



Neutral Citation Number: [2022] EWCA Civ 1392

Case No: CA-2022-000417 & 000382

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PETER MARQUAND sitting as a deputy judge of the High Court
CO/2864/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

Between :

THE KING ON THE APPLICATION OF JB (GHANA)

**Claimant/
Respondent**

- and -

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

**Defendant/
Appellant**

Lisa Giovannetti KC and Colin Thomann (instructed by **Government Legal Department**)
for the **Appellant Secretary of State**

Chris Buttler KC and Ayesha Christie (instructed by **Duncan Lewis**) for the **Respondent JB**

Hearing date 6 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean :

1. There are separate financial support regimes for asylum seekers and victims or potential victims of modern slavery. Some individuals, including JB, the Respondent to this appeal, are both asylum seekers and victims of modern slavery. The appeal concerns the period from 24 March – 28 August 2020 during which the relationship between the two support regimes, and the financial entitlement of JB and others in the same position as him, was governed by paragraph 15.37 of a Home Office document entitled “Modern Slavery Act 2015 – Statutory Guidance for England and Wales” (“the MSAG”).

The facts

2. JB is a national of Ghana, who (on his case) arrived in the United Kingdom in March 2011. In November 2019, he was arrested as an illegal entrant and taken into immigration detention. He claimed asylum on 12 December 2019.
3. While in immigration detention JB was referred to the National Referral Mechanism (“NRM”) for victims of trafficking. On 17 December 2019 the Single Competent Authority within the Home Office made a positive “reasonable grounds” decision with respect to JB, and he thus became entitled to support as a “potential victim of trafficking” (“PVoT”). There has been no final “conclusive grounds” decision on his status.
4. From 23 December 2019 to 25 March 2020, JB lived in accommodation provided by a friend. He received £35 per week and the assistance of a support worker.
5. In March 2020 JB’s friend was no longer able to accommodate him. JB therefore applied for asylum support under section 95 of the Immigration and Asylum Act 1999. He was granted temporary support under section 98, and provided with temporary asylum accommodation at a hotel in Birmingham, on a full-board basis, from 25 March 2020. He continued to receive payments of £35 per week. On 31 March 2020 he was granted support pursuant to section 95.
6. On 14 August 2020, JB issued a claim for judicial review. He sought additional (and backdated) payments, increasing his financial support to £65 per week, on the basis that he had been entitled to that amount under the terms of the MSAG issued by the Home Secretary in March 2020. The guidance was amended on 28 August 2020. By amended grounds filed on 3 September 2020 JB limited his challenge to a claim for back-payments of the difference between the sums previously paid to him and the £65 per week he claimed to be entitled to under the MSAG before its amendment.
7. We enquired how many people were in the same position as JB, and were told that the answer is thought to be at most 63. With such a small cohort of claimants the costs of this appeal might be thought disproportionate to the amount directly at stake. The Secretary of State was concerned, however, that following the judge’s decision in this case, some claims have been issued (though at present they are stayed) challenging the

amendment to the MSAG in August 2020: that challenge has far greater financial implications.

The European Convention on Action against Trafficking

8. The European Convention on Action against Trafficking in Human Beings 2005 (“ECAT”) is the principal international measure designed to combat human trafficking. It is concerned, inter alia, with the treatment of those in respect of whom there are reasonable grounds to believe that they are victims of human trafficking and the support to be provided to them by Contracting States.
9. The United Kingdom signed the Convention in March 2007 and ratified it on 17 December 2008. It has not been incorporated into UK law. While individuals cannot enforce its provisions directly, insofar as the Secretary of State has adopted parts of the Convention as her own policy in guidance, her officials must follow that guidance unless there is good reason not to do so: *R (EM) v SSHD* [2018] EWCA Civ 1070 at §19.
10. Article 12 of ECAT provides as follows:

Article 12 – Assistance to Victims

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
 - a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
 - b. access to emergency medical treatment;
 - c. translation and interpretation services, when appropriate;
 - d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
 - e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
 - f. access to education for children.
 2. Each Party shall take due account of the victim's safety and protection needs.
11. Analogous provision was made under Article 11 of the EU Anti-Trafficking Directive (Directive 2011/36/EU), prior to the UK’s withdrawal from the European Union at the end of the transition period. The scope of this duty was examined by the Court of Appeal in the *EM* case. Peter Jackson LJ held at [65] as follows:

“The general duty on the State under Arts. 11(2) and (5) of the Directive is to provide assistance and support to a PVoT by mechanisms that at least offer a subsistence standard of living through the provision of appropriate and safe accommodation, material assistance, necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services”.

The Modern Slavery Victim Care Contract

12. The NRM provides the machinery for determining whether someone is a potential or confirmed victim of trafficking and for ensuring they receive the appropriate support. Support is delivered to Potential Victims in England by the Salvation Army as prime contractor (and by its subcontracted support providers) pursuant to the Victim Care Contract (“VCC”) made between the Home Office and the Salvation Army in 2015. Schedule 2 to the VCC provided that, upon entry into the NRM of an individual assessed as being a Potential Victim, an initial risk assessment and needs-based assessment was to be undertaken, to ascertain the immediate welfare needs of the Potential Victim and their dependents. Accommodation was generally provided on a self-catered accommodation basis or, in exceptional circumstances, where individuals were found not capable of preparing their own food due to disability, debilitating illness or ongoing treatment, on a catered basis.
13. Schedule 2 to the MSVCC set out figures for subsistence payments in cash, in accordance with the following table:

Service User Type	Value of Subsistence Payment
Service user in catered accommodation provided by the contractor	£35
Service user in self-catering accommodation provided by the contractor	£65
Service user accommodated by the authority and in receipt of subsistence payments through that service	£65 minus the amount of subsistence received by (sic) the authority
Service user not accommodated by the contractor or the authority (e.g. living with friends or family)	£35

14. As part of a reform package announced in October 2017, the Home Office proposed to align subsistence rates provided to Potential Victims to those received by asylum seekers. In *K & AM* [2018] EWHC 2951 (Admin) [2019] WLR 92 Mostyn J considered the scope of “subsistence needs” as provided for under Article 11 of the Trafficking Directive, and Article 13 of the Reception Directive. He observed at §29:

“[Counsel] drew my attention to regulation 9(4) of the Asylum Support Regulations 2000 which excludes, among other things, the cost of computers (which would include smartphones), travel, recreational items and entertainment in the assessment of "essential living needs" for the purposes of asylum support. But

some money for these purposes is surely reasonably required by a person in the highly vulnerable and distressing position of a victim of trafficking. This has recently been in effect conceded by the Home Secretary through the contract change of 1 November 2018, to which I refer below”.

The Statutory Guidance

15. Mostyn J, whose decision in the case of *K & AM* was not appealed, had been critical of the failure of the Secretary of State to publish guidance for the provision of support to victims and potential victims of trafficking as she was required to do by s 49(1)(b) of the Modern Slavery Act 2015. As already noted, that statutory guidance was published on 24 March 2020. Although this was the day after the Prime Minister had announced the first national lockdown in response to the COVID-19 pandemic, the document had plainly been drafted before any lockdown was anticipated.

16. Financial support within the guidance was provided for at §15.35 to 15.36 (emphasis added):

15.35 Potential victims and victims of modern slavery who have entered the NRM, received a positive Reasonable Grounds decision and are in VCC accommodation or outreach support, will be paid financial support. This payment will continue while they remain in VCC support for as long as they are assessed to have a recovery need for this assistance. Financial support is intended to meet the potential victim’s essential living needs during this period and assist with their social, psychological and physical recovery.

15.36. The current rate of financial support payable by the Home Office to potential victims or victims of modern slavery receiving VCC support depends on the accommodation they are in. The rates are as follows:

- £65 per week for those in self-catered VCC accommodation
- £35 per week for those in catered VCC accommodation
- £39.60 per week for those receiving outreach support in other accommodation
- Subject to 15.38 below, child dependents of potential victims will also receive financial support from the VCC” [details of payments in respect of child dependents were then provided].

17. Paragraph 15.37 provided:

“The payment rates will be adjusted if the potential victim or victim of modern slavery receiving VCC support is also an asylum seeker or failed asylum seeker receiving financial support under sections 95, 98 or section 4 of the Immigration and Asylum Act 1999 (“asylum support”). In these circumstances,

the individual will receive £65 per week, made up of payments from asylum support and a further payment from the VCC to take the total payment to £65 per week.”

Paragraph 15.38 dealt with child dependents and it is unnecessary to set it out here.

18. In *R (MD) v SSHD* [2022] EWCA 336 Underhill LJ said at [24]:

“At the start of the period with which we are concerned para. F-001 of Schedule 2 to the VCC provided for weekly “subsistence payments” to be made to adult potential victims of trafficking, described as “Service Users”, in accordance with a table defining the amounts by reference to “Service User Type”. We are concerned only with the third row of the table, which specifies the payments for service users “accommodated by the Authority and in receipt of subsistence payments through that service”: the amount payable in such a case is “£65 minus the amount of subsistence received by the Authority”. “The Authority” is a reference to the Secretary of State. It is common ground that the reference to “the amount of subsistence received by the Authority” is a slip for “from the Authority”. Even as corrected, the language is rather opaque, but it is not in dispute that the effect is to require the deduction of sums received under the Asylum Support Regulations by victims of trafficking who had made asylum claims. Thus a victim receiving asylum support would receive an essential living needs payment from the Home Office under regulation 10 (2) together with a “top-up” payment from the Salvation Army (though funded by the Home Office) under the VCC to bring the total to £65; for the period from 6 February 2018, for example, the two payments would be respectively £37.75 and £27.25. It is necessarily implicit in that approach that a “subsistence payment” under the VCC is intended to cover more than essential living needs: as to this, see para. 27 below.”

19. At [27] he continued:

“I need to refer to an episode in March 2018 which casts light on the Secretary of State’s obligations as regards subsistence payments. With effect from 1 March she reduced the amounts payable to service users in the relevant category from £65 to £37.75, on the basis that she believed that it was wrong that they should receive more than was received by asylum-seekers for essential living needs. In *R (K and AM) v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin), [2019] 4 WLR 92, (to which I will refer as *K*) Mostyn J held that that reduction was unlawful because it was based on a misunderstanding of the concept of “subsistence” in the Directive, to which the VCC was intended to give effect. In the context of the Directive the term “subsistence” went beyond the minimum required to stave off destitution, i.e. essential living

needs, and also covered pecuniary assistance with the recovery needs which were peculiar to victims of trafficking; and the “top-up” in the subsistence payment reflected that element. He also held that the reduction was discriminatory by reference to article 14 of the ECHR and that the Secretary of State had been in breach of her duty under section 149 of the Equality Act 2010. The Secretary of State did not appeal against that decision, and the level of payments was restored to £65. An order was also made for her to pay the sums not paid since the unlawful change of policy. ”

20. He noted at paragraph [31] that:-

“... the financial support provided for is intended to not only meet the essential living needs of victims but also to assist more widely with their “social, psychological, and physical recovery” (a phrase deriving from Article 12.1 of the ECAT).”

21. At [33] Underhill LJ said that paragraphs 15.37-38 of the Statutory Guidance issued in March 2020:-

“...correspond to the arrangements operated under the VCC prior to the publication of the Guidance as regards victims of trafficking who are recipients of asylum support. Specifically, para 15.37 sets out the top-up arrangement explained at para 24 above.”

22. Amendments were made to the statutory guidance with effect from 28 August 2020 as the result of a policy review. As amended, paragraph 15.38 (previously paragraph 15.37) provided:

“The payment rates will be adjusted if the potential victim or victim of modern slavery receiving MSVCC support is also receiving support under sections 95, 98 or section 4 of the Immigration and Asylum Act 1999 (“asylum support”). In these circumstances, the individual is receiving asylum support because they have been assessed as destitute or an assessment is being made on whether they are destitute. In both cases support is provided by asylum support to meet their essential living needs. Generally, support to cover essential living needs is provided through a payment of £39.63 per week, but in some cases essential living needs are met through in-kind assistance, or a combination of in-kind assistance and payments. A further payment will be made from the MSVCC of £25.40 (calculated as £65 per week minus the current essential living rate of £39.63 provided by asylum support) to assist with their social, psychological and physical recovery from exploitation.”

23. The rates specified for those receiving outreach support in other accommodation have been periodically adjusted, most recently on 21 February 2022, and currently provide for a payment of £ 40.85 per week.

Asylum support

24. Provision for subsistence support provided to asylum seekers (including, but not limited to, those who are also Potential Victims of trafficking) is made pursuant to Part VI of the Immigration and Asylum Act 1999.
25. Section 95 provides, so far as material:
 - “95.— Persons for whom support may be provided.
 - (1) The Secretary of State may provide, or arrange for the provision of, support for—
 - (a) asylum-seekers, or
 - (b) dependants of asylum-seekers,

who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.
 - (2) In prescribed circumstances, a person who would otherwise fall within subsection (1) is excluded.
 - (3) For the purposes of this section, a person is destitute if—
 - (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
 - (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.
 - [...]
 - (8) The Secretary of State may by regulations provide that items or expenses of such a description as may be prescribed are, or are not, to be treated as being an essential living need of a person for the purposes of this Part.
 - (9) Support may be provided subject to conditions.”
26. By s.96, support may be provided under s.95, inter alia, by the provision of accommodation adequate for the needs of the supported person (s.96(1)) and by the provision of what appear to the Secretary of State to be essential living needs to a supported person.
27. Temporary support is provided for by s.98, pending determination of eligibility under s.95.
28. These provisions are underpinned by the Asylum Support Regulations 2000 (SI 2000/704) made under ss 95-98 of the 1999 Act. Regulation 10(5) reads:

“Where the Secretary of State has decided that accommodation should be provided for a person [...] by way of asylum support, and the accommodation is provided in a form which also meets other essential living needs (such as bed and breakfast, or half or full board), [the amount specified] in paragraph (2) shall be treated as reduced accordingly.”

29. The rate of weekly support payments made under the asylum support regime has been subject to detailed judicial consideration. In *R (SG) v SSHD* [2016] EWHC 2639 (Admin); [2017] 1 WLR 4567, Flaux J (as he then was) held at [7]-[8]:
- i. Asylum support was limited to those who are destitute, defined by section 95 of the 1999 Act as those who do not have any adequate accommodation or means of obtaining it and those who cannot meet their essential living needs.
 - ii. When an asylum seeker applies for support, and a decision is made to grant such support, accommodation is provided, at no cost to the asylum seeker, under section 96(1)(a) of the 1999 Act. Utility bills and council tax are met by the accommodation provider. The accommodation includes basic furniture and household equipment (cooker, fridge, washing machine, cooking utensils, crockery and cutlery).
 - iii. In addition, the asylum seeker receives a weekly cash payment under section 96(1)(b) of the 1999 Act to meet essential living needs such as food and clothing for him or herself and dependants, as set by the relevant Regulations.
 - iv. In addition to the accommodation support provided in kind and the weekly cash payments, asylum seekers have free access to the NHS. They obtain free prescriptions, dental care, eye tests and glasses. They are reimbursed reasonable costs of travel to and from hospital for scheduled appointments and benefit from free access to libraries.

Support for asylum seekers in full board accommodation

30. The services to be made available by providers of asylum accommodation are set out in Schedule 2 to the Secretary of State’s Asylum Accommodation and Support Services Contract. For initial accommodation, Clause 2.3 sets out the Secretary of State’s preference for this to be provided on a full board basis. The service requirements include, by paragraph 4.1.4, the provision of food, including breakfast, lunch and evening meals with a choice of at least one hot and one cold selection, as well as a vegetarian option. Personal toiletries and feminine hygiene products must be provided. By paragraph 4.1.5 vouchers and/or cash payments are to be provided, where the contractor is not otherwise able to meet the Service Requirements.
31. In *R (JM) v SSHD* [2021] EWHC 2514, Farbey J considered a challenge to the level of support received by asylum seekers accommodated in hotels as part of their overall asylum support during certain periods of the Covid 19 pandemic. She summarised the position prior to the pandemic at [32]-[34]. A person would be housed in initial accommodation while supported temporarily under s.98; typically on a full board basis in a hostel, and without the asylum seeker receiving a cash payment for their essential

living needs. Once the asylum seeker has been found eligible for support under s.95, longer-term accommodation from the stock of “dispersal accommodation” was sourced by the Home Office’s accommodation providers. Such dispersal accommodation was generally self-catering in flats and houses, and essential living needs met in cash through the operation of an electronic “Aspen card”. Pre-pandemic, an individual could typically be expected to live in initial accommodation for only a short time. Even before the pandemic, some individuals remained in initial accommodation for longer periods, typically because they had complex needs, and some such individuals received support to cover their other “essential living needs” in the form of in-kind provision, cash or vouchers, or a mixture of both.

32. The Secretary of State’s long-standing policy was that the provision of essential living needs at hotels and initial accommodation centres was the responsibility of the accommodation provider. It was only if the provider was unable to meet those needs directly that they should do so by an additional cash or voucher allowance.
33. The factual matrix changed following the decision, taken on 27 March 2020, that in view of the pandemic, the requirement for asylum seekers to leave s.95 accommodation would be suspended for 3 months. In consequence, the Secretary of State was left to source additional accommodation for asylum seekers coming into the support system on an urgent and ever-increasing basis. This was achieved, largely, by accommodating those entrants in hotels.

The Frequently Asked Questions document

34. The Secretary of State periodically issues guidance to the Salvation Army and subcontractors on the interpretation of the Policy. A ‘Frequently Asked Questions’ document entitled “FAQs about subsistence” was first sent by the Head of the Victim Care Contract at the Home Office to the Salvation Army on 29 January 2020 “to be cascaded to support providers in order to address common questions”, and again on 6 April 2020. Question 2 and the answer to it are relevant:

“2. Subsistence for catered accommodation clients:

a) Are we correct in understanding that Catered Accommodation clients are entitled to and should get £35 pw regardless of benefits or income from work etc.?

Yes – unless they are receiving support from the asylum support system, in which case their financial support should be £65 pw minus the NASS payment.”

35. Thus it appears that at the time the March 2020 guidance document was issued the Head of the Victim Care Contract at the Home Office understood paragraph 15.37 to apply to all asylum seekers in receipt of cash asylum support, regardless of whether they were accommodated in full-board or self-catered accommodation.

The decision below

36. The Claimant applied for judicial review of the Home Secretary’s failure to pay him £65 per week in respect of the period from 31 March – 28 August 2020. Permission

was granted by Lane J on 14 October 2020. The substantive hearing came before Peter Marquand sitting as a Deputy Judge of the High Court. In the discussion section of his judgment he said:-

“25. The Claimant's submissions may be shortly summarised as: an objective reading of the MSAG entitles the Claimant to a total cash payment of £65 per week, less the cash payment received as asylum support. The Defendant's submissions, which I have necessarily summarised, are that the MSAG needs to be interpreted in context and with a purposive approach. In case of ambiguity, it is necessary to step back and look at the matter in context. *Raissi* needs to be applied carefully to determine the objective intent of the policy, including looking at all of the MSAG. There is no express provision covering in-kind assistance or how it is to be dealt with. Paragraph 15.37 of the MSAG is directed towards mere financial support and not in-kind support or a mixture of both. The clear intent of the policy was that for someone like the Claimant the sum paid would be £35 per week. The rule of equality is relevant in treating people in similar circumstances equally.

26. It is clear from the evidence that before the pandemic a person claiming asylum and accommodated under section 98 IAA would generally be placed in full board accommodation and not provided with any additional financial assistance. After that temporary placement, if a section 95 IAA decision was made in the person's favour, then they would be moved to "dispersal accommodation", which was generally self-catered. They would receive the payment referred to in Regulation 10(2), which is referred to in the various pieces of evidence as £39.60 or £39.63.

27. The pandemic altered what generally happened because of a lack of self-catered accommodation. Therefore, increasing numbers of people seeking asylum and in receipt of a positive section 95 IAA decision remained in full board accommodation. As Mrs Justice Farbey concluded in *JM*, and as I understand the Defendant accepted, a person receiving support under section 95 IAA is entitled to a cash weekly payment for their essential living needs where those have not been met by the "in kind" provision of the full board accommodation. As is accepted, the Claimant in this case should have received such a weekly cash sum from the date of his section 95 IAA decision.

28. I have considered paragraph 15.37 in the context of the MSAG and from the point of view of a reasonable and literate person's understanding of the policy. I have borne in mind that I am to read the policy objectively from the language used and not with the strictness of construction of a statute or statutory instrument.

29. There is no ambiguity in the policy and there is no lacuna. The policy is clear as it states that a person who is both a Potential Victim and an asylum seeker receiving financial support under, in this case, section 95 IAA will receive a total of £65 per week. This sum is to be made up of payments from asylum support plus a further payment from the VCC. There is no basis to interpret "financial support" as meaning "the sum due under Regulation 10(2)". This is not the natural and ordinary meaning of that phrase. The understanding of the person or persons who drafted the FAQ was consistent with the interpretation that I have reached – see the answers to questions 2 and 4. It makes no difference that the Claimant did not receive, as a matter of fact, the financial support under section 95 IAA that he was entitled to, in whole or part, during the relevant period, not that I understand that to be an argument put forward by the Defendant.

30. The person or persons who drafted paragraph 15.37 of version 1.01 of the MSAG either intended it to be interpreted in that way or they had in mind what generally happened. They anticipated and expected that Potential Victims or Victims who were also asylum seekers, or failed asylum seekers, receiving financial support under the IAA would be in self-catering accommodation. This is consistent with Ms Tann's evidence and that of Mr Ryder as they both record what generally happened. Notwithstanding what was in the mind of the person or persons drafting version 1.01 of the MSAG, the policy as drafted does not reflect the "consensus" referred to in the Defendant's Part 18 response (see paragraph 20 above) or paragraph 11 of Mr Ryder's statement quoted at paragraph 21 above. The Defendant may have hoped or expected that is what the drafting stated or should state, but it does not. There is a very good reason why a policy should be interpreted in the way set out in *Raissi* and *Mahad*. It is so that people to whom the policy applies can understand the policy from the document itself. If, because of the way a document has been drafted, it becomes clear to the Defendant that the policy is not being implemented in the way that the Defendant intended, then the solution is to change the policy. As stated above, the Defendant did change the policy and the Claimant accepts from the date of that change that he is not entitled to the additional payment to make his cash weekly sum £65 in total.

31. Looking at paragraphs 15.36 and 15.37 it might be considered that £35 per week for an asylum seeker who is also a Potential Victim and in full board accommodation would seem "fair". They look to be in a similar situation to a Potential Victim who was in catered VCC accommodation, who received £35. However, although that might seem fair it is not what version 1.01 of the MSAG stated at paragraph 15.37. As the evidence

that the Claimant provided demonstrated, the sums received by Potential Victims and Victims in similar circumstances can vary considerably due to the impact of other benefits. There is no reason to "second guess" what was stated in paragraph 15.37.

32. In *SC* and *Matadeen* the circumstances were different in that those challenging the decision of a public authority sought to argue they had not been treated equally to others. In this case, the Defendant argued that the rule of equality supports the reading the Defendant contends for in paragraph 15.37. The rule of equality as advanced by the Defendant is not relevant to the circumstances of this case. If the drafting of the paragraph 15.37 was not clear or there was a lacuna it might help in interpretation. However, as I have found, that was not the case. I do not consider the interpretation I have reached of paragraph 15.37 in the context of the MSAG to be obviously wrong so as to justify reaching a different conclusion. The simple position is that the practice that was followed in the Covid-19 pandemic, as set out in the Defendant's evidence, did not match the drafting of paragraph 15.37. If paragraph 15.37 was not meant to do what it states, then the change in circumstances was not anticipated by those who drafted it, or it was not drafted with sufficient precision.

33. I have found for the Claimant. The Defendant's policy on financial support to potential victims of modern slavery at the relevant time stated that such a person would receive a total of £65 per week, less any financial support received as an asylum seeker."

Submissions for the Secretary of State

37. Ms Giovannetti KC submits that the key legal principles applicable to the interpretation of a policy document are well established:
- **Firstly**, the Court is not conducting a *Wednesbury* review of the Defendant's interpretation: it is determining, for itself, the correct interpretation of the policy (see, e.g. *R (Raissi) v SSHD* [2008] QB 836);
 - **Secondly**, as with statutory interpretation, the starting point is to consider the language used. However, the words used are to be construed in the context of the relevant background, including consideration of the document as a whole (*Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (per Lord Hoffmann [4], applied in *Mahad v ECO* [2009] UKSC 16, and more recently see the Court of Appeal in *SSHD v Khattak* [2021] EWCA Civ 1873);
 - **Thirdly**, a policy is "not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument" (per Lord Brown in *Mahad*).

- **Fourthly**, just as the aim of statutory interpretation is to discern the intention of Parliament, in interpreting a policy, the aim of the exercise is to discern the intention of the person or body promulgating that policy (*Re McFarland* [2004] UKHL 17, [2014] 1 WLR 1289);
38. In *R (Raissi) v SSHD* [2008] QB 836, the Court was interpreting a compensation scheme. Hooper LJ considered that ascertaining the intention of the policy maker involved consideration of the following questions:
- “What does the scheme mean? What was its purpose and scope?
Who was the minister intending to compensate?”
39. It was, he considered, “quite wrong” to approach “in a legalistic manner” the construction of the Home Secretary’s statement concerning the compensation of those who had spent a period in custody resulting from a serious default on the part of a police officer or of some other public authority.
40. Even in the context of statutory construction, it has, moreover, long been established that the role of the courts is not confined to resolving ambiguities in statutory language, but extends to correcting obvious drafting errors: *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586 and see also, closer to the present context, the approach of Mostyn J to the table in the MSVCC set out above.
41. The effect of the decision below is that between March and August 2020 a group of people such as JB, a Potential Victim who was provided with full-board accommodation under the Immigration and Asylum Act 1999, was entitled to almost twice as much by way of financial support as a Potential Victim whose full-board accommodation was provided under the Modern Slavery Victim Care Contract.
42. Ms Giovannetti submitted that on a correct interpretation of the March 2020 MSAG, the level of financial payments was intended to turn upon the nature of the accommodation provided (i.e. whether it was self-catering or full-board), not on the regime under which it is provided (whether it was provided under the 1999 Act or the MSVCC).
43. She argued that in construing paragraphs 15.36 and 15.37 of the MSAG, as it stood prior to 28 August 2020, the judge erred in law, since “neither paragraph provides in terms for the payment of £65 per week by way of financial support to individuals whose essential living needs are met in fully catered accommodation provided pursuant to s.95 IAA”. The submission, accepted by the judge, that the rate payable to Potential Victims in *catered* accommodation can be derived from “the plain words” of the guidance, is mistaken. The guidance does not provide in terms as to how such in-kind assistance is to be accounted for. Nor can the guidance within the MSVCC Table and paragraphs 15.36 and 15.37 sensibly be construed without regard to the context and policy, or to the intention of the Secretary of State, which can be assumed to include making fair and equitable provision for the different cohorts affected. No good reason has been identified for the difference in treatment created by the judge’s construction. It effectively doubles the support provided to Potential Victims in initial, fully catered, accommodation provided under the 1999 Act.

44. The context of the policy considered by the judge was an unusual one: at the time the Secretary of State issued the MSAG the drafter of the Guidance “would plainly have believed” that those such as JB, who were in fully catered asylum support accommodation, fell outside the terms of paragraph 15.37. The class of persons, such as JB, who were residing in fully catered asylum support accommodation were not “receiving financial support” under the IA 1999 at the relevant time.
45. Accordingly, neither the MSVCC nor the MSAG addresses payments to be made to the cohort of Potential Victims in *full board* asylum accommodation. Likewise, neither makes express reference to the treatment of *in-kind* subsistence received for the purposes of the calculation of the financial payment made under the MSVCC. The practice, pre-pandemic, of moving those assessed as eligible for s 95 asylum support to self-catered accommodation within a short time frame, is consistent with this framework. The practice at the time was summarised by Mostyn J in *K&AM* (supra) at paragraph 14:

“What is absolutely clear is that for the second and third classes, that is victims of trafficking who are in self-catered accommodation, the cash payment is £65, albeit in the third class the victim must give credit for any money received by him or her under section 95 of the Asylum and Immigration Act 1999 and the Asylum Support Regulations 2000 (SI 2000/704). Under those Regulations the weekly subsistence payment for asylum-seekers is £37.75. Thus, under the plain terms of the contract a victim in the third-class gets a top-up of £27.25 to achieve the headline figure of £65.”
46. In the present case, as in *K&AM*, the rate of payment stipulated for those in fully catered accommodation provided under the MSVCC is a key part of the relevant context and informs the intended level of support for others in fully catered accommodation.
47. Accommodation under both the MSVCC and the IA 1999 is made available on the basis of an assessment of urgent need/destitution, leaving the individual reliant upon “in kind” or financial support subsistence support to meet their essential needs. It cannot sensibly be inferred that policy maker intended that one cohort should receive almost double the level of financial support provided to the other. But that is the result of the judge’s interpretation.
48. The submission, accepted by the judge, that the MSAG “clearly and unequivocally” provided for what is, essentially, a duplicate payment in respect of essential living needs whilst individuals remained in initial, full board, accommodation is mistaken. The MSAG simply made no express provision for those in catered accommodation provided under s.95 IAA.
49. In ascertaining the intention of the Secretary of State, as promulgator of the policy, the following factors are of material assistance:
 - i) Paragraph 15.37 catered for a specific scenario then anticipated to occur in practice: the placement of a Potential Victim who has made an asylum claim in self-catered asylum accommodation. Essential living needs are met, following

dispersal to self-catered accommodation, by the payment of “financial support”. The overall entitlement is capped at £65.00;

- ii) The figure precisely matches that envisaged to be provided to Potential Victims placed in self-catered accommodation provided by the Contractor, of £65.00 per week (paragraph 15.36).
 - iii) In stipulating that Potential Victims in self-catered asylum accommodation receive a sum equivalent to those in self-catered MSVCC accommodation, the MSAG achieves a rational outcome.
 - iv) The practice of providers at the time (as illustrated by JB’s receipt of £35, rather than £65 per week) does not support the Respondent’s construction of the policy. Rather, this practice (and the absence of a challenge to it pre-cessation) provides an insight into the mutual understanding of the parties to the VCC of the terms of the contract. It further undermines any submission that the reading of the VCC/the Guidance is “unequivocal”.
50. For completeness, the judge’s reliance upon standard responses to questions 1-3 given within an FAQ document sent to the Salvation Army by the Secretary of State’s Head of Victim Care Contract was similarly mistaken. The document confirmed that account should not be taken of extraneous *benefits and income from work* when calculating VCC recovery payments for those in catered MSVCC accommodation. The inclusion, within each answer, of the phrase “unless they are receiving support from the asylum support system, in which case their financial support should be £65pw minus the NASS payment” is, in context, the consequence of an obvious mistake. This is apparent most clearly from the response to question 2: “Subsistence for catered accommodation clients” (i.e. those in VCC accommodation): by the terms of the VCC, this cohort is unambiguously accorded a VCC subsistence payment of £35.00, rather than £65.00.
51. The correct approach is to “interpret the document in accordance with the presumed intent of the maker” (see *Re McFarland* and *Raissi, supra*, at §121). In that regard:
- a) the MSAG expressly addressed the position of Potential Victims placed in self-catered accommodation only; and
 - b) it is inherently unlikely that the Secretary of State intended to provide those in fully catered asylum support accommodation with substantially higher payments (almost double) as compared to those in fully catered MSVCC accommodation.
52. Insofar as the plain words of the policy did not give effect to the intention of the promulgator, it is open to the Court to read in words, following the approach in *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586.
53. The judge acknowledged that the Secretary of State’s interpretation, by which Potential Victims in full-board accommodation all receive the same amount, irrespective of the route by which that accommodation is provided, “might seem fair”. His response was not that on closer examination it was not fair. Rather, it was that “There is no reason to “second guess” what was stated in paragraph 15.37 [of the MSAG]”. But that is predicated upon the MSAG clearly providing that those in accommodation under the

1999 Act should receive payments at a higher level than those in accommodation provided under the MSVCC. As explained above – it did not.

54. Rather, the intention of the promulgator of the policy stands to be interpreted by reference to the factual background against which it was drafted, namely the Home Office’s practice, pre-pandemic, in respect of asylum support, by which:
- i) emergency full board accommodation without the provision of additional financial support was provided on an initial short-term basis only and;
 - ii) those whose claims for s.95 support had been accepted were swiftly moved on to self-catered accommodation at which point financial support was provided.

Submissions for the Respondent JB

55. The Secretary of State’s sole ground of appeal is that the judge “erred in law by interpreting the words of the policy without due regard for the policy’s purpose and context”. In her skeleton argument, the Secretary of State also contends that the judge erred by not having regard to the “assumed... intention” and “belief” of the Secretary of State at the time of issuing the policy. These contentions are wrong.
56. First, the Secretary of State’s reliance on *Re McFarland* [2004] 1 WLR 1289 (which was not a point taken before the judge at the substantive hearing) is misplaced. The Secretary of State relies on the judgment of Lord Bingham to claim that a policy must be interpreted according to the “presumed intent of the maker” and that “it is inherently unlikely” that the Secretary of State intended to provide victims in catered asylum accommodation with higher payments than those in catered trafficking accommodation. This is a misinterpretation of *Re McFarland*:
- i) In that case the House of Lords was construing the meaning of a ministerial statement made in 1985: the Home Secretary had announced, by way of a written answer to Parliament, an *ex gratia* scheme for payment of compensation to persons whose criminal convictions had been quashed on appeal. The Home Secretary had stated that he was “prepared to pay compensation” to persons who had spent time in custody having been wrongfully convicted “where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority” (§8). Lord Bingham considered that “magistrates would not in 1985 have been regarded as members of public authorities”, and thus that the Home Secretary’s reference in 1985 to “public authority” did not include magistrates (§15).
 - ii) Lord Bingham was clearly applying an objective interpretation of the term “public authority”, based on the general understanding of the term at the time of the Home Secretary’s statement. He was not suggesting that the policy should be construed according to the Home Secretary’s subjective intention. Lord Scott, at §39, agreed that a magistrate would “not normally be regarded as a... public authority”.
 - iii) In any event, it is Lord Steyn’s dicta in *Re McFarland*, that “policy statements must be interpreted objectively in accordance with the language employed by the minister” and “the court does not defer to the minister” but undertakes an

“interpretative process... which must necessarily be approached objectively and without speculation about what a particular minister may have in mind” which have been followed by the Courts and accepted to be “good law” (see *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074 §56), and which is consistent with subsequent Supreme Court authority such as *Mahad v ECO* and *Tesco Stores v Dundee*).

57. Thus, in the present case, the question is not whether it is “inherently unlikely” that the Secretary of State intended to provide victims housed in catered asylum accommodation with trafficking support at a rate of £65/week minus their asylum cash support, when she made different provision for victims housed in catered trafficking accommodation. The Court should not “read in words... [to] give effect to the intention of the promulgator” as suggested in the Secretary of State’s skeleton. It is irrelevant that the Secretary of State, at the time of issuing the Policy, if she had thought about it, “would plainly have believed those such as JB, who were in fully catered asylum support accommodation, fell outside the terms of §15.37”. Rather the question is: what would an objective reader have understood the words of paragraph 15.37 to have meant when the Policy was promulgated on 24 March 2020?
58. It appears that the Secretary of State no longer pursues the argument advanced in the High Court that the words “financial support under section 95” in paragraph 15.37 should be construed as meaning “those in receipt of the payment set out at Regulation 10(2)” of the 2000 Regulations. Such an argument is hopeless; as the judge correctly found, since “[t]his is not the natural and ordinary meaning of that phrase” [Judgment §29].
59. Instead, the Secretary of State now contends in her skeleton argument that persons “such as JB, who were residing in fully catered asylum support accommodation were not ‘receiving financial support’ under the IA 1999 at the relevant time”, and thus paragraph 15.37 should not be interpreted as applying to them. This is wrong as a matter of fact and of construction:
- i) The provision of full-board asylum accommodation was not a new concept introduced during the pandemic – the statutory scheme has expressly provided for full-board asylum accommodation since 2000, and for a cash payment to be made where necessary to ensure that all of a person’s essential living needs (including travel and communication costs) were met: see reg. 10(5) of the 2000 Regulations.
 - ii) The Secretary of State’s own evidence was that, even prior to the pandemic, some asylum seekers who were housed in full-board accommodation under the IAA received cash support: “For as long as the person remains in initial accommodation, support... is provided... in the form of full board in-kind provision, cash or vouchers, or a mixture of both” (witness statement of Mr Bentley, §8-9). This included asylum seekers supported under section 95 who remained in full-board accommodation awaiting dispersal to self-catered accommodation (Bentley §10).
 - iii) Asylum seekers housed in full-board asylum accommodation pursuant to section 95 should have received financial support under section 95 (and JB became entitled to this on 31 March 2020 when his entitlement to section 95

support was recognised). As the judge correctly held, “It makes no difference that the Claimant did not receive, as a matter of fact, the financial support under section 95 IAA that he was entitled to, in whole or in part, during the relevant period, not that I understand that to be an argument put forward by the Defendant” [Judgment §29].

- iv) Thus, a “temporal” interpretation of paragraph 15.37, construing the words “financial support under section 95” objectively, in light of the position at the time the Policy was promulgated, would result in the same conclusion: that paragraph 15.37 applied to those in full-board asylum accommodation provided under section 95 IAA.
60. Second, there is no basis upon which to read words into the policy, as the Secretary of State now suggests (but did not argue below). The Secretary of State’s reliance on the Court’s power to correct “obvious drafting errors” is misplaced:
- i) The power described in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 applies to statutory construction, not to the interpretation of administrative policy.
 - ii) In any event, the three tests set out by Lord Nicholls in *Inco Europe* at 592F-G, which must be satisfied before a court will add or remove words from a statute to correct a drafting error, are not met: “the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made... had the error in the Bill been noticed”. Here, there was no contemporaneous evidence to enable the Court to be “abundantly sure” that the Secretary of State did not intend victims of trafficking who received a mixture of cash asylum support and in-kind support to fall within paragraph 15.37 of the Policy; on the contrary, the contemporaneous FAQ document suggests the opposite.
 - iii) Even where those tests are met, there are limits to the Court’s ability to read-in: “the insertion must not be too big, or too much at variance with the language used by the legislature” (per Lord Nicholls in *Inco Europe* at 592H). In the present case, the insertion that would be required is significant: it requires the Court to (i) remove the reference to section 95 IAA, and (ii) read in references to an entirely different statutory provision: regulation 10(2) of the 2000 Regulations.
 - iv) The variation of the language required to give effect to the Secretary of State’s proposed interpretation of paragraph 15.37 of the Policy in the present case could not be further from the simple clarification made by Mostyn J in *K & AM* at paragraph 13. Mostyn J replaced “subsistence received by the authority” with “subsistence received from the authority”, where (i) it was objectively obvious that there was a grammatical error because it was the authority who provided the money to the service user and not the other way around; (ii) both parties agreed that this was what was intended.

61. Third, the Secretary of State’s general contention that the judge “erred in law by interpreting the words of the policy without due regard for the policy’s purpose and context” is unsustainable. The judge plainly had regard to the language of paragraph 15.37 of the Policy within the context and purpose of the Policy as a whole [Judgment §25]. He took into account the situation of (non-asylum seeking) victims in catered trafficking accommodation, who received £35 per week. But he also had regard to the fact that the sums received by victims in similar circumstances can vary considerably due to the impact of other benefits [Judgment §31]. Having taken full account of the relevant context, and correctly applied the principles applicable to the interpretation of administrative policy, there is no error of law in the judge’s conclusion that the disparities in the level of trafficking support provided to victims of trafficking relied on by the Secretary of State did not provide a “reason to ‘second guess’ what was stated in paragraph 15.37” [Judgment §31].
62. JB does not dispute that the proper construction of paragraph 15.37 of version 1.01 of the Policy left victims of trafficking housed in catered asylum accommodation better off than victims housed in self-catered asylum accommodation. It might be thought that it was sensible for the Secretary of State to equalise their treatment on 28 August 2020, in version 1.02 of the Policy. However, it is a feature of the Secretary of State’s Policy (which is not based on financial need, and does not take account of any sources of income save for asylum support) that certain groups do better than others. An example is that victims housed in self-catered trafficking accommodation who are in receipt of mainstream benefits of £94.15 per week receive a further £65 per week in trafficking support, whereas victims accommodated by a charity or a friend, who do not receive any state benefits or other financial support, receive just £39.60 per week in trafficking support.
63. It is not the Court’s task to assess the merits of version 1.01 of the Policy, or to redraft the policy in an attempt to improve it. Constitutionally, that is the Secretary of State’s function. As set out above, the Court’s task is to construe the Policy, according to its natural and ordinary meaning. This is what the judge did, and there is no error of law in his judgment.

Discussion

64. In my view the judge was right for the reasons he gave. Paragraph 15.36 of the March 2020 Guidance does draw a distinction between catered and self-catered VCC accommodation and, if the matter ended there, the Claimant would not have been entitled to payments of £65 per week. But the matter did not end there, because of the inclusion in the document of paragraph 15.37. This states in categorical terms that if a potential victim of trafficking is also an asylum seeker and receiving asylum support, a further payment is to be made to him to make a total (including the asylum support) of £65 per week. Nothing is said about any offset for the value of meals provided in catered accommodation; nor is any distinction made between claimants who are in catered accommodation and those who are in self-catered accommodation. It would not have been difficult to draft a paragraph making such a distinction, and an amended scheme was introduced five months later.
65. It seems to me a reasonable inference that the reason why paragraph 15.37 in the March 2020 version reads as it does is because (as noted by Farbey J in the *JM* case) the practice before the onset of the pandemic was that people in JB’s position would

typically spend only a short time (we were told 4-6 weeks was a common period) in catered accommodation before being moved on. Although the document was issued on 24 March 2020, it had been drafted before the onset of the pandemic and the beginning of the series of lockdowns which we all remember. But that is not a reason to change the plain and obvious meaning of paragraph 15.37.

66. I do not consider that there is any merit in the Secretary of State's argument that since JB was not in fact "receiving financial support" (in the sense of cash payments) under the 1999 Act for a period beginning on 24 March 2020 that placed him outside paragraph 15.37. I accept the submissions of Mr Buttler that, firstly, most asylum seekers, even if housed in full board initial accommodation, had been receiving some cash support as well; and that JB should have been, as was subsequently recognised. It would have created a very curious anomaly if someone receiving very modest cash payments towards essential living needs was entitled to be "topped up" to £65 per week, whereas someone receiving no such payments was not.

67. It is well established that in construing a policy document a court should not subject the wording to the kind of fine analysis which might be applied to a statute or a contract: see *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983 per Lord Reed. But the document must still be interpreted objectively. As Lord Steyn said in *Re McFarland* [2004] 1 WLR 1289 at [24], although such documents need not be construed as though they were legislation, and it "seems sensible that a broad and wholly untechnical approach should prevail", nevertheless:-

"...what is involved is still an interpretative process conducted by a court, which must necessarily be approached objectively and without speculation about what a particular minister may have had in mind."

68. The principle set out in cases such as *Raissi* and *Mahad* is that documents of this kind should mean what they say, and should be interpreted as they would be read by a reasonable claimant or support worker or advisor. Some of Ms Giovannetti's arguments, though expressed with her usual persuasiveness, seemed to me to come close to asking us to interpret the document in accordance with what the drafter would have written if he or she had thought about it more carefully, or even if he or she had been able to foresee the appalling problems which the pandemic would bring.

69. I am entirely unable to accept the argument that paragraph 15.37 contained an obvious error within the terms of *Inco Europe Ltd vs First Choice Distribution* [2000] 1 WLR 586. In the well-known passage in the speech of Lord Nicholls of Birkenhead at [592] he said:-

"The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words or omit words or substitute words."

70. He continued at [592E]:

"This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed

in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation”

71. In the present case it is not obvious what the substance of para 15.37 would have been if the drafter had not made what Ms Giovannetti submits is an obvious error. Moreover, it is far from obvious that the drafter did *not* intend a claimant in JB’s position to receive a top-up to bring his total payments to £65 per week. The construction of para 15.37 which the judge found to be correct is consistent with the terms of the Victim Care Contract between the Home Office and the Salvation Army; and also with the answer given to question 2 in the FAQs document first issued by the Home Office in January 2020 and re-issued soon after the promulgation of the guidance on 6 April 2020. It is impossibly ambitious for the Secretary of State to contend that there was an obvious mistake of the *Inco* type in all three documents. As Mr Buttler put it, pithily and correctly, a flaw in the design of a policy is not the same as a drafting error.
72. In *MD* this court was concerned with alleged discrimination arising out of a much more striking anomaly than the one in the present case. A particular group of claimants were receiving two cash payments in respect of the same needs. It was not suggested by anyone in that case that that anomaly could be ignored or the relevant regulations rewritten. As Underhill LJ said at [67] “making rules in these complex interlocking areas, particularly where different departments are involved, must be far from straightforward”.
73. The lawfulness of the amendment to the guidance made in August 2020 is not in issue before us; and Mr Buttler did not seek on behalf of JB to challenge it or to argue that his client should have received £65 per week after the date of the amendment. I will only say that as at present advised I can see no reason why the Secretary of State should have been precluded from making the amendment which she did.
74. For these reasons I would dismiss the appeal.

Lord Justice Peter Jackson

75. I agree.

Lord Justice Baker

76. I also agree.