Neutral Citation Number: [2021] EWHC 2514 (Admin)

Case No: CO/4563/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2021

**Before** :

**MRS JUSTICE FARBEY**

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**Between :**

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|---|---|
| **JM** | **Claimant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Defendant** |

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**Mr Chris Buttler QC** and **Mr Raza Halim** (instructed by **Duncan Lewis Solicitors**) for the Claimant
**Mr Alan Payne QC** and **Ms Saara Idelbi** (instructed by **Government Legal Department**) for the Defendant

Hearing dates: 15, 16, 28 June 2021 and 4 October 2021

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# Approved Judgment

**Mrs Justice Farbey :**

## Introduction

1. This is my judgment following a "rolled-up" hearing in a claim for judicial review. The issue raised by the claim is whether or not asylum seekers accommodated in hotels ought to have received support for travel and communication needs as part of their overall asylum support during certain periods of the Covid-19 pandemic.

2. The claimant is a national of Honduras who has applied for asylum. His asylum claim has not been determined. From 1 May 2020 until 1 February 2021, he was provided with full board accommodation by way of asylum support under section 95 of the Asylum and Immigration Act 1999 ("s.95"). From 1 May 2020, he resided in what has been described to me as the Jaguar Building which is said to be a hotel. On 26 June 2020, he was moved to the Hallmark Hotel where he remained until he was moved to self-catering accommodation on 1 February 2021.

3. In his amended grounds of challenge, the claimant contends that:

   i. In the period prior to 19 October 2020, which marked a change of policy, the defendant unlawfully failed to make any calculation of his entitlement to asylum support and unlawfully failed to pay more than £5 per week cash support; and

   ii. The defendant's subsequent decision to make back payments failed to provide an adequate remedy for the failure to have made a lawful decision in the period prior to 19 October 2020.

4. As regards relief, the grounds seek quashing orders; declarations that the defendant's failures were unlawful; and a mandatory order for the appropriate back payment to him and to all other asylum seekers who were affected by the defendant's errors. Before me, only the claim for declarations was pursued.

5. By order dated 14 December 2020, Swift J directed that the question of interim relief be considered at a hearing. On 18 December 2020, before Sir Duncan Ouseley sitting as a High Court Judge, the parties indicated that they had reached agreement on the substance of interim relief. As a result, the application for interim relief was withdrawn. Agreement was reached, and the interim relief application withdrawn, on the basis of evidence on behalf of the defendant that turned out to be inaccurate (as I shall identify below). The court went on to give case management directions, designating the claim as the "lead claim on the challenge to the Defendant's asylum support arrangements for asylum seekers supported under section 95 in full board accommodation." The court ordered a rolled-up hearing for consideration of permission to apply for judicial review and, if granted, the substantive merits of the claim.

6. Owing to late disclosure by the defendant, Mr Chris Buttler QC (who appeared with Mr Raza Halim on behalf of the claimant) focused his oral submissions in a way that was different from the amended grounds. He mounted what was in effect a substantive and a procedural challenge. The substantive challenge was that the defendant had breached her statutory duty to provide the claimant with (i) cash for travel and (ii) access to a telephone while he was in full board accommodation after he had been granted s.95

support. He submitted in addition that the procedure used to reach decisions about cash for travel and access to a telephone was unlawful.

7. I shall refer to asylum seekers like the claimant, who have been granted s.95 support but kept in full board hotel accommodation, as "FBAs." I shall call the need for FBAs to be provided with cash for travel "the travel need" and the need to have access to a telephone "the communication need." That latter need may also be satisfied by access to a wi-fi enabled device such as a tablet on which video or audio applications ("apps") such as WhatsApp have been installed. In this judgment, my references to phones should be taken to include the use of apps as well as phone calls.

8. The claim is concerned only with the need to communicate with people other than a lawyer, a doctor or Migrant Help (an organisation funded by the defendant to provide advice and assistance to supported asylum seekers). Those three undoubtedly important categories of communicant are covered by discrete provision. My conclusions in this judgment do not cover them.

9. The hearing was listed for two days. At the end of the second day, I granted permission to apply for judicial review. The defendant had served significant documents on the day before the hearing which meant that (i) neither the court nor the claimant had had a proper opportunity to consider them and (ii) the defendant's skeleton argument, which was bound to deal with these important documents, became available only a few working hours before the hearing date. During the course of the hearing, Mr Alan Payne QC (who appeared with Ms Saara Idelbi on behalf of the defendant) informed the court of certain other potentially significant matters as part of the duty of candour.

10. Given these developments, and the court's concern to ensure that the question of remedy be fully considered as well as the merits of the claim, I adjourned the hearing part heard on directions for a further half-day hearing. I am grateful to all counsel for their helpful submissions.

## Legal framework

*Duty to provide support*

11. Section 115 of the Immigration and Asylum Act 1999 ("the 1999 Act") excludes asylum seekers and their dependents from entitlement to most social security benefits. Asylum seekers are also ordinarily prohibited from working while they are waiting for a decision on their claim (they may apply under para 360 of the Immigration Rules for permission to work if they have been waiting for 12 months or more for an initial decision from the defendant). Instead, Part VI of the 1999 Act prescribes a scheme of support. The overall framework of Part VI is accompanied by detailed provisions of secondary legislation: the Asylum Support Regulations 2000 ("the Regulations").

12. Under s.95(1) of the 1999 Act, the Secretary of State may provide or arrange for the provision of support to asylum seekers who appear to the Secretary of State to be destitute or likely to become destitute within a prescribed period. The Regulations prescribe a period of 14 days (regulation 7).

13. A destitute person is defined by s.95(3) as a person who:

> "(a) … does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) … has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

14. By virtue of s.96(1), and insofar as relevant to this claim, support may be provided under s.95 in the following ways:

> "(a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any);"
>
> (b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any);…"

Asylum support therefore has two key elements: accommodation and "essential living needs." The present claim concerns the concept of essential living needs.

15. Although s.95 is expressed as a power to provide support and s.96 as a power to provide accommodation and essential living needs, it is not in dispute that the powers should be treated as duties on account of the provisions of the Reception Directive. In *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), para 13, Popplewell J (as he then was) observed:

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

16. The Reception Directive has been recast since Popplewell J applied it in the *Refugee Action* case: see Directive 2013/33/EU laying down standards for the reception of applicants for international protection, 26 June 2013 (hereafter "the Directive"). The recast provisions form part of the Common European Asylum System but, by virtue of s.5 of the European Union (Withdrawal) Act 2018, they represented the position under English law at all times that are material to this claim.

*Temporary support*

17. When providing accommodation under s.95, the Secretary of State must have regard to the fact that the accommodation is to be temporary pending the determination of the asylum seeker's claim for asylum (s.97(1)). However, s.98(1) makes separate provision for temporary asylum support which may be provided "only until the Secretary of State is able to determine whether support may be provided under section 95" (s.98(2)). Parliament has therefore delineated temporary support as something different from ongoing s.95 support. The Secretary of State has no power to continue temporary support after a s.95 decision.

*Kinds and level of support*

18. Regulation 10(2) stipulates that "as a general rule" asylum support in respect of essential living needs "may be expected to be provided weekly in the form of a cash payment" in a prescribed amount. At present, the prescribed amount is £39.63 (see regulation 10(2)) of the Regulations as amended on 22 February 2021). However, essential living needs may be provided in kind as well as in cash.

19. Regulation 10(5) means that where an asylum seeker is accommodated in a way which meets other essential living needs in kind - such as bed and breakfast, half board or full board - the amount of the cash payment shall be treated as accordingly reduced from the prescribed amount. In practice, the prescribed cash amount represents the sum of several constituent elements which each represent an essential living need (for example food, clothing, toiletries). If any one of these elements is provided in kind in the accommodation (for example, meals), the amount allocated to that element is deducted from the prescribed amount and the asylum seeker's cash payment is accordingly reduced. An appropriate deduction will be made if an asylum seeker has income or assets (regulation 12).

20. Mr Buttler emphasised that the cash value of asylum support is now very significantly below the cash value of Universal Credit. I was told that s.95 support for those in the claimant's position is 42% of the standard Universal Credit allowance for single people aged 25 or over. That may be right but the link between the amount to be spent on essential living needs and the amount of an award of Universal Credit is governed by a statutory discretion (see s.97(5)). The operation of that discretion does not form part of the grounds for judicial review in the present claim.

21. I would nevertheless reject any suggestion that the amounts of money with which this claim is concerned are insignificant for the individuals concerned. A small deduction in cash or in kind will be significant in circumstances in which a person's entire needs have to be met from asylum support (*Refugee Action*, para 100). A deduction from the amount assessed by the defendant as meeting an FBA's essential living needs means that an FBA has a lower level of asylum support than intended by s.95 and the Regulations.

*Exceptional cases*

22. The statutory scheme permits the defendant to make cash payments at the prescribed amount "as a general rule" (s.96(1)(b)) and regulation 10(2)) while allowing the possibility of further cash payments or other support in kind "in exceptional circumstances" (s.96(2)). The distinction between what should be provided as a general

rule and what is an exceptional need was considered by Popplewell J in *Refugee Action*. He held:

> "37. In reaching her decision on the general level of support for the group of asylum seekers as a whole under s. 96(1)(b), the Secretary of State…is not bound to take into account every conceivable need of every single individual asylum seeker. Rather in considering the essential living needs of asylum seekers as a group for the purposes of s. 96(1)(b)…, **the disparate needs of all individual asylum seekers must be taken into account to the extent that they are such as can reasonably be contemplated as arising in the normal course of events.** This reflects…the Directive which sets out standards which will 'normally' suffice for the stated objective." (Emphasis added.)

Popplewell J went on to define exceptional needs as those which cannot be anticipated as being normal for the cohort of asylum seekers as a whole.

23. Mr Payne submitted that the context of the pandemic means that the distinction between general and exceptional levels of support should be considered differently. I was not however directed to any change in the legal landscape to suggest that Popplewell J's conclusions should not be applied. In my judgment, in determining what amounted to an essential living need during the pandemic, the defendant remained under a duty to consider the disparate needs of all individual asylum seekers to the extent that they were such as could be reasonably be contemplated as arising in the normal course of events.

*Travel and communication needs*

24. It is not in dispute that travel and communication are to be regarded as essential living needs for the generality of asylum seekers. They are not essential as an end in themselves but as ways of maintaining essential interpersonal and social relationships as well as cultural and religious life (*Refugee Action*, para 115).

25. Communication needs may be met in kind rather than cash by giving access to communication devices such as a phone. Article 18(2)(b) of the Directive ensures that those provided with accommodation in kind have "the possibility of communicating" with relatives and certain other categories of communicant - such as lawyers – which I shall not list as they are not relevant to this claim.

26. The "possibility of communicating" is not the same as having a right to make as many phone calls as a person may wish to make at public expense. This part of the Directive is concerned with access to the means of communication and not with how much a person is allowed to communicate. Giving access is "capable of clear practical implementation" because "physical access is an essentially binary concept." It is easily determinable whether such access is or is not possible (*Refugee Action*, para 107).

*The content of essential living needs*

27. It is not open to the Secretary of State to treat essential living needs as having a lesser content than the objective minimum required by the Directive. If the Secretary of State

were to make a judgment which treated essential living needs as something less than that objective minimum, it would be both irrational and unlawful (*Refugee Action*, para 85).

28. The court's function is nevertheless to consider the scope of what constitutes an essential living need within the confines of the supervisory jurisdiction of judicial review. As elucidated in *Refugee Action*, para 91:

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

*The focus of the claim*

29. The claimant's skeleton argument stated that the claim was not brought on behalf of JM alone but on behalf of all persons whom the defendant has accommodated in full board initial accommodation since March 2020. Mr Buttler did not pursue this approach in his oral submissions, recognising that the claim is brought only by JM and that his solicitors have no instructions on behalf of anyone else.

30. Mr Buttler was correct to withdraw the legally erroneous claim that his instructing solicitors represent anyone other than the person named as the claimant in the Claim Form. Judicial review claims are brought by individual claimants: neither solicitors nor counsel may properly claim to act on behalf of groups of people from whom they do have not have instructions (*R (DVP) v Secretary of State for the Home Department* [2021] EWHC 606 (Admin), [2021] 4 W.L.R. 75, paras 51 and 70 per Dame Victoria Sharp P.). The claimant's solicitors (and therefore counsel) were not instructed by FBAs as a group and I do not have the facts of other cases before me.

**Asylum support in practice**

31. Accommodation for asylum seekers is procured by the defendant through arrangements with service companies known as "accommodation providers." The arrangements take the form of detailed contractual terms supplemented by the "Asylum Accommodation and Support Transformation (AAST) Service Delivery Guide" (January 2019). The accommodation may be half board, full board or self-catering. Accommodation providers may procure sites for accommodation that can provide other essential living needs, such as hotels that are set up to provide full board facilities.

32. Prior to the pandemic, a person would be housed on a temporary basis - under s.98 - in "initial accommodation" which was typically a multi-person full board hostel. Those housed in initial accommodation would not receive a cash payment from the Home Office for any essential living needs. The defendant's policy - not in issue in these proceedings - is that either those needs did not arise on a short-term basis or they could adequately be met by the full board basis of the accommodation.

33. Longer-term accommodation for those eligible for s.95 support is sourced by accommodation providers from a stock of "dispersal accommodation", reflecting the "desirability, in general, of providing accommodation in areas in which there is a ready supply of accommodation" (s.97(1)(b)). Dispersal accommodation is generally self-catering in flats or houses.

34. Someone in the claimant's position prior to the pandemic could typically expect to live in hostel accommodation for a short time without receiving any cash payments and then be moved to self-catering accommodation with essential living needs met in cash through the operation of an electronic Aspen Card. I do not need to describe the technical operation of the Card and indeed have no evidence before me on that subject save to the extent that it operates like a debit card that can be used to buy items in shops or to withdraw cash from ATMs. I was told (and I am prepared to accept) that any change to policy in relation to cash payments requires technical work to the card system of some complexity. Aspen Cards are provided by Sodexo. Accommodation providers who give cash to those living in initial accommodation do not use the Cards – they give actual cash or vouchers.

*The onset of the pandemic*

35. Readers of this judgment will need no reminding that, from 23 March 2020, everyone in the United Kingdom became subject to restrictions on their movement and association because of what was to become a global Covid-19 pandemic posing risk to life. I take it as axiomatic that the Government had a duty to protect everyone in the country, including asylum seekers, from its effects.

36. By letter to local government leaders dated 27 March 2020, the Parliamentary Under-Secretary for Immigration Compliance and the Courts, Mr Chris Philp MP ("the Minister"), announced a three-month suspension to requiring asylum seekers to leave s.95 accommodation even if their circumstances meant that they were no longer entitled to it. The letter stated:

> "[W]e are currently facing an unprecedented global health emergency.
>
> This crisis has had a significant impact on the asylum system, particularly in ensuring we have enough accommodation to meet the current needs of asylum seekers who require housing, as well as safeguarding the people we care for and the communities in which they live…we must do all we can to ensure that people remain in their homes and do not travel or move around unnecessarily, adding additional measures to support that. To that end, I have taken the decision that, for the next three months, we will not be requiring people to leave our accommodation because their asylum claim or appeal has been finally decided (as would normally be the case). This decision will be reviewed ahead of the end of June 2020."

37. The benefits of that decision are plain. It reduced the risk of contagion by movement of people outside their homes. It reduced the risk of asylum seekers catching Covid-19 or spreading it.

38. Those who would ordinarily have had their asylum support terminated – after the conclusion of the asylum process - remained in dispersal accommodation. At the same time, new asylum seekers entered the support system and required housing. In order to meet the growth in numbers, the defendant's officials asked its accommodation providers to source additional accommodation across the United Kingdom. The additional accommodation was largely in the form of hotels as this was the fastest way of meeting an ever-increasing and urgent need.

39. The pause on moving asylum seekers out of accommodation was intended to last for three months and to be reviewed in June 2020. However, the pandemic continued apace, causing significant operational impacts for the defendant which were difficult to predict in advance. As Mr Simon Bentley (the official with lead responsibility within the Home Office for policy relating to support arrangements for asylum seekers) says in his written evidence:

> "the Home Office has had to try to respond as best it can as events have unfolded and to a dynamic situation with restrictions/steps imposed or lifted with very little advance notice. In practical terms the Home Office has had to procure several thousand emergency hotel places during lockdown to accommodate the extra people, the number of which [as at September 2020] are growing daily."

40. The same hotels were used to provide temporary accommodation under s.98 and accommodation for those assessed as eligible for s.95 support who could not be moved out of hotels in the conditions of the pandemic. The defendant treated all those housed in hotels as living in initial accommodation – irrespective of whether they had received a s.95 decision. Mr Bentley's evidence is that "section 98 support is not synonymous with initial accommodation, and section 95 support is not synonymous with dispersal accommodation." That would seem to reflect what happened as a matter of fact because s.95 supported asylum seekers remained in initial accommodation until a place was found in dispersal accommodation. But it cannot warrant a policy which simply assumes the lawfulness of an undifferentiated approach to s.95 and s.98 cases.

41. Some hotels provided full board accommodation which was expected to cover the needs of those who, like the claimant, would pre-pandemic have been dispersed to self-catering accommodation and would have received a cash allowance for their essential living needs. These are the class of people I have called FBAs. As they were treated as being in initial accommodation, they did not receive a cash payment from the defendant. A Home Office factsheet dated 3 July 2020 explained:

> "Those who were already in the support system and accommodated in houses and flats will continue to receive a cash allowance to cover their other essential living needs. If they are accommodated in full board then all accommodation, utilities, meals and essentials are provided by the accommodation provider and a cash allowance is not paid."

42. On 11 August 2020, those granted refugee status or leave to remain for another reason were permitted to move out of initial accommodation and into alternative, non-Home

Office accommodation as would normally happen. Failed asylum seekers wanting asylum support (under s.4 of the 1999 Act) were still required to reside in initial accommodation and the pressure on accommodation continued.

43. I was provided with a table of "hotels in use" up to January 2021. The table showed that in March 2020, there were 13 hotels used for FBAs which rose to 50 in June 2020 and 93 in September 2020. Numbers declined slightly thereafter. As at January 2021, 89 hotels were in use.

44. In ascertaining the extent to which hotels catered for the essential living needs of FBAs, I have seen witness statements made on behalf of the defendant in these proceedings and statements made at different times in other claims for judicial review. There is no comprehensive treatment by the defendant of the evidence relevant to this claim.

45. For example, in a statement dated 16 October 2020 filed in *R (MA) v Secretary of State for the Home Department* (CO/3019/2020), Mr Jonathan Blackburn (a member of the Home Office Resettlement, Asylum Support and Integration Team) said that the Coventry Hill Hotel (the Serco-procured hotel under consideration in that case) had since July 2020 provided residents with wi-fi, broadband and free SIM cards with unlimited data on request. In a statement dated 10 September 2020 filed for the purposes of *R (MK) v Secretary of State for the Home Department* [2020] EWHC 3217 (Admin), Mr Bentley described the "full package of support" in hotels procured by Serco. He mentioned free wi-fi but did not mention SIM cards. The present claim concerns in large part the operation of mobile phones and so the difference between access to wi-fi and access to a SIM card is not trivial.

46. More generally, I have encountered difficulties in understanding how aspects of the scheme of asylum support have operated during the pandemic. Mr Payne submitted that the pandemic itself explains these difficulties. Working conditions have been tough for Home Office officials. Decisions about the provision of accommodation and essential living needs have had to be taken at speed (both by ministers and by officials) in unexpected, unpredictable and ever-changing situations. The public health imperative has had to prevail over normal living conditions for asylum seekers as it has had to prevail for everyone living in the United Kingdom. It would be unrealistic for the court to expect precise records about essential living needs when the priority was to keep asylum seekers – like the rest of the population – living in one place. The court should not apply the benefit of hindsight.

47. I do not underestimate the operational, financial and logistical challenges that the pandemic caused. However, Parliament has, through the 1999 Act, placed duties on the defendant. Those duties have not changed in the pandemic: the 1999 Act and the Regulations have remained in force. The claimant is entitled to ask the court to exercise its supervisory jurisdiction in light of the evidence before it. The court has a duty to scrutinise the evidence in order to determine whether the defendant has kept in mind the applicable legal framework when taking what are undoubtedly difficult decisions.

## The calculation of essential living needs

*January 2018 to June 2020*

48. In fixing the sum of weekly cash payments for essential living needs, the Home Office undertakes periodic reviews of the cost in cash of the various elements. The amount for each element is worked out by using relevant ONS data or Home Office market research. A review was carried out in 2017. Its findings and conclusions were published in January 2018 as the "Report on Cash Allowance Paid to Asylum Seekers: 2017." I shall refer to this report as the "2018 Review."

49. In relation to travel and communication needs, the 2018 Review stated as follows:

> "We do not consider travel and communication are essential needs in themselves, but accept that they may be necessary in limited circumstances to enable other needs to be met, including those related to maintaining interpersonal relationships and a minimum level of participation in social, cultural and religious life.
>
> Participation in activities associated with interpersonal relationships and social, cultural and religious life, do not always incur a cost. Asylum seekers are invariably accommodated in urban centres where churches, mosques and other religious establishments are within walking distance. Also, many recreational and cultural activities are free (for example community centres and museums)…
>
> We nonetheless accept that it is reasonable to make some allowance for travel in the overall cash allowance provided to asylum seekers to meet these and other occasional incidental travel needs…
>
> In respect to communication, the 'essential need' is to have the possibility of accessing the means to communicate and there are various ways of doing so, including by telephone (local, international, mobile, landline or SMS), internet (free access to the internet is available at libraries, enabling email and Skype facilities), or by post or fax.
>
> In our experience, most asylum seekers already have a mobile phone when they enter the UK or obtain one shortly after arrival (an informal survey of those lodging their claims at the asylum intake unit in Croydon has shown this to be the case). A mobile phone certainly appears to be the most common means through which asylum seekers communicate and the previous research into the costs of using one has therefore been updated..."

50. The 2018 Review noted that supported persons could shop around for the best international call rates and that:

> "given that access to the internet at libraries is free, communication via Skype is cheaper still."

51. The amount fixed for the communication need included £0.04 per week for writing materials but this sum played no part in the parties' submissions and nothing turns on it. The total sum representing all essential living needs was assessed as £37.75 per week. Regulation 10(2) of the 2000 Regulations was duly amended to reflect that figure with effect from 6 February 2018 (see Asylum Support (Amendment) Regulations 2018).

52. A further process of review ("the 2020 Review") was commenced after publication of relevant ONS data on 19 March 2020. Prior to the conclusion of that Review, and in light of the impetus to ensure the needs of supported asylum seekers in the difficult circumstances of the pandemic, the defendant decided to raise the cash allowance on a provisional basis. ONS data had enabled the Home Office to calculate the portion of the cash allowance needed for food and drink but its own research into the cost of purchasing non-food essential items had not been completed. By letter to local authority Chief Executives dated 8 June 2020, the Minister announced that, for those who were housed in self-catering accommodation, the cash allowance for single able-bodied adults would rise from £37.75 per week to £39.60 from 15 June 2020.

53. This figure was calculated in accordance with data gathered by February 2020 with an adjustment for inflation:

> Food and drink: £26.49
> Toiletries/Healthcare/Household cleaning items: £1.52
> Clothing including footwear: £2.90
> Travel: £4.50
> Communications: £3.52
> Total: £38.93
> Adjustment for inflation at 1.7%: £39.60.

54. Adjusting individual elements for inflation, the travel need amounted to £4.70. The adjusted communication need amounted to £3.56 per week. Mr Bentley says that the cost of communication took account of the cost of maintaining a mobile phone and access to international dialling cards but was likely overall to be lower than £3.56 because of the provision of free wi-fi in hotels.

*The September 2020 decision*

55. On 4 August 2020, Mr Bentley provided a submission to the Home Secretary and the Minister with recommendations relating to weekly cash allowances for asylum seekers in initial accommodation or hotels. The submission recommended:

> "a change to policy that would result in the individuals receiving a weekly cash payment of £12.11 if they have been assessed as eligible to receive support under section 95 or section 4(2) and have been housed in an initial accommodation centre or hotel for more than 35 days "

The submission contained a detailed "discussion" section setting out the factual background which underlay the recommendation.

56. By email dated 10 September 2020, the Assistant Private Secretary to the Home Secretary informed relevant officials that the recommendation for a £12.11 weekly cash payment had been rejected:

> "The Home Secretary and [the] Minister have reviewed and on balance are not content to proceed with this payment. They are of the view that the asylum system already appears more generous than European equivalents and do not want to further increase any possible pull factors. In addition, they commented that the department does not have the budget to fund this move and initial accommodation/hotel use is temporary. They therefore would like to see all the department's organisational/financial efforts focused on reducing hotel use rather than mitigating the impacts (with many of the items not necessary for very short-term stays)."

57. Both parties were content to refer to this email as the September 2020 decision and for the court to treat it as representing the decision on FBA cash allowances that was taken at that time. The email indicates that the defendant decided to prioritise the Home Office's organisational and financial resources towards the movement of FBAs into ordinary dispersal accommodation rather than paying cash support to FBAs.

58. The email shows that there were in effect two policy drivers for the decision to reduce hotel use rather than to pay cash support: (i) ensuring that the United Kingdom did not take more than its share of asylum seekers in Europe; and (ii) financial considerations. Those are relevant factors which the defendant was entitled to take into consideration (at least to the extent that they are not inconsistent with her statutory duties) but they do not cast light on how the defendant viewed her statutory duties towards FBAs in the first place.

59. The email also shows that the September 2020 decision not to pay cash to FBAs was based on the proposition that FBAs would stay in hotels on a "very short-term" basis. In my judgment, the correct legal question was not whether FBAs would very shortly be moved out of hotels but whether the Secretary of State was under a duty to provide their essential living needs under s.95 at that time. As I have set out above, that duty endured in the pandemic. By providing support to FBAs in exactly the same way as to those temporarily supported under s.98, the defendant failed to recognise any distinction between the two groups. In my judgment, the defendant thereby misdirected herself in law.

60. The September 2020 decision was however short-lived in its effect and superseded by a further decision in the following month.

*The October 2020 decision*

61. The 2020 Review was completed in October 2020. The details of the Review are not contained in any published report. The total weekly cost of essential living needs was assessed as £39.63 – which is now therefore the prescribed figure in Regulation 10(2) as I have set out above.

62. On 13 October 2020, a further submission went to the Home Secretary and the Minister recommending that they:

> "**note** our further work to determine the cost of essential living items in order and agree to maintain the weekly cash allowance for destitute asylum seekers at £39.60 per person in the household pending formal amendment of the relevant regulations to make the figure £39.63;
>
> …
>
> **agree** to implement a change in policy so that individuals in accommodation where some services are provided in kind who have been assessed as eligible for support under section 95 of the 1999 Act receive a small weekly cash payment; and
>
> **agree** that the payment to these individuals is £8 per week – note that this is going to cost the Home Office £4m in this financial year based on the current level of intake and note this needs to be backdated in part; and
>
> **note** that this increases the forecast overspend in Asylum accommodation, but will be part of wider discussions on 2020/21 budget with HMT on Covid-19 pressures."

63. Proposals for back-dated cash payments were made including a proposal for £3.00 per week from 27 March 2020 to 30 June 2020 representing the clothing need; and £7.70 from 1 July 2020 representing the clothing need (£3.00) and the travel need (£4.70).

64. On 19 October 2020, the Private Secretary to the Home Secretary informed Mr Bentley and other relevant officials by email as follows:

> "Ministers…agreed with the recommendations in the [submission] i.e. to maintaining the weekly cash allowance at £39.60 and to pay a weekly cash payment of £8 for those assessed as eligible for support but are in accommodation where some services are already provided. They also agreed with the back-dating proposals…"

65. Both parties were content to refer to this email as the October 2020 decision and for the court to treat it as representing the decision that was taken at that time to make general provision for a weekly cash payment to FBAs. This marked a move away from the policy of no cash payments to FBAs in initial accommodation. The decision, together with the breakdown of what would become the £39.63 prescribed figure, was conveyed to local authority Chief Executives by letter dated 27 October 2020.

66. The cash payment of £8 per week was intended to cover the cost of clothing and footwear; travel (as restrictions had lifted); and non-prescription medication. The amount reflected the final outcome of the 2020 Review. Mr Bentley's evidence makes clear that other needs – including the communication need - would "continue to be provided by the accommodation provider pursuant to its contractual obligations." Both

payments and back payments would be subject to reduction to take account of cases where "the accommodation provider has been providing cash payments to cover any needs at a level above our assessment of the amount necessary to meet the particular need."

67. I understand Mr Bentley to mean that if a cash payment by a particular accommodation provider was regarded by the defendant as enabling an asylum seeker to have, or have had, more cash than required for his or her total essential needs, a cash payment or back payment by the defendant would be accordingly reduced. The reduction was necessary to prevent asylum seekers from using the money to fund non-essential needs outside the scope of s.95.

68. It is difficult to understand how any weekly cash payments by accommodation providers, described by Mr Bentley and by Mr Blackburn as a way of enabling asylum seekers to buy essential items during the pandemic, could subsequently have come to be conceived by the Home Office as allowing asylum seekers to spend money outside the scope of asylum support. The crucial point, though, is that the communication need of FBAs in hotel accommodation has never been fulfilled by any form of Home Office cash payment. The travel need has been fulfilled for this group from 1 July 2020 by a mixture of payments and back payments.

**The claimant's situation**

69. The claimant says that he arrived in the United Kingdom on 2 March 2020 from Honduras via France. He did not apply for asylum on arrival, citing the lack of any arrangements for him to do so at St Pancras Station where he had disembarked from a Eurostar train. He began to live with different people, whom he met online while in the UK. He applied for asylum on 16 April 2020 after a person he was living with threatened to report him to the Home Office unless he paid rent.

70. On 30 April 2020, the claimant applied for asylum support. On 1 May 2020, his application was granted. As at that date, he is recorded as having £70. He became an FBA and was accommodated in the Jaguar Building in the Norwich area. On 26 June 2020, he was moved to the Hallmark Hotel.

71. The defendant has provided a map to show that the Hallmark Hotel is situated 0.6 miles (walkable in just over 10 minutes) from the Derby Intu Shopping Centre which is indicative of city centre facilities. The Hotel appears to be close to a community hospital as the crow flies. I accept that is not in a remote area and that some essential services can be reached on foot.

72. The Hallmark Hotel was used to accommodate asylum seekers under contractual arrangements between the defendant and Serco. In addition to accommodation, Serco hotels provided:

    i. Three meals per day including non-alcoholic beverages;

    ii. A laundry service;

    iii. Free wi-fi;

iv. Access to healthcare;

v. Access to a telephone for the purpose only of contacting Migrant Help via a freephone number.

vi. A cash allowance of £5 for men and £10 for women.

73. The £5 (or £10) cash allowance could be spent in any way that the individual FBA chose. Mr Bentley's evidence (supported by evidence from Mr Blackburn) is that it was intended to enable FBAs to buy essential items such as hygiene and sanitary products. The defendant assessed hygiene and sanitary products for supported asylum seekers at £1.05 per week prior to 15 June 2020 and thereafter at £1.55 so that FBAs would have had money left over to spend on other things.

74. The arrangements did not encompass, either in cash or kind, an allowance for FBAS to:

i. Travel by public transport as opposed to walking to any particular necessary destination; or

ii. Communicate with family or social contacts other than by a wi-fi enabled device.

75. The cash allowance for asylum seekers in dispersal accommodation included amounts for the travel and communication needs which was at all material times in excess of £5. There was therefore a disparity between those in dispersal accommodation and FBAs.

76. On 1 February 2021, the claimant was moved from the Hallmark Hotel to self-catering accommodation. After some delay, he began to receive the full asylum support allowance of £39.63 per week. On 24 May 2021, he was moved to different self-catering accommodation in an urban setting. He has continued to receive £39.63 per week.

77. The claimant's solicitors did not ask the defendant to consider any of the matters raised by this claim prior to sending a letter before claim on 12 August 2020. That letter sketched over the claimant's individual situation. Elements of the claimant's witness statements, touching on evidence that is material to his grounds of challenge, are also vague.

78. The specific difficulties experienced by the claimant are not clear. On 7 December 2020, when he signed his first witness statement, the claimant said that he had had a smartphone until it broke when he was at the Jaguar Building. In the letter before claim, the claimant's solicitors had stated that he could not afford "mobile credit" to call his solicitors but did not say that he had no phone in any event.

79. In his first witness statement, the claimant said that he had a "basic phone" which he had purchased from funds borrowed from a friend. In a later witness statement, he says that a friend purchased a cheap, pay-as-you-go smartphone for him together with a small amount of credit. The friend carried out this act of generosity "towards the end of 2020." Mr Buttler did not have instructions about how the claimant had signed his first witness statement in the first week of December saying that he had a basic phone when it appears that he was given a smartphone at around that time.

80. Nor did Mr Buttler have instructions on when the claimant undertook voluntary work for Oxfam, as asserted in his first witness statement, or what the work involved. The claimant's time at Oxfam is said to have generated friendships which he had wished to sustain during the pandemic. The nature of the friendships is relevant to the travel and communication needs, but these social connections could or would carry less weight if they were the product of working prior to the claimant's decision to regularise his situation in the UK by entering the asylum process.

81. Mr Payne also drew attention to what the defendant regards as the claimant's implausible evidence (in support of his claim that he needed money for travel) that his hospital appointments involved around an hour and a half's walk from the Hallmark Hotel. I do not regard as meritorious the claimant's submission that the court should, in the absence of cross-examination, cast aside these concerns about his evidence. The claimant has said that the court's concerns amounted to an unfair impugning of his integrity but judicial review proceedings do not usually involve cross-examination and there was no good reason for the court to receive oral evidence in this case.

82. However, I do not propose to make findings of fact about these matters because judicial review proceedings are not (in general terms) a forum for the ventilation of factual matters and because, ultimately, Mr Buttler did not rely on the claimant's evidence. There may be explanations for what the claimant has said. I recite these matters to illustrate that I have had to reach conclusions on questions of law without the ability to calibrate my conclusions by reference to the claimant's concrete situation.

83. Mr Buttler confirmed that I am not asked to resolve any individualised claim brought by this specific claimant but to regard him as typical of a class of asylum seekers, namely s.95 beneficiaries living in full board accommodation, that have been the subject of unlawful decision-making. I am invited to treat the claimant's individual circumstances as irrelevant to the decisions under challenge. I would gratefully adopt the observation in *DVP*, para 51, that an application for judicial review is not a general inquiry into matters which may be of public interest. The barometer for judicial reasoning is real life facts in real life cases, against which the court is able to refine its analysis and test whether its decision is just. This is a lead case (in the sense that other cases have been stayed pending its resolution) but no different principles apply.

## The defendant's duty of candour

84. Mr Buttler submitted that the defendant's failure to disclose the ministerial submissions, the September 2020 decision and the October 2020 decision until the day before the hearing amounted to a breach of the defendant's duty of candour which applies in judicial review proceedings. The process of assisting the court by disclosing all relevant documents – including those which do not assist the defendant - had gone wrong here.

85. Mr Buttler pointed to the fact that the Claim Form had been issued in December 2020. It ought to have been obvious to the defendant from the outset of the claim that she needed candidly to explain the decision-making process and her decisions from March 2020 (when Covid restrictions began) to the October 2020 decision. That explanation ought to have been set out in evidence and in the detailed grounds of defence.

86. Mr Buttler submitted that the breach of duty was exacerbated because the claimant's solicitors had as long ago as 28 October 2020 made a formal request for disclosure of the decision documents for the purposes of the *MK* case, which had covered the same legal ground. Given that the solicitors had expressly requested the material on behalf of MK, the Government Legal Department ("GLD") must have made enquiries of the defendant's officials in relation to that request, albeit that the claimant's solicitors had received no response. Mr Buttler submitted that there is a suspicion that this material was deliberately withheld by the defendant because it was thought unhelpful to her case. I should at any rate be slow to find that such late disclosure was the result of innocent error without first making an inquiry of GLD and directing a solicitor within GLD to provide a full explanation in a witness statement.

87. On behalf of the defendant, Mr Payne apologised for the lateness of the disclosure. The solicitors' request for disclosure in *MK* related to a claim that had been withdrawn and that had not challenged the October 2020 decision. There was no direct match between the GLD response to the disclosure request (which was accurate in the context of the *MK* case) and the documents which had as a matter of candour to be placed before the court in the present case. The duty of candour must be assessed in the context of this claim and not other proceedings.

88. Mr Payne submitted that the disclosure of the letter to Chief Executives of 27 October 2020 (which conveyed the October 2020 decision) would as a matter of law have sufficed to discharge the defendant's disclosure obligations but he accepted that, for the sake of transparency and context, it was right and proper for the October ministerial submission and decision to be disclosed. While the focus of the claim was the October decision, it was right and proper for the August submission and the September decision to be disclosed once the material had come to the attention of the defendant's lawyers.

89. I was invited to separate the lateness of disclosure from non-disclosure. The defendant had disclosed the documents - albeit late - and so the court had not in the event been misled by anything done by the defendant. The reason for lateness was that, in the difficult working conditions of the pandemic, there had been more than one solicitor involved in the case within GLD. Successive solicitors had been involved for short periods of time. The short-term solicitors had lacked the knowledge to know what should be included in the case papers. Mr Payne asked me to conclude that their lack of knowledge was understandable. Having received an explanation as to what had happened, which had been provided by counsel on instructions, there was no need for anyone at GLD to provide a witness statement.

90. The ordinary rules of disclosure of documents in civil litigation are not automatic in judicial review but public authorities have a "self-policing" duty to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide (*R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 W.L.R. 123, para 106). The underlying principle is that "public authorities are not engaged in…trying to defend their own private interests. Rather they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law" (*R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), para 20).

91. There was no duty on the defendant to provide the emails or the ministerial submissions per se; but the substance of the information in the documents which shed light on the

decision-making process in my judgment fell to be disclosed as a matter of candour. The late disclosure was regrettable: the court had to list a further hearing in part so that the claimant's lawyers would have a proper opportunity to consider fresh documents. I accept the explanation for lateness which Mr Payne provided and would not regard it as proportionate to require a confirmatory witness statement from GLD. The explanation does not amount to a good reason for the delay.

92. On the other side of the scales, the documents were in the end submitted by the defendant. The court was not misled. In the circumstances, I shall not treat the late disclosure as a breach of the duty of candour. I accept Mr Buttler's submission that the consequences will need to be revisited when the court determines questions of costs. I should record the high standard of professional conduct displayed by Mr Payne and Ms Idelbi in dealing with their client's delay.

**The nature and scope of the s.95 duty: impact of pandemic**

*The parties' submissions*

93. Mr Buttler made clear that he was not asking the court to assess for itself the appropriate amount of any cash payment that should have been provided to the claimant and other FBAs. That judgment is for the defendant to make and can only be challenged on well-recognised public law principles (*Refugee Action*, para 3). His principal submission was that the defendant had not been entitled to conclude that travel and communication did not constitute essential living needs during the pandemic.

94. From a procedural perspective, Mr Buttler submitted that the defendant had breached her duty to carry out an inquiry which was sufficient to enable her to make an informed and rational judgment on the question of what constituted an essential living need (*Refugee Action*, para 120, applying *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1975] AC 1014, 1065B). The number and potential vulnerability of those in receipt of asylum support mandated a careful inquiry. The defendant had failed to take reasonable steps to gather sufficient information about the situation of FBAs in hotels, their need for travel, and their ability to communicate.

95. The defendant's evidence on the travel and communication needs was inadequate. In the October submission, officials had informed ministers: "We will continue to work with providers to ensure that the [communication] need is consistently met in all facilities." That could hardly inspire confidence that any sufficient inquiry had been undertaken even by the date of the October 2020 decision.

96. Mr Buttler submitted that the duty to provide s.95 support crystallised when an asylum seeker was assessed as eligible for that support. Setting aside a reasonable period for sourcing accommodation (a period of 35 days in normal times which was not in issue), the general rule is that a cash payment will be provided on a weekly basis (regulation 10(2)). Unless disapplied for good reason, the general rule implies that (i) cash payments should be made; and (ii) they should be made on a weekly basis. This is a defined period for the discharge of the defendant's duty which the belated scheme for back payments had failed to meet.

97. Mr Payne submitted that the defendant had not acted unlawfully in so far as she had been entitled to pause the process of inquiry and decision-making about essential living

needs because of the flux brought about by Covid. The claimant's submissions failed to recognise that the provisions of Part VI of the 1999 Act were not intended to address the problem of a worldwide pandemic. The defendant's approach had at all times been consistent with the overarching legislative objective of providing asylum seekers with "a dignified standard of living" (*R (JK (Burundi)) v Secretary of State for the Home Department* [2017] EWCA Civ 433, [2017] 1 W.L.R. 4567, para 59).

98. Mr Payne submitted that, in the context of the pandemic, the approach set out in Mr Bentley's witness statement which treated FBAs supported under s.95 in the same way as those receiving temporary support under s.98 was not unreasonable. Section 95 does not specify the time period in which asylum support must be provided. In the absence of a defined time period, the defendant was under a duty to provide support within a reasonable time. What constituted a reasonable time was context-specific (*National Car Parks Ltd v Baird (Valuation Officer)* [2004] EWCA Civ 967; [2005] 1 All ER 53, paras 58-68). The acceptable, average delay prior to the pandemic for moving people into dispersal accommodation was 35 days. The approach of the defendant in keeping FBAs in hotels for a period of months in conditions of temporary support amounted to no more than a necessary lengthening of that 35-day period. Ministers had expected the pause on moving supported asylum seekers from hotel accommodation to dispersal accommodation to last three to four months. The extent to which the period would eventually come to be elongated, owing to the ongoing public health emergency, became gradually apparent as events unfolded. The operational complexity of introducing cash payments for those in accommodation designed to be short term would have been immense. The technical work in relation to Aspen cards was complex.

99. There was no duty to provide any cash payment to any asylum seeker. Regulation 10(1) was framed in terms of a "general rule" leaving the defendant with a wide discretion to depart from the rule both in terms of the amount of cash paid and in terms of the needs for which it should be paid. The introduction of cash payments to those housed in hotels would have been contrary to the defendant's longstanding position that short-term needs should be met without the provision of cash payments. By contrast, the defendant was under a duty under regulation 10(5) to reduce any cash payment made to FBAs in circumstances where the accommodation provider also covered other essential living needs.

100. As for the defendant's inquiry, I was told that the conditions of the pandemic meant that checks could not be carried out in relation to phone access at each hotel, procured as a matter of urgency by accommodation providers. First, physical checks by Home Office officials had not been possible. Secondly, the number of hotels and their identity had fluctuated: new hotels were brought on stream at speed and others pulled out of service provision after only a short time as they did not want to carry on. It was (in Mr Payne's words) a matter of "firefighting" while at the same time coping with civil servants working at home which was a huge change.

101. Mr Payne said that very significant resources had had to be urgently marshalled to keep asylum seekers in their homes. Many hotels were closed during the relevant period or only accepting limited numbers of people in order to assure appropriate social distancing and comply with government guidelines. The context was totally different from the situation as at the date of the 2018 Review and from the situation considered by Popplewell J in *Refugee Action*. Broad and speedy decisions had had to be made

which were inevitably based on broad assumptions. Any further inquiry would have been unrealistic.

*Analysis*

102. The relevant decisions in this case were taken in person by the Secretary of State and the Minister. They were taken during a public health crisis which has across all parts of government raised profound and urgent questions of the public interest. The court recognises the constitutional importance of judicial restraint in matters of policy which are for ministers. The court must nevertheless perform its function of declaring the law even in times of national crisis.

103. Section 95(1) refers to the provision of support to "asylum seekers" but it is plain from the statutory context that the duty is an individualised one, in the sense that it is owed to individual asylum seekers. The test of destitution in s.95(3) is an individualised one. Section 95(5) relates to an individualised assessment of whether an asylum seeker's accommodation is adequate. Section 95(7) relates to the determination of the individual person's essential living needs. In deciding the way or ways in which asylum support should be provided, the defendant must assess the needs of the supported person on an individual basis (s.96(1)).

104. The pandemic did not change the nature of the duty. The defendant continued to be under a legal duty to provide s.95 support to individuals she determined were eligible for it. The general rule remained that the defendant was under a duty to provide support for essential living needs on a weekly basis in accordance with regulation 10.

105. Mr Payne emphasised the need for temporary arrangements to cope with the unfolding nature of the pandemic and submitted that the need to make earlier permanent arrangements was only appreciable with the benefit of hindsight. I do not however accept that during the pandemic the defendant could lawfully provide temporary support to anyone eligible for s.95 support on an ongoing basis. Parliament's intention is that temporary support may only be provided until the Secretary of State is able to determine whether support may be provided under s.95 (see s.98(2)). I have been directed to no provision of law and to no authority which would persuade me that Parliament's intention under s.98(2) fell to be overridden in the pandemic.

106. It is trite that, after any decision under s.95 (whether or not in the pandemic) some further time will be needed to set up the arrangements for a person's support under s.95 - for reasons of practicality and logistics. This sort of delay is not the focus of the claim. I would reject the submission that open-ended delay in meeting essential needs of asylum seekers was comparable to the 35-day period for establishing the package of asylum support prior to the pandemic.

107. As regards the procedural aspect of the claim, the *Tameside* duty of inquiry is a flexible one and context specific (*Refugee Action*, para 121). It is not for the claimant or the court to set out the exact parameters of the inquiry (*Refugee Action*, para 151). The court will not second-guess the Secretary of State. In my judgment, the exceptional circumstances of the pandemic may justify a departure from gold-plated standards.

108. Against the background of these legal conclusions, I turn to the principal areas of challenge.

## The travel need during the pandemic

*The parties' submissions*

109. Mr Buttler submitted that there had never been any absolute legal restriction on travel during the pandemic. From 26 March 2020 to 31 May 2020, regulation 6 of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 ("the 2020 Regulations") provided that any person could leave the place where they were living if they had a reasonable excuse. There was no exhaustive list of what constituted a reasonable excuse (*R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 W.L.R. 2326, paras 19 and 93). The claimant had wished to take the bus to visit his Spanish-speaking friends (who lived in Nottingham) and his Oxfam friends because he felt low and they could have provided emotional support. It would have been lawful for him to take the bus for this purpose but he had no money to pay the bus fare.

110. Mr Buttler submitted that asylum seekers in general continued to need to travel to meet other essential needs. He relied on evidence from Mr Tim Naor Hilton, Head of Asylum at Refugee Action, who has made a witness statement for these proceedings and for two other cases. Mr Hilton says that Refugee Action clients were required to travel and use public transport in order to purchase essential personal items that were not provided by accommodation providers. They needed to use public transport because of the distance between their accommodation and the shops, or because they wanted to save money by attending bigger high street chain stores rather than independent shops nearer their accommodation.

111. Mr Buttler submitted that FBAs had the same need for travel as those in self-catering accommodation and yet the defendant had not removed the travel allowance for the latter group. On the contrary, it had increased from £4.30 to £4.70 per week during the relevant period. There is no evidence that the defendant engaged with any of these material considerations and she had failed to provide any reasons to explain why the travel allowance was inappropriate notwithstanding these considerations.

112. Mr Payne submitted that in light of the restrictions in place from March 2020, the role that travel might ordinarily have played in maintaining interpersonal relationships was temporarily suspended. The claimant's suggestion that he would have benefitted from the emotional support of his friends is likely to have been the case for a large proportion of the population who, having regard to the wider interests of others, nevertheless complied with the necessary restrictions. He had provided no evidence of a mental health or physical condition that would have rendered it essential that, when it was permitted to go outside to meet friends, he should use public transport as opposed to seeing friends in outdoor public spaces within walking distance of his accommodation. The claimant's own evidence was that he had a friend nearby.

*Analysis*

*23 March 2020 to 31 May 2020*

113. On 23 March 2020, the Government announced "lockdown" measures pursuant to the international public health crisis. For present purposes, I am concerned with measures in England only. From 26 March 2020 (the date of the 2020 Regulations), people in

England were not permitted to leave the place they were living without reasonable excuse such as daily exercise. The same prohibitions applied to FBAs as to anyone else. Given the restrictions in force throughout England on the people that anyone could meet and the places anyone could visit, the need for any FBA to pay for travel was much reduced. I was provided with no properly particularised example of a social, cultural or religious activity for which an FBA needed to pay cash for travel during the period 23 March 2020 to 31 May 2020 (medical and other emergencies were catered for by other means).

114. I have considered the possibility that the claimant may have wished to volunteer for Oxfam during this early stage of the pandemic in a way that would have been permitted under regulation 6(2)(f) of the 2020 Regulations. In my judgment, even if he or another FBA had wanted to assist as a volunteer, the defendant was entitled to take the view that the need to travel for that purpose was not "normal for the cohort as a whole." It could therefore be lawfully disregarded in the assessment of asylum support (*Refugee Action*, para 37, above).

115. I have taken into consideration the point well made by Mr Buttler that the weekly payment of asylum support means that, in its practical effect, FBAs need to save money for various weeks before they can afford to buy (for instance) a particular item of clothing. In respect of travel, the relevant figure in the 2018 Review had been reached by assessing the sum "generally needed to pay for the cost of a return bus journey." I infer that the defendant therefore envisaged that supported asylum seekers would be able to maintain social relations by travel by bus each week (and not, say, by saving up for a train fare over the course of many weeks). That is a rational approach. It follows that if social relations were not permitted in any particular week for public health reasons, there was no need to pay a travel element because it would not in practice have been used for that week's travel and there was no duty to assist asylum seekers to save up for future travel.

116. A change to the law in May 2020 permitted people to meet one person from outside their household in open air spaces for recreation or exercise. While it would have permitted the claimant to have social relations with one other person, the change did not amount to an invitation from government to take public transport and I am not persuaded that it converted travel expenses into an essential living need.

117. I do not regard the payment of cash for travel to dispersed asylum seekers during this period as implying an identical duty to pay for FBAs to travel. The position of others in a different situation cannot be determinative. The question before me is whether the defendant was entitled to conclude that the need to travel fell outside the minimum standard of living required by the Directive and so was not an essential living need for FBAs. In my judgment the defendant was entitled to reach such a conclusion. She was entitled to conclude that no payment (in cash or kind) should be given to FBAs to represent travel expenses.

*1 June 2020 to 30 June 2020*

118. On 1 June 2020, restrictions eased and people in England were allowed to spend time outdoors, including in private gardens and other outdoor spaces, in groups of up to six people from different households, following social distancing guidelines. People were

allowed to travel to outdoor open spaces irrespective of distance provided that they could return the same night. Government guidance stated:

> "You should continue to avoid using public transport and should cycle, walk or drive wherever possible…Before you travel on public transport, consider if your journey is necessary and if you can, stay local. Try to reduce your travel. This will help keep the transport network running and allows people who need to make essential journeys to travel."

119. In the October 2020 ministerial submission, officials assessed that travel before 1 July 2020 had been "generally inappropriate." On the basis of that assessment, the defendant decided that no back payment for travel needs should be made for the period before 1 July 2020.

120. I accept Mr Payne's submission that, in light of the public health situation in which everyone in England was being asked to avoid travel if possible, it was not irrational for the defendant to expect the generality of FBAs to "stay local" and walk to social engagements. The role that travel might ordinarily play in maintaining interpersonal relationships was interrupted in the public interest of mitigating the effects of the pandemic. The claimant has provided no evidence of a medical need to meet friends by bus rather than in outdoor spaces within walking distance. He had a friend who lived nearby. The statutory question for the defendant was not whether the ability to meet a friend a bus-ride away was desirable but whether it was essential. In my judgment, the defendant's conclusion on travel during this period of the pandemic was open to her and not susceptible to challenge on public law grounds.

*1 July 2020 onwards*

121. The defendant accepts that from 1 July 2020, travel fell to be included as an essential living need. Ministers agreed that back payments amounting to £4.70 to cover the relevant period should be made. I understand that the claimant has received appropriate back payments. In my judgment, the defendant has recognised that FBAs may have been forced to divert funds to travel expenses from other essential living needs in this period and has arranged back payments to ensure that no prejudice arises. That is sufficient to discharge the defendant's statutory duties.

122. As for the procedural challenge, in my judgment, the defendant was under no duty to make further inquiry in order lawfully to decide that travel was not an essential living need during the period before 1 July 2020. The decision was based on public health restrictions which were known and obvious. No further inquiry would have shed light on whether the defendant was entitled or right to make a judgment which treated travel as falling outside the minimum standard of living required by the Directive. This procedural challenge fails.

123. The claimant points to the defendant's delay: the decision that FBAs should be given £4.70 for travel was not taken until several months after the start date of 1 July 2020. That may be so, but the defendant catered for the delay by making back payments. I see no practical as opposed to academic point of public law for me to determine in relation to this aspect of the case. The grant of relief would achieve no purpose.

124. For these reasons, I shall not grant relief in relation to any matter relating to the travel need. This element of the claim is dismissed.

**The communication need**

125. As Mr Buttler pointed out, the sum allocated for the communication need in the January 2018 Review does not appear to have included the cost of wi-fi. It appears to have been assumed that wi-fi would be available free in public libraries and elsewhere. Sir Duncan Ouseley took the view that the communication sum did not include the cost of wi-fi when he considered the 2018 Review in *R (MK) v Secretary of State for the Home Department* [2020] EWHC 3217 (Admin), para 14.

126. I did not understand the defendant to contend that the provision of free wi-fi in public buildings should satisfy the communication need during those periods of the pandemic when entry to public buildings was generally prohibited. The pertinent question is whether the various hotels in which FBAs were housed had free wi-fi or at least some other form of free access to communication for those who lived there. If they did not, then there was no provision of the communication need in kind. A cash payment would have been required.

127. The claimant supplied a witness statement from Ms Maddie Harris on behalf of an organisation called Humans for Rights Network who "advocate to secure better support" for asylum seekers accommodated in hotels. Ms Harris and a colleague visited the Best Western Hotel in Wembley on 7 May 2021 and spoke to a member of Serco staff about access to phones. The staff member said that about two-thirds of the men in the hotel did not have a mobile phone. That may or may not be correct but the evidence postdates the decisions under challenge and so could not have been available to the defendant at the time. On conventional principles of judicial review, the rationality of a decision cannot be assessed by reference to evidence that was not before the decision-maker.

128. The claimant relied on a number of witness statements which set out the views of the authors on the communication needs of asylum seekers. Mr Hilton says that communications remain of critical importance to asylum seekers for social well-being and emotional support – a proposition which is not in dispute. He says that his organisation supports asylum seekers who do not have access to a smartphone or are unable to rely on web-based communications services because the person they are seeking to contact does not have internet access. Cash support to assist with communications has become particularly important during the pandemic as those supported by his organisation "are particularly isolated, often living in areas where they are far from a community they can attach themselves to or are already attached to."

129. Ms Zoe Dexter who is the Welfare and Housing Manager at the Helen Bamber Foundation has made a statement for the purposes of these proceedings to which she has exhibited an earlier statement made in another case. She says that:

> "the use of internet-based communication platforms, if available, is not a silver bullet in retaining vital access to a person's support network. Many people (including many of our clients) are unable to use applications such as WhatsApp due, for example, to a lack of the language and/or computer literacy skills necessary to use

> the application or the lack of a smart phone. It is also very often the case in our experience that our clients' families and friends in their country of origin cannot be contacted using internet protocol telephony because the cost of internet data is prohibitive, or they live in rural parts of the country where there is limited or no internet coverage. The ability to make phone calls is essential and cannot be substituted by online communication applications."

130. These statements come from respected practitioners in the field of refugee care. They are doubtless the product of intelligent observation over time and aim to assist the court. But I must tread carefully in the weight to be attached to them.

131. Neither Mr Hilton nor Ms Dexter have been put forward as giving expert evidence in accordance with CPR Part 35; and the court's permission would have been needed to do so (CPR 35.4(1)). Their views are expressed in generalised language; for example, Ms Dexter refers to "many people" being unable to use applications such as WhatsApp. Their statements, and other statements from Dr Angela Burnett of Freedom From Torture, Katy Harris of Reading Red Kitchen and the claimant's own solicitor, amount to the sort of material that Popplewell J has called "a partial body of relevant evidence, in both senses of the word" (*Refugee Action*, para 134).

132. Other parts of the material supplied by the claimant are irrelevant, relating to issues in other claims for which they were produced. Parts express personal opinions rather than facts, such as Mr Hilton's view that cash support for FBAs is inadequate to meet their essential living needs. The subject matter of asylum support is "laden with value judgments" (*Refugee Action*, para 134) which can be difficult for the court to unpick from the facts. In the present case, I am not persuaded that the various witness statements filed on behalf of the claimant advance his claim on any conventional ground of public law challenge.

133. The Review in January 2018 deals with communication needs in the following terms:

> "In respect to communication, the 'essential need' is to have the possibility of accessing the means to communicate and there are various ways of doing so, including by telephone (local, international, mobile, landline or SMS), internet (free access to the internet is available at libraries, enabling email and Skype facilities), or by post or fax.
>
> In our experience, most asylum seekers already have a mobile phone when they enter the UK or obtain one shortly after arrival (an informal survey of those lodging their claims at the asylum intake unit in Croydon has shown this to be the case). A mobile phone certainly appears to be the most common means through which asylum seekers communicate and the previous research into the costs of using one has therefore been updated.
>
> Some asylum seekers may prefer to communicate by post and may occasionally need to send documents, for example to legal

> advisers. However, the cost of writing materials and postage is very low.
>
> Our conclusion is that the typical cost of meeting needs related to communication still appears to be around £3 per week (unchanged from 2016)."

134. In the August 2020 submission, officials took the view that:

> "**provided that we meet core essential needs (food and toiletries), it is rational and defensible to delay making provision for the full range of needs until the person is moved to their dispersal accommodation – but only where that period is short.** The longer individuals are in…hotels, the harder it is to show that needs related to travel and communicating are being fully met." (Emphasis in the original.)

135. The submission goes on to state:

> "The need to replace clothes and obtain a reasonable wardrobe of items (if the person does not have that already) clearly becomes more pressing after a period of 35 days. The same applies to communication and travel for the purposes of maintaining social relationships…Some needs relating to communication…have been partially met for those in the facilities in other ways (e.g. by providing ad hoc access to free phone calls…"

136. The October 2020 submission advised ministers about communication needs as follows:

> "Communication – there are some variations but generally this is provided adequately by giving access to a mobile phone and internet facilities. We will continue to work with providers to ensure the need is consistently met in all facilities."

137. It is appropriate, though, to consider the defendant's evidence beyond the ministerial submissions. In his witness statement dated 10 September 2020 produced for the *MK* case, Mr Blackburn told the court: "Hallmark Hotel provides service users with access to a telephone/mobile to enable them to call Migrant Help/Doctor." In his witness statement also dated 10 September 2020 in the *MK* case, Mr Bentley told the court that the communication element of the s.95 cash allowance took account of the costs of maintaining a mobile phone and access to international dialling cards. The costs of communication were likely to be lower for FBAs because of the provision of wi-fi in hotels.

138. In his witness statement dated 16 October 2020 in the *MA* case, Mr Blackburn stated in relation to the Coventry Hill Hotel:

> "I have confirmed with Serco that access to wi-fi was not restricted and that the broadband is sufficient strength for the

> hotel when fully occupied. From July 2020, the Defendant has provided SIM cards with unlimited data that guests can request and use in their mobile phone devices. These SIM cards are stored at reception. Service users who require a SIM card can collect it from reception. This is in addition to the hotel telephone on which service users can receive calls."

139. In his witness statement dated 17 December 2020 prepared for this case, Mr Blackburn said that, in addition to phones to be used to contact Migrant Help and medical assistance, the Hallmark Hotel had three other handsets (mobiles that were not smartphones) available from Serco to contact anyone else. The handsets were "made available via appointments to service users by Hallmark Hotel reception staff." On the basis that the Hallmark Hotel had three mobile handsets for use by FBAs for private and personal phone calls, the claimant withdrew his application for interim relief. In the recitals to his December 2020 order, Sir Duncan Ouseley recorded that that the defendant had agreed to notify asylum seekers at the Hallmark Hotel that three phones were available for use upon request.

140. Mr Blackburn's evidence was inaccurate and was corrected by Ms Kirby who said in a witness statement dated 26 February 2021:

> "3. There are currently five phones available to service users at Hallmark Hotel. Four mobile phones are available to receive incoming calls from Migrant Help. These phones were provided to Hallmark Hotel by Migrant Help, as part of a scheme by which they have provided a number of mobile phones to hotels where they have had difficulty contacting service users (for example, due to lack of personal mobile phones). Where this is the case, Migrant Help would, on a discretionary basis, use charitable funds to purchase pool phones to be kept at hotel reception.
>
> 4. I note that the information in the above paragraph differs from that given in the witness statement of Jonathan Blackburn dated 17 December 2020. Having spoken to Serco, I understand that they may have inadvertently provided information that was not accurate at the time the statement was drafted. Mr Blackburn is presently on leave, and in the timeframe available I have not been able to clarify with him whether this was the case, including what information he had before him at the time of making his statement, or why it differs from the information provided above. I intend to seek further clarification from Mr Blackburn upon his return.
>
> 5. There is also a mobile phone behind reception desk that service users can use to make calls to their solicitors, family or friends. Service users are free to approach on-site staff should they wish to use this phone. Use of the phone is at the discretion of on-site staff, and requests are considered on a case-by-case basis. If the service user requests use of the phone to speak to their solicitor, this will always be agreed. If the service user wishes to speak to friends or family, then consideration will be

> given to factors such as their vulnerability and how often the service user is making the same request. If the on-site staff are in any doubt they will escalate the matter in the first instance to the Serco Field Operations Manager at the site and then, if necessary, to the Head of Field Operations (West Midlands), AASC."

141. I derive the following propositions from Ms Kirby. First, Migrant Help provided four mobile phones for the use of asylum seekers housed at Hallmark Hotel to contact Migrant Help. Second, Serco provided only one mobile phone for the use of asylum seekers housed at Hallmark Hotel to contact friends and family. Third, the use of those phones was regulated by the discretion of on-site staff, who may or may not have understood the defendant's statutory duties. Fourth, the defendant was unaware of the phone arrangements at the Hotel until Ms Kirby found out from her enquiries for these proceedings. Had the defendant known the position before then, her solicitors would not have submitted an erroneous statement to the court and would presumably have taken at least some step to correct the error which formed the basis of a recital to Sir Duncan Ouseley's order and which influenced the claimant's decision to withdraw his application for interim relief. Fifth, there is no evidence from Ms Kirby or any other source of the number of asylum seekers supported in the Hallmark Hotel. The court is left with no way of knowing whether the single phone falls to be used by 1 or 1000 people.

142. In a witness statement dated 12 March 2021, Karim Ismail (a Service Delivery Manager for UKVI) gave details of the provision of phones for the use of asylum seekers at the George Mercure Hotel which is apparently a hotel contracted to provide accommodation to asylum seekers by an accommodation provider called Clearsprings Ready Homes. That hotel had fifteen handsets (four of which were readily available with the balance kept in stock in case of need). As I understand it, Mr Ismail stated in relation to that Hotel:

> "7. In my experience, most service users have their own mobile phones and it is very rare for a service user to come to service desk to request a mobile phone. Those who do not have their own phone can borrow one from reception. These are rudimentary phones, rather than smart phones. Alternatively, hotel staff will assist them in using the hotel reception landline phone.
>
> 8. Should any service user require access to documents or the internet, there is also a hotel laptop they can use. The hotel also has tablets available for use. If a service user's personal smart phone is broken, they can raise the issue with reception staff, who will provide support, including scanning, printing, filling GP registration forms, assistance in connecting to Wi-Fi or operating smart phones. Staff are also able to help in topping up or recharging service users' mobile phone credit, if they are not sure how to do it themselves. Staff on reception are available to provide support 24 hours a day. As noted, there is also 24/7 on-site access to Clear Voice interpreting services. Most hotel staff also speak several languages.

> 9. The provision of communications is standard across all Clearsprings hotels. The only difference would be the number of mobile phones available to service users, which will depend on the number of service users accommodated at the hotel. There is no particular formula used to establish the number of handsets that ought to be available in the hotel. This will depend on the number of service users residing in the hotel.
>
> …
>
> 12. Service users have had unrestricted Wi-Fi throughout the hotel since April 2020."

143. The claimant was not housed in a Clearsprings hotel. I asked Mr Payne why the defendant was not able to give better evidence about the number of, and arrangements for, phones across the gamut of hotels used for FBAs. He told me that the Home Office had felt overwhelmed at having to provide so many hotel places at such a large number of hotels during the pandemic. The number of hotels had increased so quickly that it had been practically and operationally impossible for civil servants to keep up with the changes.

144. I have no doubt that the workload was a heavy one but the defendant has had ample opportunity to gather evidence for these proceedings. I am not prepared to infer from the partial picture presented to me that FBAs at the Hallmark Hotel have been given adequate access to a mobile phone for the essential purpose of maintaining social relationships. Any such inference would in my judgment amount not to judicial restraint in entering the territory of factual assessment in judicial review proceedings but to judicial indulgence of a party's failure to provide evidence.

145. Turning to the defendant's legal approach, Mr Payne submitted that the defendant has at all times been able to discharge her statutory duty because if there had been a problem in a particular hotel, the affected FBAs could have used a complaints system to ensure access to a phone. I do not agree. The duty lies on the defendant to provide essential living needs. I have been directed to no authority to suggest that an asylum seeker has any corresponding duty to take steps (such as complaining) to secure them for him- or herself.

146. I have given consideration to the defendant's view that asylum seekers in general have mobile phone handsets which, coupled with free wi-fi in accommodation, means that the communication need was generally met. However, I do not accept that the legally relevant question is whether asylum seekers in general have a mobile phone. If that were the relevant question, the essential living needs provided to a person with no phone would be unlawful as having a lesser content than the objective minimum required by the Directive. The binary nature of an individual asylum seeker's physical access to a phone – which underpins article 18(2)(b) of the Directive – cannot involve pointing to the access of others, even if those others are a majority.

147. Mr Payne sought to rely on Popplewell J's conclusion in *Refugee Action* (at para 37, above) as meaning that the defendant need only consider the essential living needs of asylum seekers as a group and in general. If most asylum seekers have a phone, there is no need for the defendant to cater for asylum seekers who do not have a phone: such

individuals may apply for exceptional support under s.96(2). I do not agree that this is what Popplewell J means or implies. The need in question is the need to communicate – not the need to have a mobile phone which is no more than one possible way of fulfilling the communication need. The need to communicate is an essential living need for the group of asylum seekers as a whole and cannot properly be classified as exceptional. It cannot reasonably be contemplated as arising other than in the normal course of events in accordance with the standards of the Directive (*Refugee Action* para 37). The defendant owed a duty to an asylum seeker supported under s.95 to meet the communication need - even during the pandemic. In my judgment, she failed to have proper regard to that duty.

148. I am fortified in this conclusion by the jurisprudential underpinnings of the refugee concept. Under article 1A(2) of the 1951 Refugee Convention, a refugee is a person who departs from his or her country of origin owing to well-founded fear of being persecuted. The defendant's position that most asylum seekers have smartphones fails in my judgment to have regard to the situation of genuine refugees fleeing persecutors. A person who flees out of fear may be expected not to delay his or her departure to gather material resources. He or she may not have time to make plans about what possessions to bring on what may be a perilous journey to the host country. I agree with Mr Buttler that, in public law terms, the defendant has failed to have regard to a relevant factor, namely the logic of a system that may leave genuine refugees without the ability to communicate even if other FBAs may be able to do so.

149. For these reasons, I am not persuaded that the defendant properly recognised or carried out her duty to provide FBAs with the means of communication (in cash or kind) as an essential living need during the pandemic. The claimant's substantive challenge to the provision of the communication need succeeds.

150. As the substantive challenge has succeeded, it is not necessary for me to determine any discrete procedural challenge in relation to the communication need. I would not wish to add to an already lengthy judgment by dealing with matters that would be extraneous to the grant of relief. The procedural challenge was of a secondary order and overlapped with the substantive challenge in that the substantive challenge covered the flaws in the defendant's evidence and approach to decision-making. I do not regard the *Tameside* challenge as adding to the claimant's case.

## Conclusion and relief

151. Accordingly, the claim is allowed to the extent that the substantive challenge to the defendant's treatment of the communication need succeeds. I am asked by the claimant to grant declaratory relief to reflect that conclusion. The defendant opposes the grant of relief, contending that the terms of my judgment are a sufficient reflection of the legal position.

152. The court has power to grant a declaration in judicial review proceedings where it considers it "just and convenient in all the circumstances of the case" (s.31(2) of the Senior Courts Act 1981; see also CPR 54.3). The discretionary nature of the remedy was emphasised in *Regina (Hunt) v North Somerset Council* [2015] UKSC 51, [2015] 1 WLR 3575, para 12:

> "… in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no "must" about making a declaratory order…"

153. Prior to the letter before claim, neither the claimant nor his solicitors had told the defendant about any prejudice he may have suffered from the defendant's decision-making. As I have said, the evidence which he has supplied to the court is vague so that I am left with no clear impression of any individual prejudice to him that would warrant the grant of relief.

154. In financial terms, the claimant was granted s.95 support on 1 May 2020, received weekly cash payments of £5 from 26 June 2020, and has since received backdated payments which, averaged out over the period of s.95 support, amount to a weekly payment of £9.78 (which is £0.32 less than the general weekly payment of £37.75 prior to 15 June 2020 and £1.81 less than the weekly figure of £39.60 from 15 June 2020 until he started to receive cash payments in dispersal accommodation). Mr Payne submitted that, from a financial perspective, the claim is academic in that the backdated payments will have provided substantial mitigation in relation to any prejudice that the claimant may have suffered.

155. I have some sympathy with Mr Payne's submission. However, as I have explained above, I am not asked to conduct an individualised assessment of the claimant's situation. In circumstances in which the claimant does not want the court to assess his personal situation, and in the absence of satisfactory evidence of real and ongoing prejudice to him, I do not regard it as just and convenient to grant any relief that relates to him specifically.

156. This is however a "lead case" and other asylum seekers will or may be affected by its legal conclusions. Mr Payne submitted that I should decline to grant relief because the system of cash payments and cash back payments meant that the prejudice to any asylum seeker would be minimal to non-existent. In the absence of any evidence of any material prejudice to any FBA, the court had not been asked to determine any "real question" worthy of the grant of relief (*R (Robert Hitchins Limited v Worcester City Council* [2014] EWHC 3809, para 72 per Hickinbottom J as he then was).

157. Mr Payne was nevertheless inclined to agree in discussion with the court that there would be utility in a limited declaration for the purpose of guiding the defendant in her approach to future litigation raising similar issues. In the public interest and in the interests of the administration of justice - to make the position clear to the Secretary of State and to those other claimants whose cases will or may follow this lead case - I shall grant relief in the form of a declaration that will mark the defendant's unlawfulness.

158. I will grant declaratory relief which will reflect that the defendant failed to have proper regard to the communication need of asylum seekers supported in full board hotel accommodation under s.95 of the Immigration and Asylum Act 1999.

159. As discussed at the hearing, Counsel should endeavour to agree the wording of a declaration which reflects what I have decided.

## ADDENDUM

160. Following the circulation of this judgment in draft form, the defendant raised an issue about the wording of one sentence and refused to agree the form of a declaration absent an amendment to that sentence. I held a short hearing to consider the matter. By the time of the hearing (but not before then), I had understood the defendant's position and was persuaded that I could properly amend that sentence. Having done so, I proceeded to make a declaration in accordance with para 158.