposed aimed at protecting the economy, hospitals and wider society does not supply evidence of a real and immediate risk to the health or life of every individual who is homeless or shares accommodation.

88 In her decision, the Principal Judge said at [57] that the pandemic gave rise to a “real, immediate and serious risk of life”. The court was entitled to take judicial notice of the fact that risks vary from person to person depending on a number of factors including, in particular, age. Mr Payne submitted:

“Whilst a minority of individuals are at high risk from COVID-19, for the vast majority of people the symptoms of COVID-19 are flu-like and insufficiently serious to require hospitalisation.”

89 The Principal Judge’s decision contained no individualised assessment of the risk to AM, who chose not to attend the appeal hearing. The analysis was therefore generic.

90 **Second**, if Article 8 imposes a positive obligation to take some measure to mitigate the risk of COVID-19 to individuals, the Principal Judge erred in concluding that this required the provision of accommodation by the Secretary of State. The Government has done a number of things to combat the pandemic: for example, it has enacted the Health Protection Regulations and initiated a mass vaccination programme. In relation to destitute failed asylum-seekers, it has taken account of the impact of the pandemic on their ability to leave the country. In the light of these steps, there is no basis for concluding that any positive duty extends to requiring the Secretary of State to accommodate all destitute failed asylum-seekers until step 4 in the Roadmap is reached.

91 More generally, the Principal Judge failed to afford any margin of appreciation to the Secretary of State. It is for the Government to decide how to deploy the State resources available. The Principal Judge failed to give adequate weight to the factors militating against the provision of accommodation to destitute failed asylum-seekers: Parliament’s view (reflected in the terms of s. 4 of the 1999 Act) that failed asylum-seekers should leave the UK; that providing them with accommodation disincentivises them from doing so; that taxpayers’ funds should not be expended on such accommodation; and that providing accommodation to failed asylum-seekers diminishes the stock of accommodation available for those who are entitled to be in the UK because their asylum claims have not yet been determined.

- 92 Furthermore, the Principal Judge failed to take into account the costs of accommodating failed asylum-seekers and failed to give any weight to the significant positive impact of the vaccination programme.
- 93 **Third**, the Principal Judge applied a confused and unstructured approach to the question whether the decision to refuse support was compatible with Article 14. Had she applied a proper, rigorous approach, she would have concluded that:
- (a) a decision to offer accommodation on terms which an individual can reasonably meet, but chooses not to, does not fall within the ambit of Article 8;
 - (b) being a destitute asylum-seeker who does not meet any of the criteria in reg. 3(2)(a)-(d) of the Accommodation Regulations is not an “other status” for the purposes of Article 14;
 - (c) in any event this cohort are not in an analogous position to asylum-seekers (who cannot leave) or to persons settled in the UK (who are entitled to remain); and
 - (d) it is justifiable to treat this cohort differently from any plausibly relevant comparator group.
- 94 **Fourth**, Mr Payne submitted that the Principal Judge’s decision misunderstands *PA & MA*, which did not find (even *obiter*) that withdrawal of accommodation from a destitute failed asylum-seeker in a Tier 3 area would be unlawful, only that the weight to be attached to the public health considerations in such an area was “very high”. Alternatively, and in any event, the Principal Judge’s decision in the present case is inconsistent with *PA & MA*, because the restrictions applicable at the time when she made her decision were broadly equivalent to those in Tier 1 and Tier 2 areas at the time of *PA & MA*. She gave no reason for concluding that there was an obligation to accommodate every destitute asylum-seeker now, when there was no such obligation in Tier 1 and Tier 2 areas in October 2020.

Submissions for the interested parties

- 95 If, contrary to the interested parties’ submission, permission to apply for judicial review is granted, Mr Cox submitted that the claim should nonetheless be dismissed, because none of the grounds of challenge has merit.
- 96 As to **ground 1**, the challenged decision is based not on any general proposition that Articles 2, 3 or 8 requires a contracting State to accommodate those within its jurisdiction, but on the exceptional circumstances of the COVID-19 pandemic. Mr Cox relied on a number of authorities supporting the existence of a positive duty to take steps to protect life and health.
- 97 Mr Cox referred to *Cevrioğlu*, where the applicant alleged a breach of the positive duty under Article 2 after his 10-year old son had died having fallen into a water-filled hole on a building site. The European Court of Human Rights (“the Strasbourg Court”) said at [49]-[50] that the State’s obligation to take appropriate steps to safeguard the lives of those within its jurisdiction may apply “not only to situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act” but also “in cases raising the obligation to afford general protection to society”. This obligation was said to encompass a “wide range of sectors”, including dangers emanating

from buildings and construction work and “[i]n principle, this obligation will arise in the context of any activity, whether public or not, in which the right to life may be at stake”.

- 98 One of the authorities for this latter proposition was *Öneryildiz v Turkey* (2005) 41 EHRR 20, where the applicant’s close relatives had been killed after a methane explosion at a rubbish tip caused a landslide which engulfed his house. The Grand Chamber of the Strasbourg Court found a violation of the positive duty under Article 2. At [98], it considered it decisive that “there was practical information available to the effect that the inhabitants of certain slum areas... were faced with a threat to their physical integrity on account of the technical shortcomings of the municipal rubbish tip”. The Turkish Government had argued that it was relevant that the applicants were living in the vicinity of the tip in breach of domestic law. The Court disagreed, because the authorities had done nothing to stop them doing so: see [103]-106].
- 99 In *Genç v Turkey* (App. No. 24109/07), 27 January 2015, the Strasbourg Court had to consider an Article 2 claim by an applicant whose premature baby had died because of the lack of space at any nearby neonatal unit. At [67], the Court said this:
- “In this area, the positive obligations imposed on the State by Article 2 imply, above all, that a regulatory structure be set up, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients’ lives are protected.”
- 100 At [80] the Court found that “the State had not taken sufficient care to ensure the smooth organisation and correct functioning of the public hospital service, and more generally of its system for health protection, and that the lack of places was not linked solely to an unforeseeable shortage of places arising from the rapid arrival of patients”. As a consequence, the applicant’s son “was simply not offered any form of treatment at all”: [82]. This amounted to a breach on the part of the State of the positive obligation under Article 2.
- 101 Finally, Mr Cox referred to *Cyprus v Turkey* (2002) 35 EHRR 30, where at [219] the Grand Chamber of the Strasbourg Court observed that “an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of healthcare which they have undertaken to make available to the population generally”. It was not necessary to examine “the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care”.
- 102 In assessing the extent to which it was possible to protect lives by accommodating destitute failed asylum-seekers, Mr Cox submitted that it was relevant to look at the steps taken in relation to other groups. The positive duty under Articles 2, 3 and 8 is to protect not only from the risk of death but also from a “serious and imminent risk to public health” of the kind the Health Protection Regulations were made to address. The suggestion that the Principal Judge failed to undertake any analysis of the nature and extent of any increased risk from not providing accommodation is not well founded. The Tribunal was entitled to and did rely on Prof. Coker’s expert report.
- 103 As to **ground 2**, the Principal Judge was entitled and obliged to make her own assessment of proportionality, giving weight to the views of the primary decision-maker: see *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, [53].

The concept of a margin of appreciation has no direct application in domestic law: *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1, [27]-[28]. As to the suggestion that the Principal Judge should have accorded more weight to the judgment of the Secretary of State:

- (a) there was no evidence of any evaluation or decision about the public health or human rights implications of continuing to refuse accommodation to destitute failed asylum-seekers during the pandemic;
- (b) there was no evidence about any of the countervailing factors the Secretary of State now says the Principal Judge should have taken into account;
- (c) in any event, the Principal Judge did give weight to the evaluation of the executive more widely (see [57]-[60] of her decision) and was entitled to compare this with the decision of the Secretary of State, which was not attended by any proper evaluation.

104 As to **ground 3**, the Principal Judge’s conclusion in relation to Article 14 was immaterial. It is not part of the *ratio* of the decision. In any event, the Secretary of State’s criticisms of it are flawed:

- (a) The decision fell within the ambit of Article 8: (i) on the reasoning in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin) and [2020] EWCA Civ 542, [2021] 1 WLR 1151; and/or (ii) given the potential effect of COVID-19 on the physical and psychological health of destitute failed asylum-seekers and/or the public more generally.
- (b) The concept of “other status” is broad and has been held to include immigration status: *R (C) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, [2019] 1 WLR 5687, [62] and [65].
- (c) Destitute failed asylum-seekers are in an analogous position to other destitute persons who are entitled to support from public funds: see e.g. *R (Kebede) v Secretary of State for Business, Innovation and Skills* [2013] EWHC 2396 (Admin), [2014] PTSR 92, [31].
- (d) The Secretary of State advances no submissions on justification distinct from the submissions on grounds 1 and 2.

105 As to **ground 4**, the challenge is misconceived. The Principal Judge made clear that *PA & MA* was not binding on the AST. Although she made clear that she had not changed her view about the correctness of the decision in that case, she also said at [52] that she would go on to consider the “entirely new” arguments on public health under Articles 2, 3 and 8: see at [52]. In any event, new evidence in the form of Prof. Coker’s expert report was available to the Principal Judge that had not been available in *PA & MA*.

Discussion

The basis for and scope of the positive duties imposed by Articles 2, 3 and 8

- 106 In *R (C) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, [2019] 1 WLR 5687, Leggatt LJ (with whom Patten and Nicola Davies LJJ agreed) said this at [29]:

“The rights defined in the Convention are predominantly civil and political in nature. This reflects the original purpose of the Convention, conceived and developed as it was in the aftermath of the Second World War as a bulwark for protecting the peoples of Europe against tyranny and oppression. As stated in its Preamble, the Convention is a collective enterprise of European countries which are ‘like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law’, and is designed to maintain ‘those fundamental freedoms which are the foundation of justice and peace in the world’. Within the legal framework established by the Council of Europe, social and economic rights are protected by a separate treaty, the European Social Charter, adopted by the Council in 1961.”

- 107 One reason why the Strasbourg Court has been reluctant to read the ECHR as conferring social and economic rights is that decisions about the existence or extent of such rights are apt to involve considering and weighing multiple competing calls on public funds. Reasonable people differ about which ones to prioritise. The judicial process, which (broadly speaking) involves the resolution of a dispute between two parties, is in general not well-equipped to determine questions of this kind. Even if it were, the outcomes would lack democratic legitimacy: see generally *R (Condliff) v North Staffordshire Primary Care Trust* [2011] EWCA Civ 910, [2012] 1 All ER 689, [40]-[41] (Toulson LJ); *McDonald v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, [2011] 4 All ER 881, [16] (Lord Brown). The Strasbourg Court and the domestic courts have therefore trodden cautiously in cases involving alleged breaches of positive obligations, whether arising from Articles 2, 3 or 8.

The Article 2 case law

- 108 In *Osman*, at [116], the Strasbourg Court said that a positive duty arose where “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals... and that they failed to take measures within the scope of their powers which, charged reasonably, might have been expected to avoid that risk”. The cases in which a breach of Article 2 has been found have generally involved a failure to address a particular situation posing a risk to an identified individual (as in *Osman*) or category of individuals (as in *Öneryildiz*). Where the Strasbourg Court has recognised a positive duty owed to an unidentified class of individuals, the class is generally tightly confined by reference to a specific location or dangerous situation (as in *Cevrioğlu*). This approach mirrors the approach of the common law courts to the development of positive duties in the law of tort. The courts have in general been reluctant to impose on public authorities positive duties owed to the public at large, preferring to make liability conditional on the assumption of responsibility in a specific situation: see e.g. *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780.
- 109 In *Budayeva v Russia* (2014) 59 EHRR 2, the Strasbourg Court held that, in the context of dangerous activities, compliance with the positive duty imposed by Articles 2 and 8 should be assessed in the same way. Thus, the principles developed under Article 8 may be applied also under Article 2. As to the choice of particular practical measures, the Court said this at [134]:

“where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means.”

- 110 The highpoint of Mr Cox’s case was the decision in *Genç*, in which – unusually – the duty to establish a hospital system was owed to the public at large. That duty, however, was framed at a high level of generality and could be discharged in many different ways. Only where there is a complete failure to provide a system or framework of medical care capable of ensuring that basic medical treatment was provided (as in *Genç*) will the duty be breached.

The Article 3 case law

- 111 Leggatt J said this in *C*’s case at [32]:

“32. Where the European Court of Human Rights has held that the Convention imposes obligations on the state to make socio-economic provision for basic material needs, it has done so by reference to article 3, which prohibits inhuman or degrading treatment. Thus, in the leading case of *MSS v Belgium and Greece* (2011) 53 EHRR 2 the court held that Greece was in breach of article 3 in failing to provide for the most basic needs for food, hygiene and shelter of an asylum seeker (‘a member of a particularly underprivileged and vulnerable population group in need of special protection’) who had spent several months living on the street in a state of extreme poverty (see paras 249-264). It is clear that the test for a breach of article 3 is a demanding one...”

- 112 *MSS* was a case where an asylum seeker whose claim had not been determined “spent months living in a state of the most extreme poverty, unable to care for his most basic needs: food, hygiene and a place to live”: [254]. Moreover, there was a systemic failure by the Greek Government to provide sufficient accommodation for the number of asylum-seekers present: [258]. But, at [249], the Strasbourg Court prefaced its analysis of the extreme facts in that case by saying that:

“art. 3 cannot be interpreted as obliging the high contracting parties to provide everyone within their jurisdiction with a home. Nor does art. 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.”

- 113 This is consistent with the analysis of the House of Lords in *Limbuela*. There, the statutory provision at issue, s. 55(5)(a) of the Nationality, Immigration and Asylum Act 2002, was similar to reg. 3(2)(e) of the Accommodation Regulations. It authorised the provision of support to late asylum applicants to the extent necessary for avoiding a breach of their ECHR rights. Lord Bingham said this:

“7... A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support,

unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.

8. When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.

9. It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed."

- 114 Lord Hope described at [59] the factors to be taken into account in deciding whether an asylum-seeker's situation engaged Article 3:

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

- 115 Lord Brown explained at that it was not justifiable to single out asylum-seekers as a group ineligible for public support. At [100], he explained why:

"...asylum seekers, it should be remembered, are exercising their vital right to claim refugee status and meantime are entitled to be here. Critically, moreover, unlike UK nationals, they have no entitlement whatever to other state benefits."

- 116 Very recently in *R (NB) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin), Linden J held that accommodation provided to asylum-seekers at Napier Barracks in Kent was not "adequate" within the meaning of Council Directive 2013/9/EC (the Reception Directive). One of the bases for this finding was that insufficient measures had been taken to guard against an outbreak of COVID-19. The evidence before him included evidence from the same Prof. Coker who has given evidence here. However, Linden J rejected a claim that the conditions gave rise to a breach of Articles 2, 3 or 8. As to Article 3, he reviewed the authorities at [248]-[261]. There is no need to reproduce that summary here. The cases in which breaches of Article 3 have been found have mostly involved detained persons. The conditions at Napier Barracks, though they were inadequate to prevent

the spread of COVID-19, did not reach the level required to find a breach of Article 3: [265]-[268].

The Article 8 case law

117 The Grand Chamber of Strasbourg Court said this in *Chapman v United Kingdom* (2001) 33 EHRR 18, at [99]:

“It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.”

118 Some 18 years later, in *C’s* case, Leggatt LJ said at [31] that “[a]ttempts to argue that article 8 imposes an obligation to provide financial support for family life have met with short shrift”. Similarly, in *NB* at [278], Linden J “did not immediately see where it was that the Claimants could potentially fail under Article 3 and yet succeed under Article 8”.

119 In *Stoicescu v Romania* (2011) EHRR 1193, the applicant was attacked and injured by a pack of stray dogs. She claimed that the State had breached its positive obligations under Articles 3 and 8 to protect her by addressing the problem of stray dogs. The Strasbourg Court considered that the case fell to be examined under Article 8: [45]. At [51], it said this:

“The obligation to adopt appropriate measures must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities. For the Court, not every claimed risk to the physical integrity can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. In the opinion of the Court, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life or the physical integrity of an identified individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk...”

120 At [59], the Court continued:

“It is not the Court’s task to substitute itself for the competent domestic authorities in determining the best policy to adopt in dealing with problems of public health and safety such as the issue of stray dogs in Romania. In that connection it accepts that an impossible or disproportionate burden must not be imposed on the authorities without consideration being given in particular to the operational choices which they must make in terms of priorities and resources...; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult spheres such as the one in issue in the instant case...”

121 On the facts of the case, the Court found Romania in breach because of its failure to address the particular risks posed by stray dogs.

122 In *Marzari v Italy* (App. No. 36448/97), judgment 4 May 1999, a disabled man brought a complaint about (*inter alia*) the decision of the local authorities to evict him from his existing accommodation and their failure to provide alternative accommodation adapted to his needs. In an admissibility decision, the Strasbourg Court held that:

“although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual.”

123 The application was manifestly ill-founded on the facts.

124 In *Hudorovic v Slovenia* (App. Nos 24816/14 and 25140/14), judgment 10 March 2020, the Strasbourg Court considered an application by members of a Roma community, who complained of lack of access to water and basic sanitation. At [116] it said that “[a] persistent and long-standing lack of access to safe drinking water can therefore, by its very nature, have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8”. At [144], the Court said that:

“the level of realisation of access to water and sanitation will largely depend on a complex and country-specific assessment of various needs and priorities for which funds should be provided. In the Court’s view, the States must be accorded wide discretion in their assessment of those priorities and the legislative choices they make, given their wide margin of appreciation in socio-economic matters. That discretion must also apply to the concrete steps aimed at ensuring everyone has adequate access to water, such as the adoption of a national water strategy, national and local implementation projects of any such strategy, or, indeed, the provision of water from the public water-distribution system to individual households.”

125 On the facts, the steps taken by Slovenia were sufficient, given the margin of appreciation due to it: see [145]-[159].

The scope and basis of the duty identified by the Principal Judge

126 AM did not attend to give evidence before the Principal Judge. The submissions made to her were therefore not based on any particular characteristics of his. There was no evidence, for example, that he was particularly vulnerable to COVID-19 because of any medical condition. On the evidence in Prof. Coker’s report, his age (29) placed him in a lower risk group, though as an Afghan national his ethnic origin is likely to have elevated his risk somewhat above the average for people of his age. This was not a case in which the Principal Judge was able to carry out the kind of multifactorial individualised assessment envisaged in *Limbuela*, at [8] and [59].

127 AM’s failure to give evidence also meant that there was no evidence about why he had failed to register with the Home Office’s voluntary returns service and had not taken any other

steps with a view to leaving the UK. There was no evidence about his reasons for wishing to stay.

- 128 The Principal Judge’s reasoning was, therefore, based entirely on the generic risk posed to destitute asylum-seekers as a class and to the public at large from infection by members of that class. In the light of those risks, the circumstances arising from the pandemic gave rise to a duty on the part of the Secretary of State to accommodate *all* destitute failed asylum-seekers until step 4 in the Roadmap is reached.

The rights referred to in reg. 3(2)(e) of the Accommodation Regulations

- 129 Regulation 3(2)(e) of the Accommodation Regulations applies when the provision of accommodation is necessary for the purpose of avoiding a breach of “a person’s Convention rights”. The Principal Judge considered that this formulation was broad enough to encompass not only the ECHR rights of the applicant or a family member, but also those of other members of the public. I agree.
- 130 The apparent purpose of reg. 3(2)(e) is to avoid a situation in which the UK is in breach of its international obligations under the ECHR. Its language reflects a recognition that the ECHR rights of one person may require accommodation to be provided to another. No doubt the paradigm situation in which that will be so is where the ECHR rights of a dependent family member require accommodation to be provided to an applicant. But the language is sufficiently general to catch any situation in which the ECHR rights of a person or persons require accommodation to be provided to another person or persons.
- 131 This means that the Principal Judge was entitled to decide AM’s case, as she did, by reference to the ECHR rights of (i) AM (as a representative of the class of destitute failed asylum-seekers) and (ii) the general public, insofar as the rights of the latter can be shown to found a duty to provide accommodation to the former. I have analysed these two sources of the duty identified Principal Judge separately, before considering whether cumulatively they justify the conclusion she reached.

Obligations arising from the ECHR rights of failed asylum-seekers

- 132 As noted above, *Limbuella* addressed the duty to provide accommodation to asylum-seekers who made their claims late. As Lord Brown noted at [100], they were exercising their right to claim asylum and “meantime are entitled to be here”. The position of *failed* asylum-seekers, such as AM, is different. Their asylum claims have been rejected. Their appeal rights are exhausted. They have no legal entitlement to be here.
- 133 The structure of reg. 3(2) reflects the policy that failed asylum-seekers should leave the country if possible. The first condition under which support is available is that the failed-asylum seeker “is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure”. Conditions (b) and (c) deal with cases where there is a good reason why he cannot leave. Condition (d) covers cases where permission to apply for judicial review has been granted (which are analogous to those where appeal rights have not been exhausted). Condition (e) is a residual category where, although none of the previous conditions is satisfied, a person’s ECHR rights require the provision of accommodation.

- 134 The Secretary of State's evidence in this claim establishes that, in practice, she will accept a failed asylum-seeker as falling within reg. 3(2)(a) if he has registered with the Home Office's voluntary returns service and is taking the necessary action to obtain any required travel documents from the embassy of his country of origin. If a failed asylum-seeker is not doing these things, and there is no other impediment to his leaving (so that conditions (b) and (c) are not satisfied), he should generally be expected to leave. But the presence of reg. 3(2)(e) shows that the legislator nonetheless envisaged that there would be some cases not falling within reg. 3(2)(a)-(d) where accommodation should be provided. I asked Mr Payne for examples of cases the Secretary of State would accept as falling within reg. 3(2)(e).
- 135 Initially, Mr Payne said that an individual who was particularly vulnerable because of a health condition (including mental health) might qualify; and he could not exclude that this category might include someone who was particularly vulnerable to COVID-19. By the end of the hearing, however, he had withdrawn that submission on instructions. His considered answer was that the only those who had lodged, or were about to lodge, further representations in respect of their asylum claims would qualify under reg. 3(2)(e). They could legitimately expect to remain in the UK while the Secretary of State considered whether their representations amounted to a fresh claim. Outside this category, there were *no* circumstances in which a destitute failed asylum-seeker who did not qualify under reg. 3(2)(a)-(d) would be entitled to support under reg. 3(2)(e).
- 136 *Kimani* establishes, as a general proposition, that a State owes no duty under the ECHR to provide support to foreign nationals who are "in a position freely to return home". Identifying whether someone is in such a position may not be straightforward. I note, for example, that the Secretary of State expressly accepted that the analysis in *Limbuella* applies when considering whether to impose or lift the "no recourse to public funds" condition commonly attached to grants of leave to enter and remain in the UK: see *R (W) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin), [2020] 1 WLR 4420, [60]-[61]. I do not, for my part, regard it as obvious that the only failed asylum-seekers not falling within reg. 3(2)(a)-(d) who are not "in a position freely to return home" are those who have made, or are about to make, further representations in relation to their asylum claim.
- 137 It is not necessary, and would not be wise, to attempt to define here the precise boundaries of the category of destitute failed asylum-seekers whose ECHR rights require the provision of accommodation under reg. 3(2)(e). All that is necessary for present purposes is to say that a multifactorial assessment would be required in each individual case. Such an assessment would have to include consideration of the sorts of factors identified in *Limbuella*, at [8] and [59]. The consideration might also include any individual factors which put the individual at high risk if he contracted COVID-19. In addition, it would have to consider the reasons why the individual failed asylum-seeker asserts that he would or could not return to his country of origin.
- 138 In this case, as noted, AM did not attend the appeal to give evidence and there was no other evidence as to why he could not or would not return to his country of origin. Nor was there any evidence to show that he was particularly vulnerable, either generally or to COVID-19 in particular. These facts are, in my judgment, sufficient to show that the Principal Judge erred in concluding that AM's ECHR rights required the Secretary of State to accommodate him, even though he was taking no steps to leave the UK.

- 139 Looking at the matter in terms of the case law on positive obligations under Articles 2, 3 and 8, I would analyse the case as follows:
- (a) It is for the UK Government to decide how best to protect destitute asylum-seekers from the various threats to their life and health to which homelessness gives rise (including COVID-19). A broad margin of appreciation is to be accorded to it in taking that decision: see *Budayeva*, [134]; *Stoicescu*, [59]; *Hudorovic*, [144].
 - (b) The existence of a margin of appreciation at the international level does not necessarily mean that the national courts must accord the Secretary of State an equivalent margin to reach decisions about policy: *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1, [26] *et seq.*
 - (c) In this case, however, formulating policy in relation to the accommodation failed asylum-seekers requires the weighing of competing policy considerations and the making of predictive judgments about the consequences of particular measures. There are strong constitutional reasons for accordng the executive a broad discretionary area of judgment when performing these functions.
 - (d) The Accommodation Regulations reflect a legislative choice to discharge any positive protective duty by accommodating destitute failed asylum-seekers on condition that they take reasonable steps to leave the UK. In general, that is a legitimate policy, at least where the failed asylum-seeker is in a position freely to return home: *Kimani*, [49]. It falls well within the discretionary area of judgment to be accorded to the Secretary of State.
 - (e) In the absence of any explanation as to why AM is not in a position to return home, the Secretary of State was entitled to regard the offer of accommodation conditional on taking steps to leave the UK as a reasonable discharge of any positive obligation under Articles 2, 3 or 8 to protect AM from risks to his life and health.
- 140 This part of the Principal Judge’s analysis focused on the risks to destitute failed asylum-seekers of contracting COVID-19 if they are forced on to the streets or into “congregate” settings. I am prepared to accept on the basis of Prof. Coker’s report that the risks of contracting COVID-19 in such settings are considerably higher than those for the population at large. But the Secretary of State offered AM a way to avoid these risks by registering with the voluntary returns service. If he had done that, he would have been accommodated. Because he chose not to do so, and did not explain why, his exposure to the risk of contracting COVID-19 must be assumed to be the result of his own decision, not the Secretary of State’s omission.
- 141 In those circumstances, the Principal Judge was wrong to conclude that the rights of AM under Articles 2, 3 or 8 required that he be accommodated, whether until step 4 of the Roadmap is reached or at all.

Obligations arising from the ECHR rights of the public at large

- 142 The second part of the Principal Judge’s reasoning is based on the rights of the public at large and the correlative positive obligation on the Secretary of State to protect them from risks to their lives and health from infection by homeless failed asylum-seekers.

- 143 There are some situations in which the rights of the public at large give rise to positive duties under the ECHR. In the field of freedom of expression, for example, there is a right under Article 10 to receive information. This right is enjoyed by the public at large; and it can give rise to duties on the part of public authorities, such as courts: see e.g. *R (Barking and Dagenham College) v Office for Students* [2019] [2019] EWHC 2667 (Admin), [2020] ELR 152; *R (Governing Body of X) v Ofsted* [2020] EWCA Civ 594, [2020] EMLR 22.
- 144 But Articles 2, 3 and 8 have rarely been held to impose specific obligations owed to the public at large. As the analysis at [108]-[110] above shows, the class of persons to whom the duty is owed is generally circumscribed. In the rare situations when it is not, the obligation is framed at a high level of generality (e.g. the obligation identified in *Genç* to establish a system or framework of medical care).
- 145 For present purposes, I am prepared to assume, without deciding, that Articles 2, 3 and/or 8 individually or cumulatively impose on contracting states a general obligation to take reasonable steps to protect their populations from the risks associated with the COVID-19 pandemic. Even on that assumption, the range of responses from different contracting states shows that different circumstances and political systems have led to different choices about how the obligation should be discharged. If, as the Strasbourg Court said in *Stoicescu* at [59], a broad margin of appreciation applies when tackling the much narrower problem of stray dogs in Bucharest, the same must be true *a fortiori* of the considerably more complex constellation of problems generated by the COVID-19 pandemic.
- 146 Any government facing the present pandemic will have many policy choices to make. Some involve matters of high principle, such as to what extent it should favour measures that preserve lives in the short term over measures that protect the economy in the short term. Some, like deciding upon the policy for destitute failed asylum-seekers, are more specific. But even these require the decision-maker to decide what weight to give to public interests, such as the integrity of the asylum system. They also require predictive judgments about the impact of particular measures. For the reasons given above, it is appropriate to accord to the executive a broad discretionary area of judgment when performing these functions. Indeed, when the rights in question are those of the public at large, rather than those of an individual or small group, the constitutional reasons for according weight and latitude to the executive and legislative branches are all the more powerful.
- 147 Even if it had been shown by Prof. Coker's or other evidence that the decision not to accommodate AM and others in the same position gave rise to an increase in the overall risk to the public, the increase would be incremental, given the numbers involved. The question whether to accept such an incremental increase in risk would be a matter for the Government. The answer might depend on the value placed on the integrity of the asylum system and on discouraging those without valid claims from coming to the UK. These are quintessentially matters for the executive, acting within the legislative framework set by Parliament and answerable to it.
- 148 As it is, however, there is nothing in Prof. Coker's report which substantiates the submission that failing to accommodate AM and others in his position will increase overall the risk of the health of the public. Logic suggests that some of those in AM's position will remain in the UK either on the streets or in congregate settings. Because the risk of transmission is higher in such settings, it is possible to infer that this will cause some increase in the number

of cases of COVID-19. But the Secretary of State's policy is premised in part on the need to avoid encouraging others without valid claims from remaining in the UK. Any assessment of the overall risks would need to factor in the public health benefit attributable to that. There was no proper evidential basis for concluding that, overall, the risk to public health would be materially increased.

- 149 More generally, the UK's response to the COVID-19 pandemic has included a suite of measures designed to protect public health, including unprecedented restrictions on individual freedom, investment in test and trace and vaccination programmes and economic measures such as the furlough scheme. Some of these have been criticised as inadequate. Parliament is the proper forum for such criticism. There is no basis in authority for concluding, against the background of this suite of measures, that the policy of refusing accommodation to destitute failed asylum-seekers who are not taking reasonable steps to leave the UK falls outside the broad discretionary area of judgment accorded to the Secretary of State under Articles 2, 3 and 8.
- 150 In my judgment, the Principal Judge was therefore wrong to conclude that rights of the general public under Articles 2, 3 and 8 provide a basis for imposing a duty to accommodate AM and others like him, whether until step 4 of the Roadmap is reached or at all.

Article 14

- 151 At [63] of her reasons, the Principal Judge said that there was "also an Article 14 dimension read with Article 8". If by that she meant that Article 14 supplied a distinct basis for the imposition of a duty to accommodate AM, she was in my judgment mistaken.
- 152 As I have explained, at the time of the hearing before the Principal Judge, the Secretary of State had signalled her intention to resume cessation decisions, so the argument that there was a difference in treatment between those who were currently accommodated and those who were not was not available (though it may well be available before the AST in this or other cases in the future).
- 153 The difference in treatment relied upon at [63] and [74] is a difference between AM and those in his position, on the one hand, and other members of the public, on the other. The point being made was that there were measures to protect the public in general (referred to in [58]), but nothing to protect destitute failed asylum-seekers like AM.
- 154 I am prepared to assume, again without deciding, that AM's status as a failed asylum-seeker is an "other status", for the purposes of Article 14, and that any discrimination against him on the ground of that status would fall within the ambit of Article 8. Even on that assumption, the discrimination argument considered by the Principal Judge in this case should have failed for one of two reasons, which are different ways of putting the same point:
- (a) The position of destitute failed asylum-seekers is not relevantly analogous to that of the remainder of the general public. Their claims having been rejected and their appeal rights exhausted, they have no legal entitlement to remain. That makes it appropriate to make any offer of accommodation to them conditional on their taking steps to leave the UK. The same is not true of other members of the general public.

- (b) If it is appropriate to compare the treatment of destitute asylum-seekers to the treatment of other members of the public, there is an objective justification for treating them differently, namely that the former have no legal entitlement to remain.

Cumulative effect of the Article 2, 3 and 8 rights of destitute asylum-seekers and the general public

- 155 Even taking the rights of destitute asylum-seekers together with those of the general public, the Principal Judge was in my judgment wrong to conclude, for the reasons she gave, that the Secretary of State was obliged to accommodate AM.

Conclusion

- 156 The Secretary of State's claim for judicial review therefore succeeds. In the light of my conclusions, it is unnecessary to consider ground 4.
- 157 I will quash the Principal Judge's decision and remit the appeal to the AST for rehearing and reconsideration in accordance with this judgment.