Neutral Citation Number: [2023] EWHC 1876 (Admin)

Case Nos: CO/1599/2022, CO/549/2022, CO/2813/2022, CO/2415/2022, CO/3910/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2023

Before

MR JUSTICE SWIFT

- -

Between

HA, SXK, K, NY, and AM **Claimants**

-and-

Secretary of State for the Home Department **Defendant**

- -
- -

Zoe Leventhal KC and Ben Amunwa for **HA, SXK** (instructed by **Deighton Pierce Glynn**)
Alex Goodman KC and Natasha Jackson for **K, NY and AM** (instructed by **Leigh Day**) for the **Claimants**
Catherine Brown and Jack Anderson (instructed by **Government Legal Department**) for the **Defendants**

Hearing dates: 6-8 June 2023

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Approved Judgment

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MR JUSTICE SWIFT

A. Introduction

1. Each of these five applications for judicial review concerns the Home Secretary's obligations under the Immigration and Asylum Act 1999 ("the 1999 Act") and the Asylum Support Regulations 2000 ("the 2000 Regulations"), to provide accommodation and support to meet the essential living needs of asylum claimants.

2. The primary issue in HA and SXK's application is whether additional support the Home Secretary must provide to pregnant women and children under 3 years old, by reason of regulation 10A of the 2000 Regulations, must be given by way of the cash payment referred to in regulation 10A, or whether the obligation under that regulation can be discharged by provision in kind. When they commenced their claims, both HA and SXK also complained that the Home Secretary had failed to decide their section 95 applications sufficiently promptly and for that reason too, had failed to comply with her obligations under the 1999 Act and the 2000 Regulations. Shortly before the hearing the Home Secretary conceded this part of each claim, and the terms of a consent order have been agreed. K's application arises in circumstances in which there was significant delay by the Home Secretary in deciding an application under section 95 of the 1999 Act. K's claim also concerns the Home Secretary's obligation under section 98 of the 1999 Act to provide temporary support pending decisions on section 95 applications for support. In NY's case the Home Secretary agreed to provide section 95 support but then failed to do anything for several months. Both NY and K also contend that the Home Secretary's failures amounted to a breach of article 3 of the European Convention on Human Rights and claim damages under the Human Rights Act 1998. The last case listed to be heard was brought by AM. Shortly before the hearing, AM and the Home Secretary agreed terms to compromise the claim save for one point: whether the Home Secretary should pay AM's costs of the proceedings assessed on the standard basis or on the indemnity basis. I will address that point at the end of this judgment.

3. The facts giving rise to each claim occurred in 2021 and 2022. During this period the asylum support system continued to operate under the pressures that had built up during the pandemic period. Ordinarily, before the pandemic, asylum seekers requesting section 95 support would first be provided with initial accommodation, which was full board. This would typically be for a short period, one that corresponded to the time the Home Secretary needed to take a decision on the section 95 application and make different longer-term provision for the asylum claimant in what is referred to as dispersal accommodation. Dispersal accommodation is self-catered accommodation. This sequence fitted with the working assumption made for the purpose of applying the 2000 Regulations that the Home Secretary would meet the costs of essential living needs by a cash payment (now provided through a debit card arrangement, the Aspen card). In practice, therefore, asylum claimants would move through the system for provision of support at a pace that fitted with the Home Secretary's ability to take decisions on section 95 applications.

4. The pandemic upset that balance; several adverse circumstances combined. The time taken to deal with substantive asylum claims increased. This meant those in dispersal accommodation tended to stay longer in that accommodation. Second, for entirely obvious reasons, from the end of March 2020 the Home Secretary ceased to remove asylum claimants whose claims had failed from dispersal accommodation. In many

cases the circumstances of the pandemic prevented removal from the United Kingdom, and in any event, there were clear public health reasons for not removing those concerned from dispersal accommodation notwithstanding that their asylum claims were at an end. Third, it became progressively more difficult to find additional dispersal accommodation. Fourth, the number of asylum claims and claims for asylum support began to rise. The cumulative effect was that the Home Secretary had to place greater reliance on initial accommodation, and the period an asylum claimant was likely to spend in initial accommodation increased dramatically. All this is some context for the problems raised by the Claimants in this litigation.

B. Statutory provisions

5. Part VI of the 1999 Act contains provisions central to the present claims. By section 95 of the 1999 Act the Home Secretary has a power to provide support for asylum seekers and their dependants if they are either destitute or likely to become destitute within a prescribed period (which, by regulation 7 of the 2000 Regulations, is 14 days). Destitution for this purpose is defined at section 95(3).

> "(3) For the purposes of this section, a person is destitute if—
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

It is common ground that the power in section 95 of the 1999 Act is a duty to the extent either section 122 of the 1999 Act or regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005 ("the 2005 Regulations") applies. The former requires the Home Secretary to offer section 95 support if it appears to her either that the essential living needs of a child are not being met or that a child does not have adequate accommodation; the latter requires the Home Secretary, if a section 95 application has been made, to provide support if she thinks the applicant is eligible for support.

6. Section 96 of the 1999 Act specifies the ways in which support can be provided. These include by providing accommodation the Home Secretary considers "adequate" for the needs of the person concerned and his dependants; or by providing essential living needs (as they appear to the Home Secretary) of the person concerned and his dependants; or by providing both. Regulation 10 of the 2000 Regulations, titled "Kind and levels of support for essential living needs", is as follows:

> "**10.—Kind and levels of support for essential living needs**
>
> (1) This regulation applies where the Secretary of State has decided that asylum support should be provided in respect of the essential living needs of a person.

> (2) As a general rule, asylum support in respect of the essential living needs of that person may be expected to be provided weekly in the form of a cash payment of £40.85
>
> (3A) For the purposes of paragraph (1), a decision to grant support is made on the date recorded on the letter granting asylum support to the applicant.
>
> …
>
> (5) Where the Secretary of State has decided that accommodation should be provided for a person by way of asylum support, and the accommodation is provided in a form which also meets other essential living needs (such as bed and breakfast, or half or full board), the amount specified in paragraph (2) shall be treated as reduced accordingly."

7. It is common ground that the amount the Home Secretary now pays in respect of essential living needs is £45.00 per week. This has been the position since 20 December 2022; regulation 10(2) has not yet been amended to keep pace. Regulation 10(5) does not anticipate that the relevant reduced amount, paid when accommodation also meets other essential living needs, will be specified in regulations. From time to time since October 2020, the Home Secretary has announced the amount she will pay. As of 27 October 2020, the amount was £8.00 per week; from 21 February it rose to £8.24; and from 22 December 2022 it rose to £9.10. That weekly cash payment ("the regulation 10(5) payment") is made in respect of essential living needs, other than food and toiletries, identified by the Home Secretary as clothing and footwear, travel, communications, and non-prescription medicines.

8. Regulation 10A provides for "additional support" for pregnant women and children under 3:

> "**10A.— Additional support for pregnant women and children under 3**
>
> (1) In addition to the cash support which the Secretary of State may be expected to provide weekly as described in regulation 10(2), in the case of any pregnant woman or child aged under 3 for whom the Secretary of State has decided asylum support should be provided, there shall, as a general rule, be added to the cash support for any week the amount shown in the second column of the following table opposite the entry in the first column which for the time being describes that person.
>
> …"

The amounts in the table are: £3.00 for a pregnant woman; £5.00 for a child aged under 1 year; and £3.00 for children aged between 1 and 3 years old. Regulation 10A was introduced by the Asylum Support (Amendment) Regulations 2003 ("the Amendment

Regulations") with effect 3 March 2003. The rates in the table have not changed since then.

C. Decision. HA and SXK.

(1) Facts

9. HA arrived in the United Kingdom on 22 November 2021 with her two children aged 1 and 2. She claimed asylum the same day and from 23 November 2021 HA and her children were provided with full-board accommodation at the Broadfield Park Hotel in Rochdale. On 3 May 2022 they were moved to the Britannia Country House Hotel in Manchester, also full-board accommodation, and remained there until 17 May 2022 when they were provided with dispersal accommodation. As already mentioned, HA's claim as originally made included a complaint that the Home Secretary had failed to decide her application for section 95 support sufficiently promptly. While the section 95 claim was made in November 2021 the decision on the claim (which was to allow it) was made on 29 March 2022. HA and her children received regulation 10(5) payments from that time. But no further payment was made under regulation 10A. The first payment under that regulation was not made until 23 May 2022 (in respect of HA's younger daughter, then aged 2 years and 2 months). This followed the move to dispersal accommodation. HA's case is that regulation 10A payments should have been made from the time payments under section 95 should have started. The part of HA's claim concerning delay in taking the decision on her section 95 application has now been compromised on the basis that she should have received regulation 10(5) payments from November 2021. Thus, the part of her claim that remains, concerns whether the Home Secretary discharged her obligation under regulation 10A between 23 November 2021 and 17 May 2022.

10. SXK arrived in the United Kingdom with his partner and twin daughters on 23 November 2021 and claimed asylum that day. Initially, SXK and his family were provided accommodation at a hotel near Gatwick Airport. From 14 December 2021 they were moved to the Ambassador Hotel in London where they remained until 25 March 2022 when they were moved to dispersal accommodation. The hotel accommodation was full board. They received regulation 10(5) payments from 1 March 2022. Regulation 10A payments did not commence until 8 August 2022. For the purposes of this claim the issue is whether the Home Secretary discharged her obligation under regulation 10A for the period SXK and his family remained in hotel accommodation.

(2) The issue in the claims

11. The issue between the parties can be shortly stated. The Home Secretary's submission is that regulation 10A does not require cash payments and that the regulation 10A obligation can be discharged by provision in kind. On the facts, she contends that the food provided from time to time at each of the hotels was sufficient to meet the regulation 10A obligation. HA and SXK submit that, properly construed, regulation 10A requires a cash payment and the obligation to provide additional support for children and pregnant women cannot be met by provision in kind. In the alternative, HA and SXK submit that if the obligation under regulation 10A can be met by provision in kind, what was provided for them at the hotels was not good enough to discharge the obligation.

(3) Can the regulation 10A obligation be met by provision in kind?

12. The provisions concerning support for essential living needs in the 1999 Act and the 2000 Regulations must be read together as part of a single scheme. Section 96 of the 1999 Act permits section 95 support to be provided in various ways. By section 96(1)(b) the Home Secretary may provide support "by providing what appear [to her] to be essential living needs of the supported person and his dependants". Section 96(2) permits the Home Secretary where she "considers that the circumstances of a particular case are exceptional …" to "provide support under section 95 in such other ways as [she] considers necessary to enable the supported person and his dependants … to be supported". By paragraph 1 of Schedule 8 to the 1999 Act, the Home Secretary has the power to make regulations to make further provision "with respect to the powers conferred …" by section 95. Further, paragraph 3 of schedule 8 provides that regulations may provide for the circumstances (a) in which "as a general rule" the Home Secretary may… be expected to provide support in accordance with prescribed levels or of a prescribed kind"; and (b) in which she might as "a general rule" be expected to provide support "otherwise than in accordance with the prescribed levels". The 2000 Regulations were made in exercise of the powers in Schedule 8. Regulation 10(2) refers to provision of support in the form of a weekly cash payment "as a general rule".

13. The Home Secretary's submission is that the phrase "as a general rule" is significant. If cash payments are the "general rule" then it may logically be inferred both that there is no requirement that support for essential living needs must be in the form of cash payments, and that it is open to the Home Secretary to meet her obligation to provide essential living needs by provision in kind. The Home Secretary further submitted that the same conclusions are supported by regulation 10(5), which also anticipates that the Home Secretary may meet some essential living needs by providing bed and breakfast, half-board or full-board accommodation. Further, and if all that is correct so far as concerns meeting essential living needs pursuant to regulation 10 of the 2000 Regulations, the submission continues that the position ought to be no different when it comes to regulation 10A. Regulation 10A provides for additional support for the essential living needs of 3 classes of person. If the support required to be provided for essential living needs can be provided in kind, there is no relevant distinction between what is required under regulation 10 and what is required under regulation 10A. Moreover, in regulation 10A, the amounts specified are to be added to the regulation 10 payment as "a general rule". This phrase must have the same meaning in both regulation 10 and regulation 10(A).

14. Taken together these points make a strong case in support of the Home Secretary's position. But I do not consider the Home Secretary's submissions are correct. At paragraph 36 of his judgment in *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033, Popplewell J considered the meaning of the "as a general rule" phrase:

> "36. The framework put in place by the Secretary of State to meet her obligations includes the payment of the amounts under the [2000 Regulations] "as a general rule". This is pursuant to section 96(1)(b), which provides that one of the ways in which the section 95 duty may be fulfilled is by "providing … the essential living needs." In addition, there is a power under section 96(2), if the Secretary of State considers that the

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

The context for those observations was different from the present case. In *Refugee Action*, the challenge was to the level of the payment the Home Secretary had set in regulation 10(2) to meet the obligation to provide for essential living needs. The specific submission that Popplewell J was addressing at paragraph 36 was to the effect that the Home Secretary had erred when setting the rate by assuming that the essential living needs to be met were those of an able-bodied person. Nevertheless, this analysis of how section 96(1)(b) and section 96(2) fit together provides a general logic. A general rule that essential living needs are met by a cash payment, subject to exceptions to the extent permitted by section 96(2) makes strong practical sense. The Home Secretary must provide section 95 support in thousands of cases, week by week. The ability to discharge that obligation by paying a set amount is both administratively convenient and provides certainty for all concerned that that which the law requires has been provided. Thus, the statement in regulation 10 that cash payment is to be made "as a general rule" is better regarded as setting a *prima facie* requirement that the Home Secretary discharge the obligation to meet essential living needs by paying the specified amount to each relevant person. That requirement is displaced in only two situations. The first is any situation falling within section 96(2), where the circumstances of the case are "exceptional". In such a case, as Popplewell J pointed out, the Home Secretary is still doing no more than meeting essential living needs. The second situation where the requirement to meet essential living needs by making the cash payment specified in regulation 10(2) is displaced, is where regulation 10(5) applies. I do not accept the submission that the inference to be drawn from regulation 10(5) is that in all cases the Home Secretary has the option to meet essential living needs by payment in kind. Rather, regulation 10(5) does no more than impose an obligation on the Home Secretary to pay an amount less than the one required under regulation 10(2) where accommodation she provides itself meets some of the applicant's essential living needs that would otherwise be met by the regulation 10(2) payment. Read in this way,

regulation 10(5) tends only to support a conclusion that the Home Secretary is required (save so far as I have indicated) to meet essential living needs by payment and does not have any general liberty to meet those needs by provision in kind.

15. In the premises, regulation 10A must be interpreted in the same way. It follows that regulation 10A requires the Home Secretary to meet the additional essential living needs of pregnant women, children under 1 year old, and children aged between 1 and 3 years, by making the payments specified in the table. This would be subject to situations falling within section 96(2) of the 1999 Act.

16. The only remaining matter is whether regulation 10(5) should be understood as applying to payments made under regulation 10A(1) in the same way that it applies for the purposes of regulation 10 – i.e. if and to the extent that the Home Secretary can show that the accommodation she provides goes to meet the additional essential living needs that the regulation 10A(1) payments are designed to meet, she is required reduce what she pays accordingly. I do not consider regulation 10A(1) should be read as being subject to regulation 10(5). The most important consideration is that there is nothing in regulation 10A that suggests that regulation 10A(1) should be read in this way. Had that been the intention when regulation 10A was inserted into the 2000 Regulations by the Amendment Regulations, it would have been a simple matter for those Amendment Regulations to provide for that, expressly.

17. A further consideration is that in practice it might be difficult to identify what would amount to provision in kind for the purpose of the essential living needs that regulation 10A is intended to address. So far as concerns provision required by regulation 10, situations where accommodation provided by the Home Secretary also meets some essential living needs are likely to be readily apparent – for example where meals are provided. Situations where what is provided with accommodation goes further and extends to meet the additional essential living needs of pregnant women or young children are likely to be less obvious. As a matter of general principle, and where the opportunity arises, it is better to construe a statutory provision so that its application is more rather than less workable in practice. That principle has a particular role to play in the present context, one in which the 1999 Act and the 2000 Regulations establish the rules of the system probably applied thousands of times each week. Even if the occasions each week when regulation 10A is applied are measured in hundreds rather than thousands, the principle that construction should, where possible, promote workability carries some weight. Even more so when the opposite approach, for which the Home Secretary contends, also entails significant modification of the language in which regulation 10A was made.

18. All this being so, HA and SXK succeed on their first submission with the consequence that the Home Secretary ought, from the dates stated in paragraphs 9 and 10 above, to have made the payments required by regulation 10A(1) of the 2000 Regulations. However, in case my conclusion on the meaning and effect of regulation 10A is wrong, I will briefly, consider the merits of the Claimants' alternative submission, that even assuming the regulation 10A(1) obligation can be met by provision in kind, such provision was not made.

(4) If regulation 10A support can be provided in kind, was that support provided in these cases?

19. The evidence on whether regulation 10A provision was made in kind has focused on the food provided at each of the hotels. The Home Secretary's submission is that regulation 10A payments are intended to meet the objective met, in a different context, originally by the Welfare Food Regulations 1998 and since November 2005 by the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 ("the Healthy Start Regulations"). These regulations establish what is colloquially referred to as the Healthy Start Scheme. The scheme is that the benefits specified in regulation 3(2) of the Healthy Start Regulations are provided to pregnant women and children (i.e., those under the age of 4); these are "healthy start vitamins" and "healthy start food". Put generally, healthy start food comprises milk, infant formula, fresh frozen or canned fruit and vegetables, and pulses (see schedule 3 to the Healthy Start Regulations). Healthy start vitamins are defined in regulation 5A as "products containing vitamins of a form and quantity the Secretary of State has determined are appropriate for the beneficiary who receives them". The Healthy Start Regulations assume that healthy start food is provided through a voucher system, and that vitamins are provided (with payment in lieu of vitamins being made only where the Secretary of State has failed to provide vitamins).

20. The Home Secretary's submission is that the Healthy Start Scheme established by these regulations is not available to asylum claimants and that regulation 10A is the counterpart provision. Regulation 10A of the 2000 Regulations was inserted by the Amendment Regulations made in 2003 but the Explanatory Note for those regulations makes no mention of the healthy start scheme. Nevertheless, the Claimants have not contested this part of the Home Secretary's submission, and for the purposes of this judgment I will assume that this submission on the purpose of regulation 10A is correct.

21. Both HA and SXK have provided witness statements describing the food available at the hotels where they were accommodated. HA's evidence is that the food at the Broadfield Park Hotel "[tended] to be pasta, rice, dried chips, plain mash potatoes and dry sandwiches". This was not the type of food her children were used to. She complained about the quality of the food: portions provided were small and children received the same food as adults. In her first statement she said the hotel "rarely provided fresh fruit or vegetables". In her second statement she said one piece of fruit was given each day, but that fruit juice was not available, only water or milk. HA stated that the food at Britannia Country House Hotel was better. She said there was "special food for children with items such as chicken nuggets on the menu". SXK has provided evidence about the food at the Ambassador Hotel. In his first statement he said the food for his children was poor quality and that they would mostly eat only cereal, bread or milk because the other food provided was not palatable. In a second statement SXK responded to documents disclosed by the Home Secretary. The documents were disclosed by the Home Secretary without explanation of their relevance to the case. The documents are headed "Baby Inventory Records" and appear to record occasions when SXK was provided with items such as nappies, wipes, cereal, porridge, and formula milk. SXK explained these documents recorded occasions when he had been provided with items, on request. He went on to state that on some days, things such as formula milk or baby cereals were out of stock.

22. Having regard to this evidence, I am satisfied that HA and SXK have established *prime facie* cases that the Home Secretary did not meet the requirements of regulation 10A(1) by provision in kind.

23. The Home Secretary's evidence does not directly respond to the Claimant's evidence. The first matter she relies on is the general obligations contained in the Asylum Accommodation and Support Contract. This contains the standard terms in which the Home Secretary contracts to obtain hotel accommodation. The provisions relied on are as follows:

> "2.2.6 If "full board" accommodation is supplied by the Provider for any Service User, the full board food service shall comprise complete and adequate provisions for pregnant women, nursing mothers, babies and young children, for whom 3 daily meals may not be sufficient, and people who need special diets e.g. gluten free. Religious dietary requirements must also be catered for.
>
> 2.3.7 Where specific dietary needs are known by the Authority, the Authority shall communicate this information to the Provider, to ensure the best interests of the Service User are served. It is possible, however, that the Authority may not be aware of the specific dietary needs of each Service User. The Provider shall take proactive steps to try to ascertain whether a Service User has specific dietary needs and shall respond in accordance with Paragraph 2.3.6 where necessary. The Provider shall also notify the Authority if a Service User has dietary needs that have previously not been identified by the Authority, as soon as practicable as soon after the need is identified.
>
> …
>
> 4.1.4 The Provider shall provide full board service to applicable Service Users:
>
> 1. The Provider shall provide a full board service entitled Service Users who are:
>
> a. supported under Section 4 or Section 98 of the immigration and Asylum Act 1999; and
>
> b. accommodation in full board style accommodation without access to facilities for food storage and preparation.
>
> 2. The Service shall be provided in a location easily accessible to the Service User and/or within the relevant accommodation within which the Service Users are accommodated.

3. The food provision under the full board service shall include:

   a. breakfast;

   b. lunch and evening meal, with a choice of at least one hot and one cold selection. At least one vegetarian option shall be provided at each meal;

   c. a beverage service with each main meal;

   d. a food service for babies and small children with the appropriate foodstuffs. This service shall enable babies and small children to be fed whenever necessary;

   e. options which cater for special dietary, cultural or religious requirements (including, without limitation, gluten free and diabetic options where necessary); *and*

   f. additional foodstuffs or meals as required to meet the nutritional needs of Service Users for whom three daily meals may be insufficient.

4. The food service shall meet appropriate nutritional standards for each varied menu and satisfy cultural, religious, health or other specific requirements. The Provider shall also clearly advertise the availability of religious or cultural sensitive meals to relevant Service Users, where appropriate.

5. The Provider shall ensure that each varied menu is validated by a suitably qualified nutritionist or health professional as being appropriate to the dietary needs of Service Users.

6. The full board service shall include additional support items required by Service Users, including:

   a. baby care equipment and disposable nappies; *and*

   b. personal toiletries and feminine hygiene products."

24. So far as they go, there is no inconsistency between these terms and compliance by the Home Secretary with her obligations under regulation 10A(1). But the existence of these obligations does not demonstrate compliance in practice. First, there will be room for dispute whether, on any particular occasion, at any particular hotel, what was provided met the terms of the contract. However, even if that possibility is put to one side, the contractual provisions as drafted are as consistent with compliance with

provision in kind to meet the obligation under regulation 10 as they are with provision in kind that meets both that obligation and the further obligation under regulation 10A. Clause 2.3.7 concerns specific dietary requirements of "Service Users", when they are known. However, meeting such requirements must be part and parcel of compliance with regulation 10. The essential needs of a vegetarian will not be met by constant provision of burgers and sausages. Clause 4.1.4(3)(d) is of the same nature. Where the "Service User" is a baby or very young child, meeting his essential living needs will require provision of appropriate food, and require that food to be available on (reasonable) demand. Thus, compliance with that contractual obligation would not, *per se* entail provision in kind equivalent to what is required to satisfy both regulation 10 and regulation 10A. Clause 2.3.6 requires provision of "complete and adequate provisions" for pregnant women, babies and young children, referring to provision above and beyond three meals a day. Again, this could entail provision that goes to meet the requirements of regulation 10A but, if the purpose of that regulation is, as the Home Secretary contends, an equivalent to the Healthy Start Scheme, then mere provision of food outside mealtimes would not require provision in the nature of healthy start food or healthy start vitamins (see above at paragraph 19).

25. Second, the Home Secretary relies on the availability of snacks (i.e., food provided in-between mealtimes) at each of the hotels where HA and SXK stayed. This evidence is taken from reports of inspections undertaken at the hotels (as provided for in the terms of Accommodation Support Contract). The dates of the inspections do not match the periods each Claimant spent at each hotel, but for present purposes that is not decisive. Even if, so far as they concern food, the inspection reports are accepted at face value they do not evidence compliance with regulation 10A by provision in kind.

26. The inspection report for Broadfield Hotel of 4 August 2022 states:

> "There are snacks throughout the hotel including fruit, crisps and biscuits. More can be requested at the Serco office if required."

The report for the Britannia Country House Hotel for the inspection on 28 April 2022 states that snacks are "available to take away with their meals". There are two inspection reports for the Ambassador Hotel. The first concerns an inspection on 27 May 2021. That states:

> "Fruit, cake bars, yoghurt, water, tea and coffee is available throughout the day."

The second report, for an inspection on 18 August 2021 records that food available between meals is "fruit, tea, coffee and juice".

27. Provision of food between meals is entirely consistent with provision in kind necessary to meet the regulation 10 obligation. It is not something that speaks and could speak only to compliance with regulation 10A(1). To make an obvious point, each inspection report records only the between meal provision available to all residents, not the provision made available specially to pregnant women, babies, and young children.

Further, what is said to be provided is not such that it could be said to be consistent only with provision in kind to meet the regulation 10A obligation. If, once again, comparison is made with the healthy start food and healthy start vitamins provided under the Healthy Start Regulations, the things the inspection report say were available do not hit the target – or at least, not sufficiently clearly to be satisfactory evidence of compliance with regulation 10A(1).

28. Thirdly, the Home Secretary relies on sample menus showing the meals habitually provided at each hotel. Nutritional information about the meals has also been provided, although there is no evidence to the effect that the nutritional value is such that the meals provide the additional essential living needs that regulation 10A is intended to meet. This evidence is not sufficient either. This evidence too, goes to the provision made at each hotel for all residents. Meeting the essential living needs within the scope of regulation 10 requires the provision of nutritional food. The evidence that the Home Secretary relies on goes no further than that.

29. Having regard to the totality of the Home Secretary's evidence: (a) it is only evidence at a generic, systems level, it does not address the specifics of the Claimants' evidence; and (b) taken on its own terms as generic evidence, it provides nothing that sets compliance with regulation 10A by provision in kind apart from compliance merely with regulation 10. A conclusion that the evidence the Home Secretary relies on was consistent only with compliance with regulation 10A would hollow out the obligation under regulation 10 to provide essential living needs, an obligation that applies equally for pregnant women and young children.

30. For these reasons, the Claimants also succeed on their alternative case. If it is open the Home Secretary to comply with the obligation under regulation 10A by provision in kind, the evidence available does not show that the provision made in these cases for the children of HA and SXK, respectively, was sufficient to meet the regulation 10A obligation.

31. HA and SXK have also raised further submissions as to respects in which the Home Secretary acted unlawfully. However, none of these matters goes materially beyond the two central submissions already addressed, and for that reason it is unnecessary in this judgment for me to consider any of them.

D. Decision. K, NY, and M.

(1) K's claim: section 95 and delay

32. K claimed asylum on 29 November 2021. Both at that time and since, K lived with a friend, together with her daughter, who was 4 years old when the asylum claim was made. At the end of November 2021 K contacted Migrant Help to make a claim under section 95 of the 1999 Act, requesting only a payment to meet essential living needs.

33. Migrant Help works under a contract with the Home Secretary (the Advice, Issue, Reporting and Eligibility ("AIRE") contract) to provide a helpline and advice service to asylum claimants seeking section 95 support. Put very generally, Migrant Help's role is to assist applicants to fill in the relevant form (the ASF1 form) and collate the documents (which might for example, include copies of bank statements or birth certificates) and other information that must be provided in support of an application

for section 95 support. Migrant Help then forward the completed application to the Home Secretary for consideration. In this way, Migrant Help performs a role as the gatekeeper to section 95 support. Migrant Help is not itself responsible for taking any decision as to eligibility for section 95 support.

34. On 12 January 2022, K sent the documents required to support her section 95 claim to Migrant Help. By 11 February 2022, Migrant Help had put those documents onto its system. Nothing further then happened until June 2022 when, promoted by calls made on K's behalf asking after the progress of her application, Migrant Help requested copies of recent bank statements. K had provided bank statements in January 2022, but by June 2022 those had ceased to provide the up-to-date information required to support a section 95 claim. On 2 August 2022, K received a text message from the Home Office informing her that her section 95 application had been received. On 8 August 2022 K was informed that the Home Secretary had granted her section 95 application. It appears from the witness statement made by Daisy Noble, the Deputy Director for Asylum Services at Migrant Help, that on 2 August 2022, following pre-action correspondence with K's lawyers, the Home Office required Migrant Help to submit K's section 95 application. Miss Noble explains that Migrant Help had not submitted the application because it considered further supporting documentation was required. Be that as it may, K's section 95 application was submitted without that documentation, and was granted in a matter of days.

35. On the second day of the hearing Mr Anderson, on behalf of the Home Secretary, conceded that there had been unreasonable delay in processing K's section 95 application. That concession was correctly made. Neither the 1999 Act nor the 2000 Regulations specifies the time within which section 95 applications are to be determined. However, I am satisfied that there is an obligation to determine such claims promptly. Section 95 claims are for support to meet essential living needs; the Home Secretary comes under an obligation to provide that support if she thinks the applicant is either destitute or will, very shortly (within 14 days) become destitute. Regulation 3 of the 2000 Regulations makes some provision for how applications for section 95 support should be made. It is notable that by regulation 3(5A) if the Home Secretary seeks further information in connection with an application, the applicant is required to respond within 5 days. Failure to respond within that period, absent reasonable excuse, permits the Home Secretary to conclude the applicant is not "cooperating" and in such a case regulation 3(4) requires the Home Secretary not to entertain the application. These matters support the conclusion that the Home Secretary is required to consider applications promptly.

36. The Home Secretary's evidence on what usually happens also points to this conclusion. Steve Smyth, the Chief Caseworker in the Home Secretary's Asylum Financial Support Team, has provided two witness statements. He explains that under the terms of the AIRE contract, Migrant Help is required to ensure ASF1 forms are completed within 5 days (if the applicant is a person in initial accommodation). He further states that in March 2020 the average time from contact with Migrant Help in relation to a section 95 claim to that claim being submitted by Migrant Help to the Home Secretary was 5.69 days. That average time increased significantly during 2021 - 2022 and at one point was at 45.3 days. As at the date of his statement, March 2023, the average time had fallen to 10 days. Mr Smyth also states that once an application has been passed to the Home Office the working premise is that a decision will be taken within 3 days.

37. The obligation to take section 95 decisions promptly cannot be equated to a set period of time that applies in all cases. The circumstances of each application must be looked at on their own terms. However, absent particular cause, I am satisfied that what promptness requires for this purpose is that section 95 applications are decided by the Home Secretary within a short period following an applicant's first contact with Migrant Help. In all cases the Home Secretary and those she has contracted with must act promptly; in most cases a decision ought to be taken within 10 days.

38. For the purposes of K's case there is no need for any application of fine judgement. The decision on the section 95 application came almost 7 months after the information in support of the application was provided. Some parts of the evidence relied on by the Home Secretary explained the pressure upon the application system in 2021 and 2022; the number of claims increased dramatically, and insufficient staff were available at Migrant Help. That resulted in claims by certain types of claimants being prioritised. In part, this explains the delay taking a decision on K's application. Miss Noble explains that at the request of the Home Office, Migrant Help gave priority to section 95 claims made by applicants already in initial accommodation. K's claim was for financial support only, and for that reason was not dealt with. This may explain what happened, but it does not amount to legal excuse. It is for the Home Secretary to decide the arrangement she makes with her contractors. But those arrangements will not shape the scope of the legal obligation on the Home Secretary arising under the 1999 Act and the 2000 Regulations.

(2) K's claim: support under section 98 of the 1999 Act

39. K's next submission is that the Home Secretary acted unlawfully by failing to provide her with financial support to meet essential living needs pursuant to section 98, pending the decision on her section 95 application. Section 98 support is proved to those "who it appears to the Secretary of State may be destitute", but only for the period necessary for the Home Secretary to decide the applicant's application for section 95 support. Section 98 is described as provision for temporary support.

40. On the facts, support was not provided to K pending the decision on her section 95 application. For the purpose of deciding this part of K's claim, it is necessary to consider the nature of support provided under section 98 of the 1999 Act. Although section 98(3) incorporates provisions in section 95 into the regime for temporary support, section 96 is not expressly incorporated. Section 96 of the 1999 Act sets out the ways in which section 95 support can be provided and, in terms, permits support by way of provision of accommodation and support to provide essential living needs. Section 98 simply refers to provision of support, that is not further defined for that purpose. In this regard it is important to note that regulation 10 of the 2000 Regulations, the provision that identifies the weekly cash payment for essential living needs (the £45.00 payment), does not apply for the purposes of section 98 temporary support. Regulation 10 applies when there has been a decision to provide "asylum support", defined in the 2000 Regulations to mean support provided under section 95 of the 1999 Act.

41. It is clear from the Home Secretary's evidence that her practice now is to provide section 98 temporary support only in the form of hotel accommodation. She does not provide payments to meet the essential living needs of those who do not also require accommodation. This part of the Home Secretary's evidence is provided by Mr Smyth.

He explains that, prior to 2017, the Home Secretary had, on occasion, made one-off subsistence payments pursuant to section 98 of the 1999 Act, but that since 2017 the Home Secretary only provides hotel accommodation (the same as the initial accommodation referred to above at paragraph 3) in exercise of her powers under this section.

42. Nevertheless, this evidence shows the Home Secretary accepts, as a matter of principle, that her power to provide temporary support under section 98 permits her to make payments to meet essential living needs even when accommodation is not provided. If the Home Secretary acted in exercise of that aspect of her section 98 power she would not be required to make the £45.00 weekly payment specified in regulation 10. (She might, as a matter of convenience, choose to make payment in that amount. It is likely that were any lesser sum to be paid the Home Secretary would need to be able to show if called on, that the sum paid reflected her realistic assessment of what the particular applicant required by way of provision for essential living needs.)

43. The practice Mr Smyth describes, of providing section 98 temporary support only in the form of hotel accommodation, would not in ordinary times be likely to give rise to practical problems. In ordinary times, the Home Secretary's expectation was that such hotel accommodation would be provided for only a very short period, measured in days, after which a section 95 would be taken and the regulation 10 cash payment for essential living needs would be made. In ordinary times, an applicant in K's position who requested only essential living needs support would have a prompt section 95 decision and the lack of essential needs to support for the short period before the section 95 decision might well go overlooked. The Home Secretary's practice only to provide section 98 temporary support by way of hotel accommodation might not correspond exactly to the extent of her statutory powers, but the mis-match would probably not be visible.

44. However, the mis-match that results from the approach that section 98 temporary support will only be provided by way of hotel accommodation will become apparent, when as on the facts of K's case, significant time separates the section 95 application and the decision on that application. When that is so, the Home Secretary's failure, as a matter of discretion, to consider providing section 98 temporary support in the form of payment to meet essential living means, is unlawful. I am satisfied that the Home Secretary does, under section 98, of the 1999 Act, have the power to make such payments; should in circumstances where the section 95 decision is pending for some time consider the exercise of that power; and, in the circumstances of K's case, ought to have made some provision to meet essential living needs by way of temporary support.

45. For the purposes of K's case it is unnecessary to give any close consideration to how long it should have been before the Home Secretary should have considered whether to provide temporary support to meet the essential living needs. On any analysis, K's section 95 application remained outstanding for far too long. K's claim under section 98 of the 1999 Act therefore succeeds.

(3) NY's claim: section 95 support.

46. NY and his family first entered the United Kingdom in July 2017. NY came to the United Kingdom to take up employment. On 5 February 2021, his circumstances

having changed, NY made a claim for asylum. On 12 March 2021 NY made an application for section 95 support requesting both accommodation and provision for essential living needs. At the time of the application, NY and his family were living in accommodation that had been provided with his employment. That employment had come to an end and NY anticipated he and his family would soon be required to leave. The section 95 application was granted in a decision letter dated 27 May 2021. The Home Secretary agreed to provide both accommodation and essential living needs support. However, NY did not receive a copy of that letter, and did not know a decision had been taken. At various times after May 2021, NY contacted Migrant Help asking for money to meet his family's essential living needs. On other occasions, from around August 2021, NY or those acting for him contacted Migrant Help explaining he was likely to be evicted. It appears that on 13 August 2021, NY's landlord served notice requiring the family to leave by 17 December 2021. From 22 December 2021 NY and his family were provided accommodation at the Ramada Hotel in Crawley. That coincided with when they were required to leave the accommodation that had come with NY's employment. From 20 January 2022 NY and his family moved to dispersal accommodation in Slough. Payments to meet essential living needs did not commence until 5 March 2022.

47. NY's case on section 95 support is put in two ways. First, that the Home Secretary failed to determine the application promptly: the decision should have been made before 27 May 2021. Second, that in any event, the Home Secretary acted in breach of her obligations under the 1999 Act by not making support available until December 2021.

48. Mr Smyth's evidence on the progress of NY's application is that it was received from Migrant Help on 28 April 2021; that a request for further information was made on 19 May 2021; that the information requested was provided on 24 May 2021; and that the decision on the application was then made 27 May 2021. There is no evidence of what happened between 12 March 2021 when the ASF1 form was completed and provided to Migrant Help, and 28 April 2021when that form was passed to the Home Office. Based on the evidence available I am satisfied that this application was not determined promptly. There is an unexplained period of 6 weeks between 12 March 2021 when the ASF1 form was completed and 28 April 2021 when Migrant Help provided the form to the Home Secretary; and there is a further unexplained period of 3 weeks between 28 April 2021 and 19 May 2021 when a request for further information was raised. Overall, the delay amounted to a breach by the Home Secretary of her obligations under the 1999 Act and the 2000 Regulations. If, during that period or some part of it, the Home Secretary had provided NY with section 98 temporary support the outcome may have been different. But that did not happen.

49. The failure after 27 May 2021, to provide support was a further breach by the Home Secretary of her obligations under the 1999 Act and 2000 Regulations. Neither the Act nor the Regulations prescribes the period within which section 95 support is to commence once a decision to provide that support has been made. However, given the nature of a section 95 decision, which is an acceptance that the applicant is, or is soon to be, destitute, the necessary inference is that once a decision has been made steps towards making section 95 provision will start immediately and will be pursued efficiently. Each case will therefore turn on its own facts. However, on the facts of this case the matter is clear. The Home Secretary failed to provide the section 95 support

in sufficient time, and, on any analysis, support should have been provided to NY by mid-June 2021.

50. One cause of confusion appears to be that NY was in private accommodation both when he made his application for section 95 support, and after the application had been determined. Mr Smyth explains that in 2020 and 2021 the Home Office, in the face of the practical problems presented by the pandemic, developed two strategies referred to enigmatically as "the Approach" and "the Practice". The Practice meant that even after a favourable decision on a section 95 application had been made, the Home Secretary did not provide support for essential living needs until such time as the applicant was moved into dispersal accommodation. The Approach meant that when a person who made a section 95 application was already in private accommodation, even if the application was granted no steps would be taken to move the applicant into accommodation provided by the Home Secretary unless the applicant "made a further request for urgent accommodation". The Home Secretary's evidence in this case does not provide any definitive account of why, after 27 May 2021, NY was not provided with the support the Home Secretary had by that time agreed was necessary for him and his family. However, I think it is a fair assumption that the delay in provision was the consequence of the Approach and the Practice. For completeness' sake, Mr Smyth's evidence goes on to state that the Practice has now been abandoned. It appears that the Approach survives in some modified form but what follows is directed only to the form it took before modification.

51. In a letter dated 18 November 2022 the Home Secretary conceded that the Approach (in the form it then existed) and the Practice were unlawful to the extent that each amounted to an unpublished policy. However, that concession goes both too far and not far enough. There is no general rule that every unpublished policy is, by reason of non-publication, unlawful. Lord Dyson's comments in *R(WL Congo) v Secretary of State for the Home Department* [2012] 1AC 245 at paragraph 34 -39 must be understood in the context of that case. The considerations requiring that conclusion in that case will not apply to every policy on every matter regardless of context. More importantly, however, neither the Practice nor the Approach was consistent with the Home Secretary's obligations under the 1999 Act and the 2000 Regulations on the provision of section 95 support. Each assumed that once a favourable section 95 decision had been taken, accommodation and support for essential living needs had (or ought) to be provided as a package. That is wrong; it is at odds with sections 95 and 96 of the 1999 Act and the 2000 Regulations. An application can request support either in the form of accommodation, or provision for essential living needs, or both. The Home Secretary may decide to provide either or both. It is obvious there will be occasions where the provision of support for essential living needs outside accommodation provided by the Home Secretary better suits the circumstances of the applicant. NY's circumstances are a case in point. Although he anticipated losing the accommodation he had, and in mid-August 2021 had been served with notice to leave by mid-December, for the time being it suited him better to remain in that accommodation and be provided with support to meet essential living needs, as that would permit his children to continue to attend their schools. Therefore, strategies by which the Home Secretary effectively ceased to comply with her obligation to meet the essential living needs of those who met the definition of destitution at section 95(3)(b) of the 1999 Act were unlawful.

(4) NY's claim: section 98 support

52. This part of NY's case concerns the period from 12 March 2021 to 27 May 2021. The reasons at paragraphs 40 – 44 apply, *mutatis mutandis*. This part of the claim succeeds.

(5) Other matters

53. Several other points were made on behalf of K and NY advancing further reasons why the Home Secretary's failure to provide either section 95 support or section 98 temporary support was unlawful including, for example, the submission that the Home Secretary had failed to comply with the obligation arising under section 55 of the Borders and Citizenship Act 2009. Given the conclusions already stated it is unnecessary for these matters to be addressed in this judgment.

(6) K and NY: article 3 claims.

54. These claims rest on the premise that in situations where applications under section 95 of the 1999 Act are made to the Home Secretary, section 6 of the Human Rights Act 1998 imposes a duty on her to act where there is an imminent prospect that the applicant will be subjected to inhuman and degrading treatment in the form of destitution. The Claimants rely on two authorities: the decision of the House of Lords in *R(Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396, per Lord Hope at paragraph 62; and the decision of the Divisional Court in *R(W) v Home Secretary* [2020] 1 WLR 4420.

55. *Limbuela* concerned the operation of section 55 of the Nationality and Immigration and Asylum Act 2002 which prevents the Home Secretary from providing section 95 support to an asylum claimant if the asylum claim was not made as soon as reasonably practicable after the person's arrival in the United Kingdom, save for an exception (at section 55(5)) that permits the Home Secretary to act in exercise of section 95 powers "to the extent necessary for the purpose of avoiding a breach of a person's Convention rights". At paragraphs 44 and 62 of his speech, Lord Hope explained the effect of section 55(5) as follows:

> "44. Nevertheless, stringent though this new test was no doubt intended to be, the application of section 6 of the Human Rights Act 1998 to the acts and omissions of the Secretary of State as a public authority had to be recognised. The purpose of section 55(5)(a), therefore, in this context is to enable the Secretary of State to exercise his powers to provide support under sections 4, 95 and 98 of the 1999 Act and accommodation under sections 17 and 24 of the 2002 Act before the ultimate state of inhuman or degrading treatment is reached. Once that stage is reached the Secretary of State will be at risk of being held to have acted in a way that is incompatible with the asylum-seeker's Convention rights, contrary to section 6(1) of the 1998 Act, with all the consequences that this gives rise to: see sections 7(1) and 8(1) of that Act. Section 55(5)(a) enables the Secretary of State to step in before this happens so that he can, as the subsection puts it, "avoid" being in breach.

…

> 62. The best guide to the test that is to be applied is, as I have said, to be found in the use of the word "avoiding" in section 55(5)(a). It may be, of course, that the degree of severity which amounts to a breach of article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage before the power in section 55(5)(a) is capable of being exercised. It is not just a question of "wait and see". The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it."

The Claimants rely on these final words in paragraph 62 where Lord Hope explains the source of the power for the Home Secretary to act not just by reference to section 55(5)(a) which, as enacted, clearly permits action in anticipation of a breach of Convention rights, but also section 6 of the Human Rights Act 1998. Lord Hope's point is that section 6(1) of the Human Rights Act 1998, which states it is "unlawful for a public authority to act in a way which is incompatible with a Convention right" extends beyond situations of actual breach and covers situations where there is an "imminent prospect" of a breach of a Convention right (or at the least, has that effect when the Convention right in issue is article 3).

56. This conclusion was applied by the Divisional Court in *W*. In that case the court considered the legality of the Home Secretary's policy on adding a "no recourse to public funds" condition to grants of limited leave to remain in the United Kingdom save where the applicant for leave had provided evidence that he was destitute, within the definition at section 95(3) of the 1999 Act. At paragraph 42 of its judgment, with reference to paragraph 62 of Lord Hope's speech in *Limbuela,* the court said this:

> "42. This makes two things clear. First, the fact that someone is "destitute" as the term is defined for the purposes of section 95 of the 1999 Act does not necessarily mean that he or she is enduring treatment contrary to article 3 of the Convention: the threshold of severity which must be reached to make out a breach of article 3 is higher than that required for a finding of destitution within the section 95(3) definition. Second, section 6 of the 1998 Act imposes a duty to act not only when someone *is* enduring treatment contrary to article 3, but also when there is an "imminent prospect" of that occurring. In the latter case, the law imposes a duty to act prospectively to avoid the breach."

57. Drawing this together, it is important to recognise that whether article 3 ill-treatment has occurred is a question of fact for the court. Mr Goodman KC for K and NY submitted that for present purposes a decision by the Home Secretary that section 95 support should be provided was synonymous with an admission of a breach of article 3. I disagree. In *Limbuela,* Lord Hope said, in terms, that the section 95 destitution standard was not *per se*, article 3 ill-treatment. The consequence for K and NY is that the Home Secretary's acceptance that each met the standard for provision of section 95 support is not an admission of their article 3 claims. Rather, each claim must depend on its own facts, taking account of the extended reach attributed to section 6 of the Human Rights Act 1998 by Lord Hope in *Limbuela.*

58. For K the relevant period is between December 2021 when she first contacted Migrant Help and August 2022 when her application for section 95 support was approved. During this period, she and her children were provided with accommodation by a friend. However, K's evidence is to the effect that so far as concerns need for food, clothing, and other essentials she lived a hand-to-mouth existence. She received some support from the local authority, weekly vouchers in the amount of £74.70 redeemable at the Post Office. However, the vouchers came by post and did not always arrive on time, or at all. K also describes obtaining occasional assistance from charities, from friends, and at food banks. I accept that K's evidence describes an existence that was in many respects wretched, particularly for a young child who went without on many occasions. However, I am not satisfied that this evidence describes matters that reached the high bar that is set for article 3 ill treatment. K's claim under article 3 therefore fails.

59. NY's claim concerns the period from March 2021 when his claim for section 95 support was made to December 2021 when he and his children were provided with initial accommodation, and then from mid-January 2022 to the beginning of March 2022 when they were in dispersal accommodation but did not receive payments to meet essential living needs. During relevant periods, NY and his children had accommodation. His evidence is that by July 2021 he had run through his savings and he then had to sell possessions to get money for food and other basic needs. Although his younger child received school meals, his elder child did not. NY describes how, between July and December 2021, he struggled to buy food and was reduced to asking at shops for leftover food. He explains that his children became "lethargic" and "visibly thinner". NY also struggled with his own health consequent on heart surgery he had undergone in 2020. So far as concerns the period January to March 2022, NY explains he was assisted by local volunteers who he describes as "amazing" and who provided food. NY's evidence like K's points to very saddening circumstances. But I do not consider to what happened crosses the threshold for article 3 ill-treatment. NY's article 3 claim therefore also fails.

(6) AM's case: the basis on which the costs payable by the Home Secretary should be assessed.

60. Agreement was reached on AM's claim on 5 June 2023. AM had started proceedings on 24 October 2022. She had first requested section 95 support in November 2021 but by the time she commenced proceedings that application had not been determined. The Home Secretary's pleaded response to the claim was that no application for asylum

support had been made until 28 October 2022. The Home Secretary maintained this position in Detailed Grounds of Defence filed in January 2023. On 10 March 2023 the Home Secretary filed further evidence that accepted that an ASF1 form had been provided to Migrant Help on 21 December 2021, but said Migrant Help had not submitted the form to the Home Secretary until 27 October 2022, after the judicial review proceedings had been commenced.

61. The Home Secretary accepts that she should pay AM's costs of the proceedings and that costs incurred from the date of the Detailed Grounds of Defence should be assessed on the indemnity basis. However, she contends that costs incurred prior to that time should be assessed on the standard basis. AM's submission is that her costs of the whole proceedings should be assessed on the indemnity basis. I accept AM's submission. The Home Secretary should have taken reasonable steps to ascertain the circumstances of AM's application by the time the proceedings commenced. It was unreasonable not to do so. AM had complied with the pre-action protocol. It appears the Home Secretary relied on mistaken information provided by Migrant Help. However, that has no effect on the Home Secretary's responsibility. AM's costs of the proceedings will be paid by the Home Secretary either in an amount that is agreed or in an amount assessed on the indemnity basis.

E. Conclusions

62. HA and SXK succeed on their primary submission that from the time they should have received support under section 95 of the 1999 Act they should have received the payment specified in regulation 10A. The Home Secretary is not permitted to discharge the obligation under regulation 10A by provision of support in kind. HA and SXK also succeed on their alternative case that, even if the regulation 10A obligation can be met by provision in kind, such provision was not made for them.

63. K and NY succeed on their claims that the Home Secretary failed to meet her obligations to provide support under the 1999 Act and the 2000 Regulations. Neither K's nor NY's applications for section 95 support were decided promptly. In NY's case the Home Secretary further acted in breach of her obligations when, having decided NY was eligible for section 95 support in May 2021, she failed to provide any support to him until December 2021.

64. In both cases, the Home Secretary also failed to meet her obligation to provide section 98 temporary support. Given the delays that occurred when deciding and, in NY's case acting upon entitlement to section 95 support, section 98 temporary support ought to have been provided. In reaching these conclusions I have further concluded that the Home Secretary's strategies referred to as "the Practice" and "the Approach" were unlawful not for want of publication but rather because neither was consistent with the obligations arising under section 95 of the 1999 Act and the material parts of the 2000 Regulations.

65. The claims by K and NY under the Human Rights Act 1998 fail and are dismissed.

66. In AM's case the application that the costs payable by the Home Secretary be assessed on the indemnity basis succeeds.
