Neutral Citation Number: [2022] EWHC 3329 (Admin)

Case No: CO/1804/2022

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

Wednesday 21st December 2022

Before:

MR JUSTICE FORDHAM

- -

Between:

R (on the application of CB)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

- -

Jamie Burton KC and **Michael Spencer**
(instructed by Greater Manchester Law Centre) for the **Claimant**
Colin Thomann (instructed by Government Legal Department) for the **Defendant**

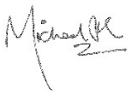
- -

Hearing date: 15/12/22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

I. INTRODUCTION

1. In these judicial review proceedings there are two Agreed Issues. Issue (1): Did the Defendant ("the SSHD") err in law for the reasons set out in the Claimant's Grounds of Challenge in setting the rate of weekly cash payment in respect of the essential living needs of persons to whom she has decided to provide asylum support, by regulation 2 of the Asylum Support (Amendment) Regulations 2022 (SI 2022 No. 78) ("the 2022 Regulations") with effect from 21 February 2022 ("the Uprating Decision")? Issue (2): Did the SSHD in any event err in law in failing to reconsider and/or review the rate of asylum support after 21 February 2022 and is she currently in breach of her obligations under s.95 of the Immigration and Asylum Act 1999 ("the 1999 Act")?

2. As can be seen from Agreed Issues (1) and (2), this case is an example of a "then and now" claim (cf. R (Rowley) v Minister for the Cabinet Office [2021] EWHC 2108 (Admin) [2022] 1 WLR 1179 at §10). It does not fall foul of the vices associated with "rolling judicial review". Declaratory relief can be "then" or "now" or both. Mandatory orders – and one is sought in the present case – are by nature about "now". The claim form and grounds for judicial review stand as a fair and clear framework with distinct temporal focuses. On Agreed Issue (1), the focus in time is on the position on 11 November 2021 when the SSHD decided what rate to set, and on 26 January 2022 when she made the 2022 Regulations setting it (£40.85). On Agreed Issue (2), the focus in time is the period after 21 February 2022 and, ultimately, the date of the hearing before me (15 December 2022). None of this is in dispute: the issues are agreed.

3. Issue (2) encompasses these questions: (i) whether the SSHD erred in law in failing to make a decision after 21 February 2022; (ii) whether the SSHD erred in law and breached her obligations under s.95 in failing to increase the rate after 21 February 2022; and (iii) whether as at the present time the SSHD is acting unlawfully and in breach of her obligations under s.95. At the substantive hearing before me, Colin Thomann for the SSHD accepted that he "could not resist" – albeit nor could he "consent" to – the Court making Declarations against the SSHD on all these questions. On behalf of the SSHD, he accepted that he was unable to identify or advance any viable argument as to why any of these three conclusions of law would be incorrect, or as to why Declarations would be inappropriate to reflect the correct legal position. I was, and am, quite satisfied that Mr Thomann was right to take that course. I announced at the end of the hearing that I had decided to make Declarations, with my reasons to follow in this judgment. I explained that my judgment would also deal with the arguments I had heard about whether to make a Mandatory Order, subject to any appropriate submissions on consequential matters following receipt of a confidential draft judgment. The judgment would also need to deal with Issue (1) Grounds (i)-(iii).

4. By an Order dated 16 December 2022, and referring to an Advice to Ministers (31.8.22) to which I will return later, I recorded:

> ***UPON the Defendant having disclosed in these proceedings, inter alia, an Advice to Ministers dated 31st August 2022, and the Court being satisfied that the appropriate date***

> ***for the purposes of Declaration (1) below is 2 weeks (14 September 2022) from the date of that Advice***
>
> ***AND UPON the Defendant by her Counsel not being able to resist the making of the Declarations below, but nor consenting to them***
>
> ***IT IS DECLARED THAT: (1) The SSHD has since at least 14 September 2022 acted unlawfully in failing (i) to review the rate of asylum support under section 95 of the Immigration and Asylum Act 1999 and (ii) to ensure that the rate of asylum support under section 95 of the Immigration and Asylum Act 1999 is adequate to meet the essential living needs of asylum seekers. (2) Unless and until the SSHD increases the rate of asylum support by policy and/or by amendment to regulation 10(2) of the Asylum Support Regulations 2000, the SSHD will be acting unlawfully and in breach of her statutory duty to ensure that the rate of asylum support is necessary to meet the essential living needs of asylum seekers.***

5. Agreed Issue (1) refers to the "reasons set out in the Claimant's Grounds of Challenge". The Claimant's Grounds for Judicial Review summarised these as follows. Ground (i) (breach of statutory duty): In the context of accelerating inflation, the Uprating Decision represents a significant real-terms cut in the rate of asylum support, in breach of the SSHD's duty to ensure that asylum support can maintain a dignified standard of living. Under Ground (i), the SSHD accepts that the Uprating Decision "requires justification by a careful examination if it is to be defended as rational" (see §36 below). Ground (ii) (breach of Tameside duty of inquiry): In making the Uprating Decision, the SSHD failed to undertake a sufficient inquiry to enable her to make an informed and rational decision as to the rate required to meet the minimum standard, including by failing to consider the most relevant and up to date data as to the impact of price rises on the ability of asylum seekers to meet their essential living needs. Ground (iii) (failure properly to consult): Having committed to holding a consultation with leading voluntary sector groups, the SSHD failed to do so properly, by adopting a new (fundamentally flawed) approach not canvassed during the consultation.

II. CONTEXT

The Claimant

6. The Claimant is a Nigerian national aged 32 who arrived in the UK in April 2021, accompanied by her three children aged 6, 7 and 8. They are survivors of domestic violence. The eldest child has Cerebral Palsy and Sickle Cell Disease. The Claimant claimed asylum on 22 November 2021 and was housed with her children in temporary accommodation in Liverpool. On 16 December 2021, she was granted asylum support under s.95 and is accommodated by the Home Office in a two-bedroom house in Liverpool. The children attend school and receive free school meals. Since 21 February 2022, the Claimant receives £163.40 per week (£40.85 for her and each of her three children) paid onto a specially issued debit card usable to take out cash and in shops. It was clarified by Mr Thomann at the hearing, and subsequently specifically confirmed (by letter dated 19 December 2022 from Laura Cameron, Head of the Asylum Support Policy Team) that the Claimant is entitled to 'carry forward' an unspent balance to the following week.

The Five Cases (Refugee Action to AXG)

7. The legal framework applicable to the present case has been laid down in primary and secondary legislation. The way it operates, and the Court's own responsibilities, have been explained by the Courts in previous cases. The parties placed before me five cases in which the Courts have dealt with judicial review claims in respects of aspects of the weekly cash payment in respect of the essential living needs of persons to whom the SSHD has decided to provide s.95 asylum support. These cases provide authoritative guidance for the parties and for me, and reference points which I can gratefully incorporate. The sequence is as follows: R (Refugee Action) v SSHD [2014] EWHC 1033 (Admin) [2014] PTSR Digest D18 (Popplewell J, 9.4.14); R (SG) v SSHD [2016] EWHC 2639 (Admin) [2016] ACD 133 (Flaux J, 24.10.16); R (JK (Burundi)) v SSHD [2017] EWHC 433 [2017] 1 WLR 4567 (on appeal from SG) (CA, 22.6.17); R (JM) v SSHD [2021] EWHC 2514 (Admin) [2022] PTSR 260 (Farbey J, 4.10.21); R (AXG) v SSHD [2022] EWHC 56 (Admin) (Steyn J, 14.1.22).

Statutory Scheme

8. The statutory scheme can be summarised as follows (JM §§11-19). Section 115 of the 1999 Act excludes asylum seekers and their dependants 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. Part VI of the 1999 Act prescribes a scheme of support and is accompanied by the Asylum Support Regulations 2000 (SI 2000 No. 704) (the "2000 Regulations"). Under section 95(1) of the 1999 Act, the SSHD may provide or arrange for the provision of support to asylum seekers who appear to the SSHD to be destitute or likely to become destitute within a prescribed period. Destitution is defined by section 95 Act as those who do not have any adequate accommodation or means of obtaining it and those who cannot meet their essential living needs (SG §6). Although section 95 is expressed as a power to provide support and section 96 as a power to provide accommodation and essential living needs, the powers were treated as duties (Refugee Action §13, SG §10) on account of the provisions of an EU Directive 2003/9/EC (subsequently recast as Directive 2013/33/EU: see JM §16). The Directive is "retained law" insofar as it confers rights that are "recognised" by a relevant court in a case decided before "exit day" (s.4(2)(b) of the European Union (Withdrawal) Act 2018). It was common ground that, for the purposes of the present case, the Court should proceed on the basis that the position in law is unchanged (cf. JM §16, AXG §10): Mr Thomann described any question-mark as a "moot point". Regulation 5(1) of the Asylum Seekers (Reception Conditions) Regulations 2005 provides: (1) If an asylum seeker or his family member applies for support under section 95 of the 1999 Act and the SSHD thinks that the asylum seeker or his family member is eligible for s.95 support she must offer that support. Regulation 10(2) of the 2000 Regulations 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 £40.85 with effect from 21 February 2022. That is by reason of the Uprating Decision, given effect by regulation 10(2) of the 2000 Regulations as amended by the 2022 Regulations.

Two Basic Questions and Seven Categories

9. There are the Two Basic Questions (Refugee Action §29) which the SSHD has to answer in reaching a decision about the level of the weekly cash payment. Each is

approached aiming at the "able bodied destitute" (Refugee Action §§63, 82; SG §38). The Two Basic Questions were identified by Popplewell J (Refugee Action §29) as:

> ***the two separate questions which the SSHD had to answer in reaching her decision, namely: (1) What are the essential living needs for which she is obliged to provide support under section 95? (2) What amounts are sufficient to meet those needs?***

10. So far as concerns "essential living needs" identified in answering Basic Question (1), there are Seven Categories which – since 2016 – the SSHD has considered essential living needs for asylum seekers. These are: (i) Food and non-alcoholic drinks; (ii) Toiletries; (iii) Healthcare; (iv) Household cleaning items; (v) Clothing and footwear; (vi) Travel; and (vii) Communication. To each of these Seven Categories, amounts are allocated in answering Basic Question (2), to arrive at the weekly cash payment (AXG §20). When Popplewell J granted judicial review in April 2014, in relation to the SSHD's June 2013 decision setting the weekly cash payment at £36.62, he addressed points relating to Basic Question (1) (Refugee Action §§83-119). Allowing the claim for judicial review, he found that the list of needs identified by the SSHD (Refugee Action §93), in light of missing items (Refugee Action §94), meant (Refugee Action §117, SG §41) the SSHD had "erroneously failed to take into account" in reaching her decision four categories of essential living needs which fall to be taken into account in setting the level of cash provided pursuant to s. 96(1)(b): (a) essential household goods such as washing powder, cleaning materials and disinfectant; (b) nappies, formula milk and other special requirements of new mothers, babies and very young children; (c) non-prescription medication; and (d) the opportunity to maintain interpersonal relationships and a minimum level of participation in social, cultural and religious life. He also found (Refugee Action §118, SG §42) the SSHD had "failed to consider whether" the following were essential living needs, finding that these were all capable of having to be treated as such: (e) travel by public transport to attend appointments with legal advisors, where this is not covered by legal aid; (f) telephone calls to maintain contact with families and legal representatives, and for necessary communication to progress their asylum claims, such as with legal representatives, witnesses and others who may be able to assist with obtaining evidence in relation to the claim; and (g) writing materials where necessary for communication and for the education of children.

11. In his April 2014 analysis, Popplewell J also addressed points relating to Basic Question (2) (Refugee Action §§120-162). It was in this part of the analysis that identified the principle of "justification by a careful investigation" (§36 below) (Refugee Action §§130, 149). Although Popplewell J "clearly considered that it was legitimate" for the SSHD to have used the data that she did, he found flaws "in the way the SSHD had treated" the data (SG §48). He found the SSHD had failed (Refugee Action §§150, 158(2)) to take into account the erosion of rates in real terms, a significant factor which she was bound to take into account (Refugee Action §131). Two of several specific points he accepted were "well founded" (Refugee Action §144) involved an under-representative and so misleading comparator figure (Refugee Action §145). The use of the comparator figure meant that the data had been misunderstood or misapplied (Refugee Action §158(3)(b)). One underrepresentation of the data led to the Time Lag Fix (§23 below); another led to the Missing Meals Fix (§24 below). Overall, on Basic Question (2), Popplewell J concluded (Refugee Action §158(4)) that the SSHD had "failed to take reasonable steps to gather sufficient

information to enable her to make a rational judgment in setting the asylum support rates" (SG §49), an application of the public law Tameside principle (§31 below).

Other Assistance

12. The s.95 weekly cash payment in respect of essential living needs must be placed in its wider context and setting of other assistance. When an asylum seeker applies for support, and a decision is made to grant section 95 asylum support, accommodation is provided, at no cost to the asylum seeker, under section 96(1)(a) of the 1999 Act. Utility bills and council tax are met by the accommodation provider. The accommodation includes basic furniture and household equipment (cooker, fridge, washing machine, cooking utensils, crockery and cutlery). Cots and high chairs are provided for young children and sterilising equipment for babies under twelve months. The weekly cash payment under section 96(1)(b) to meet essential living needs such as food and clothing for the asylum seeker and their dependants, is not the only means by which the UK discharges its obligations to asylum seekers. Asylum seekers have free access to the NHS. They obtain free prescriptions, dental care, eye tests and glasses. They are reimbursed reasonable costs of travel to and from hospital for scheduled appointments. They benefit from free access to libraries. Child dependants of asylum seekers are also entitled to free state education for those aged between 5 and 18, free early years childcare of at least 15 hours a week for 38 weeks of the year for children aged between 2 and 5, free school meals in term time and free transport to and from school up to the age of 16, where the school is outside the statutory walking distance or in certain other circumstances. They may also benefit from discretionary schemes run by local authorities in certain areas such as free or concessionary travel on public transport and grants for the purchase of school uniforms. Additional payments for exceptional needs are available under s.96(2), which demonstrates that the rate of weekly support for essential living needs under s.96(1)(b) need only be set at a level which ensures, taken with the other support available such as free accommodation, a dignified standard of living for the general cohort of asylum seekers. All of this is explained in the case-law (SG §§6-8, 146; JK §35).

The Weekly Cash Payment

13. The first regulation 10(2) weekly cash payment (with effect from ("wef") 3.4.00) (SI 2000 No. 704) had five separate categories with rates, including the "lone parent" rate of £36.54. This was retained (wef 4.12.00) (SI 2000 No. 3053), increased to £37.77 (wef 8.4.02) (SI 2002 No. 472) which was retained (wef 11.11.02) (SI 2002 No. 2619), increased to £38.26 (wef 7.4.03) (SI 2002 No. 472), then to £38.96 (wef 12.4.04) (SI 2004 No. 763) which was retained (wef 4.6.04) (SI 2004 No. 1313), increased to £39.34 (wef 11.4.05) (SI 2005 No. 738) which was retained (wef 5.12.05) (SI 2005 No. 2114), increased to £40.22 (wef 10.4.06) (SI 2006 No. 733) then £41.41 (wef 9.4.07) (SI 2007 No. 863) and £42.16 (wef 14.4.08) (SI 2008 No. 760) and £42.16 (wef 6.7.09) (SI 2009 No. 1388) then £42.62 (wef 12.4.10) (SI 2010 No. 784), £43.94 (wef 18.4.11) (SI 2011 No. 907) which was retained (wef 6.4.15) (SI 2015 No. 944). By this time, the single adult asylum seeker weekly rate was £36.62 (SG §19), as it had been since 2011 (SG §1). The rates for single adults from 2007 to 2013 were as follows: 2007 (25 plus) £41.41; 2008 (25 plus) £42.16; 2009 £35.13; 2010: £35.52; 2011 £36.62; 2012 £36.62; 2013 £36.62. From 2015 there was a single flat rate, with no distinct categories, of £36.95 (wef 10.8.15) (SI 2015 No. 1501),

increased to £37.75 (wef 6.2.18) (SI 2018 No. 30). In the context of the pandemic, in June 2020 (8.6.20) the SSHD increased the rate to £39.60, as a "policy" decision, ahead of the amendment prescribed in regulation 10(2) of £39.63 (wef 22.2.21) (SI 2021 No. 99) (AXG §18). Then there was the increase to £40.85 (wef 21.2.22) (SI 2022 No. 78) which is the subject of Agreed Issue (1).

14. The story of the weekly cash payment as from 2000 to February 2014 was told by Popplewell J in his April 2014 judgment (Refugee Action §17) and echoed by Flaux J in his October 2016 judgment (SG §§17-18). The original 2000 rates were set at 70% of Income Support rates for adults. From that time, increases to 2008 were annual and broadly in line with increases to Income Support. The link to Income Support was broken in 2008 and the increases in 2008/09, 2009/10, 2010/11 and 2011/12 were based on the Consumer Price Index rate of inflation ("CPI") (§20 below) (Refugee Action §17(4), Refugee Action §140). The decision in June 2013 (5.6.13) was not to increase levels of support (Refugee Action §26), following a departmental review to April 2013 using "comparators" (Refugee Action §§§25, 28). That June 2013 decision was the target of the judicial review claim which Popplewell J heard in February 2014 and granted in his judgment of April 2014. The story from April 2014 to July 2016 was told by Flaux J in his October 2016 judgment (SG). A "thoroughgoing review" of "methodology" had taken place in 2014, with "more detailed research and analysis of the likely weekly expenditure needed by an able-bodied asylum seeker to meet each of the various need identified as 'essential' by Popplewell J" (SG §52). A decision was made in August 2014 (11.8.14) to maintain the same rates as were challenged before Popplewell J, but "using a different methodology" (SG §2(1)). The increases announced on 8 April 2015 (wef 6.4.15) (SG §20) and 16 July 2015 (wef 10.8.15) (SG §2(2)(3)) used this new methodology (SG §§56-67), the latter with "more recent data" (SG §71). The SSHD's position was that she had identified "a new, robust, evidence-based methodology" (SG §96). The judicial review challenge to the 2014 and 2015 decisions was dismissed by Flaux J (SG), part of whose judgment was appealed, unsuccessfully, to the Court of Appeal (JK). The story from July 2016 to June 2021 was taken up by Farbey J (JM) and, to October 2021 by Steyn J (AXG). There was the February 2018 change of rate (JM §51). Then, "in light of the impetus to ensure the needs of supported asylum seekers in the difficult circumstances of the pandemic" (JM §52), in June 2020 (8.6.20) the SSHD increased the rate to £39.60 "on a provisional basis", ahead of the amendment prescribed in regulation 10(2) of £39.63, and ahead of the 2020 review, but in light of its findings (AXG §18). At this time, in October 2020, decisions were made about appropriate "backdating" payments, and it was in relation to these that the judicial review claims decided by Farbey J (J4) and Steyn J (J5) succeeded.

Reviews

15. 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 (JM §48, AXG §17). As Steyn J explained in January 2022 (AXG §21):

> ***These Reviews are the only evidence-based analysis carried out by the SSHD for the purposes of (i) determining what essential living needs have to be met under s. 95 IAA 1999; and (ii) determining the "minimum" sum required to meet each identified essential living need.***

For the purposes of Agreed Issue (1) the review which is directly relevant started in July 2021 and culminated in the decision on 11 November 2021 to accept a recommendation made on 29 October 2021.

Consultation

16. As Dr Miv Elimelech, Deputy Director in the Asylum and Protection Unit, within the Migration and Borders Group in the Home Office explains in her evidence: "At the start of the annual review process, we consult with the National Asylum Stakeholders Forum (NASF)", sending out "questionnaires". For the purposes of Agreed Issue (1) the relevant letter to NASF Members was written on 5 July 2021. The report of the 2021 Review (published in April 2022) records that a total of 19 NASF members were contacted, and 12 responses were received from: Asylum Link Merseyside, Asylum Matters, Displaced People in Action, Doncaster Conversation Club, Freedom from Torture, Gatwick Detainees Welfare Group, Helen Bamber Foundation, Oasis Church Welcome Group, Refugee Council, Refugee Women Connect, Sanctuary Hosting and Thousand 4£1000. The SSHD describes consultees as "partner organisations".

Financial Implications

17. Issue (1) concerns the Uprating Decision which involved a change from a methodology which would have produced a rate increase from £39.63 to £41.76, to one which instead produced a rate increase from £39.63 to £40.85. That £40.85, assessed in October 2021 and coming into effect on 21 February 2022, is still what asylum seekers receive as a weekly cash payment per person. That is the subject of Issue (2). There is evidence before the Court as to the financial implications from the perspective of both parties.

18. The amounts at stake from the perspective of Government and the public purse are encapsulated in an Information Note to Ministers dated 5 August 2022:

> ***At the end of March 2022, we were providing support to 85,007 destitute asylum seekers… We are providing £40.85 in weekly support to 58,148 individuals, costing the department £2.4m …***

19. To asylum seekers, in the words of Andy Hewett (Head of Advocacy at the Refugee Council): "every penny makes a difference". The Claimant describes herself having to choose between Calpol and food, or which child to buy clothes for; not having enough money to pay for household cleaning items; unable to afford sanitary products for herself, so that "when I am on my period I have to use toilet tissue"; and struggling to pay for basic educational items. She explains how worried she is about the predicted increases in prices and how this will affect her children. She tells me:

> ***Even an increase of a few pence on these items can make a big difference for me when I am trying to budget week to week.***

Giving a practical example (tomatoes), she tells me:

> ***I know that to some people 17p might not mean very much, but when you are living off so little and counting every single penny it is very much… The cost of everything is just going up so much …***

She says:

> ***It feels like it's getting harder and harder just to survive day to day. I'm going without the clothes, toiletries, and food that I need, to try to give as much as I can to the children. When I speak to my friends at the church, they tell me that they are facing the same problems. We are all just so worried about what we hear on the news and costs rising even more. When we share our problems with each other, we understand how when a friend says that her child lost his PE kit, spilt the pint of milk, or dropped a toilet roll in the toilet, these are not everyday accidents for us. Things like this have real consequences when you're trying to survive on such a little amount.***

CPI

20. CPI is a measure of annual inflation to a particular date, published by the ONS. As has been seen, CPI was used for the increases in 2008/09, 2009/10, 2010/11 and 2011/12. As will be seen, CPI was also used for the Time Lag Fix, to address one of the under-representations identified by Popplewell J. CPI is the changed methodology which the SSHD used in the Uprating Decision and is the subject of Issue (1) Ground (i). CPI is the main UK domestic measure of consumer price inflation for macroeconomic purposes, forms the basis for the Government's target for inflation that the Bank of England ("BOE")'s Monetary Policy Committee is required to achieve, and has (using the annual September CPI) for many years been used to uprate benefits, tax credits and public service pensions. The CPI measures the average change from month to month in the prices of goods and services purchased by a typical household in the UK. As the SSHD has explained:

> ***CPI reports are produced by the Office for National Statistics and use recognised economic principles to measure increases in the cost of living. Further, the use of the CPI rate for September of the relevant year is a common public sector method used to adjust mainstream benefits and other social entitlements to take account of rises in costs of living.***

As the ONS puts it:

> ***imagine a very large "shopping basket" full of goods and services on which people typically spend their money … The content of the basket is fixed for a period of 12 months, however, as the prices of individual products vary, so does the total cost of the basket… CPI … measure[s] price changes… [to] give us a useful yardstick of the impact of inflation …***

21. Dr O'Neill – an econometrician at the University of Manchester – explains: "The CPI index is an aggregate of a number of sub-indices, weighted together using LCF expenditure data. The food index begins with elementary aggregate indices for homogenous items in which no weighting data is available. The sub-indices are then weighted together based on the relative expenditure weights from the LCF data to provide a measure of food and non-alcoholic beverage price levels across the whole population."

ONS:L10%

22. A key feature in the story of s.95 weekly cash payments is the Office for National Statistics ("ONS") published annual survey data about average household spending for the lowest 10% income group in the UK ("ONS:L10%") (AXG §19). This is taken from the ONS annual Living Costs and Food ("LCF") Survey (SG §53). As Dr O'Neill explains, the LCF survey collects information on spending patterns and the cost of living that reflects household budgets across the country, as an important

source of economic and social data for Government and other research agencies, whose data breaks down into a range of specified areas (eg. food and non-alcoholic beverages) by expenditure deciles (eg. the lowest 10% income group). In the 2016 judicial review, ONS:L10% this was described as "the best available indicator of the likely amount of money needed to meet most of the various needs identified as essential" (SG §53). In the April 2014 judicial review judgment, considering the June 2013 decision, this was described as "the most important comparator" (Refugee Action §§143, 145), the information derived from which was found by Popplewell J to have been misunderstood or misapplied (Refugee Action §158(3)(b)). In the August 2014 decision ONS:L10% was described as the "nearest comparator" (SG §69). As at 2016, four out of seven items (ie. food and non-alcoholic drinks, toiletries, healthcare and household cleaning items) were being assessed using ONS:L10%. It was also new ONS:L10% data published on 19 March 2020, in the context of the pandemic, which triggered "a temporary exceptional increase" to asylum cash support, by a decision on 8 June 2020 increasing the weekly cash payment to £39.60 (JM §52). This was part of the "robust, evidence-based methodology for setting the asylum support rates" (SG §96) and "evidence-based analysis" (5Y21). The virtue of ONS:L10% for food and non-alcoholic drinks was recorded in this way in the 2020 Review Report (published in early 2021):

> ***we have followed the practice of previous years and accepted the ONS level of expenditure on food is at the right level to cover the essential need (to purchase sufficient food to live healthily).***

The Time Lag Fix

23. One of the issues with using ONS:L10% data is that this data captures a particular period of time. That means there can be a time lag between the date of collection of the data and the date of the decision setting the weekly cash payment rate. Popplewell J found in his April 2014 judgment that this produced an underrepresentation. He explained that the ONS data was 2011 data which, in a June 2013 decision, "would require to be increased for inflation" (Refugee Action §144(3)). That is not a problem about it being the wrong data. Rather, it is a problem of it being yesterday's data. By the time of the 2016 judicial review before Flaux J, a method had been introduced to address this problem (the "Time Lag Fix"), namely adjusting the ONS data by CPI to "take account of inflation since the ONS data was collected" (SG §56). This Time Lag Fix has been described by the Home Office as follows (2021 Review Report 19.4.22):

> ***CPI inflation was then added to account for the time lag between the point the ONS information was gathered and the point at which the review took place.***

The Time Lag Fix has always been operated imperfectly. That is because the CPI index used for the Fix is itself out of date by the time that the rate is set, and certainly by the date it is implemented. When the weekly cash payment rate of £36.95 was retained (October 2016) after the 2016 Review, the Time Lag Fix was using CPI at December 2015 to update outdated 2014 ONS:L10% data. When the weekly cash payment rate of £37.75 was adopted in October 2017 (wef 6.2.18) after the 2017 Review, the Time Lag Fix was using CPI at October 2017 to update outdated 2015/16 ONS:L1% data.

The Missing Meals Fix

24. Another underrepresentation from using ONS:L10% found by Popplewell J in April 2014 was that food had been used in a way which omitted food for meals which families were assessed to get from eating out or takeaways (Refugee Action §144(1)). The point was this. ONS:L20% assessed that some meals would be accessed by eating out or takeaways. But these meals were "recorded … separately" (SG §57). That separate part of the ONS food data was not included in the ONS:L10% data used for setting the weekly cash payment. That meant there were missing meals for asylum seekers, which were being given no allowed cost. The meals at the equivalent times in the week – albeit prepared and cooked by the asylum seekers at home – were being given no cost figure at all (Refugee Action §144(1)). By the time of the 2016 judicial review, a method had been introduced to address this problem by an "upwards adjustment" (SG §§57, 154), as a "necessary" adjustment "to reflect the particular circumstances of asylum seekers" (SG §69).

Market Research

25. By 2014 the ONS:L10% data was not used "for all the categories", but instead "for clothing and footwear, travel and communications, the weekly figures arrived at by the Secretary of State were rather based on the review team's own market research" (SG §56). Flaux J described this as "rational and sensible" (SG §167). Taking clothing and footwear for example, "the ONS data was for people already resident in the United Kingdom with a significant wardrobe and that the figure only represented routine replacement", so "the review team did not use the ONS data, but conducted research to assess the cost of buying a basic wardrobe of three sets of clothing (one on, one clean and one in the wash) so that asylum seekers were adequately clothed to ensure good health" (SG §59). By the 2020 Review, market research evidence had replaced ONS:L10% data for toiletries, healthcare and household cleaning items. The use of market research evidence is part of the "robust, evidence-based methodology for setting the asylum support rates" (SG §96) and "evidence-based analysis" (5Y21).

Best Evidence

26. As has been seen, after the April 2014 grant of judicial review and until 2021, the methodology was that "the amount for each element" was "worked out by using relevant ONS data or Home Office market research" (JM §48), with the Time Lag Fix for the ONS data (SG §56). This approach to the reviews continued from 2015 through to 2021. Flaux J described this as a "best evidence" approach (JK §152):

> ***If, as was the case, in the 2014 and 2015 reviews, the SSHD was either using 2012 or 2013 ONS data, with an uplift for inflation since the date the data was collected or up to date data from Home Office researches, that represents the best evidence of what items cost in 2014 or 2015.***

Better Evidence

27. In the annual review documents, where changes have been made to replace ONS:L10% data (with the Time Lag Fix) with Market Research, it has been described as having an 'overpayment rationale', because it was a lower and more accurate evidence-based assessment of annual costs of essential needs. For toiletries the 2020 Report (published in early 2021) records that "ONS data is no longer used to calculate this cost as our research has consistently shown the cost of the essential need is lower". Similarly, for clothing and footwear: "Extensive research is conducted each

year, last done in 2019, into the costs of a set quantity of essential clothing in both retail and charity outlets" and "ONS data is not used as the survey data is likely to include items that may be considered non-essential". It was "analysis" and "research" which the Home Office invoked and flagged up. The 2016 Review Report flagged up that these changes may come in future, because "our own analysis suggests that the actual cost of meeting these needs is probably lower than the ONS expenditure levels would suggest" and since, "our research suggests that the figure exceeds the actual costs of meeting these needs we will therefore consider whether it is appropriate to continue to use the ONS data for these items in future years, taking into account the views of partner organisations".

Candid Disclosure

28. In these proceedings the SSHD's representatives have properly disclosed a series of relevant internal documents, including a series of Advices to Ministers (ATMs). This disclosure is in the discharge of a public authority's "self-policing" duty to assist the judicial review court with full and accurate explanations of all the facts relevant to the issues which the court must decide, where the underlying principle is that "public authorities are not engaged in … trying to defend their own private interests" but rather are "engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law" (JM §90).

III. THE LAW

Objective Minimum Content

29. The correct legal analysis of the statutory scheme entails the following. First, there are "requirements" which constitute the "minimum content" of the essential living needs criterion under the 1999 Act, where unmet by another organ of the State (Refugee Action §88). This is a "hard-edged minimum standard" (AXG §11). The requirements are (Refugee Action §87) that: "(1) asylum support be set at a level which promotes, protects and ensures full respect for human dignity, so as to ensure a dignified standard of living …; (2) asylum support be set at a level which seeks to promote the right to asylum of those who are refugees …; (3) asylum support be provided which is adequate to ensure asylum seekers can maintain an adequate standard of health and meet their subsistence needs …; and (4) the special needs of vulnerable people are provided for so as to meet this minimum standard of living". This minimum standard is not a matter for the SSHD's subjective judgment but is an objective minimum standard; to this extent it is not open to her to treat essential living needs as having a lesser content than that objective minimum; sections 95 and 96 are interpreted to place such a view outside the range of reasonable judgments (Refugee Action §85).

Latitude Beyond the Objective Minimum

30. There is a further area, falling within section 95, involving a "latitude afforded to the SSHD" and a "value judgment" (Refugee Action §130), beyond the objective minimum content, the position is as follows. It is open to the SSHD to provide for a more generous level of support than required by the minimum content. Subject to meeting the objective minimum requirement, it is a matter for the SSHD's decision what needs are properly to be regarded as essential living needs. The SSHD may decide that some particular needs are essential living needs although they would not

be necessary to ensure a dignified standard of living or meet subsistence needs. What is "essential" is a criterion on which views may differ widely; the concept of "needs" is inherently imprecise; and "need" is "relative, not absolute". 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 SSHD. There are duties, identified by public law, which recognised the decision-making latitude. (Refugee Action §§90-92, SG §139, JK §34)

Tameside and Reasonably Sufficient Enquiry

31. As Popplewell J explained (Refugee Action §120; SG §133), the SSHD is "under a duty to carry out an inquiry which was sufficient to enable her to make an informed and rational judgment of how much was necessary to meet the essential living needs of asylum seekers", reflecting Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1975] AC 1014, 1065B that a "question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

The Court's Supervisory Jurisdiction

32. It is the responsibility of the judicial review Court, underpinned by primary legislation (the Senior Courts Act 1981 s.31) to hold the SSHD to her statutory and public law duties. If the SSHD were to make a judgment which treated essential living needs as something less than the objective minimum standard it would be both irrational and unlawful (Refugee Action §85, JM §27). It is for the judicial review Court to "determine whether the rate set has achieved the objective minimum standard" (SG §129). Subject to compliance with the objective minimum requirement, the SSHD's judgment only open to review on the high threshold of Wednesbury unreasonableness or other established public law grounds (Refugee Action §91; JM §28; AXG §13).

Boundaries Between the Judicial and Executive Spheres

33. The following passages are particularly important. First, from Popplewell J (Refugee Action §3, SG §36):

> ***It is worth emphasising… that the question is not what the Court considers to be the appropriate amount to meet the essential living needs of asylum seekers. That judgment does not lie with the unelected judges, but is vested by Parliament in the elected government of the day. The latter's decision can only be challenged on well recognised public law principles.***

As to which, from Flaux J (SG §38):

> ***That limitation on the scope of interference by the Court in what is essentially a matter for the executive is of critical significance …***

And then, from Gross LJ in the Court of Appeal (JK §§88, 89v):

> ***I agree with the approach adopted by both Popplewell J … and Flaux J … and I have followed the same approach...***

> ***I agree with the approach adopted by Popplewell J … and Flaux J …, as to the boundaries between the judicial and executive spheres in this area.***

34. As Flaux J explained (SG §290) and Gross LJ endorsed (JK §50):

> ***it is important to emphasise that, provided that the SSHD achieved the minimum standard required by the [Directive] and did not act irrationally or in a manner which was Wednesbury unreasonable, the setting of asylum support rates … is a matter for the discretion of the SSHD, not the court. As Popplewell J rightly concluded, within those parameters, it is for the SSHD to set the rate, not the court and, a fortiori, not the experts for the claimants. To the extent that the claimants . . . have concerns about the setting of asylum support rates, save to the limited extent that the court can interfere if the objective minimum standard is not met or the assessment of essential living needs is irrational or Wednesbury unreasonable, it is for Parliament to address those concerns, not unelected judges …***

35. As Gross LJ explained (JK §§85-87), under a heading "The Judiciary and the executive":

> ***… this is one of those cases exemplifying the importance of judicial reserve or restraint and calling for a proper appreciation of the different provinces of the executive and the judiciary.***
>
> ***… the SSHD must decide upon what are essential living needs in a manner which is neither irrational nor Wednesbury unreasonable. Should the SSHD fail to meet the … minimum standard or act irrationally or Wednesbury unreasonably as to what constitutes essential living needs, then the court may properly intervene; the question of whether she has done so is a matter upon which the court is entitled and, if asked, obliged to rule.***
>
> ***Provided, however, that the SSHD has complied with the … minimum standard and assessed essential living needs rationally and reasonably, then the value judgment of what does and does not comprise an essential living need is for her and not for the court. Within the boundary thus demarcated, the inclusion or exclusion of any particular item belongs within the SSHD's sphere rather than that of the court. Policy choices in such areas, concerning resource allocation and implications for the public purse, fall properly to the SSHD for decision. In this way, while the court retains the power and the duty to adjudicate upon threshold questions, the "judicialization" of public administration, very much including the provision of welfare services, can beneficially be avoided; so too, the realities of public sector finances can be taken into account …***

"Justification by a Careful Investigation"

36. In his April 2014 judgment Popplewell J identified this principled approach (Refugee Action §130, SG §44):

> ***It must be remembered that the SSHD's evidence was that in previous years the levels had been set at the minimum required to meet essential living needs. As a matter of logic there is no necessary error in rates being set at what is lower, in real terms, than what was previously regarded as necessary to meet essential needs, because the latitude afforded to the SSHD in this value judgment means there is a range within which both figures might fall. But I accept the Claimant's argument that the significant reduction in real terms from what was previously regarded as the bare minimum level necessary to avoid destitution requires justification by a careful investigation if it is to be defended as rational.***

He returned to the same point (Refugee Action §149):

> ***a decision to set rates at a level which involves a reduction in real terms from what was regarded in 2007 as the bare minimum level necessary to avoid destitution requires justification by a careful investigation if it is to be defended as rational.***

The same point was articulated by Flaux J in October 2016 (SG §44):

> ***There was no necessary error in setting rates at a lower level than previously, since the latitude afforded to the SSHD was such that there was a range within which both figures might fall. However, given that the earlier figure was regarded as a bare minimum to avoid destitution, a reduction in rates would require justification by a careful investigation if it was to be rational.***

It is common ground that this 'justification by a careful investigation' approach is applicable when considering Issue (1) Ground (i) in the present case.

37. This 'justification by a careful investigation' approach can be seen in action, in relation to decisions which withstood scrutiny under the supervisory jurisdiction, in this passage from Flaux J's 2016 judgment (SG §§150-151):

> ***[T]here would be no necessary error in setting the rates at a lower level, in real terms, than in previous years, because of the possible range of figures given the discretion available to the SSHD. However, if there was such a reduction or erosion, it would require justification by careful investigation. Thus it follows that if the court is satisfied, as I am, that the rates set … were arrived at after careful consideration and meet the minimum standard required by the Directive, the fact that the rate arrived at is the same as or less in real terms than the rate in previous years does not mean that the Decisions under challenge are disproportionate or Wednesbury unreasonable or irrational. The reduction in the rate can be explained by a number of factors such as the realisation that, when economies of scale were taken into account, the previous rate may have been too high or the fact that, contrary to Mr Aspinall's evidence, the price of food came down between 2013 and 2015.***

Public Law Error and Re-Evaluation

38. In a case – outside the objective minimum requirement – where the Court concludes that there is an error of approach in the evaluative judgment of the SSHD within her area of latitude, the Court will not identify the level of weekly cash payments. That would be to arrogate to the Court the SSHD's function. It would trespass beyond the boundary between the judicial and executive functions. The SSHD is entitled to re-evaluate, on a basis consistent with her public law duties. This is graphically illustrated by the case-law. When the SSHD's June 2013 decision (6.6.13) setting the weekly cash payment at £36.62 was held by Popplewell J in April 2014 (Refugee Action) to have been vitiated in public law terms, the SSHD went back to the drawing board. She adopted a new methodology and made a new decision in August 2014 (11.8.14), but setting the weekly cash payment at the same level of £36.62. The new methodology involved no public law error and withstood scrutiny before Flaux J in October 2016 (SG) on the 'justification by a careful examination' approach. That was notwithstanding that Flaux J specifically agreed with Popplewell J. This illustrates two things. First, that the judicial review Court will focus on the approach taken, to see whether there is an error of approach. Secondly, that it is unsafe for the judicial review Court to proceed from an identified error of approach to a conclusion that a higher rate – still less a higher rate identified by a Judge – follows or ought to follow from having identified an error of approach.

IV. THE UPRATING DECISION

39. Issue (1) concerns the lawfulness of the Uprating Decision. Issue (2) concerns the lawfulness of what has happened since the Uprating Decision. The Uprating Decision was taken by the SSHD on 11 November 2021, to set the rate of £40.85 (wef 21.2.22). The sequence of events was as follows. On 29 October 2021 an Advice to Ministers ("ATM10.21") was provided to the SSHD, containing a recommendation. In an email dated 11 November 2021 it was communicated that the Home Secretary and the Immigration Minister agreed with the recommendation. On 26 January 2022 an Advice to Ministers, with an Explanatory Memorandum, recommended the signing of the statutory instrument. On 26 January 2022 the SSHD made the 2022 Regulations, which were accompanied by the published Explanatory Memorandum. On 27 January 2022 the Minister for Safe and Legal Migration wrote a letter to members of the NASF communicating the decision. On 19 April 2022 the Home Office published its Review Report for 2021. On 11 July 2022 the SSHD filed her Summary Grounds of Resistance with a Statement of Truth. On 22 November 2022 Dr Elimelech filed her witness statement. I have considered all these materials.

40. Mr Burton KC (appearing with Mr Spencer) submits, and Mr Thomann accepts, that the reasons for the Uprating Decision are to be found in ATM10.21. I agree. That was a detailed document which gave reasons for the recommendation accepted by the SSHD. In the "factual" part of the Summary Grounds of Resistance (at §§16-22), the contents of ATM10.21 are reflected in the description of the SSHD's thinking. No other document evidences that the SSHD disagreed with those reasons, or that she had some further reason. In defending the SSHD's decision Mr Thomann has, rightly, been careful to distinguish between points he can properly say were within the reasons, and points which he advances as submissions. I will need, to do justice to the arguments and the Uprating Decision itself, to return to set out the reasons in some detail when I turn to Issue (1).

41. The Uprating Decision involved taking the previous rate as a "baseline" and applying overall CPI for 12 months to September 2021. The essence of this chosen action is encapsulated in these contents extracted from ATM10.21.

> ***… cash values relating to each of the essential items … make up the current rate of £39.63… [and] become the baseline figures to be used when uprating the allowance going forward… baselining the allowance at £39.63 using the individual essential living amounts…***
>
> ***applying overall CPI for September to the existing rate of £39.63… [as] an alternative methodology … applying CPI when assessing the appropriate level of financial support … [with] an increase in the standard weekly allowance from £39.63 to £40.85 per person…***

V. ANALYSIS OF ISSUE (2)

42. Issue (2) is about what happened after the Uprating Decision, from November 2021 to December 2022. As I explained at the start of this judgment, I have already made Declarations on this part of the case. In those circumstances, this is where I am going to begin the Analysis. For the purposes of analysing Issue (2), I will put to one side all question marks under Issue (1) relating to the legality of the Uprating Decision. As has been seen, the SSHD had adopted her new methodology, taking the rate of £39.63 as the "baseline" and applying the September 2021 rate of CPI (3.1%) to that baseline weekly cash payment rate, applying CPI (3.1%) assessed as at October 2021. Issue (2) arises from the fact that the SSHD has made no decision, and allowed no increase, to

the rate (£40.85) which she accepted on 11 November 2021 and prescribed on 26 January 2022 (wef 21 February 2022). I need to explain why that is unlawful, as recorded in the Declarations which I made on 16 December 2022.

43. The starting point, as is common ground, is that the SSHD had an ongoing duty. Through Mr Thomann, as expressed in his skeleton argument (8.12.22):

> ***The SSHD accepts that her statutory duty under s.95 of the 1999 Act is an ongoing one, and it includes a duty to carry out an inquiry which was sufficient to enable her to make an informed and rational judgment of how much was necessary to meet the essential living needs of asylum seeker …***

44. The first point is that, even by the date of the making of the 2022 Regulations the CPI annual inflation rate used by the SSHD in her new methodology was climbing. The Claimant's solicitor Josie Hicklin provides these uncontested figures:

> ***3.1 % in the 12 months to September 2021 (published on 20 Oct 2021)***
> ***4.2 % in the 12 months to October 2021 (published on 17 Nov 2021)***
> ***5.1% in the 12 months to November 2021 (published 15 Dec 2021)***
> ***5.4% in the 12 months to December 2021 (published 17 Jan 2022)***

This means that, by the time the new weekly cash payment (£40.85) based on the "baseline" (£39.63) was included in regulations (made on 26 January 2022), it was already known that CPI had risen from the 3.1% used in ATM10.21 to 5.4%, and that this increase was indicating actual cost of living during a period which had already occurred. As Mr Thomann rightly points out, even the Time Lag Fix (§23 above) had a similar imperfection. However, as he accepts, this imperfection did not produce any problem similar in nature or scale to the stark position arising from the CPI changes observed between 11 November 2021 (when the SSHD accepted the recommendation in ATM10.21) and 26 January 2022 (when the regulations were made).

45. The second point is that the CPI annual inflation rate continued to climb after the 2022 Regulations and £40.85 rate was made (26.1.22). Ms Hicklin provides these uncontested figures:

> ***5.5% in the 12 months to January 2022 (published 16 Feb 2022)***
> ***6.2% in the 12 months to February 2022 (published 23 Mar 2022)***
> ***7.0% in the 12 months March 2022 (published 13 April 2022)***
> ***9.0% in the 12 months to April 2022 (published 18 May 2022)***

Alongside these increased measures of past annual inflation, being used as the measure of the cost of living, there were Bank of England ("BOE") forecasts contained in BOE published Monetary Policy Reports:

> ***By 3 February 2022, the BOE forecast that inflation would be over 7% in the Spring 2022.***
> ***On 17 March 2022, the BOE said it expected inflation to rise to around 8% in Spring 2022 and perhaps even higher later in the year.***
> ***In May 2022, the BOE said that inflation was expected to rise to about 10% by the end of 2022.***

The problem has continued. As the SSHD's pleaded Defence to this judicial review claim records:

> ***by July 2022, the CPI rate had continued to increase, and stood at 9.4% in June, 10.1% in July and 9.9% in August 2022.***

As Dr O'Neill explained, the ONS CPI Bulletin for September 2022, published on 19 October 2022 gave the CPR rate as 10.1% and the CPI Sub-Index for food and non-alcoholic beverages rate as 14.5%.

46. As Mr Thomann rightly acknowledges, the picture which arises from these first two points is highly relevant to Issue (2). Mr Thomann emphasises, rightly, the inappropriateness of any "hindsight" review of actions which preceded a change in circumstances (cf. JM §127). He disputes that these increases were "capable of rendering the implementation of the 2021 Review recommendation unlawful", but he accepts they are "appropriately directed to the submission that the SSHD was obliged to conduct a review in light of increases in the cost of living reflected, inter alia, in the CPI for 2022". As Kathleen Cosgrove of Greater Manchester Law Centre explains, Members of the NASF have consistently called for an increase in the rate of asylum support and agencies working with asylum seekers have expressed urgent concern since the limited increase of 3.1 % in February 2022. All of which brings into sharp focus the interim review which was indeed undertaken by officials, and how the SSHD responded.

47. The third point is that the Advice to Ministers dated 31 August 2022 ("ATM8.22"), to which I referred in my Order making the Declarations, presented a compelling picture to the SSHD. ATM8.22 said to the SSHD:

> ***We are under a legal duty to ensure asylum seekers are not left destitute by providing support under section 95 … of the Immigration and Asylum Act 1999 … We review the rates that asylum seekers supported on an annual basis …***
>
> ***The 2021 Asylum rates review resulted in a rise in the support rate from £39.63 to £40.85. This uplift was based on Sept 2021 CPI rate of 3.1% but when the new rates were implemented in Feb 2022 the CPI had jumped to 6.2%. The CPI has continued to increase since then and now stands at 10.1% in July 2022, the latest figure available up from 9.4% in June.***
>
> ***There is precedent to conduct an interim review ahead of the formal conclusion of the annual review of the essential living rate – we implemented an uplift in June 2020 following clear evidence of the impact that Covid-19 had had on the cost of living. Unlike DWP where there are statutory limits on the review of pensions and benefits, our review regime is set in guidance and doesn't have any such restrictions.***
>
> ***[W]e have set out the options below with recommendations and are asking for a decision on how to proceed … Option 1: Offer an interim uplift based on a review of the percentage increment in the CPI rate for the cost of food and non-alcoholics drinks (which is the main element in the CPI basket which impacts asylum seekers)… Option 2: Offer a one-of-payment of £96.24 to supplement the costs of foods for asylum seekers… Option 3: Invite asylum seekers on section 95 support to apply for additional payment under exceptional circumstances payment.***

Option 2 was recommended. It was described as "in tandem with the reflection of the government response to mitigating the living crisis" and it was emphasised that it "will only to be offered to those on Section 95 who we have assessed as destitute".

48. The fourth point is that no decision was ever taken. In my judgment, the failure to consider this issue and make any decision was unlawful. In public law terms this, in my judgment, was an abdication of function. It was a failure to take into account relevant matters (cf. Refugee Action §117); a failure to consider matters (cf. Refugee

Action §118); a failure to take into account a significant factor which the SSHD was bound to take into account (cf. Refugee Action §131). The context includes that: (a) the SSHD (as she accepts) owes an ongoing duty; (b) the CPI increases and BOE forecasts were (as the SSHD accepts) plainly relevant; and (c) an interim review had been undertaken by officials and was put for a decision. Passivity was unlawful. The SSHD's pleaded position in her Defence (20.9.22) was (emphasis added) that:

> ***The SSHD remains … in the process of considering an urgent interim review to assess, inter alia, whether asylum support rate should be increased, exceptionally, to address changes in the cost of living pending the completion of the 2022 review (compare the adjustment made by way of a one-off payment under the Social Security (Additional Payments) Act 2022). Alternatively, consideration is being given to whether asylum seekers supported under s.95 should be invited to apply for an additional payment upon demonstration of additional needs on a case by case basis. The SSHD will notify the Claimant's representatives and the court upon completion of the process.***

There is evidence before the Court of steps taken by officials to inform the SSHD's "considering" what to do and whether to increase the rate. But there is no evidence which reflects this "considering". There is no evidence of any decision. There are no reasons.

49. Officials had not in ATM8.22 expressly put forward a "do nothing" option. I am confident that, had one been set out, it would have said "unlawful", as it was subsequently (§51 below). Mr Thomann for the SSHD has been unable to put forward any possible defence of the failure of the SSHD to make a decision, or the failure of the SSHD to increase income support. There is none. Dr Elimelech points out that there have been "several changes to Ministerial positions": the Rt Hon Priti Patel left on 6 September 2022; the Rt Hon Suella Braverman KC was appointed on 6 September 2022 but resigned on 19 October 2022; the Rt Hon Grant Shapps was appointed on 19 October 2022 but left the role on 25 October 2022; the Rt Hon Suella Braverman KC was appointed on 25 October 2022. But that cannot provide a lawful basis for the failure and Mr Thomann rightly does not argue that it can. Mr Thomann did fairly make the point that the recommendation in ATM8.22 "needed to be considered once communicated to the Minister". I identified a 14-day date in the Order, which Mr Thomann was unable to resist. It was in these circumstances and for these reasons why I made Declaration (1)(i) and (ii) of unlawfulness as at September 2022 (§4 above).

50. The fifth point is that further Advices to Ministers were written on 21 September 2022 ("ATM9.22") and 15 November 2022 ("ATM11.22"). These too presented a compelling picture to the SSHD. Again, no decision was taken, no reasons provided. Again, there is no evidence of the "process of considering". ATM9.22 told the SSHD

> ***We are under a legal duty to ensure asylum seekers are not left destitute by providing support under section 95 … of the Immigration and Asylum Act 1999 … We generally review the asylum support rates on an annual basis, but this is not set in legislation like the DWP's review of benefits and pensions. Our review is to make sure the support we offer covers the essential needs for asylum support who [would] otherwise be left destitute.***
>
> ***The 2021 Asylum rates review resulted in a rise in the weekly support rate from £39.63 to £40.85. This uplift was based on Sept 2021 CPI rate of 3.1% but when the new rates were implemented in Feb 2022 the CPI had jumped to 6.2%. The CPI has continued to increase since then and now stands at 9.9% in Aug 2022, the latest figure available.***

> ***There is precedent to conduct an urgent interim review ahead of the formal conclusion of the annual review of the essential living rate …***
>
> ***[W]e have set out two options below with recommendations and are asking for a decision on how to proceed… Option 1: Offer an interim uplift based on a review of the percentage increment in the CPI rate for the cost of food and non-alcoholics drinks (which is the main element in the CPI basket which impacts asylum seekers)… Asylum seekers are directly affected by food and non-alcoholic drinks in the CPI Index computation. Percentage annual change to food and non-alcoholic drinks in August 2022 was 13.1% (although the overall CPI figure was 9.9%) which would translate to a percentage increase of £5.35 per person using the weekly £40.85 rate… This option will only to be offered to those who have assessed to be destitute and are provided with support under Sections 4 and 95 of the 1999 Act. It is in tandem with the reflection of the government to provide help to low-income individuals. We recommend this option. This will be in line with several government wide measures of additional financial support to mitigate cost of living crisis… Option 2: Invite asylum seekers on section 95 support to apply for additional payment under exceptional circumstances payment …***

51. ATM11.22 provided the SSHD with the "outcome recommendations" from the 2022 Review of the level of financial support provided to destitute asylum seekers. It told the SSHD (emphasis added):

> ***the weekly support allowance (£40.85) needs to be raised to ensure we meet our legal obligations to provide for the costs of essential living needs.***
>
> ***In reviewing the main rate (£40.85) set in 2021, we assessed whether this was sufficient to meet our statutory duty to meet essential living costs. Our review concludes that the current rate does not meet these costs.***

It also identified the "do nothing" option, where the rate "remains £40.85", as being "unlawful". And yet the SSHD has done "nothing". Mr Thomann for the SSHD, again, was unable to put forward any possible defence of the failure of the SSHD to make a decision, or the failure of the SSHD to increase income support. Again, there is none. The SSHD's own skeleton argument (8.12.22), for the hearing before me (15.12.22), said:

> ***Regrettably … no Ministerial decision has been taken in response to the most recent advice sent on 15 November 2022.***

It was in these circumstances that I made the Declaration (2) as to present breach (§4 above).

VI. MANDATORY ORDER

52. I now need to address whether to make a Mandatory Order in relation to Issue (2). Mr Burton KC opened the hearing before me on 15 December 2022 by making clear that in relation to Issue (2) he was inviting the Court to make an immediate mandatory order – of which he had put Mr Thomann on notice – that the SSHD must increase the weekly cash payment by the CPI 10.1% to £45.00. Mr Thomann resists a mandatory order. Mr Thomann emphasises that it is not the function of the Court to prescribe the relevant rate. He also emphasises that mandatory orders are frequently said to be unnecessary and inappropriate in judicial review cases, because a declaration is a binding Court order with which the executive recognises it must comply. He says the declarations, which he could not resist, are sufficient and the Court should go no further. He says that, in principle, it must be for the SSHD to set the appropriate rate,

by reference to her own chosen methodology. He took me to an example in ATM11.22, as illustrative of the SSHD's function and latitude. It was an alternative "option" which he submitted the SSHD could reasonably (rationally) adopt. By way of a 'fallback' position, Mr Thomann canvassed the possibility of an "interim" mandatory order. By that he meant an order which made clear that it was operative only pending a decision by the SSHD.

53. I decided against making an immediate Mandatory Order when I announced at the hearing that I would make the Declarations and when I then made them the following day. I considered it important to re-read the materials, and to deliberate further on the arguments which I had heard. I had left open that it might be necessary, depending on the terms of the judgment when available in draft, to hear further submissions as to remedy. I am satisfied that considerable circumspection is appropriate. No Mandatory Order was made by Popplewell J (Refugee Action). He identified an unlawful approach, but when a lawful approach was subsequently adopted (SG) the rate did not change. In the backpayment cases, declarations were the appropriate orders made by Farbey J (JM §158) and Steyn J (AXG §80). The points I have made about Public Law Error and Re-Evaluation (§38 above) and about the Boundaries Between the Judicial and Executive Spheres (§§33-35 above) are powerful inhibitors to the making of a Mandatory Order.

54. In the end, I am satisfied that it is necessary and appropriate for this Court to make a Mandatory Order. I propose to Order that the SSHD must now implement a change in the rate of the weekly cash payment which is no lower than the agreed outcome of the 2022 Annual Review. She is able to do so through policy changes. That is nothing new in any of this to the Home Office officials or to the SSHD. It tracks the course which was identified and recommended by the SSHD's own officials in ATM11.22 (§51 above). The content of the Mandatory Order is not a rate being designed by the Court, but rather already designed by the SSHD's own officials. It is a minimum, not a prescription. It allows for Mr Thomann's posited alternative option. The timing (immediacy) of that mandatory Order is also not designed by the Court, but was also recognised by the SSHD's officials. The same is true of the mechanism of policy changes. Regulations are not needed. The Mandatory Order does not preclude the SSHD from taking a reasoned decision, or making regulations. It is also "interim" in the sense described in the SSHD's own 'fallback' position.

55. The reasons that have led me to make that Order are as follows. I have concluded that the SSHD is in present breach of her public law duties in not making a decision and of her statutory duty in not increasing the rate of the weekly cash payment. Indeed, I have concluded that she has been in breach since September 2022. I have in mind, moreover, that this is a situation which has arisen in the context of judicial review proceedings and in the light of a sequence of clear ATMs. I accept of course (see §33 above) that it is not the function of the Court, but is the function of the SSHD, to set the relevant rate. I also accept, as graphically seen in the way that the methodology changed after the judgment of Popplewell J (Refugee Action), in a way that left the overall figure untouched but was nevertheless lawful as held by Flaux J (SG), that the Court should be wary before reaching any conclusion on what level would result from an error of approach being corrected by the adoption of a legally permissible approach, of which the Court can have no present visibility. But the circumstances of the present case are very specific with very particular features. The SSHD has an

evaluative assessment which records, in terms, that the current rate does not meet the essential living costs so as to discharge the statutory duty. It also expressly records, in terms, that the rate needs to be raised to meet the SSHD's legal obligations, that "do nothing" with the rate remaining as it is would be unlawful. The evaluative assessment also records, in terms, that an option with a rate of £43.06 "would not reflect the increase in the cost of meeting essential living needs" and "is less than the sum assessed … as required to ensure an asylum seeker supported within the s.95 cohort is able to meet their essential living needs" which sum is "£45". Those are the points which arise from the evaluative assessment of the Home Office itself. The figure of £45 comes from the Home Office. It comes from a thorough annual review. It follows through the logic of using the CPI index which now calls for a 10.1% increase. This work is the considered product of a lengthy Annual Review and links to several ATMs earlier in the year which were themselves evaluative exercises.

56. I accept that this is not one of those cases where a mandatory order constitutes the "sole legally justifiable outcome". That is because it is impossible to say there is a single reasonable and justifiable figure at which the SSHD could arrive. That would offend the "logic" which Popplewell J identified (§36 above) and Flaux J endorsed (§37 above). But a mandatory order can in principle secure the "minimum lawful action necessary", to secure lawfulness and avoid ongoing unlawfulness, provided that this minimum can be identified with confidence. Here, I am satisfied that it can be. The SSHD's latitude for judgment and appreciation is intact. It is intact because it is open to the SSHD at any time to exercise her own reasoned judgment, just as she could at any time have done so since February 2022 and since August 2022. A Mandatory Order from the court would not cut across that decision-making latitude. The Boundaries Between the Judicial and Executive Spheres are also intact. First, because I am identifying the minimum action open in law. Secondly, because the content and timing are informed by the work of the relevant SSHD's own officials.

57. As I have mentioned, in the ATM11.22 the SSHD was given a worked example of an "option" for which would be a rise of 5.4% to £43.06. That is lower than the £45.00 figure. It was based on using "earnings" as a comparator. But Mr Thomann has not submitted that that option could lawfully be adopted by the SSHD. The assessed reason for not recommending the £43.06 option based on the clear and convincing recognition that there is no equivalence between asylum seekers support and "earnings", and the clear and convincing reasoning that this option "does not reflect the increasing cost of meeting essential living needs" being "less than the sum assessed of £45 (option two) as required to ensure an asylum seeker supported within the s.95 cohort is able to meet their essential living needs". The reasoning in ATM11.22 therefore excludes this £43.06 option being reasonably (rationally) open to the SSHD, as indeed it does with any option below £45. The option on which Mr Thomann relied as illustrating the SSHD's latitude is one that would produce a figure above £45. There are two such options in ATM11.22. A Mandatory Order requiring an immediate minimum uplift to £45 pending any decision by the SSHD would not cut across the SSHD's ability to choose either of these options, whether immediately or subsequently. The highest Mr Thomann was able to put it was that "possibly" the rate could "rationally be lower than £45". But nothing in the options or reasoning in ATM11.22 can support this. I am satisfied, on the materials before the Court, that urgent action is needed and the rate could not reasonably (rationally) be below £45. In the circumstances, the Mandatory Order would be holding the SSHD to the

reasonableness (or rationality) of the evaluative assessment of her own Department, in circumstances where there is a clear present unlawfulness.

58. The remaining point is about mandatory orders – and for that matter final prohibitory or injunctive orders – being unnecessary. The reason is because of the binding nature of declaratory relief. The contention comes to this. A mandatory order is unnecessary because the Court can proceed on the basis that action will be taken in any event. In the present case, in my judgment, the answer is that it is open to the SSHD to indicate what she is doing in light of the Declarations which I announced in open court on 15 December 2022 and made on the morning of 16 December 2022. There is no element of surprise or unpreparedness, given the sequence of ATMs, written against the backcloth of these judicial review proceedings with its known hearing date. From the Court's perspective it was already told in a pleaded Defence dated 20 September 2022 that urgent consideration was being given to the issue by the SSHD. The Court also knows that the SSHD was advised, in terms, that "do nothing" was "unlawful" on 15 November 2022. This Judgment was being circulated in draft on the morning of 19 December 2022. The process allows the SSHD to say whether she is going to act – in light of the Declarations – to replace the current ongoing unlawful unresponsiveness with a lawful response. That is entirely a matter for the SSHD. But it would not, in my judgment, be an appropriate response to decline a Mandatory Order. The position in law is that the SSHD must act. The Court cannot countenance, or to be seen or understood as countenancing, a further period of inaction. The fact that the context is about a protection from destitution by enabling affordability of the costs of their essential needs, as prescribed through primary legislation, strongly reinforces the position.

59. Finally, I have reached this and my other conclusions on Issue (2) on the premise that when the SSHD accepted the changed methodology on 11 November 2021 and fixed the new rate at £40.85, instead of the higher rate of £41.76 which the established methodology would have produced, she was acting lawfully. In other words I have assumed that the Claimant would lose on Issue (1). I can do so with confidence. Mr Thomann has not submitted that victory for the Claimant on Issue (1) would have a 'side-wind' knock-on effect of reducing the force of the arguments on Issue (2).

VII. ANALYSIS OF ISSUE (1)

60. I turn then to Agreed Issue (1) and the three Grounds (i)-(iii) on which the Uprating Decision of 11 November 2021 is impugned. No party has submitted that this issue is academic in light of subsequent events. The points have been fully argued. I have set out in detail above the nature of the action which the SSHD decided to take (§41 above). I will first set out in detail the SSHD's expressed reasons for the Uprating Decision.

The SSHD's Reasons

61. From the opening page (numbering in square brackets added):

> ***[a] the weekly support allowance (£39.63) needs to be raised to ensure we meet our legal obligations to provide for the costs of essential living needs.***
>
> ***[b] we have a legal duty to meet the essential living needs of asylum seekers (and some failed asylum seekers) who would otherwise be destitute;***

> ***[c] if we continue to use the existing methodology to calculate the weekly support rate to meet the costs of essential living needs, it results in the rate rising from £39.63 to £41.76 per week, an increase of around 5% which significantly higher than the rate of inflation;***
>
> ***[d] this will incur costs – there are currently around 50,000 supported individuals who receive the full standard allowance and raising it to £41.76 would cost around £1.8 million over a full year; [vi] note your obligations under the public sector equality duty …***

62. Under the heading "Discussion":

> ***2. The methodology used to set the level of the standard weekly cash allowance was developed in 2014 and has been used in annual reviews since. These reviews are undertaken to ensure the level remains sufficient to meet the legal test. More detailed background of how we have determined which needs are essential and the way we have calculated the cost of meeting them is set out at Annex A. In basic terms, however, the approach is to identify all needs of an average1 able-bodied asylum seeker that are accepted as essential and are not being met in some other way and assess the weekly cost of meeting each of these needs. The needs accepted as essential are: food; clothing and footwear; non-prescriptions medicines; toiletries; and household cleaning items. We also accept the ability to maintain interpersonal relationships and a minimum level of participation in social, cultural and religious life are essential needs. Some provision is therefore made for travel and communication for this purpose.***
>
> ***4. The cost of meeting needs related to food (£26.89 per person in the table above) was assessed in 2020 and previous years by reference to data from Office of National Statistics (ONS) reports on family spending by the lowest 10% income group in the UK, with some small necessary adjustments as explained in Annex A. Our rationale for assessing £26.89 is sufficient to meet the food needs of the average single person is ONS data shows this is what the lower 10% income group typically spend on food each week. The lower 10% income group would include those relying on universal credit or other mainstream benefits, which are higher than asylum support payments. We have in the past considered an alternative process that bases the amount needed for food on an actual assessment of the exact cash sum an individual requires to maintain a healthy diet, but this is difficult because of the subjective nature of the assessment. Some reports from nutritionists suggest individuals are able to maintain a healthy diet by spending lower amounts, but that relies on a knowledge of the relevant cheap ingredients and meal recipes and where to obtain them, which may be difficult for newly arrived asylum seekers. The issue is further complicated by cultural and religious preferences for different foodstuffs.***
>
> ***5. Our assessment for meeting the other essential needs listed … above was based on our own detailed assessment of the items that need to be purchased to meet the particular need and their costs…***
>
> ***6. The 2020 review resulted in the weekly standard allowance rising from £37.75 to £39.63, an increase of around 5%, which was considerably above CPI inflation levels at the time. The reason for this was ONS data showed expenditure on food by the lower 10% income group had risen faster than inflation.***
>
> ***7. There is a significant lobby to uplift asylum support rates. Calls for asylum support cash allowances to be increased receives regular media coverage and is of interest to NGOs, parliamentarians and the public. The Home Office is regularly accused of not providing sufficient support to destitute asylum seekers, with claims they are kept starving and cold, impacting on their mental health and wellbeing.***

63. Then, under the heading "The 2021 Review: The impact of continuing to rely on using the current methodology and the latest ONS data on food expenditure".

> ***8. If we continue with the same methodology we have used since 2014 to assess the costs of essential living needs, this approach results in the standard allowance rising from £39.63 to***

> ***£41.76, an increase of around 5%. This is illustrated in the table below. The £41.76 figure is calculated by taking the relevant ONS data on expenditure on food by the lower 10% income group (with minor adjustments as explained in Annex A) and applying overall CPI to the other items (using the values for each of the essential items calculated in 2020). As was the case in 2020, this results in an increase in the rate considerably above inflation. Once again, the reason is caused by expenditure on food by the lower 10% income group rising faster than general inflation (3.1%) or indeed rates of food inflation (0.8%)… [R]elying on ONS expenditure of food by the lower 10% income group and following the existing methodology, the rate increases to £41.76.***
>
> ***9. This level of increase would be the highest since the inception of the methodology in 2014 and if implemented, results in two consecutive annual increases to the allowance that are considerably above rises in the costs of living.***

64. Next, under the heading "New methodology for calculating the costs of essential living needs - Baselining the rate at £39.63 and applying Consumer Prices Index".

> ***10. We have undertaken exploratory work and analysis to better understand and compare the strengths and limitations of considering a different approach. The £39.63 rate was calculated following an assessment that identified all of the needs we consider are essential for an average asylum seeker and careful analysis of the actual cost of purchasing the necessary items to meet each of these needs. The existing £39.63 rate is therefore reasonable to use as the baseline for the assessment of the adequacy of the allowance, provided it is adjusted appropriately to take account of subsequent rises in the cost of living.***
>
> ***11.By way of background, CPI is a standard which uses recognised economic principles to measure increases in the cost of living and both options below are based on applying CPI data to the £39.63 rate. CPI identifies the price of a basket of goods by assessing the prices of the goods over a one-month period. This is then compared to the price of the basket of goods for the corresponding month one year previously in order to provide the annual percentage change.***

65. Under a heading "Options to Consider":

> ***12. By baselining the allowance at £39.63 using the individual essential living amounts in the table at paragraph 3 we have identified two options using CPI to measure the appropriate uprate in light of subsequent rises in costs of living.***
>
> ***A. Applying overall CPI for September to the existing rate of £39.63. This is the simplest and preferred option. Taking this approach would result in an increase of 3.1%, meaning the new weekly rate would be £40.85 per person. Whilst it is not the cheapest option it is a recognised public sector standard we would be using. Other Government Departments such as the MOD, HMRC and BEIS also apply overall CPI when making increases to pensions and other social entitlements. By specifically using the September's CPI rate to provide for the annual uplift, we would be aligning with the long-established DWP default inflation measure. The September figure has been used for the government's statutory annual review of universal credit and other welfare benefits since 2011. Adopting this approach reinforces the position of utilising a consistent and transparent single standard.***
>
> ***B. Applying the individual CPI rate for food (0.8%) 4 , but September's overall inflation (3.1%) 5 for other essential living items to the existing rate of £39.63. This would mean the increase to the weekly rate is lower at £40.23. The option has been considered as food needs makes up a large proportion of the weekly allowance (around 70%). Using the most relevant source of information about rises in the cost of food therefore has some attraction. However, we do not recommend this approach as it is not a recognised method or common practice used by other parts of government. Further, this approach could be perceived as the Home Office "cherry picking" the cheapest option – and therefore would attract considerable criticism from NGOs and stakeholders who already regularly accuse us not providing adequate cash to destitute asylum seekers to meet the costs of food and, clothing.***

> ***Moreover, although it is the cheapest option this year because food inflation is lower than general inflation, this may not be the case in future (see paragraphs 18 and 19 for more on this matter).***
>
> ***13.We have also considered a methodology that tries to measure individual CPI increases on each of the component needs we accept are essential. This would have some advantages as it would be measuring increases in costs of the actual items we expect asylum seekers to purchase. However, whilst it is possible to do this for some items such as food and clothes, which are recorded clearly in ONS data, it is extremely difficult for the other items. For example, the data on CPI for travel takes account of rises in travel by air and private car, whereas we are only concerned with the cost of bus fares. Although ONS officials have advised it could be possible to extract some data, for instance about bus fare increases, they also advise using data at this granular level may be problematical because of the relatively low sample size of the items measured. For these reasons we do not recommend this approach.***

66. Under the heading "Conclusion and Recommended Option":

> ***17. Notwithstanding that we consider a departure from the existing methodology makes a renewed judicial review more likely, we on balance, recommend the option set out at paragraph 12A. Our assessment in 2020 was that £39.63 per week (the baseline) was sufficient to meet the essential living needs of an average asylum seeker. It follows in our view an increase that matches the rise in cost of living since, as measured through overall CPI, the normal government method to measure such increases, is rational and fair approach …***
>
> ***18. Moving forward, if you agree our recommended approach of applying September's overall CPI for the reasons set out above, we consider it important to apply the same approach in future years. We do not consider it will be easy to flip between different methodologies or revert to the former methodology - for example because the ONS data on food expenditure by the lower 10% income group in a particular year had fallen since the previous year or not risen as fast as inflation. This would attract considerable criticism with the Home Office accused of cherry picking to keep the rate as low as possible.***

67. Under a heading "Financial implications":

> ***23. The amount we pay is subject to intense scrutiny and if we don't increase the rate to that suggested we would undoubtedly be legally challenged. It is a relatively small increase in the context of the overall asylum expenditure, but if implemented, increasing cash support costs from £39.63 to £40.85 would increase the in-year forecast by £1 million and next year's full year forecast by £4 million against an already challenging budget position. There are currently c57k individuals in receipt of cash support, this is forecasted to increase to c58k by the end of the next financial year. This is an unfunded pressure; it is not included in this year's budget or current in-year forecast and if implemented will be included in discussions with HMT on wider asylum support pressures.***

68. Finally, under a heading "Analysis and insight":

> ***24. HOAI economists have reviewed the submission and analysis contained within. The submission recommends that the September 2021 headline CPI rate is used to calculate an annual increase to the weekly asylum cash support rate. HOAI has ensured that the September 2021 headline Consumer Price Index (CPI) rate has been interpreted and applied correctly.***
>
> ***25. Office for National Statistics (ONS) does not routinely advise on how its statistics are used. However, the submission recommendation has been informed by discussion between Home Office and ONS. On the basis of this discussion, and in the absence of a more accurate measure of the inflation experience of asylum seekers, the recommendation is appropriate…***

> ***26. Economists have not provided advice on whether the weekly asylum cash support rate should be increased nor have they provided analysis on whether the recommended rate of support is sufficient to meet the living expenses of the asylum seeker cohort.***

69. Ultimately, as I see it, the essence of the Claimant's argument on Ground (i) must turn on an examination of the reasons set out in ATM10.21, viewed against the principled approach of "justification by a careful investigation" (§36 above), in circumstances where the SSHD accepts that her reasons are found in ATM10.21 and accepts that the principled approach applies in this case.

First Stage: Reasonable Baseline

70. The reasons for the decision in essence proceed in two stages. The first stage involved identifying an appropriate "baseline for the assessment of the adequacy of the allowance" (ATM10.21 at §10). What ATM10.21 says about that baseline follows on from saying (§10) that:

> ***We have undertaken exploratory work and analysis to better understand and compare the strengths and limitations of considering a different approach… The existing £39.63 rate is … reasonable to use as the baseline for the assessment of the adequacy of the allowance …***

Identified Virtues of the Existing Methodology

71. In that context, the Home Office officials speak of the existing methodology, used previously, which had taken the rate of £37.75 to £39.63 in the 2000 Annual Review (see ATM10.21 §6). They give a reasoned justification for adopting that methodology for the baseline. In my judgment, this careful embedded description of the assessed virtues of the existing methodology is unmistakeable and important. It is here (ATM10.21 §10, emphasis added):

> ***We have undertaken exploratory work and analysis to better understand and compare the strengths and limitations of considering a different approach. The £39.63 rate was calculated following an assessment that identified all of the needs we consider are essential for an average asylum seeker and careful analysis of the actual cost of purchasing the necessary items to meet each of these needs. The existing £39.63 rate is therefore reasonable to use as the baseline for the assessment of the adequacy of the allowance …***

There are many key words in this description of virtues: "assessment", "all", "needs", "essential", "average asylum seeker", "careful", "analysis", "actual", "cost", "necessary" and "each".

72. So, what is unmistakeably being described, in reasoned evaluative terms, are the clear Virtues of the Existing Methodology. This fits with what had been seen above as having been said – and recognised by the Courts – about a "robust, evidence-based methodology" (SG §96) (§14 above); an "evidence-based analysis" (AXG §21) (§15 above); a "best evidence" approach (JK §152) (§26 above); with the 'better evidence' of Market Research (§27 above); and so on.

Second Stage: Appropriate Adjustment

73. The second stage then involves taking that "baseline" position – derived from a methodology having all the Identified Virtues (§10) – and ensuring it was "adjusted appropriately to take account of subsequent rises in the cost of living" (§10).

Discussion

74. Pausing there, "appropriately" and "rises in the cost of living" must mean rises in the cost of living for "an average asylum seeker", by reference to "all" of the "needs considered essential", with "careful analysis" of the "actual" cost of purchasing the "necessary" items to meet "each" of those "needs". There was no logical reason to dilute any of these virtues at the second stage. Moreover, at the second stage the SSHD has at her fingertips (see ATM10.21 §8) the product of the methodology whose Virtues were being Identified (§10). She knows that a new rate, "calculated following an assessment that identified all of the needs we consider are essential for an average asylum seeker and careful analysis of the actual cost of purchasing the necessary items to meet each of these needs", is £41.76. She knew that the rise in costs, "calculated following an assessment that identified all of the needs we consider are essential for an average asylum seeker and careful analysis of the actual cost of purchasing the necessary items to meet each of these needs", was the rise from £39.63 to £41.76, just as it had been for the previous year (§6) to arrive at the reliable baseline by reason of the Virtues (§10).

75. Basic questions are these. Where is a reasoned justification for using CPI instead? Is there an "analysis to better understand and compare the strengths and limitations" (§10) which shows – and if so how – that CPI is a better "calculation and assessment identifying all of the needs considered essential for an average asylum seeker with careful analysis of the actual cost of purchasing the necessary items to meet each of these needs"? The problem is that there is no description of CPI in ATM10.21 which begins to match, still less exceed, the Virtues recognised for the previous evidence-based methodology. Given that it was being accepted that the existing virtuous methodology reliably assesses the real world essential costs for asylum seekers as having risen from £37.75 to £39.63 in 2000 (§6), no reasoned explanation is given why the rise to £41.76 assessed by the same virtuous methodology would not, again, be a reliable assessment of the real world increase in essential costs.

76. Reasons for using CPI at the second stage are given as follows. In the first place, there is the avoidance of an increase to the allowance – for the second consecutive year – which is "considerably above rises in the cost of living" (§11). In the second place, there is the use of CPI as a "standard" using "recognised economic principles" to "measure increases in the cost of living" (§11) used by other Government Departments in the context of pensions and social entitlements and as a DWP "default inflation measure" (§12A). All of which begs the question. On what basis is it being said, if it is being said, that this general standard for the cost of living – this default inflation measure – is more virtuous than the methodology described in such positive terms (§10) and which produced the reliable answer in the previous year (§6)? I cannot find in ATM:10.21, nor in the submissions made by Mr Thomann about it, anything approaching a convincing answer to that question.

77. In the witness statement of Dr Elimelech there is no description of the Uprating Decision. The point is touched on in discussing the latest 2022 Review. Dr Elimelech says that:

> ***… we explored past methodologies used in asylum support reviews, noting the methodology used in 2021 of applying September CPI index to the previous annual review (taken as baseline) was better than the previous one. This was because the level of support was***

> ***pegged to the level of inflation to ensure it remains sufficient to meet the legal test of essential living needs of asylum seekers.***

The ideas that the level of support is "pegged to the level of inflation" so as to "meet the legal test", and that this is a methodology "better than the previous one", do not explain why it is that a general inflation measure was or is "better" than the methodology which had all the Identified Virtues.

78. The problem is seen in the description of "rises in the cost of living" at the end of ATM10.19 §9 and again at the end of §10. The obvious question is whether these can really be read as meaning:

> ***… increases to the allowance that are considerably above rises in the costs of living for asylum seekers in respect of essential needs***
>
> ***… adjusted appropriately to take account of subsequent rises in the cost of living for asylum seekers in respect of essential needs***

Is there any reasoning, and any informed assessment, about "rises in the cost of living for asylum seekers in respect of essential needs"? The answer is no. Mr Thomann accepts, rightly, that these passages cannot be read in that way. He cannot point to such an informed assessment. If there were one, it would mean that repeating the methodology used the previous year – with all its Identified Virtues – would involve overpayment, by reference to the actual costs of the necessary items to meet the relevant needs on the part of an average asylum seeker. As Mr Thomann rightly accepts, the point being made at the end of §§9 and 10 is generic. The point that is being made is that the increases will be considerably above rises in the cost of living for the general population using the CPI basket. The fact that a rise in the rate is considerably above the general rise in the cost of living reflected in the CPI basket for the general population certainly raises questions about whether such a rise is justified. But those questions have to be assessed by considering the relevant cohort (asylum seekers) and the relevant costs of living (the items of essential needs). If the actual cost to asylum seekers of purchasing those necessary items to meet each of those needs is at a higher level than the generic, it can be no answer that this is higher than the general basket for the general population. Turning the problem around, the fact that CPI is a standard measure used as a default inflation measure raises the question of whether it reliably represents increases in the actual cost to asylum seekers of purchasing the necessary items to meet essential needs. If it does not do so, then the fact that it is a standard measure and a default inflation measure cannot assist. If it does do so, the fact that it is a standard measure in default inflation measure is not what is carrying the day. What is carrying the day is that it has such virtues that it reliably represents increases in the actual cost to asylum seekers of purchasing the necessary items to meet essential needs. So what is the product of "exploratory work and analysis" to "compare strengths and limitations" (§10) which attributes such virtues to CPI?

79. The point comes into clear focus when considering the position by which the rate increased in the 2020 review from £37.75 up to £39.63, is an increase of around 5% considerably above CPI inflation levels at the time (ATM10.21 §6). This is recognised expressly to be linked to expenditure on food by the lower 10% income group having risen faster than inflation (§6). The rate was increased to £39.63, however, because that was the product of the calculation following the assessment

identifying all the needs considered essential for the average asylum seeker in the careful analysis of the actual cost of purchasing the necessary items to meet each need: the Identified Virtues of the Existing Methodology (§10). Against that backcloth, when the present year is described (§8) the same work has been done to identify a new level of £41.76 which would again be an increase of around 5%. The same cause is identified: expenditure on food by the lower 10% income rising faster than general inflation or indeed rates of food inflation. This was true the previous year (§6). It is now true again in the present year. And yet what is described as a methodology with all the Virtues (§10) is being replaced in the present year with something referable only to the general cost of living of the general population.

80. Mr Thomann emphasises that the references to the lower 10% spending on food rising faster than general inflation is a measure of actual spending and not a measure of necessary spending. In other words, he says, it reflects "choice" rather than "need". That submission entails the proposition that the poorest 10% have had to pay food costs increasing at a higher rate than for the general population not as a function of their needs but rather as a function of their choices. It also presumably entails the proposition that CPI is a better reflection of the rate of increase of the costs of essential needs. As Mr Thomann put it, it makes CPI "better reflective of actual cost increases of actual needs". But nothing in the reasoning of the decision or any document supports these propositions. If that were the reasoning it would be – and would need to be – identified, explained and supported. Particularly when the choice that is being made is to decouple the methodology from its established link with the spending on food of the poorest 10%, and link it instead to a general index for the general population with a general basket. As Mr Burton KC puts it, to say that the poorest 10% are choosing to buy more food than they need is an assertion, not found in the reasoned assessment, and having no evidential support. Again, in my judgment, the analysis circles back to the fact that ONS:L10% is described in the same analysis as having the Identified Virtues (§10) of assessment identifying essential needs for average asylum seekers with careful analysis of their actual purchasing costs in relation to necessary items to meet relevant needs.

81. Mr Thomann next emphasises that the recommended decision was to choose general CPI at 3.1% rather than the individual Sub-Index CPI rate for food (then at 0.8%) (§12B). But ATM10.21 gave reasons for not using the CPI Sub-Index for food. It was recognised that it could involve 'cherry picking' the cheapest option and that there was a volatility in the index for food inflation which happened to be lower than general inflation at the current time (§12B). But the point returns to the observable and evidenced rate of increased food spend, for the poorest 10%, in the ONS:L10% data which was available and showed the "increase in the rate considerably above inflation", given "expenditure on food by the lower 10% income group rising faster than general inflation" (§8). And where that was the data which informed the methodology with the Identified Virtues (§10).

82. Nowhere in ATM10.21 is there any description of CPI as being a more accurate measure of the inflation experience of asylum seekers, in relation to the relevant essential needs, than the increase in costs observed through the Existing Methodology including the ONS:L10% data. It is recorded that reviewing economists have confirmed the correct interpretation and application of CPI (§24), but it is not said that any economist advised that CPI was a more accurate measure of the inflation

experience of asylum seekers, in relation to the relevant essential needs, than the Existing Methodology using ONS:L10% and Market Research. There is a reference (at §25) which says that the ATM10.21 had been "informed" by "discussion" between the Home Office and ONS. That is in the context of saying that ONS "does not routinely advise on how its statistics are used". There is then reference to "the absence of a more accurate measure of the inflation experience of asylum seekers". That does not state that CPI is a more accurate measure of the inflation experience of asylum seekers, in relation to the relevant essential needs, then the Existing Methodology. It does not explain what is not more accurate than what. It does not explain why it is no more accurate. It does not engage with the Identified Virtues identified in the Existing Methodology (§10). No materials have been produced. I can find in ATM10.21 nothing which identifies CPI as having those Virtues, or no less accuracy, or any greater virtue, nor any reasons why that is so, nor any person or entity to whom such a view is being attributed.

83. In "Annex A" to ATM10.21 there is a description of the Existing Methodology, including the Time Lag Fix. As has been seen (§23 above), the Time Lag Fix uses CPI to fill the gap left by the most recent ONS:L10% data. CPI has not been used to dispense with the most recent ONS:L10% data, or with the Existing Methodology as a whole. The Existing Methodology has been used, because of its Identified Virtues. The point is recognised that Market Research has been used by virtue of an overpayment rationale, where ONS data provides information where "the spending is higher than what is necessary to meet essential needs". As Emma Birks of Asylum Matters points out, the use of Market Research was linked to a specific reason given by the Home Office that "research" had shown "that the cost of meeting essential need was lower than that spent by the lowest 10% income group". Nothing in ATM:10.21 professes the same 'overpayment rationale' (§27 above) in replacing the Existing Methodology with CPI. It is not said that the Existing Methodology, including the up-to-date information which it is known would have taken the rate to £41.76, would involve spending "higher than what is necessary to meet essential needs." The Equality Impact Assessment for the Uprating Decision repeats the Identified Virtues from ATM:10.21 §10. So does the factual narrative in the SSHD's Summary Grounds of Resistance, accompanied by the statement of truth.

The "Headroom" Points

84. This takes me to Mr Thomann's reliance on the 'overpayment rationale', identifiable as a "theme" from certain passages in earlier Review Reports. He submitted that the Existing Methodology was being recognised in those Reports as "liable to exceed" the actual costs of asylum seekers' essential needs. He submitted that this was part of an evaluation of a "sufficiency" to "cover" the actual costs of meeting essential needs, rather than being set at the level of necessity to meet actual costs of meeting essential needs. Mr Thomann argued that "in setting the rate, the SSHD assessed that adoption of ONS data as to expenditure by the lowest 10% income group among the UK population was liable to exceed the requirements under s.95" but, rightly and fairly, he accepted the contention that "liable to exceed" was not within the SSHD's reasoning for the Uprating Decision. It resolved, instead, into a "submission" that the ONS data was "liable to exceed" s.95 requirements which, objectively, could support the Uprating Decision as reasonably justified. As he put it, there was "sufficient headroom" for the Uprating Decision to be "rational". These linked contentions

painted a picture of a "headroom" within the level of the weekly cash payment, on which reliance could be placed in justifying as reasonable (rational) the new methodology of using CPI to produce the new rate in the Uprating Decision.

85. I cannot accept this analysis. There are many difficulties with it. In the first place, to the extent that there is 'surplus' factored into the assessment in the Review Reports (for example due to the availability of prescription medicines for children or clothing from charity stores) they are found in relation to specific groups or in any event as part of an overall 'trade-off' in which factors balance out 'in the round'. Where there is an "overpayment rationale" in the Reports – such as in the reasoning which flagged up and then actioned a change from ONS:L10% to Market Research for items in the Seven Categories – this reasoning is clear and explicit (§§27, 83 above). This is what Flaux J described as a "realisation" that a previous rate has been "too high" (SG §151). I agree with Mr Thomann that it is important to focus on "sufficiency". I agree that the SSHD could have assessed that £10 was "sufficient" to meet the cost of an asylum seeker's essential need for which, had she drilled down into an evidence-based assessment, she would have found a lower amount (say £9) to be "necessary". That would have meant a "headroom" (of £1). It is clear, however, that "sufficiency" was a drilled-down, evidence-based assessment of the necessary costs of the essential needs. The ATM10.21 §10 description of the previous methodology – which is how it was seen in the contemporaneous reasons for the Uprating Decision – Identified its Virtues: a careful analysis of actual cost or purchasing necessary items to meet essential needs (§71 above). When, in his April 2014 judgment, Popplewell J described the Two Basic Questions which the SSHD "had to answer" – that is, as reflecting her legal obligation – he framed Basic Question (2) as "what amounts are sufficient to meet" the "essential living needs for which she is obliged to provide support under section 95" (Refugee Action §29). He later used the word "necessary" when describing the same question in the context of the Tameside duty (§31 above). The 2014 exercise was described by Flaux J (SG §149) as "assessing the cost at that time of the various items comprised within essential living needs". The 2020 Review Report, for example, addressed the Category of food as an assessment of individual needs, with data showing the basic amount of the need, resulting in an amount "sufficient" to cover the average weekly dietary needs of an adult asylum seeker. As Mr Burton KC points out, that Review Report also makes clear that it was identifying "the amount of money assessed at the time as necessary to meet each of the needs". The Uprating Decision was not adopting a new and distinct approach. The Explanatory Memorandum to the 2022 Regulations explained "what is being done and why" at §7.1 as an exercise in "ensuring" the weekly cash allowance provided to asylum seekers under s.95 remained "sufficient" to "cover their essential living needs".

Judicial restraint

86. It is imperative that the court should be highly circumspect and deeply reflective, recognising the limits of the secondary supervisory role and the primacy of the executive latitude of the SSHD. This is a national economic instrument. Beyond the core objective minimum requirements, there is a latitude. There is no necessary lack of logic in adopting an approach or figure which departs from what in the past has been assessed as being necessary. The SSHD has constitutional and institutional credentials for evaluative decision-making entrusted to her by primary legislation,

with expert and experienced input, which a court assisted by legal submissions and witness statement evidence cannot begin to match. Nor should it try. Every question in public law about the proper limits of executive power is at the same time a question about the proper limits of judicial power. In this exercise in circumspection, I bear in mind that after the new single rates was introduced in 2008 there were annual increases which used to CPI. I bear in mind that when ONS: L10% data is being updated the Time Lag Fix uses CPI.

Conclusion

87. I am acutely aware of the constitutional boundaries (§§32-35 above). I cannot abdicate my own constitutional responsibility, as part of a secondary supervisory review jurisdiction, to scrutinise the reasons for the Uprating Decision and to do so – as the SSHD accepts – adopting the "justification by a careful investigation" approach identified in the caselaw (§36 above). I am obliged to rule (JK §86: §35 above) that caselaw shows that, albeit that the SSHD has a latitude and has exercised a judgment, judicial review has the function of considering whether the "approach was flawed, illogical or in breach of some other public law principle" (SG §129). The Court is acting squarely within its supervisory jurisdiction when it examines whether an approach has a "logical basis" or lacks "logical force" (Refugee Action §140, SG §45); whether there was a "rational explanation" for a gap (Refugee Action §141); whether there were "some rational criteria to quantify and justify" a discrepancy (Refugee Action §142); whether "the information used" was "simply insufficient to reach a rational conclusion" to act as the SSHD did (Refugee Action §150); whether reasons given have "no logic or coherence" or are "rational and sensible" (SG §167); whether there is a conclusion for which there was "no evidence that could rationally form the basis" (AXG §62); whether an approach taken lacks "any evidential support" (AXG §72). Logic and rationality are key to public law reasonableness. Courts have spoken of whether a reasoned decision 'stacks up' or 'stands up'. I interpose, going with the grain of all this, that in one recent case (R (Wells) v Parole Board [2019] EWHC 271 (Admin) at §§33-34) the idea was expressed through asking whether there is "an unexplained evidential gap or leap in reasoning which fails to justify the conclusion", bearing in mind that an "unreasonable decision" often "fails to provide reasons justifying the conclusion". In the circumstances of the present case, faced with the reasons articulated for the Uprating Decision, I cannot – as Flaux J did with the 2014/2015 methodology – find that a reasonable justification is present in the reasons for the Uprating Decision adopting CPI. In the end, the clear reasoned explanation in the decision of the Identified Virtues of the Existing Methodology (§71 above), put alongside the absence of any (still less clear or reasoned) explanation of the greater virtues of CPI, and the absence of any (still less clear or reasoned) explanation of a headroom or overpayment rationale, lead me to conclude that the Uprating Decision lacked the justification by careful investigation which was needed for it to be defended as rational.

The Missing 7 Months

88. There is an important endnote to Ground (i). When the weekly cash payment rate of £39.63 was set in October 2020 (with effect from 22.2.21) the Time Lag Fix (§23 above) used CPI at March 2020 to update the outdated 2018/19 ONS:L10% data. The recommendation in ATM10.21, subsequently accepted by the SSHD on 11.11.21, then used CPI annual inflation to September 2021 to update the baseline. A

consequence of that is that actual increases during the 7 months period from March to October 2020, which the use of subsequent ONS:L10% data would have included for future years, has dropped out of the picture altogether. The witness statement of Dr Robert O'Neill – an econometrician at the University of Manchester – says that this missing 7 months is measurable and would itself have warranted a 0.4% uplift in CPI. There was always an imperfection in the operation of the Time Lag Fix, because the CPI rate was itself outdated by the time the new level was being set. But that was in a world where the same evidence-based methodology was carried forward, to catch up with the present reality. Further, as Mr Burton KC points out, the stated purpose of the Time Lag Fix (stated in Annex A to ATM10.21) was to account for the time lag "between the point the information is gathered and the point at which the review takes place". Mr Thomann acknowledges the 7 month gap but submits that it could not render the Uprating Decision unreasonable (irrational). In my judgment, the criticism of the Missing 7 Months is "well founded" as were the Missing Meals (Refugee Action §144(1)) and Time Lag (Refugee Action §144(3)) points described by Popplewell J. In public law terms, I would characterise this as a relevant consideration to which regard needed to be had, as it can be when any further decision is made to set a new rate of weekly cash payment. For present purposes, having found the Uprating Decision to be incapable of withstanding scrutiny, it is enough to point to this and to Mr Burton KC's further submission – which I accept – that the Missing 7 Months reinforces the position about the SSHD's inability convincingly to invoke "headroom".

Ground (ii)

89. I do not uphold this ground of challenge. The SSHD had plainly undertaken a reasonably sufficient enquiry as to the merits of the Existing Methodology whose virtues were identified (§71 above). She had plainly undertaken a reasonably sufficient enquiry as to what the application of the Existing Methodology would mean, to inform current costs and the rise in costs, because ATM10.21 was able at §8 to give a concrete calculation of the £41.76 rate produced. That enquiry was not known to the Claimant's representatives when the Grounds of Claim were formulated. Nor in my judgment can it be said that the SSHD's officials lacked sufficient information about CPI. They were able to describe its nature as a standard using recognised economic principles measure increases in the cost of living (§11) and the other areas of Governmental work in which it served as an inflation measure (§12). What undermines the reasonableness (rationality) of the decision was the inability to identify a reasoned basis why CPI – with its narrow nature – constituted a more accurate measure of the inflation experience of asylum seekers, so far as the actual costs of the relevant essential needs over the past year was concerned, than did the adoption of the evidence-based methodology (described at §10). It can be said that more would have been needed, whether by way of enquiry or reasoning or both, before a reasonable decision to adopt CPI could be taken. I can see that one way of putting the vice under Ground (i) is that "the information used" was "simply insufficient to reach a rational decision to [adopt CPI] which would mirror the finding of Popplewell J (Refugee Action §150) which was a Tameside conclusion (Refugee Action §158(4)). I prefer to put the insufficiency in the reasoned justification as the failure to take a rational decision (Ground (i)). The Tameside question is whether the SSHD had made a reasonably sufficient enquiry to be able to answer the questions which she was required to address. If, as I have found, the SSHD was unable

reasonably to justify the decision at which she had arrived, I think the legal vice lies in the logic of the reasons and reasoning. Since the claim succeeds on the substantive grounds, the Tameside challenge does not add to the Claimant's case, which was how Farbey J put it (JM §150).

Ground (iii)

90. Nor can I accept that there is a freestanding breach of public law duties of consultation. Mr Burton KC, rightly, accepts that there is no evidence that the new methodology was in mind as at 5 July 2021, when the consultation exercise was launched, but which proposal was withheld from the consultees. His is a reconsultation argument: that there was a "change of such a kind that it would be conspicuously unfair for the decision-maker to proceed without having given consultees a further opportunity to make representations about the proposal as so changed" (R (Elphinstone) v Westminster City Council [2008] EWHC 1287 (Admin) at §62). The argument is that when, by 29 October 2021, the CPI proposal had crystallised it was a dramatic and unheralded change of position warranting a short period of reconsultation, to elicit views of the consultees which could really have assisted the SSHD. I can quite see the wisdom of such a course. But I cannot accept that there was any such legal obligation. Nor, I add, can I accept Mr Thomann's submission that, had this step been taken, it would have (or was highly likely to have) made no difference. The methodology had changed over the years. An open question was asked in the questionnaire of 5 July 2021 about methodology. Consultees were able to put forward their own suggested changes in methodology. This was not a 'proposals' consultation. It was, moreover, a regular review process. It is true that there are references to earlier years where decisions subsequently taken – for example the adoption of Market Research in place of ONS:L10% data – were 'flagged' up as being on the horizon, so that consultees would have been in a forewarned position. The high watermark of Ground (iii), as I see it, lies in this observation in the 2016 Review Report (published on March 2017) which says:

> ***As our research suggests that the [ONS:L10%] figure exceeds the actual costs of meeting these needs we will therefore consider whether it is appropriate to continue to use the ONS data for these items in future years, taking into account the views of partner organisations.***

The reference to decisions on appropriateness taking into account the views of the consultee "partner organisations" can be said to illustrate the virtue of forewarning and the value of taking into account those views. It can undoubtedly be said that the SSHD may have been better informed if such an opportunity had been given in relation to CPI, and that consultees could not have predicted that they needed to address the change that was made. But this is not a legitimate expectation case. There is no evidence of a practice of consultation which identified proposals consulted once a proposal had been identified. This process stood as an open forum for views on methodology, knowing that there was the scope for further evaluation consideration and comment on the next annual review, viewed against the practical realities of dealing with issues along a decision-making flightpath. In the context and circumstances of the present case, I do not accept that there was a freestanding breach of a public law duty of reconsultation. That conclusion does not turn on Mr Thomann's characterisation of "sophisticated consultees". Although there was no legal duty to reconsult, what was important was that the consultation exercise needed to culminate in a decision-making approach in which the reasoned evaluative decision

was consistent with standards of reasonableness (rationality) as well as reasonable enquiry (Tameside). If the ultimate decision had a reasoned and reasonable justification, following a reasonable sufficiency of enquiry, then the absence of reconsultation to elicit the views of consultees about this changed methodology would not, in my judgment, constitute a freestanding vitiating flaw.

Issue (1): Remedy

91. On Issue (1) the claim succeeds on Ground (i). The circulation of this judgment as a confidential draft will enable me to consider whether, in the circumstances and given the present position, any remedy or Order is appropriate: see §94 below.

VIII. CONSEQUENTIAL MATTERS

92. The parties' responses on receipt of the confidential draft judgment have crystallised the position regarding the Court's Order. Subject to one insertion, the contents of the Judgment at §§1-91 above stand as circulated by way of a confidential draft, but with the usual suggested typos and other similar corrections. The insertion is the description of the letter of confirmation about the "carry forward" point (see §6 above). That was prompted by my saying at the end of the confidential draft judgment that Mr Thomann at the hearing had told me he would be able to provide "chapter and verse" on that point and that, depending on the response to the circulated confidential draft judgment, I thought it may be appropriate to say more about that.

Costs

93. It is common ground, in light of this Judgment, that the appropriate costs order is that the SSHD pay the Claimant's reasonable costs of the claim to be assessed if not agreed; and that there shall be a detailed assessment of the Claimant's publicly funded costs. I will make those Orders.

Declaration on Issue (1)

94. As to this (see §91 above) Mr Burton KC submitted, and Mr Thomann accepted, that it would be appropriate to grant a further Declaration that: "The SSHD's decision to set the rate of asylum support at £40.85 from 21 February 2022 was unlawful". I made a further Declaration in those terms. By a recital in my Order I also record the making of the original Declarations on 16 December 2022 (§4 above).

Mandatory Order: Revisited

95. Mr Burton KC's submission was that the Court should make a Mandatory Order (see §§52-59 above), in the following terms: "(1) The SSHD shall forthwith increase the general rate of asylum support under s95 of the Immigration and Asylum Act 1999 to £45 per person per week. (2) The SSHD shall inform the Court and the Claimant by 4pm on 23 December 2022 as to her compliance with the terms of this Order. (3) Failure to comply with the terms of this Order shall constitute contempt of Court." As to (1), I would instead have ordered that the SSHD "shall increase the main standard weekly allowance from £40.85 to £45.00 per person, and amend other suggested asylum support rates in line with inflation increase to 10.1% September CPI Index, immediately by way of policy change". That formulation tracks the course (see §54

above) – and indeed every word of it constitutes the chosen language – adopted by the Home Office officials who wrote ATM11.22 for the SSHD, the document in which they told the SSHD that "do nothing" was "unlawful". I would not include Mr Burton KC's paragraph (2) or (3). As to (2), what is needed from the Court is clarity and finality, not ongoing 'supervision' (at some stage after 4pm on Friday 23 December 2022). As to (3), it is an unnecessary truism.

96. After the deadline I had set for submissions on consequential matters, Mr Thomann communicated to the Court (at 14:58 on 20 December 2022) that: "the SSHD has agreed to an immediate increase in the asylum support rate by 10.1% on an interim basis". This was confirmed, in the same terms, in a letter from Natalie Crooks at the Government Legal Department to the Court (provided at 16:55 on 20 December 2022). I accept, of course, what Counsel and GLD tell me: that the SSHD has made that decision, in light of the terms of this Judgment. I accept that the process has allowed the SSHD to say whether she is going to act (see §58 above). I also accept that "immediate" means, and must be understood by all to mean, what it says. In the light of that new decision, Mr Thomann's submission (at 15:52) was that the Court should now make no Mandatory Order, on the basis that it is "no longer required". He suggested, instead of a Mandatory Order, that the Court should "incorporate" in the Order a "requirement" for the SSHD to "inform" the Court and the Claimant by 4pm on 23 December 2022 of "the steps taken to implement the decision of 20 December 2022 with immediate effect" (which formulation reiterates that the SSHD's decision is "with immediate effect"). For reasons already explained in relation to Mr Burton KC's suggested paragraph (2), I do not consider it appropriate to make an Order for ongoing 'supervision' at some stage after 4pm on Friday 23 December 2022. In all the circumstances I consider, as an exercise of judgment and discretion, that a Mandatory Order is appropriate. However, the Order will be framed in the SSHD's terms: "The SSHD shall make an immediate increase in the asylum support rate by 10.1% on an interim basis". That language matches precisely the SSHD's own new and legitimate, communicated response. That response is necessary, but also when actioned sufficient, as a matter of immediate legal obligation. The SSHD is right to recognise that the terms of the Judgment require immediate action. What is needed from the Court is complete clarity, as to what the law requires. I have explained (§58) that the Court cannot countenance, or to be seen or understood as countenancing, a further period of inaction. There is rightly no suggestion on behalf of the SSHD that a Mandatory Order would or constitute any harm, including to good administration or the public interest. I agree with Mr Burton KC that a Mandatory Order in this case has virtues of the kind I described in R (Raja) v Redbridge LBC [2020] EWHC 1456 (Admin) [2020] PTSR 2129 at §66: "The fact that the order embodies what I was told … is now a decision of the [SSHD] … can be recorded in an appropriate recital"; there is a "healthy … congruence" between my Order and the SSHD's communicated decision; and "the story and circumstances of this case … reinforce[]" the view that "what is needed, in the current circumstances, is clarity".

Seven days

97. Finally, Mr Thomann submitted that in all the circumstances I should Order that the SSHD shall be permitted 7 days to file any application for permission to appeal. This was opposed by Mr Burton KC, but I agree that it is justified and proportionate and I will include it in my Order. The time-frame for hand-down of judgment was

truncated. It is understandable that the SSHD should be permitted the time which she seeks, to be able to reflect with her advisers on whether it is felt that there is some viable ground of appeal and if so, identify and formulate it. The Claimant can then be allowed a period of time to respond, after which I would consider what is said, on the papers.