

Neutral Citation Number: [2020] EWHC 3416 (Admin)

Case Nos: CO 4126/2019
and CO 4362/2019

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

Royal Courts of Justice, London

Date: 14/12/2020

Before:

MR JUSTICE ROBIN KNOWLES CBE

In the Matter of an Application for Judicial Review

R (on the application of DMA, AHK, BK and ELN) **Claimants**
- and -
THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT **Defendant**

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

Mr Alex Goodman and Ms Katherine Barnes (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimants DMA, AHK, BK and ELN**
Ms Zoe Leventhal and Mr Ben Amunwa (instructed by **Deighton Pierce Glynn Solicitors**)
for the **Claimant AA**

Mr Robin Tam QC, Mr Shakil Najib and Ms Emily Wilsdon (instructed by the **Government Legal Department**) for the **Defendant, the Secretary of State for the Home Department**

Hearing dates: 20 to 23 July 2020 (orally), and 24, 26 August, 13 September and 10 December 2020 (in writing)

Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Robin Knowles J:

Introduction

1. The claimants in these proceedings had each sought asylum. Their claims for asylum had been rejected by the defendant (“the Secretary of State”) although they awaited consideration of further representations. For the time being, each remained in the country.
2. Under prevailing arrangements, the claimants had no right to work to provide for themselves. At the same time, they had “no recourse to public funds” for shelter, food or what, in one of the authorities, Lord Bingham termed “the most basic necessities of life”.
3. Each claimant asked the Secretary of State to accept a duty to provide accommodation or arrange for the provision of accommodation. The Secretary of State properly accepted the duty in each case, by reference to section 4(2) of the Immigration and Asylum Act 1999 (“the 1999 Act”).
4. The issues in these proceedings concern the performance of that duty; the actual provision of the accommodation. At the same time they provide a particular focus on the role of monitoring (including collection and capture of data, and evaluation).
5. There are two claims, and they are heard together by order of Swift J, as Judge in Charge of the Administrative Court. There are 5 claimants in total, there are various aspects of vulnerability, and one claimant at least is severely disabled. Their identities have been kept private in these proceedings. Their circumstances are examples of the circumstances of others.
6. One claimant was in due course granted asylum and leave to remain and two were in due course granted leave to remain.
7. This judgment divides into these sections:

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The legislative framework

8. Section 4(2) of the 1999 Act provides, so far as material:

“4. Accommodation.

...

(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—

- (a) he was (but is no longer) an asylum-seeker, and
- (b) his claim for asylum was rejected. [...]

(3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under subsection (2).

...

(5) The Secretary of State may make regulations specifying criteria to be used in determining—

- (a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;
- (b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.”

9. In the present proceedings the Secretary of State accepts that whilst the word “may” appears in section 4 “she was and is under an obligation to exercise her powers under section 4(2) and 4(5) to promote the policy objectives of those provisions”.
10. Regulations have been made under section 4(5). These are the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (“the 2005 Regulations”). Regulation 3 of the 2005 Regulations concerns “Eligibility for and provision of accommodation to a failed asylum-seeker”. Paragraph (1) of that Regulation provides:

“(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) ... of that Act are–
(a) that he appears to the Secretary of State to be destitute, and
(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.”

11. Regulation 2 of the 2005 Regulations provides that “destitute” is to be construed in accordance with section 95(3) of the 1999 Act. That is, a person is destitute if:

“... he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met) or (b) he has adequate accommodation or the means of obtaining it, but cannot meet other essential needs”.

12. In the present proceedings, the relevant “[condition] set out in paragraph (2)” of regulation 3 of the 2005 Regulations is:

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

13. For present purposes, the central Convention right is Article 3, which prohibits inhuman or degrading treatment. This prohibition is not a qualified right; it is absolute. Section 6(1) of the Human Rights Act 1998 (“the 1998 Act”) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(6) makes clear that “an act” includes a failure to act.

14. The other conditions set out in paragraph (2) of regulation 3 are as follows (each is an alternative):

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

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

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

(d) he has made an application for judicial review of a decision in relation to his asylum claim–

(i) in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998 (2),

(ii) in Scotland, pursuant to Chapter 58 of the Rules of the Court of Session 1994 (3) or

(iii) in Northern Ireland, and has been granted leave pursuant to Order 53

of the Rules of Supreme Court (Northern Ireland) 1980 (4); ...”

15. The language of the relevant condition under paragraph (2) of regulation 3 of the 2005 Regulations (condition (e)) reflects that found in Section 55(5)(a) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). This referred to “... a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998)”.
16. The provision providing that power mitigated a regime under section 55 of the 2002 Act which prohibited the Secretary of State from providing or arranging the provision of accommodation for a person prohibited from earning the wherewithal to support himself or herself. Such a regime amounted to “treatment” within the meaning of Article 3: R (Limbuela) v Secretary of State for the Home Department [2006] 1 AC 396 at [6], per Lord Bingham.
17. In Limbuela, Lord Bingham asked and answered the following question, at [8]:

“When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life.”

18. Lord Bingham spoke further of the threshold for an Article 3 breach at [9]:

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

Lord Bingham also commented at [8] that it is relevant to give consideration to factors such as “age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.”

19. Lord Hope explained, at [44] and [62]:

“The purpose of section 55(5)(a) [...] is to enable the Secretary of State to exercise his powers to provide support [...] and accommodation [...] before the ultimate state of inhuman or degrading treatment is reached. Once that stage is reached the Secretary of State will be at risk of being held to have acted in a way that is incompatible with the asylum-seeker's Convention rights, contrary to section 6(1) of the 1998 Act, with all the consequences that this gives rise to: see sections 7(1) and 8(1) of that Act. Section 55(5)(a) enables the Secretary of State to step in before this happens so that he can, as the subsection puts it, “avoid” being in breach.”

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

20. Very recently, in R (W) v Secretary of State for the Home Department (Project 17 intervening) [2020] 1 WLR 4420; [2020] EWHC 1299 (Admin) at [42] the Divisional Court (Bean LJ and Chamberlain J) held at [42], applying Limbuela:

“...section 6 of the 1998 Act imposes a duty to act not only when someone *is* enduring treatment contrary to article 3, but also when there is an “imminent prospect” of that occurring. In the latter case, the law imposes a duty to act prospectively to avoid the breach” (original emphasis).

The Divisional Court observed that the propositions of law that support this conclusion would also follow at common law even in the absence of Article 3: see at [60]-[61], and see R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants [1971] 1 WLR 275 at 292 per Simon Brown LJ cited at [34] in R(W) and in turn citing Lord Ellenborough CJ in R v Inhabitants of Eastbourne (1803) 4 East 103 at 107.

21. It is apparent from regulation 3 of the 2005 Regulations, and from Limbuela, that the fact that a person is destitute is not necessarily sufficient to engage a duty under section 4(2), a point in fact given emphasis in the argument made on behalf of the Secretary of State in these proceedings. The duty will engage when the provision of accommodation is necessary for the purpose of avoiding a breach of the Article 3 prohibition on inhuman or degrading treatment. That is to say, that “it appears on a fair and objective assessment of all relevant facts and circumstances that [the destitute] individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life”.

Policy

22. The Secretary of State has published her policy in relation to section 4(2) of the 1999 Act. This is entitled “Asylum support, section 4(2): policy and process” (16 February 2018) (“the Policy”).
23. The Policy includes these passages on destitution:

“To be eligible for support under section 4(2) a person must appear to be destitute or likely to become destitute within 14 days (or 56 days if they are already in receipt of support). A person is destitute if they:

- do not have adequate accommodation or any means of obtaining it (whether their other essential living needs are met)
- have adequate accommodation or the means of obtaining it, but cannot meet their other essential living needs.”

“... Generally, decisions should be made within 5 working days, but careful consideration should be given to any additional factors that call for the case to be given higher priority and the decision made more quickly.

Where the following circumstances apply, reasonable efforts should be made to decide the application within 2 working days (the list is not exhaustive):

people who are street homeless
families with minors
disabled people
elderly people
pregnant women
persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence
potential victims of trafficking”.

24. Turning to Article 3, the Policy further provides:

“The first step in determining whether accommodation and or support may need to be provided for human rights reasons is to note that in ordinary circumstances a decision that would result in a person sleeping rough or being without food, shelter or funds, is likely to be considered inhuman or degrading treatment contrary to Article 3 of the ECHR The decision maker will therefore need to assess whether the consequences of a decision to deny a person accommodation would result in a person suffering such treatment. To make that assessment it may be necessary to consider if the person can obtain accommodation and support from charitable or community sources or through the lawful endeavours of their families or friends.

Where the decision maker concludes that there is no support from any of these sources then there will be a positive obligation on the Secretary of State to accommodate the individual in order to avoid a breach of Article 3 of the ECHR. However, if the person is able to return to their country of origin and thus avoid the consequences of being left without shelter or funds, the situation outlined above is changed. ...

... If there are no legal or practical obstacles preventing the person leaving the United Kingdom, it will usually be difficult for them to establish that the Secretary of State is required to provide support in order to avoid breaching their ECHR rights.”

25. It is to be noted that in these passages the Policy is focused on the decision whether there is a duty to accommodate in the case of an individual, and not on the provision of accommodation pursuant to a decision that there is a duty to accommodate that individual.
26. It is also to be noted that under the Policy, consideration by the Secretary of State through her or his officials of whether an individual can instead obtain accommodation and support from charitable or community sources precedes the decision by the Secretary of State through her or his officials that the Secretary of State has a duty to accommodate. The present proceedings concern the provision of accommodation following that decision. This is important given the obvious difficulties of a situation where the Secretary of State anticipates that charities and community groups will provide accommodation whilst charities and community groups look to the Secretary of State to do so.
27. Ms Carol Bond is a Senior Caseworker with the Asylum Financial Support Team at the Home Office. Her role includes “offer[ing] advice and guidance on complex queries that impact process and policy”. Having confirmed her authority to make a witness statement on behalf of the Home Office she stated “... the Home Office recognises that we are working with highly vulnerable people ...”.

Guidance

28. The Secretary of State has additionally produced a guide entitled “Asylum Accommodation and Support Transformation Service Delivery Guide” (January 2019) (“the Guide”). This addressed the provision of accommodation, referred to as “dispersal” of an individual, pursuant to a decision that there is a duty to accommodate an individual.
29. This provides:
 - “6.2 The [section 4] process is the same as for [section 95 of the 1999 Act] ... apart from:
 - i. Dispersals for Section 4 should normally occur within 24 hrs, 48hrs or 9 working days of the Provider receiving the relevant accommodation request This will be in line with the different priority categories of Service Users
 - Category A (Street Destitute: family or single parent): 24 hours to accommodate
 - Category B (Street Destitute: Single person): 48 hours to accommodate, or
 - Category C (Staying with friends or family/change in circumstances: Singles or Families): 5-9 days

Providers will be advised if dispersal is required to occur in a different timeframe.”

30. The Secretary of State has also drawn attention to two other documents produced by the Home Office or the Secretary of State. The first is titled “Asylum Seekers with Care Needs” (version 2, 3 August 2018), and the second “Healthcare Needs and Pregnancy Dispersal Guidance” (version 3, 1 February 2016).
31. The former was described on behalf of the Secretary of State as “outlin[ing] the approach taken by the Home Office to the duties and obligations owed to asylum seekers who have disabilities, care needs or both”; the latter as “set[ting] out extensive and detailed guidance dealing with the identification of suitable accommodation for those with healthcare needs.” AA accepts that in the latter and in the Policy those acting for the Secretary of State are permitted to consider providing accommodation in a particular location or of a particular type where medical or healthcare needs are identified and to prioritise those needs.

Reports

32. The claimants’ legal representatives also drew attention to a number of reports. These included National Audit Office reports, a report of the House of Commons Home Affairs Committee of 2017 and the Government’s response of November 2017, a report of the Independent Chief Inspector of Borders and Immigration of 2018, as well as reports by NGOs between 2018 and 2019.
33. For the Secretary of State, Mr Robin Tam QC, Mr Shakil Najib and Ms Emily Wilsdon, referring to Article 9 of the Bill of Rights 1688/9, argued that it was better for the Court to “leave aside” all Parliamentary materials.

DMA, AHK, BK and ELN

34. The decisions of the Secretary of State acting by her officials to accept that she had a duty to provide accommodation to DMA, AHK, BK and ELN under section 4(2) of the 2019 Act were reached as follows: in DMA’s case on 9 September 2019, in AHK’s case on 13 September 1999, in BK’s case on 12 August 2019, and in ELN’s case on 28 June 2019 (strictly, a decision of her predecessor as Secretary of State) and again on 10 September 2019. I will refer to each decision as a “section 4(2) decision”.
35. By 17 October 2019 (45 days after the section 4(2) decision in his case) no accommodation had been provided to DMA. The decision then ceased to apply as he was informed on that date that he was granted asylum. Accommodation was provided to AHK on 13 November 2019 (60 days after the section 4(2) decision). BK was provided with accommodation on 26 November 2019 (105 days after the section 4(2) decision). As a matter of record on 2 December 2019 he was granted leave to remain in the UK. In ELN’s case accommodation was provided on 25 November 2019 (151 days after the first section 4(2) decision or 75 days after the second section 4(2) decision). Orders of the High Court were required before accommodation was provided in the

cases of BK and ELN.

36. Charities, or sometimes friends or churches, helped in meantime. The help took the form of somewhere to sleep (even a hallway), or modest payments, or some food. The charities included Refugee Action, ASHA, the Red Cross, Coventry Peace House and Hope House.
37. DMA suffers from rheumatism and has had three operations on a damaged left knee. He also suffers from back and neck pain. It is difficult for him to stand and walk for long periods. He has bad nightmares and cannot sleep properly. BK has been addicted to heroin and the lack of stability he has experienced over the period under discussion has increased the risk with this addiction. ELN has mental health difficulties which have affected her ability to cope with the stress of her situation. She is a patient of Dr Sanjey Rai of Stockland Green NHS Health Centre who wrote on 25 September 2019 that she “has developed a small support network in Birmingham ... has been suffering with severe stress and depression and it is essential she remain in Birmingham to reduce the risk of further deterioration in her mental health”.

AA

38. AA has chronic kidney disease at stage 5 (end stage), hypertension, cardiomyopathy, hypotensive nephropathy, atrial fibrillation and chronic hepatitis C.
39. On 28 February 2019, the then Secretary of State acting by his officials accepted AA as destitute and as eligible for accommodation under section 4(2) of the 1999 Act. On 7 March 2019 AA moved to accommodation in Harrow provided by the then Secretary of State. The accommodation was unsuitable for AA given his disabilities.
40. In March 2019 on two occasions the Independent Medical Advisor to the Secretary of State advised that AA did not require accommodation in London, due to the availability of dialysis in other metropolitan centres.
41. On 20 March 2019, the then Secretary of State acting by his officials agreed AA’s request for single-room accommodation with ground floor or lifted access on medical grounds. Accommodation of this description was not however provided. For two months (from on or around 26 March 2019 until 28 May 2019), AA stayed on friends’ sofas or floors and was also street homeless, sleeping on streets near the renal clinic he had to attend for kidney dialysis.
42. On 29 May 2019, the then Secretary of State acting by his officials proposed a property in Cheltenham, but arrangements to collect AA failed. A claim for judicial review was issued on 6 June 2019 and on the same date, Lang J made an order for urgent interim relief requiring the then Secretary of State to provide suitable accommodation to AA.
43. From 13 June 2019, the then Secretary of State acting by his officials provided AA with full-board initial accommodation at an hotel or hostel in Thornton Heath within the London Borough of Croydon. The then Secretary of State acting by his officials funded AA’s transportation to and from a renal clinic in Tottenham by taxi three times a week,

but the dietary requirements of his disability (evidenced by a Consultant Nephrologist, Dr Goodlad) were not met.

44. Ms Rachel McLean works for the relevant accommodation provider contracted by the Secretary of State. Her evidence is: “I can find no reference of this booking being chased [on behalf of the Secretary of State] until early November 2019”. This is from, as I understand it, July.
45. On 6 November 2019, AA issued the present claim for judicial review and applied for urgent interim relief. The Secretary of State proposed accommodation at Haringey. The accommodation was unsuitable for AA given his disabilities. Ms McLean explains that the booking request from the Secretary of State acting by her officials “did not state that all facilities were required to be on the ground floor just that the bedroom was required on the ground floor”.
46. On 2 December 2019 AA was accommodated in Barking but the issue was transport to the renal clinic for dialysis. On 11 December 2019, AA made a further application for urgent interim relief. By Order of Thornton J, on 12 December 2019 AA was granted permission to apply for judicial review and his interim relief application was listed for a hearing on 18 December 2019.
47. The Secretary of State acting by her officials then agreed to provide the Claimant’s transportation to and from the renal clinic if the clinic did not and AA’s interim relief application was resolved by way of a consent order sealed on 23 December 2019 by Thornton J. This was more than 9 months after the section 4(2) decision.

Alleged “failure to travel”

The allegations

48. On behalf of the Secretary of State it is specifically contended that “any delays in [DMA, AHK, BK and ELN] moving into section 4 accommodation were by and large due to [those] Claimants’ own failure to travel to the relevant accommodation when directed to do so”.
49. I note that in an application notice dated 4 November 2019 seeking an extension of time for the Secretary of State to file and serve her Acknowledgement of Service in the case brought by DMA, ALK, BK and ELN it was said on behalf of the Secretary of State, and in a statement supported by a statement of truth, that:

“The majority of the Claimants applications [for interim relief, issued on 21 October 2019 and served by 24 October 2019] involve a failure to travel, the circumstances around which is vital to the claim. The [Secretary of State] is in the process of obtaining information around this from the accommodation provider, Serco however this has not yet been forthcoming.”

By 8 November 2019 in Summary Grounds of Defence it was said that the Secretary of State “does not admit” “[w]hether or not either BK and ELN had a reasonable excuse

for failing to travel”.

50. On the material before me, taking each claimant individually, the position is as follows.

DMA

51. One occasion of failure to travel is alleged against DMA, on 20 or 26 September 2019. The summary advanced on behalf of the Secretary of State is in these terms:

“On 16 September 2019, the Section 4 Team accepted a proposal from Serco for DMA to be accommodated in Derby, with a travel date of 20 September 2019. Despite the efforts of Serco’s driver, however, DMA failed to travel on that date. Had DMA cooperated with [the Secretary of State’s]’s efforts, he would have been accommodated within 11 days of being granted s4 support.”

52. A charity assisting DMA however explained on his behalf that he was at the doctors when a driver arrived to take him to section 4(2) accommodation, and that the pick-up had not been pre-arranged for that time or date.

53. A Serco file note reads:

“[Service User] was informed of dispersal 13/09/19 ... This was done by telephone ... SU isn’t at the collection address. When driver called him he keeps saying 5 minutes. Driver had to leave after waiting for over 30 minutes as he had other collections to do.”

In Detailed Grounds of Defence dated 20 January 2020 it was alleged on behalf of the Secretary of State that:

“On 20 September 2019, Serco sent a driver to the collection point and called DMA several times. DMA told the driver that he would be at the collection point in 5 minutes. However, DMA did not attend as stated. After 45 minutes of waiting at the collection point, the Serco driver left.

...

... On 1 October 2019, Refugee Action sent the S4 team an email stating that DMA had been contacted by Serco on 26 September while he was at the doctors and told he had only 5 minutes to get to his pickup address. ...”

54. The Secretary of State has not, through her officials or lawyers, responded to the specific explanation given.
55. DMA has given evidence in these terms, in a witness statement of 16 October 2019:

“About three weeks ago I was told very last minute that there was accommodation for me to go to. I was not given any notice of this whatsoever. I only received a call from the accommodation provider that day and I was not

near the pick location [sic]. I desperately tried to get there is time, even trying to get a taxi. I asked them to wait for me but they did not wait for me.”

56. I conclude that this episode involved no fault on the part of DMA. I do not regard the attempt to blame DMA as justified.

AHK

57. Although AHK is included in the contention made on behalf of the Secretary of State that “any delays in [DMA, AHK, BK and ELN] moving into section 4 accommodation were by and large due to [those] Claimants’ own failure to travel”, in fact no allegation of failure to travel is made against AHK.

BK

58. One occasion of failure to travel is alleged against BK, on 27 September 2019. By this date 45 days had passed since the section 4(2) decision.
59. The allegation of failure to travel was not made until 18 October 2019. Two days before, in an email of 16 October 2019 the section 4 accommodations bookings team at the Home Office advised “Dispersal is expected by 25/10/2019” and “Provider as of yet has not proposed an appropriate property”.
60. As to the allegation about 27 September 2019, on 1 October 2019 Refugee Action had informed the provider (Serco) and the accommodation bookings team at the Home Office by email as follows:

“On 27th September a driver came to pick up a different [person with the same first name B] and informed our client that the pickup was not for him.”

61. The reply to this information from “Asylum Support Casework, Resettlement, Asylum Support and Integration, UK Visa and Immigration” on 2 October 2019 was that they were “still waiting for confirmation from the accommodation provider as to whether your client travelled, or Failed to Travel”.
62. There is no mention of this exchange in the letter of response dated 18 October 2019 that followed on behalf of the Secretary of State to the Pre-Action Protocol Letter on behalf of BK. On 14 October 2019 BK made a witness statement in these proceedings and confirmed that he had not been contacted nor offered accommodation. Neither the exchange nor the evidence were mentioned in Detailed Grounds of Defence served on behalf of the Secretary of State on 20 January 2020.
63. There is no further correspondence on the point. In the skeleton argument on behalf of the Secretary of State the allegation is pursued, based on the fact that “on 3 October 2019, Serco so notified the section 4 Team” that BK had failed to travel on 27 September 2019. In her witness statement Ms Bond refers to this and to Serco stating that the applicant was not at the collection point. She adds:

“No further information was given, and Serco do not have any further notes on their system. I note that the “Failure to Travel”’s comes through the portal and once the case is actioned on Atlas it is removed from the portal. The S4 team do not usually contact providers for explanations regarding “Failures to Travel”.

64. I conclude that this episode involved no fault on the part of BK.
65. The summary advanced on behalf of the Secretary of State was in these terms:
- “BK was granted s4 support on 12 August 2019 and referred by the Section 4 Team to its provider for accommodation on 31 August 2019 – the delay being necessary to confirm the correct address for collection. That request was cancelled on 6 September 2019 due to the transition to a new contract with the accommodation provider. However, a fresh request was submitted by the Section 4 Team on 10 September 2019. On 24 September 2019, the Section 4 Team accepted a proposal for BK to be accommodated in 25 Chapel Street, Derby, with a proposed travel date of 27 September 2019. However, BK failed to travel on that date as required. Had BK cooperated with [the Secretary of State’s] efforts, he would have been accommodated in less than 7 weeks of being granted s4 support. On 3 October 2019, the Section 4 Team made a fresh referral for accommodation. On 20 November 2019, it accepted a proposal for BK to be housed in Nottingham and he was accommodated on 26 November 2019, a period of less than 8 weeks from the referral. ... From the above, it is apparent that – while some delays arose from the need to confirm a collection address and the transfer of contracts from one provider to another - the most substantial cause of delay in BK’s case was his own failure to travel as required on 27 September 2019.”
66. I do not regard the characterisation of BK’s conduct on 27 September 2019 as a fair characterisation. The reference to it as “the most substantial cause of delay” is not evidence-based.

ELN

67. Five occasions of failure to travel are alleged against ELN. As noted above she has mental health difficulties.
68. The first occasions alleged are 11 July 2019, 8 August 2019 and 20 August 2019. The email record is however illuminating, and I shall take it in a little detail.
69. On 1 July 2019 Refugee Action, a charity assisting ELN, advised the section 4 accommodation booking team at the Home Office of an address and phone number for contact with ELN for travel to accommodation.
70. Ms Bond states:

“On 26 July 2019 confirmation was received by G4S that [ELN] had “Failed to Travel” due to not being at the collection point. No further information was

given.”

71. On 31 July 2019 Refugee Action requested an urgent update on behalf of ELN. Their email advised:

“[ELN] has stated that she was at the reporting centre when she received a call from the accommodation provider on 16/07/2019. If the travel has been missed please can it be rearranged as she was unable to travel at the time for to needing to be at the reporting centre.”.

“S 4 National Team Resettlement Asylum Support and Integration UK Visa and Immigration” replied on 31 July 2019 to say: “Please be advised the deadline date for the proposed move is the 8th August”.

72. No reference is made to this exchange on 31 July 2019 in Detailed Grounds of Defence dated 20 January 2020. The Detailed Grounds of Defence refer to a failure to travel on 11 July 2020, but without reference to the explanation given on ELN’s behalf. ELN herself made a witness statement dated 14 October 2019 and said:

“On 11th July 2019 I was called in the afternoon by someone to say that I was to be picked up that day. But that day I was at the Home Office in Solihull, as I had to sign on there on that day.”

73. On 8 August 2019 Refugee Action emailed the section 4 accommodation booking team at the Home Office as follows:

“Following your email confirming the deadline for the proposed move is 8th August, client is ready at her pick up address and waiting to be dispersed. However, she has not been contacted by Serco to confirm her pick up today. Please could you advise if client is still due to be dispersed today?”

A reply confirmed that “your client is due to be dispersed today”.

74. Ms Bond states that:

“ELN was recorded as “Failed to Travel” a second time on 14 August 2019 [in relation to a booking for 8 August 2019]. The reason given was “other” with no further details provided.”

75. On 9 August Refugee Action advised the section 4 accommodation booking team at the Home Office that ELN was not picked up on 8 August “despite being ready and waiting all day at the pick up address”. Refugee Action asked: “Please can you advise why client was not dispersed and when her dispersal will be.”

76. On 14 August 2019 a reply was sent by The Telephone Advice Centre Team Leader at Migrant Help who wrote to Refugee Action:

“Apologies for the delay in responding to you. I have forwarded your email to the Section 4 bookings team and we will let you know once we have received an update on the client’s dispersal. Please let us know if there is anything else

that we can help with in the meantime.”.

77. On 23 August 2019 Refugee Action wrote by email to the section 4 accommodation booking team at the Home Office and to Migrant Help as follows: “... We have requested an update why she was not dispersed on 8th August and there is still no update. Can you please provide an update on her dispersal”.
78. No mention is made of these last several communications in the Detailed Grounds of Defence served on behalf of the Secretary of State on 20 January 2020. The Detailed Grounds of Defence simply allege: “On 8 August 2019, ELN failed to travel as required.”
79. The email from Refugee Action was at 1207 hrs on 23 August. 13 minutes later a Mr Michael Sellers of the “Section 4 National Team” at the accommodation booking team wrote simply:

“The applicant has failed on 3 occasions 11/07/19, 08/08/19 and again on the 20/08/19. Due to the number of times the applicant has failed to travel her case has not been closed and she will have to reapply for Section 4 support”.
80. The Detailed Grounds of Defence dated 20 August 2020 allege that on 20 August 2020 ELN was “recorded as not being at the collection point”. Ms Bond makes clear “no further details provided”.
81. In written submissions on behalf of the Secretary of State it is said: “Notably, ELN did not appeal this decision [of Mr Sellers on behalf of the Secretary of State] to the First-tier Tribunal (Asylum Support)”. I do not find that notable, because reapplication was expressly being indicated. Starting tribunal proceedings would involve delay and cost.
82. By email of 28 August 2019 Refugee Action submitted the reapplication explaining:

“[ELN] has previously been approved for section 4 support on 1st July 2019, however section 4 team have requested that she re-apply due to missing her dispersal on three occasions. On 11/07/2019 she was unable to be dispersed as she was at her reporting event. We requested a rearrangement of her dispersal and were informed that it would be arranged for 08/08/2019. On this date she waited at her pick up address all day and was not contacted or picked up by Serco, we contacted Section 4 booking team on this date to check if she was still due to be dispersed as she had not been contacted by the accommodation providers, we received no response. When we requested an update on her dispersal we were informed that she also missed her travel on 20/08/19 however, no one had informed us or the client that she was due to be dispersed on this date. She has been waiting at the house to be contacted and dispersed as she is anxious not to miss her travel. We are submitting application again, but do not think that it has been the client’s fault that the dispersal was missed. ... she should not have to re-apply for the support that she urgently needs and has been approved for, due to the failings of the accommodation providers”
83. The re-application was granted on 10 September. On 1 October 2019 Refugee Action wrote to the section 4 accommodation booking team at the Home Office and to Serco

“to request an update”. A reply on the same date from the accommodation booking team read simply:

“The applicant is set as Failed to travel please provide explanation for applicant not being at collection point.”

84. The Detailed Grounds of Defence allege that on 20 September ELN failed to travel; that Serco’s driver attended but ELN was not present and not contactable by phone. A questionnaire has been disclosed on behalf of the Secretary of State which lists ELN as informed of dispersal on 16 Sept 2019 by telephone for 20 September and notes: “Comments from transport – SU isn’t at the property. Won’t be back until later on this afternoon”.

85. Refugee Action addressed this on 2 October 2019 the day after hearing of the allegation. They said:

“We have contacted the client and she has confirmed that she was never contacted by the accommodation provider and informed to be ready for the pickup. She doesn’t even know when she was supposed to be dispersed. ...”

86. ELN herself made a witness statement (on 14 October 2019) and her evidence was that “... about a week or so ago, I was called one morning, and advised that someone was picking me up in 10 minutes.” She explained she was on her way to collect medicine and could not return in time. The caller advised he could not wait.

87. On 4 October at 1339 hrs Refugee Action wrote to the section 4 accommodation booking team at the Home Office to advise “Client is waiting at property and ready to be picked up”. On 16 October 2019 Refugee Action requested an update, advising that ELN was “still waiting at the property for her dispersal”. The reply from the section 4 accommodation booking team was: “Deadline for move in should be end of this week. Provider should be in touch”.

88. The questionnaire previously mentioned also lists ELN on 18 October 2019 as informed by telephone of dispersal on 24 October 2019 and notes: “No answer at the collection address”. ELN responds in a note to a chronology that she “averts she received no notification of the proposed dispersal”. No reference to an alleged failure to travel on 24 October 2019 was made in the Secretary of State’s Summary Grounds of Defence served two weeks later on 8 November 2019 although it appears in Detailed Grounds of Defence on 20 January 2020.

89. Ms Bond says of the alleged “Failure to Travel” on 20 September 2019 and 24 October 2019:

“ELN subsequently “Failed to Travel” on two separate occasions. Firstly, on 20 September 2019 ... and again on 24 October 2019 ... after S4 re-booked the accommodation on 3 October 2019. The reason given for both on our system was because [ELN] was not at the collection point. Serco confirmed that the driver attended the property on 20 September 2019 but the claimant was not in the property and was unreachable by phone. Serco do not have any further details on the failure to travel on 2[4] October 2019.”

90. The summary advanced on behalf of the Secretary of State is in these terms:

“ELN was granted s4 support on 10 September 2019, having previously had her support withdrawn due to her repeated failures to travel – a decision she did not appeal. On the same day, the Section 4 Team referred ELN to Serco for accommodation. On 17 September 2019, the Section 4 Team accepted a proposal from Serco for ELN to be accommodated in Nottingham, with a proposed travel date of 20 September 2019. However, ELN failed to travel on that date. On 3 October 2019, the Section 4 Team sent a fresh request for ELN to be accommodated. On 24 October 2019, however, ELN again failed to travel. In all the circumstances, it is clear that the primary source of delay in accommodating ELN was ELN’s own repeated failure to travel when required. ...”

91. The position with ELN over alleged failure to travel is clearly more complex than with DMA, AHK and BK. I am not persuaded that the alleged failures to travel were the fault of ELN. I see no allowance being made for her mental health difficulties or vulnerability generally. On any view, in my judgment ELN cannot sensibly be described as the “primary source of delay”.

Overall

92. I regret to come from this review with the sense that the worst is assumed of the claimants, with no room for reflection that there may be good reasons or if there is fault that it may lie elsewhere.
93. This is unhappy in any situation but especially so where the claimants are individuals whom the Secretary of State through her officials has accepted need accommodation.
94. It is not as though other evidence might bear out the allegations. The Secretary of State has had every opportunity to put evidence before the Court. On 18 November 2019 the Court (Mr Dan Squires QC sitting as a Deputy High Court Judge) stated “if the parties have any relevant evidence on the issue of refusal to travel it should be disclosed as soon as possible”.
95. Ms Bond described what she termed the “policy around failure to travel” as follows:

“The policy around failure to travel dictates that, upon notification of an applicant failing to travel to their allocated accommodation, we await an explanation from the applicant or their representative for the reason the applicant has failed to travel. This is stipulated in paragraph 4 of the grant of support letter where it states ‘*If you fail, without reasonable explanation, to travel to the accommodation arranged for you there should be no expectation that alternative accommodation will be arranged for you.*’

Upon receipt of reasons for failure to travel these are assessed and if deemed reasonable accommodation is rebooked immediately. The applicant or

representative will be advised that the reasons for failing to travel has been accepted ...”

The cases of the claimants show rebooking of accommodation.

Context

96. In Summary Grounds of Defence in the case of DMA, AHK, BK and ELN, settled by the Government Legal Department, it is said on behalf of the Secretary of State that:

“Although [the Secretary of State] regrets the delay in providing each Claimant with accommodation and financial payments under s4, she denies that any of their circumstances came anywhere close to reaching the threshold under article 3 EHCR. Though the Claimants had been assessed as being destitute, in the sense of lacking adequate accommodation and/or sufficient support to meet their living needs, none of the Claimants were street homeless in the relevant period and all appear to have the benefit of (albeit very limited) subsistence support from other sources.”

97. I cannot accept a contention that the circumstances of the claimants did not come close to reaching the threshold under article 3 EHCR. This is because for each claimant in the present proceedings the Secretary of State accepted a duty to accommodate under section 4(2). The context that must underpin that acceptance is as follows:

(1) The claimants appeared to the Secretary of State to be destitute at the point of the decision by the Secretary of State to provide or arrange for the provision of accommodation: see regulation 3(1)(a).

(2) That is to say, they did not have adequate accommodation or any means of obtaining it (whether or not his or her other essential living needs were met) or had adequate accommodation or the means of obtaining it, but could not meet other essential needs: see regulation 2 of the 2005 Regulations, and the Policy.

(3) Further, on a fair and objective assessment the claimants faced an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life: see regulation 3(2)(e), read with Limbuela and R (W).

98. It is common ground that the claimants were “highly vulnerable people”: see Ms Bond’s evidence on behalf of the Home Office.

Contracting

Contracts with accommodation providers

99. If her decision is to accept a duty to provide accommodation or arrange for the provision of accommodation to an individual, the Secretary of State uses contractors to perform

that duty.

100. The Secretary of State is of course free to do this, but the duty remains hers. This point needs to be made specifically because in a letter dated 22 January 2020 from the Government Legal Department to the claimants' solicitors it is stated, wrongly, that "The SSHD is not responsible for a housing provider's performance".
101. Until March 2019 there were six regional contracts under arrangements known as Commercial and Operational Managers Procuring Asylum Support Services ("COMPASS"). These were replaced by Asylum Accommodation and Support Contracts ("AASC").
102. Mr Paul Mill has been in post as the Senior Commercial Manager "with responsibility for the commercial management of the UKVI asylum portfolio including management of the AASC contracts" since April 2019. (In later evidence on 10 December 2020 he was described as "Associate Commercial Specialist, Home Office Commercial Directorate). His evidence in a witness statement on 24 June 2020 was that AASC contracts "had been awarded in January 2019 and became operational between September and October following a period of mobilisation and transition in the early parts of 2019". The contracts under COMPASS came to an end between September and October 2019.
103. Mr Paul Bilbao is the Head of Asylum Support Contracts and Finance within Resettlement, Asylum Support and Integration at the part of the Home Office known as the United Kingdom Visa and Immigration Service. He has provided evidence on behalf of the Secretary of State by a witness statement dated 17 August 2020, following the oral hearing. In addition to seven regional AASC, he referred also to a national Advice Issue Reporting and Eligibility contract" with the abbreviation "AIRE".

Operation of contracts

104. What Mr Bilbao termed "support eligibility" (which I take to be the decision to accept a duty under section 4(2) to provide accommodation) was, he said, "recorded and managed through [what is known as] the ATLAS case-working database". He explained that information was "automatically extracted from ATLAS and channelled via [a secure web-based facility known as CBP (Collaborative Business Portal)] to the relevant service provider to instruct them in relation to a service (e.g. to provide accommodation, provide transport, stop accommodation and so on)."
105. In earlier evidence on behalf of the Secretary of State and dated 20 January 2020 Ms Bond explained:

"When an accommodation request is booked [by the Secretary of State with an accommodation provider], it is done as one for three possible priorities. The classification for these is A (24 hours), B (48 hours) and C (9 days). This is an informal system and not set out in policy. Priority A and Priority B [are] predominantly used for court orders where interim relief has been ordered or for family cases with dependent minors. Priority C being used in all other cases. Our provider aims to propose the property within the specified time frame."

(The claimants highlight a number of other features of the new contracts. These include the fact that the new contracts continued from the COMPASS contracts a timeframe of 20 working days within which permanent rather than temporary accommodation should be provided.)

106. Mr Bilbao said that the automatic information exchange system “allows the provider to respond to the instruction in a structured pre-defined process flow.” The instruction is in the form of an “Accommodation Request” and this “contains all relevant details ... such as the service user details, group size, support type, accommodation requirements and the timeframe for the providers response”. “[A] provider will update the record by entering a proposed address and move-in date”, he said. It is not clear from the evidence given what in practice happens at this stage if no property is proposed or a property is proposed with a “move-in date” that is not within the time frame specified by the priority.
107. As I understand Mr Bilbao’s evidence and that of Ms Bond, if a proposal is made the Home Office has then to accept or reject the proposal from the provider.
108. When and if the provider’s proposal of accommodation is accepted by the Home Office Mr Bilbao explained that “this is done by recording this in ATLAS, and that system automatically updates the record in CBP.” He said that “[a] provider will [then] confirm a successful move to accommodation or notify the Home Office of an individual’s ‘failure to travel’ to the accommodation by updating CBP.” It will be noted that these alternatives do not include a failure to move to accommodation where the individual has not “failed to travel”.
109. When and if the provider’s proposal of accommodation is rejected by the Home Office Mr Bilbao explained that “the provider is notified of the reason via CBP and the CBP record remains open for the provider to propose a new address that meets the request within the original request timescale”, and “until the request is either fulfilled by the provider or cancelled by the Home Office”. I assume the Home Office will then have to accept or reject the new proposal. It is not clear from the evidence given what in practice happens at this stage if the “original request timescale” has expired or a new address is proposed that is not within that “original request timescale”.
110. Mr Bilbao added that “[i]n addition, in some cases supplementary information is sometimes ... exchanged by email between Home Office and [a] provider operation team.”
111. Mr Mill’s evidence referenced the Secretary of State’s accommodation policy to the effect that accommodation “as a general rule is provided outside London and the South East”, but “in areas of the UK where the Home Office has a ready supply”.

Affordability of accommodation

112. In a witness statement dated 24 June 2020 Mr Mill explained that he had “been asked to explain some of the aspects of the way in which the AASC contracts operate”. He said that he has been asked to do this “partly because of misapprehensions that have

become evident in the course of litigation concerning them.”

113. Mr Mill summarised the position:

“Under the contracts, the providers are required to accommodate individuals whom the Home Office is required to support ... When the Home Office requires a provider to accommodate an individual, the Home Office notifies the provider, who is then under a contractual obligation to accommodate that individual.

...

The contracts prescribe that the Home Office pays the provider a specified amount per accommodated individual per night. The way in which property is sourced, prepared and provided is a matter for the provider. One of the reasons for discharging these statutory obligations by way of the contracts is to make use of the provider’s experience and expertise in doing this. The Home Office expects that when a company bids for a contract, it will deploy its experience and expertise when assessing the amount that it would require to be paid in order to operate the contract viably from a commercial point of view, given that there is a fixed-rate payment per accommodated individual per night.

The contracts contain no cost or affordability caps on how much the provider may spend to secure accommodation for any particular individual whom the Home Office requires that provider to accommodate. ... [A]n allegation that the search for property for accommodating a particular individual is limited by costs or affordability caps imposed by the Home Office misunderstands the contracts, which do not contain any such caps.

When an individual is accommodated by a provider, the provider is responsible for meeting all of the costs involved. The provider has no recourse to the Home Office for reimbursement or recompense if the provider spends more on providing accommodation for a particular individual than the payment rate specified in the contract. It is entirely a matter for the provider as to how it will accommodate that individual and how much it spends in order to do so. The essence of the contract is that the provider must, regardless, accommodate the individual because it is contractually obliged to do so.”

114. Pausing here, it is Mr Mill’s point that the Home Office need not be concerned that the public purse will face increased cost in a particular case. The Secretary of State’s written argument gave particular emphasis to this. Thus:

“Pursuant to the AASC contracts the Home Office pays the provider a set amount per individual per night accommodated.

There is no ‘cost cap’ or ‘affordability constraint’ on the amount a provider may spend to secure appropriate accommodation for any particular individual. The essence of the contract is that the provider must, regardless, accommodate the individual because it is contractually obliged to do so.

Naturally, the Secretary of State aims to spend public money effectively. The tender process for the AASC contracts assists with this, as it involves each potential provider assessing how much it will cost them to operate the contract and bidding accordingly.

In addition, the dispersal policy allows individuals to be accommodated in areas in which accommodation is in ready supply and therefore more affordable. However, that does not affect the contractual obligations where the Secretary of State requires the provider to accommodate a person in a particular area - the provider is contractually obliged to do so regardless of the cost to the provider of doing so.”

115. This evidence and argument does not address the point that the alignment of interest has changed so as to make the provision of accommodation that needs most resource (in terms of time and money) least profitable (and potentially least sustainable) for the provider. This will be true even where some increased cost has been “priced in” by the provider in negotiating the contract with the Secretary of State. Recognising the disability issues in the present proceedings, considered further below, accommodation that has to be provided with particular accessibility requirements or with particular priority may be among the accommodation that needs most resource.

Securing performance

116. Of course, the provider will have its commercial reputation to consider and contractual compulsion is available to the Secretary of State. Mr Mill dealt with contractual compulsion in this way:

“... The provider’s performance in meeting its contractual obligations is measured against Key Performance Indicators set out in the contract. One KPI measures the timeliness of the provision of accommodation. If the provider is able to source appropriate property for a particular individual whom the Home Office requires the provider to accommodate, but declines to do so on the ground that the property is too expensive when compared to the payment rate, that is nevertheless a breach of the provider’s contractual obligations and non-compliance for the purposes of performance measurement, which can have consequences in the form of financial penalties.

In addition, the provider cannot claim to have discharged its contractual obligation to accommodate a particular individual by providing either substandard accommodation or accommodation that did not conform to the specifications set out by the Home Office when it required the provider to accommodate the individual. The provision of substandard or non-conforming accommodation is also a breach of the provider’s contractual obligations and non-compliance for the purposes of performance measurement. If the provider is able to source appropriate property for that individual, but is reluctant to do so on the ground that the property is too expensive, the provider cannot evade the performance measurement regime by purporting to accommodate the individual in some other property that is inadequate or unsuitable for the individual.”

117. It will be noted that this evidence addresses the potential eventual financial consequences for the provider who does not provide required accommodation on time. It does not however deal with securing performance in the individual case so that the particular individual is in fact provided with appropriate accommodation within the time required by the Secretary of State. Schedule 2 to the AASC comprises a Statement of Requirements. This states at paragraph 1.2.8.5 (North West version):

“The KPIs are not aimed at providing a day-to-day management tool, but are the means by which the Provider may provide compensation to the Authority for losses which it suffers as a result of failures in service performance.”

118. Further, as will become clear below, the KPI to which Mr Mill referred allows a percentage of non-performance. A KPI of 98% will of course be met if in less than 2% of cases there is a failure to provide in time. It would not be difficult to contemplate that the 2% may be where, in practice, one found a concentration of cases where the provision of accommodation that needs most resource (in terms of time and money) and is least profitable (and potentially least sustainable) for the provider. Again, the implication for disability issues is particularly relevant because accommodation that has to be provided with particular accessibility requirements or with particular priority may be among the accommodation that needs most resource.

Volume caps

119. In a witness statement dated 21 October 2019 at paragraph 85 Ms Polly Glynn of the claimants’ solicitors described what she suggested was the most important difference with the AASC as being the introduction of a limit “up to the agreed Volume Cap” for accommodation “suitable for Service Users with specific needs ... and in compliance with the Disability Discrimination Legislation”. There is evidence from Mr Mill on behalf of the Secretary of State that in the operation of the AASC contracts, “to date no volume cap has actually been reached to any of the contracts”. In that circumstance I do not address this feature further in the present proceedings.

120. That is not an indication that the subject is not an important one. Mr Mill stated “[t]here is ... no ceiling on the amount of accommodation that the provider is required to provide for disabled individuals compared to those who are not disabled; either the volume cap is reached overall or it is not.”. That point does not allay concern if, for example, those who are not disabled are more likely to get accommodation before the cap is reached.

Monitoring

Performance management

121. In his evidence provided following the oral hearing, Mr Bilbao confirmed that the Home Office has a performance management system. This, said Mr Bilbao, “relies on data from multiple overlapping sources”; with “the nature of the data available to the Home

Office and its assurance work var[ying] between different elements of the [accommodation, transportation and other support] services”.

122. On 6 March 2020 the Home Office had written to Deighton Pierce Glynn Solicitors (the firm representing all the claimants in these proceedings) in these terms:

“Thank you for your letter of 14.05.19 to the Government Legal Department (GLD). As there are on-going litigation proceedings in respect of the matters you raise the matter has been passed to me for a response.

The monitoring of Section 4 (and Section 95) accommodation bookings are an integral part of our contractual arrangements with accommodation providers and I can confirm that their performance has been monitored on a regular basis since our commitment to do so in May 2017.

It is, however, important to note that, since our commitment, there have been a number of significant changes to our procedures, not least the adoption of new contractual arrangements as well as changes to the UK VI teams who manage and assure these contracts.

I thought it would be therefore be useful to set out the current arrangements we have in place for managing provider performance given these changes. In particular and as I have said above, new accommodation contractual arrangements commenced in September 2019 and performance in relation to the services required to be delivered under the new contracts are measured against a number of formal Key Performance Indicators (KPIs).

Specifically and in relation to requests for accommodation (both Section 95 & S4), there are two formal KPIs enshrined within the contract that set out that a Provider must issue an appropriate proposal for an accommodation address (“dispersal accommodation”) within the timescales set by the Authority and where that proposal is agreed make arrangements to move the person to the address within timescales set by the Authority. ...

Performance against these requirements is monitored on a monthly basis, via the new Asylum Support Contracts Assurance Team who take the data report by our accommodation providers and compare that with data from UKVI casework teams. Any failures are then recorded formally, each month, at a Contract Management Group (CMG) and discussed by our Service Delivery Managers who monitor each contract.

I should be clear that if a Provider fails to propose an address or disperse an individual within the time set by UKVI then this would be a failure and depending upon the number of failures it may result in a decision to apply a deduction of a service credit following the CMG. Additionally, where persistent failures occur for three consecutive months then we would, as a matter of course, ask for a service improvement plan from the Provider.

...

I hope this provides reassurance that we are routinely monitoring provider performance in relation to accommodation requests.

...”

123. Mr Bilbao said that the AASC contract is “designed to be a self-reporting contract”. He explained that by this was meant “that the Home Office oversees the performance of providers by analysing data supplied by providers and undertaking ‘assurance’ work on that data”.
124. For the purposes of performance management, Mr Bilbao said there are nine Key Performance Indicators (‘KPIs’). These “and their measurement” are defined in Schedule 13 Appendix 1 of each AASC contract. Under that Schedule, KPI 2 is defined as:

“In respect of every Dispersal Accommodation Request issued by the Authority, the Provider disperses the identified Service User/s to appropriate Dispersal Accommodation or Temporary Dispersal Accommodation within the timescale stated on the relevant Accommodation Request.”

125. Target, Measure, Measurement Mechanism and MI Reporting for KPI 2 are specified as follows:

“Target

98% of relevant Service Users with the relevant Payment Period are dispersed into appropriate Dispersal Accommodation or Temporary Dispersal Accommodation within the timescale stated on the relevant Accommodation Request.

Measure

Percentage of Service Users within each relevant Payment Period who were not accommodated with the timescales stated on the relevant Accommodation Request.

Measurement Mechanism:

The record of Accommodation Requests made in each Payment Period shall be obtained from the Authority’s MIP (and any alternative methods of communication which may have been used).

The Provider shall provide notifications to the Authority when Service Users are moved to Dispersal Accommodation or Temporary Dispersal Accommodation through the Authority’s MIP.

At the end of the Payment Period, the provider will report on their compliance against this KPI 2.

The Authority shall run an exception report from the MIP and the Authority's Primary System of Record, alongside the reporting from the Authority's inspection and compliance activities, to validate the MI reporting provided by the Provider.

MI Reporting

Shall include, as a minimum, for the relevant Payment Period:

- The number of Accommodation Requests issued by the Authority which had a dispersal timescale within the relevant Payment Period;
- the unique identification reference for each relevant Accommodation Request;
- the timescales for dispersal for each relevant Accommodation Request;
- the actual timescale of dispersal met by the Provider; *and*
- the Provider's assessment of their performance against the KPI expressed as a percentage of relevant Services Users dispersed to appropriate Dispersal Accommodation or Temporary Dispersal Accommodation within the timescales stipulated by the Authority in the relevant Accommodation Requests, and a description of instances of failure against the relevant performance standard."

126. It is relevant to note that in the letter dated 2 March 2020 from the Government Legal Department to Deighton Pierce Glynn Solicitors it was stated:

"Accommodation proposals in any given case are uploaded to Asylum Support's Central Business Portal (CBP) by the housing provider. Once accommodation is provided, the case is removed from the CBP and Asylum Support no longer have access to the historic records."

127. In his witness statement Mr Bilbao drew particular attention to the measurement mechanism for two of the KPIs in these terms:

For KPI 1: "The record of new Dispersal Accommodation and Initial Accommodation Requests made in each Payment Period shall be obtained from the Authority's Management Information Portal (MIP) (and any alternative methods of communication which may have been used out of hours)".

For KPI 2: "The record of Accommodation Requests made in each Payment Period shall be obtained from the Authority's MIP (and any alternative methods of communication which may have been used). The Provider shall provide notifications to the Authority when Service Users are moved to Dispersal Accommodation or Temporary Dispersal Accommodation, through the Authority's MIP. At the end of the Payment Period, the Provider will report on their compliance against ... KP 2. The Authority shall run an exception report from the MIP and the Authority's Primary System of Record, alongside the reporting from the Authority's inspection and compliance activities, to validate the MI reporting provided by the Provider."

128. Mr Bilbao said the provider will provide a monthly report “extract[ing] and aggregat[ing] data from its IT system and from the CBP to obtain the number of accommodation requests that were made and the number that were fulfilled in the required time, within the previous calendar month”. This includes a “baseline” figure “that refers to the total number of ‘accommodation requests’”, a “non-conformance” figure of the “total number of requests not fulfilled within the required time”, and the provider “will also list the individual references for those ‘non-conformance cases’”.
129. As I understand it, this forms part of what was described by Mr Bilbao as a “Schedule 7 submission”. An advance draft copy of the submission “and where required any supporting data” is provided by the provider “to the relevant Home Office Asylum Support Contract Assurance (‘ASC-A’) team”.
130. Mr Bilbao says the relevant ASC-A team “undertakes the assurance of the information supplied by the provider for each KPI”. To do that “the Home Office uses reporting from the CBP and ATLAS” alongside “reporting from the Home Office’s inspection and compliance activities”.
131. Mr Bilbao explained that the ASC-A team check the provider totals “alongside data held by the Home Office” “with the aim of agreeing the level of ‘non-conformance’”. It is not clear what the “data held by the Home Office” is here referred to, but Mr Bilbao states that the Home Office “extracts a report from CBP that lists all requests made in the relevant period and various pertinent details of the request including raised date, target date, current status and fulfilment date”. He continues: “Thus they identify for themselves the ‘baseline’ and ‘non-conformance figure’” and that they also “[check] the individual non-conformance references given by the provider”.
132. Mr Bilbao observed that:

“In practice, as both the provider and the Home Office are in part using the same underlying source data (i.e. from CBP) there are generally minimal discrepancies between their respective figures – especially the ‘baseline’ figure”.

133. On Mr Bilbao’s evidence:

“Where discrepancies are identified they predominantly concern whether an individual accommodation request was fulfilled within the target time or whether it should be counted as a ‘non-conformance’.”, Mr Bilbao said.

His evidence is that “In general such cases are small in number and are mainly attributable to a lag or divergence in record keeping (e.g. the request was fulfilled in time but the CBP record was not correctly updated by the time of the assurance check)”.

134. According to Mr Bilbao, “[w]here there is any discrepancy with the provider’s totals or individual non-conformance cases, the Home Office sends the data to the provider”, “to consider and resolve before the provider produces the formal papers for the CMG” at its monthly meeting. He adds that “[w]here possible discrepancies identified by ASC-A are resolved through discussion between the Home Office and the provider prior to

the CMG meeting. Any residual disagreements regarding the KPI figures are escalated to the CMG meeting for resolution.”

135. Mr Bilbao confirmed that the CMG meeting is “held each calendar month between the Home Office and each provider to review the performance of the provider in the previous month”. The Schedule 7 submission will be provided to the CMG meeting. He stated:

“If [for a CMG meeting] the performance data is incomplete it will remain open until such time it can be finalized.”

Provider monitoring

136. Ms McLean has 12 years’ experience as Contract Compliance Manager according to a witness statement made in other proceedings on 18 July 2019. Her evidence is that “[t]he list of outstanding requests is regularly monitored at least weekly by the person responsible for bedspace allocation, including those that [the provider] has not been able to fulfil previously and reviewed against the list of [bedspaces where a person is required to vacate the property]”

137. McLean continues:

“All requests for accommodation that have been requested by UKVI remain within [the provider’s] systems until such time as we are able to propose an address that meets the needs of the applicant or UKVI decides it no longer needs the accommodation. This list is continuously reviewed by the person responsible for allocating bedspace and the priority is given to those cases that have been waiting the longest or that UKVI have requested need to be dealt with as a matter of urgency. [The provider] has regular weekly case list reviews and monthly contract management meetings where progress against the cases are discussed at length. ...”

“Hourly checks”

138. Mr Bilbao’s evidence included the statement that “In practice, Home Office employees check for changes of request status every hour”.

Disability monitoring

139. By way of amendment to her Detailed Grounds of Defence the Secretary of State said, at paragraph 104(v):

“It is correct that there is no monitoring of the numbers of disabled applicants.”.

Enforcement

140. As recorded above, according to officials, service credits may be deducted following the CMG meeting, and that a request for a service improvement plan would be made “where persistent failures occur for three consecutive months”.
141. An Order of Pepperall J made in these proceedings required disclosure of “the number of service credits due to be deducted, as per Schedule 13 section 4 of the Contract, and actually deducted in respect of the Dispersal Accommodation service area (KPI 2) since inception of the Contract”.
142. The following information was provided on 22 May 2020:

“Service Credit points due to be deducted re Serco in respect of KPI 2 performance under the Contract (which covers the Midlands and the East of England regions) – September 2019 to February 2020 (NB: information about the number of any Service Credit points due to be deducted for March 2020 is not yet available – although preliminary indications are that the number is likely to be low).

<u>Month</u>	<u>Service credit points due to be deducted</u>
September 2019	1,250
October 2019	1,250
November 2019	1,250
December 2019	250
January 2020	550
February 2020	0

If any Service Credit points are due to be deducted in respect of performance under any KPI, the Contract stipulates in detail the way in which the financial effect of that points deduction should be calculated. The Home Office has not yet made any financial deductions arising from the Service Credit points due to be deducted in the months identified above. As a consequence of issues arising from performance measurement processes under the Contract (which led to a review into how data is captured and collated for specific KPIs), the Home Office and Serco only arrived at an agreed position re Service Credit deductions in March 2020. Events were then overtaken by the Covid-19 crisis. Bearing in mind the potential impact of the Covid-19 crisis on Serco and noting the possibility of a further revision to the performance measurement processes (which may yet affect the relevant financial calculations), the Home Office has agreed to Serco’s request to delay any financial deductions until July 2020. The Home Office will review the matter in June.”

143. Evidence of Ms McLean gives a provider perspective. Her evidence appears to indicate that “the KPI regime” is the means by which “any issues regarding the failure of [the provider] to provide accommodation, that meets the requirements of any specific booking are dealt with”. She adds: “All request for accommodation that have been requested by UKVI remain within [the providers’] systems until such time as we are able to propose an address that meets the needs of the applicant or UKVI decides it no longer needs the accommodation”.

144. Enforcement by way of later financial penalty provides incentive to perform. However, it is only enforcement that actually remedies a detected breach that brings about the accommodation required in a particular case. The context is crucial, i.e. the performance by a Secretary of State of her accepted legal duty to claimants who are destitute, face an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life, and are “highly vulnerable”. However suitable it might be in other contexts, it is not, for example, clear that expecting a service improvement plan only after “persistent failures ... for three consecutive months” appreciates the context.

Performance of the duty to accommodate

145. It is important to approach the evidence constructively and respectfully. This is an area in which many have been under pressure, on all sides, especially more recently in light of the Covid-19 pandemic.
146. However, in the case of each claimant in these proceedings, the periods in the Guide for the provision of accommodation (of 24 hours up to 5-9 days) bore no relation to what was experienced (45 days up to 151 days, with 9 months in the case of AA). All the periods pre-date the pandemic, and the pandemic will only have added more challenges.
147. The claimants have adduced evidence that this experience is not confined to them. In evidence from Mr Paul Hook of Refugee Action:

“These delays are an extensive problem that has been ongoing for some time. This has not just had an impact on Refugee Action’s clients but also on failed asylum seekers more broadly within the sector. I have spoken to a number of experienced professionals within the sector who have also encountered delays to the provision of s.4 support, and am aware that this is an area of general concern.”

There is further evidence from Ms Stefania Raschig of the Refugee Support Service and Ms Deborah Gubbay of Bristol Refugee Rights. All this evidence is informed evidence from those with relevant experience of what is happening.

148. Ms Polly Glynn, one of the solicitors representing the claimants, highlights:

“... clients who do not have access to advisors who can prepare pre-action letters, or to solicitors who are able to take the cases on, remain for long periods without accommodation.”

Ms Glynn also highlights the delays for those who do access advisors: legal aid applications, pre-action correspondence, and sometimes proceedings, all take time. Ultimately the performance of the duty may be achieved, but through pressure to prioritise the particular case over others. Again, this is informed evidence from someone with relevant experience of what is happening.

149. System-wide figures were provided to the Court on behalf of the Secretary of State. In final form as provided at the oral hearing in July 2020, for “dispersed to dispers[al] accommodation within required timescale (target = 98% or more) [KPI 2]” the average of monthly figures (with aggregate over entire quarter shown in square brackets) is as follows:

Country/Region	Sep-Dec 2019		Jan-Mar 2020
Scotland	62%	[63%]	67% [66%]
Northern Ireland	76%	[72%]	92% [93%]
Wales	99%	[99%]	98% [97%]
England:			
North East, Yorkshire and Humber	76%	[75%]	79% [76%]
North West	94%	[94%]	98% [98%]
Midlands and East of England	61%	[61%]	64% [63%]
South	96%	[96%]	98% [98%]

150. It should be noted that data for September 2019 for Wales was “awaited”. Figures for Scotland, Northern Ireland, North East, Yorkshire and Humber were October to December 2019 rather than September to December. Further, at least as at July 2020, January to March 2020 figures were still “provisional due to data quality issues and possible outstanding disagreements/ disputes with Accommodation Providers.”
151. In no country/region was “dispersed to dispers[al] accommodation within required timescale” achieved in full. Consistently high percentages were shown in Wales, the North West and the South. In the North East, Yorkshire and Humber and in Midlands and the East and Scotland at times in Northern Ireland percentages were materially below “target”. Again the context is crucial; these represent delays (of unspecified length) in provision of accommodation to those who faced “an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life”.
152. Even the high percentages for the North West contrasted with this evidence from Ms Polly Glynn in a witness statement dated 16 June 2020, reporting experience “on the ground”:

“I have been in contact with one office of Refugee Action which is located in the North West – in Manchester. They assist people to apply for section 4 support, and there is no reason to think their client group would be any more likely to experience delays than the average applicant.

In the period 1st January to 31st March 2020 covered by the data, 46 of their service users were granted section 4 support (i.e. told in principle that they would be provided with accommodation and support). Out of these 46 service users, only 13 were provided with accommodation within 14 days or less from the date of the positive section 4 decision. This is 28% of this sample.

...

At the date of the last review on 7th May 2020, 13 applicants (28%) had still not been provided with accommodation or support. These applicants had waited in a state of destitution on average for almost 60 days after a positive decision ... was made.

The remaining 20 applicants had been provided with accommodation as at 7th May 2020. These applicants had waited in destitution an average of 28.7 days after the positive decision on the application for section 4 support to be provided with accommodation (and obviously for a period before that too). ...”.

153. Mr Bilbao provided his evidence, detailed earlier in this judgment, on 17 August 2020 “in order to provide the Court with a full explanation of the source of the statistics provided” “after consulting colleagues across the support casework, accommodation monitoring, contract compliance, service delivery and contract management teams”.
154. Mr Bilbao cautioned in that evidence to the Court that the calculation used for these figures “is the inverse of the normal performance reporting and is not normally used by the Home Office”. I note that the calculation is however by reference to KPI 2, used by the Home Office. And that it was the calculation used for earlier figures provided to the Court on behalf of the Secretary of State on 22 May 2020, to which I refer in the next section, in response to the Order made by Pepperall J on 7 May 2020.

Knowledge of performance of the duty

155. The response on behalf of the Secretary of State to the Order of Pepperall J on 7 May 2020 has important wider implications.
156. The Order included these terms:

“1. The [Secretary of State] shall ... give disclosure of:

1) the s.4 accommodation provider's contractual reporting on its performance on dispersal within the timeframes set by [the Secretary of State] since inception of its contract with [the Secretary of State] ["the Contract"]; ...

...

by, at her election:

(a) Serving copies of the relevant documents (suitably redacted, if so advised, in order to protect the identity of the contractors, so far as this is possible while still preserving the overall figures on delay and any reasons given by the contractors), and/or

(b) Providing a fair summary of the data contained within the relevant documents by way of a witness statement or otherwise.”

157. Two weeks were allowed to provide this disclosure. The Secretary of State elected to

provide a fair summary. As ordered, this was to be a fair summary “of the data contained within the relevant documents”. On 22 May 2020 the following figures were provided on her behalf for “dispersed to dispers[al] accommodation within required timescale (target = 98% or more) [KPI 2]”:

Country/Region	Sep-Dec 2019	Jan-Mar 2020
Scotland	80%	88%
Northern Ireland	78%	98%
Wales	99%	No data yet
England:		
North East, Yorkshire and Humber	85%	83%
North West	94%	100%
Midlands and East of England		
South	61%	96%
	99%	98%

The summary did not include any “reasons given by the contractors”.

158. Based on these figures the written argument on behalf of the Secretary of State as at 16 July 2020 was as follows:

“169. It is clear ... that in the vast majority of cases, the accommodation providers have met and continue to meet the relevant contractual KPIs as to dispersal within the timeframes set out in the relevant contracts.

170. It is not unusual for there to be ‘teething’ issues in the first few months of a new contract, resulting in relevant KPI targets being missed. This is particularly so in the context of high value and complex contracts such as this set of new contracts.

171. In the particular context of these contracts, there were difficulties with service delivery in regions where the accommodation providers were establishing working practices and developing relationships with new stakeholders. Serco, in particular, reported to [the Secretary of State] that some of the accommodation that they had taken over from the outgoing accommodation provider in the Midlands and the East of England region (the area covered by the Contract under which accommodation was provided to the Claimants) was in poor condition and required immediate attention and repairs. This led to reduced accommodation stocks in the early months of the new contracts in those regions, which, in turn, is likely to have contributed to Serco’s initial difficulties in meeting the relevant KPIs.

172. To add to the difficulties, the volume of new applications for accommodation increased significantly during the course of 2019 and into the first few months of 2020. This has placed increased pressure on the asylum support system. In September 2019, the [Secretary of State] was providing

support to circa 48,000 asylum seekers nationwide, which has increased to circa 51,500 by May 2020.

173. The [Secretary of State] worked and continues to work with the accommodation providers to encourage and assist the accommodation providers to meet the relevant KPI targets. There has been significant improvement in accommodation providers meeting the relevant KPI targets during the period 1 January 2020 to 31 March 2020. In particular, Serco's performance under KPI 2 has increased from 61% to 96% in the Midlands and the East of England region – which is the region that is relevant to the Claimants' claims."

Paragraphs 170 to 173 of this written argument largely repeated what had been written in notes accompanying the provision of the disclosure on 22 May 2020.

159. By the time of the oral hearing in late July it was accepted on behalf of the Secretary of State, and since the oral hearing Mr Bilbao has confirmed, that these figures provided to the Court on 22 May 2020 were not correct.
160. The figure for the Midlands and the East of England region, highlighted at paragraph 173 of the written argument on behalf of the Secretary of State increased from 61% to 64%, not 96%. It was not in fact the case that "in the vast majority of cases, the accommodation providers have met and continue to meet the relevant contractual KPIs as to dispersal within the timeframes set out in the relevant contracts". 'Teething' issues in the first few months of a new contract did not in fact explain the position, nor a reduction in accommodation stocks "in the early months" by reason of "immediate attention and repairs" and contributing to "initial difficulties". Only in Northern Ireland could it be said that there had "been significant improvement in accommodation providers meeting the relevant KPI targets during the period 1 January 2020 to 31 March 2020".
161. On the first day of the oral hearing, Mr Tam QC properly intervened in the course of argument to indicate that checks and changes would be required to the figures provided on 22 May 2020. Updates were then provided on each of the following days of the oral hearing, with a final explanation following in writing after the oral hearing, in the form of Mr Bilbao's evidence by witness statement dated 17 August 2020. Mr Tam QC handled the situation with the professionalism and integrity the Court would expect, but Ms Zoe Leventhal and Mr Ben Amunwa for AA did not overstate the underlying position that he was handling and responding to when they described it as chaotic.
162. The actual overall provision of accommodation is as described earlier at paragraph [149]. It is obviously a serious matter where, as here, inaccurate figures are provided to a Court, but there is a point with wider implications to the issues in the current proceedings.
163. This is that the Secretary of State's state of knowledge until July 2020, through her officials, was inaccurate. Through her officials her understanding was that the inaccurate figures were accurate, and therefore that the performance was as described in the written argument provided on her behalf and quoted above. Indeed, the Court was informed the figures were adopted from a draft section of a National Audit Office report.

164. At the oral hearing in July 2020 Mr Tam QC also informed the Court that the “service credit points due to be deducted” for February 2020 were not zero as stated on 22 May 2020 but 1250. For March 2020 they were not “low” as per the “preliminary indications” on 22 May 2020 but 1250.
165. The Secretary of State was due to file evidence after the oral hearing in late July 2020 to explain the errors that had led to the original disclosure of unreliable information on 22 May 2020. In additional written submissions provided on behalf of the Secretary of State on 13 September 2020, it was stated that the Secretary of State was aware that this remained outstanding but “... as explained during the hearing, an illness is involved and this will take further time”. In the event an explanation was not provided until after a draft of this judgment was made available to the parties, in a witness statement from Mr Mill dated 10 December 2020.
166. Mr Mill apologised that incorrect information was provided to the Court on 22 May 2020, and Mr Mark Akiwumi of the Government Legal Department apologises that the explanation was not provided at an earlier point. I accept, without reservation, their apologies and commend them for their frank acceptance of responsibility. Mr Mill’s evidence on 10 December 2020 however includes three matters that it is material to mention because they bear on the substantive aspects of this judicial review.
167. First, Mr Mill said that an operational team “has at all times had ready access to information about the contractors’ performance, including information that is used to measure the Key Performance Indicators (KPI) specified by the contract”. He said that the operational team were “extremely stretched” in May 2020 “to ensure that eligible asylum seekers are provided with accommodation and support during the pandemic”. He added that “[a]t this particular point in time both the [o]perational team and my own commercial team were working on providing contingency solutions to ensure asylum seekers were not left destitute during the lockdown period.” Colleagues who would have been better placed to provide advice and data were working on providing essential services for asylum seekers, often whilst trying to balance caring responsibilities.
168. As to this, whilst I fully understand the significant pressures of the pandemic and the intense work required as a result of it, what Mr Mill terms “ready access to information about the contractors’ performance, including information that is used to measure the Key Performance Indicators (KPI) specified by the contract” was not sufficiently ready to allow access without distraction from the intense work required by the pandemic. But more crucial still is the point that “advice and data” that colleagues “would have been better placed to provide” is seen as something other than essential to the successful provision of services, including (and perhaps especially) in the pandemic.
169. Second, Mr Mill said: “KPI performance should also be reported to my team, but the reporting systems to allow this were not in place in May 2020.” He said the information required to comply with the Court’s order was not readily available to him and he did not have “ready access to the underlying data”. He indicated that information relevant to KPI 2 is reported (elsewhere) in the Home Office, but it was not practicable to disclose relevant documents containing this information even if redacted for confidentiality and sensitivity, because “it would have been incomprehensible and indigestible”. Mr Mill said he “had access to the initial draft of a National Audit Office (“NAO”) Report following a review they had undertaken into the performance of the

AASC.” This was used to provide the information on 22 May 2020. Mr Mill acknowledged that the NAO’s information source was the Home Office itself. He said “that the NAO had misinterpreted the data made available to them, and that the Home Office pointed this out to the NAO.”.

170. As to this, it is to be kept in mind that Mr Mill and his team had “responsibility for the commercial management of the UKVI asylum portfolio including management of the AASC contracts” (Mr Mill’s statement of 24 June 2020)” The Court’s order was simply for “the s.4 accommodation provider's contractual reporting on its performance on dispersal within the timeframes set by [the Secretary of State] since inception of its contract with [the Secretary of State] [“the Contract”]. Mr Mill’s evidence gives rise to the concern that even where data is being gathered on behalf of the Secretary of State it is not readily accessible in a form usable for monitoring or (as discovered by the NAO) is capable of being misinterpreted.

171. Third, Mr Mill added this:

“At that time, I had heard anecdotal evidence to the effect that during 2020, Serco’s performance in the Midlands and East of England region had improved by leaps and bounds when compared to the first few months of them providing services in that region, and I therefore believed that Serco’s performance in the Midlands and East of England Region had indeed improved significantly in the first quarter of 2020 when compared to the latter part of 2019.”

172. As to this, one of the reasons why data capture and monitoring are so important is to avoid the risks where anecdotal evidence alone informs belief. It seems clear that at May 2020, the arrangements described by Mr Bilbao in his witness statement of 17 August 2020 were not reaching those with “responsibility for the commercial management of the UKVI asylum portfolio including management of the AASC contracts” (Mr Mill’s statement of 24 June 2020), who were prepared instead to accept anecdotal evidence that Mr Mill “had heard” to support a belief that performance in the Midlands and East of England against KPI 2 had improved from 61% in one quarter to 96% in the next.

173. It is now known that the relevant KPI was largely not being met. Through her officials, the Secretary of State did not in practice have the means to the true position. This is because there were no proper arrangements for data capture and monitoring.

Time for performance of the duty

Grounds advanced

174. The first three grounds advanced by DMA, AHK, BK and ELN contend, respectively, that the law requires the provision of accommodation to be “upon” the decision on an application for section 4(2) accommodation, or within a reasonable period of that decision, or “expeditiously”.

175. For DMA, AHK, BK and ELN, Ground 1 contends that the Secretary of State failed to

provide section 4(2) accommodation (and ancillary payments) so as to alleviate destitution and that this frustrated the legislative objects of section 4(2) read with the 2005 Regulations (and, to the extent necessary, the 1998 Act), and was unlawful. Ground 2 contends that the Secretary of State failed to provide section 4(2) accommodation within a period that was reasonable; the contention is that around two days at most was reasonable. Ground 3 contends that the Secretary of State failed to exercise the power to provide section 4(2) accommodation expeditiously and that this was an unlawful failure to perform her duty.

176. Ground 2 of the grounds advanced by AA contends that there are unlawful delays on the part of the Secretary of State and in the system.
177. As revised on the second day of the hearing, the declaratory relief sought by DMA, SHK, BK and ELN was reframed in these terms. These terms centre on “a reasonable period of time”:

“Declarations that [the Secretary of State’s] failure to operate a system capable of securing, and which in fact secured, accommodation within a reasonable period of time:

- (i) frustrates the purposes of the legislative and policy scheme to alleviate destitution and to anticipate and obviate human rights breaches that flow from destitution; and /or
- (ii) was and is Wednesbury unreasonable and unfair
- (iii) is in breach of Articles 3 and 8 ECHR and ultra vires section 6 of the Human Rights Act 1998”.

A reasonable period of time

178. The first point to make is that the Secretary of State in fact accepts that the legal requirement is for the provision of accommodation to be within a reasonable period of time. The Secretary of State accepted through Mr Tam QC that:

“... having concluded that an applicant is entitled to s4 support, she is under a duty to provide such support. In the absence of an express time limit in the 1999 Act and Regulations, she must do so within a reasonable period but ensuring at all times that no substantive breach of Article 3 occurs”.

179. But the present proceedings are, in substantial part, really about what that means.
180. For the Secretary of State Mr Tam QC described section 4(2) as a mechanism to address the situation of destitution; it was a release valve and it was not the only mechanism. For my part I see no other mechanism at the point at which section 4(2) is engaged by regulation 3. Release valves in the form of earning through work or recourse to public funds have been closed to the applicant.
181. Mr Tam QC points out that there is nothing in section 4 itself or in the 1999 Act generally “or in any of the secondary legislation or statutory guidance” which provides

that the Secretary of State is required to provide an individual with support within a specific timeframe.

182. It is emphasised on behalf of the Secretary of State that what is reasonable will depend on the circumstances. Mr Tam QC referred to National Car Parks Ltd v Baird [2004] EWCA Civ 967 where Dyson LJ considered the issue of time of performance where a statute is silent as to when a duty should be performed. Dyson LJ set out a non-exhaustive list of factors including “(i) the subject-matter of the duty and the context in which it falls to be performed” and “(iv) any prejudice that is, or may be, caused by the delay”.
183. The reference to context is of course particularly important for present purposes. The context is that a breach of Article 3 is imminent. The situation is best seen as one involving the prevention of inhuman and degrading treatment rather than simply as a case involving the provision of accommodation. In a particular case before a decision is reached to accept the duty to accommodate there may be a question whether an individual is destitute or whether a breach of Article 3 is imminent. But at the point of the Secretary of State’s section 4(2) decision made through her officials that question has been answered in the affirmative.
184. Mr Alex Goodman and Ms Katherine Barnes, for DMA, AHK, BK and ELN emphasised the importance of understanding the obligation as one that kept time to a minimum. Time will already have passed in reaching the section 4(2) decision. Mr Goodman points out that already in some cases, before the decision, time will have elapsed. The policy choice of Parliament and Government has been to close “release valves” and engage the duty to accommodate at a point that leaves no room for delay. It may follow from Mr Goodman’s argument that if the policy choice had been different, and had not imposed “no recourse to public funds” or had chosen to engage at a point earlier than imminent risk of Article 3 breach, then more time would be possible without unlawfulness.
185. In MK and AH v The Secretary of State for the Home Department (Refugee Action intervening) [2012] EWHC 1896 (Admin) the Court considered the time within which to make a section 4 decision, rather than (as here) carry it out. Foskett J held that the Secretary of State’s policy that renewed claims for asylum made by failed asylum seekers who were or risked being destitute had to be considered before their applications for support under section 4 of the 1999 Act were considered, unless 15 working days had elapsed, was unlawful because it created an unacceptable risk of a breach of Article 3.
186. Mr Goodman noted that a period from section 4(2) decision to provision (of up to 14 days) now appears to have been, as he put it, “baked in contractually”. This, he argued, was not appropriate in the context, and even then it was not being met in a material proportion of cases.
187. It is also the case that the Guidance does identify periods. The latter may as often be too short as adequate. These proceedings show instances of those periods being vastly exceeded and the Secretary of State acting by her officials cannot say by how long (other than longer than her Guidance) in large percentages of other cases.
188. Mr Tam QC offered an example that it is useful to discuss:

“By way of example only, a delay of 48 hours may be wholly unreasonable in the case of street homeless vulnerable female with significant health issues, whereas a delay of 4 weeks, whilst not ideal, may be reasonable in the case of a healthy male who was able to access a roof over his head each night and food each day (even though his circumstances were less than ideal) and where in fact no breach of Article 3 occurred during the 4 week period.”

189. The first part of the example (the vulnerable female with significant health issues) is sound. The difficulty with the final limb of the second part of the example (the healthy male) is that it uses hindsight (“where in fact no breach of Article 3 occurred”). Hindsight is not available when the Secretary of State has a duty to provide accommodation within a reasonable time.
190. And how realistic is the second part as an example under section 4(2), with its reference to “access [to] a roof over his head each night and food each day (even though his circumstances were less than ideal)”? The section 4(2) duty will engage if an individual is destitute and faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. It is also interesting that the second part of the example, with the healthy male who has a roof over his head and food each day, is used to illustrate where 28 days may be reasonable, a period again substantially less than the periods experienced by the claimants in these proceedings.
191. For the Secretary of State, Mr Tam QC criticises argument on behalf of the claimants for ignoring the “practical reality” that she does not own or possess an endless supply of accommodation. As was pointed out by Mr John Cavanagh QC sitting as a Deputy High Court Judge in R (Bag) v Secretary of State for the Home Department [2018] EWHC 1721 (Admin) (on the facts of that case): “The Secretary of State cannot create appropriate accommodation out of nothing for this claimant.”
192. Through Mr Tam QC, the argument for the Secretary of State is that she can only act “with reasonable diligence to secure and provide accommodation within a period which is reasonable in all the circumstances, bearing in mind any specific urgency in any individual case, whilst at all times ensuring that the Article 3 threshold is never crossed”. Without adopting the language, in my judgment this is a fair position, but that is because it requires reasonable diligence, respects urgency, and respects Article 3 as absolute.
193. It does meet an argument of the claimants to the effect that the Secretary of State’s duty includes a requirement to carry an existing stock of accommodation. I cannot accept that that argument is sound; carrying stock is one way of carrying out her duty but it is not necessarily the only one. To anticipate the discussion below where the individual is disabled, there is force in the point made on behalf of the Secretary of State that it may be unrealistic, inefficient and ineffective for the Secretary of State to require providers to maintain a stock of suitable accommodation for such individuals, when the locations and adaptations required cannot be predicted in advance.
194. However, Mr Tam QC for the Secretary of State also cites a decision of Mr Clive Sheldon QC sitting as a Deputy High Court Judge in Chkharchkhalia v Secretary of

State for the Home Department [2019] EWHC 2232 (Admin). The decision concerned a challenge to a delay of four months in providing an individual with suitable accommodation, but it is important to note that this was under section 95 of the 1999 Act, not section 4. At [37] the Judge said of the fact that a suitable property was not procured in less time that was "... not by reason of a failure to adhere to the Secretary of State's policies. Rather it is the fact that suitable properties have not been located, in spite of the Secretary of State's best efforts within the affordability constraints that he has applied".

195. The decision is not, in my judgment, applicable to section 4(2), when a breach of Article 3 will be imminent. "Best efforts within the affordability constraints that he has applied" will not be enough to avoid breaches of Article 3. Indeed, I observe that the Secretary of State has sought to emphasise through her officials that there are no affordability constraints (see paragraph [112]-[115] above). But as I seek there to explain, in practice a similar impact may not have been avoided by her contracting arrangements.

The time taken in the claimants' cases

196. In the result, the answer in these proceedings is not that a reasonable time means a fixed period, whether 24 hours or 9 days or some other period. Rather, the periods of time seen in the present proceedings are such that, on any view they are not reasonable. Indeed they are so large that absent an explanation, they do question the system.
197. The only explanation offered on behalf of the Secretary of State (that, to paraphrase, "it was all the claimants' fault") is one that I have rejected. It is not possible to reconcile the delays with the monitoring that is said to be present and is described above. There cannot have been proper monitoring.
198. Mr Tam QC argues that the delay in each case was reasonable because at no point between the section 4(2) decision and the provision of suitable accommodation was any of DMA, AHK, BK or ELN in fact street homeless or otherwise without food or shelter. Their circumstances did not actually "cross the Article 3 threshold and amount to inhuman or degrading treatment" and did not deteriorate. It is argued that "accordingly, the policy objective of section 4(2) was achieved".
199. This argument relies on the help given by charities, or sometimes friends or church, who were not prepared to see the Article 3 threshold crossed. This was help while the Secretary of State through her officials delayed beyond a reasonable time. It is not right to say that the policy objective of section 4(2) was achieved "accordingly", as though that was the plan. It was achieved despite a failure of the Secretary of State through her officials to provide the accommodation that in each case she had by her section 4(2) decision recognised she had a duty to provide, and provide within a reasonable time.
200. Thus, I reject the argument, but the implications of advancing the argument are also concerning. If the Secretary of State through her officials anticipates that charities and community groups will provide accommodation whilst charities and community groups look to the Secretary of State through her officials to do so, matters can quickly deteriorate to "who blinks first". The victim of that situation is an individual who already faces an imminent prospect of serious suffering caused or materially aggravated

by denial of shelter, food or the most basic necessities of life and who is prevented from addressing these needs in any other way.

The Padfield principle

201. There was some discussion of what has come to be known as the Padfield principle in relation to Ground 1 (Padfield v Minister of Agriculture [1968] AC 997). The principle concerns the exercise of power to promote the policy and objects of the legislation conferring the power, determined by construing the legislation as a whole (see generally R (on the application of Palestinian Solidarity Campaign Ltd and another) v Secretary of State for Housing, Communities and Local Government [2020] UKSC 16).
202. In his valuable analysis of a challenge in respect of alleged failures in provision under section 4(1)(c) of the 1999 Act, Edis J said (R (Sathanantham and Others) v The Secretary of State for the Home Department [2016] EWHC 1781 (Admin); [2016] 4 WLR 128 at [67]):

“The power to provide accommodation in s.4(1)(c) is a power to provide it to those who have been released on bail. The SSHD has established a system for its exercise She has not decided not to exercise it. If she adopted a policy of declining every application to accommodate those who were released on bail this may perhaps violate the rule in Padfield’s case, but that is not what has happened here. What has happened here is that the system which the SSHD has established is trying, but failing, to offer suitable bail accommodation to the small number of high risk bail applicants within a reasonable period of time. The policy which she has established is not irrational or unreasonable, it is simply not working very well. There are several reasons for this which include the complex nature of the task in difficult cases and maladministration. The complex nature of the task includes the difficulty in sourcing accommodation for asylum seekers generally in what is sometimes a hostile climate. That difficulty is magnified when the detainee is dangerous which requires the accommodation to be of a particular kind and in a particular location ...

... The nature of the problem in this case is not the same as that in Padfield and the Scottish Ministers cases. It is unintended delay which is the problem, not a deliberate decision to delay as in the latter case ...”

203. Mr Tam QC argued:

“This is not a case in which it is said that the Regulations are ultra vires; nor has the [Secretary of State] decided not to exercise her powers under section 4(2) and/or 4(5); nor has she adopted a policy of refusing all applications by failed asylum seekers; nor has she imposed insurmountable obstacles to qualifying for s4 support (e.g. by imposing qualifying criteria which would, in practice, be impossible for failed asylum seekers to meet) – such that the policy objectives of section 4(2) would be frustrated (thus engaging the Padfield principle).”

204. This only goes so far. The Secretary of State would be deciding not to exercise her powers under section 4(2) such that the policy objectives of section 4(2) would be

frustrated (thus engaging the Padfield principle) if she continued a system which continued the failures evidenced in the present proceedings. There is not so much difference between insisting on a scheme which takes too long and imposing an obstacle in the scheme. To decline to improve a system that is failing to meet the requirements of a duty, when that system can be improved, is equivalent to a decision not to perform a duty; it would be an example of the “deliberate decision to delay” to which Edis J refers.

205. The policy objective of section 4(2) is the avoidance of a breach of Article 3, argued Mr Tam QC. In my judgment, it is this that makes the matter so serious. Mr Goodman added that it is not the only policy objective; avoiding destitution is a policy objective too. I am not sure that is right in the case of section 4(2), given Limbuela, save as a route to avoiding breach of Article 3. But Mr Goodman does not need the added point. In accepting a section 4(2) duty to an individual, the Secretary of State accepts that there is an imminent risk of breach of Article 3.
206. Mr Tam QC suggested that:

“The mere fact that [the Secretary of State] is dealing with thousands of applications for s4 support each month and providing s4 accommodation to all those who qualify, (even if there is delay in dealing with some applications) makes it clear that the [Secretary of State] is exercising her powers under section 4(2) to promote the relevant policy objectives”.

However, this is to say only that the Secretary of State is not exercising her powers for some ulterior purpose. It does not mean that, through her officials, she is fulfilling her duty.

207. The claimants’ cases, and the figures provided to the court, show that the monitoring arrangements either did not happen or do not work. Had they done so, what went wrong in the claimants’ cases could be explained now and could have been tackled at the time. This includes the hourly checks by “Home Office employees for changes of request status” to which Mr Bilbao refers, the reporting to which Ms Mclean and Mr Bilbao refer, and the Home Office “inspection and compliance activities” to which Mr Bilbao refers.
208. On behalf of the Secretary of State, it is also contended that the scope of her duties by reference to the Padfield principle, common law and Article 3, and the question whether those duties have been breached, “are wholly independent of and not concerned, in any way with, or informed by, what KPIs may or may not have been agreed on a commercial basis between [the Secretary of State] and the third-party accommodation providers in a highly competitive marketplace”.
209. This is correct in the sense that monitoring for compliance with a contractual KPI is not monitoring for compliance with a Minister’s legal duty. However, the suggestion that the monitoring for compliance of one is not informed by the other cannot be accepted for a KPI that measures the timely performance of the section 4(2) duty to provide accommodation. It is measuring the same subject area that arises at law even if the requirement of the law is more rigorous than the requirement of the contract. This is why it is not surprising to find the argument on behalf of the Secretary of State referring

to the KPIs; whilst it is surprising to find no real reference on behalf of the Secretary of State to monitoring compliance with her legal duty.

A systemic issue or issues

210. For the Secretary of State, Mr Tam QC argued that “the difficulties which are the subject of the Claimants’ claims have concerned the practical arrangements for actually securing accommodation for each Claimant, and the mechanism for actually transporting each Claimant to the accommodation secured for them”. He characterised what the claimants were doing in these proceedings as “seeking inappropriately to attempt to involve this Court in an exercise of management review or in a form of public inquiry into the [Secretary of State’s] systems for actually securing accommodation and transport after a decision that an individual is entitled to s4 support”.
211. Mr Tam QC made clear that it was not in dispute (a) that the Secretary of State had power under section 4(2) to support the claimants, (b) that Article 3 could mean that this power could be a duty in certain circumstances, (c) that if an application was made to her under section 4(2) she had a duty to consider and decide it and (d) if the application was granted then she had a duty “of some kind” to give effect to and implement that decision. At each point a claimant was entitled to come to the Court in the individual case and say that one of these steps had gone wrong. If the matter was not resolved then the Courts would have to decide by order, and sometimes by interim order.
212. But in the present proceedings, all cases were, he argued, now beyond that point as the claimants were all now accommodated. In continuing to pursue the cases the claimants were asking the Courts to look at the matter systemically. The Courts could in certain cases do this, but to do so would require an examination of the reasons why a part of the system worked as it did and that was not really what the Courts were here to do.
213. Mr Tam QC cited Hossain and Others v Secretary of State for the Home Department [2016] EWHC 1331 (Admin) where at [144]-[145] Cranston J shared the view that:
- “... the courts are not expert in the type of enquiry demanded when a whole system of public administration is on trial as to how it handles the ‘full run of cases’ ...
- An investigation into how an administrative system works as a whole requires the more informal, wide-ranging and iterative methods of inquiries.”
- (and see Hickinbottom J in R (Edwards) v Birmingham City Council [2016] EWHC 173 (Admin); [2016] HLR 11).
214. In the present case, added Mr Tam QC, “the matters are complex and involve not just the [Secretary of State’s] own operations but those of contractors”. He argued that “... the [Secretary of State] is accountable to Parliament for matters of management.”. He continued: “An argument ... about whether the [Secretary of State’s] systems (or those of its contractors) could be designed or operated in a better way is not within the Court’s

proper sphere of illegality, but essentially involves questions of maladministration which could be and should (if desired) be made elsewhere.”

215. The question of what he termed the respective constitutional roles of Government and the Courts formed the first and largest part of Mr Tam QC’s oral argument for the Secretary of State. He described what he termed an “inevitability” about Government work. It had “big things to do” but with limited resources, coming from taxation. It should work effectively and efficiently, looking to do so at lower cost given that it worked with other people’s money, and lawfully in accordance with the rule of law.
216. Constitutionally, Mr Tam QC argued, different bodies supervised different aspects of what Government did. It was for Government to make decisions but always there would be criticism of some aspect of these decisions. The fundamental question of how the Government was to do what needs to be done was not a question which the Courts alone could answer, he argued.
217. In cases such as the present he contended that the debate had now passed beyond what the Courts can deal with. If the Courts tried to intervene, they would be venturing into areas of supervision. These were areas for others and areas that the Courts were ill-equipped to judge, argued Mr Tam QC. Supervision of this part of the system and on a systemic basis was not for the Courts to sort out.
218. Thus, argued Mr Tam QC, the Secretary of State could have chosen a number of different ways of providing accommodation. She had chosen to enter into a contract with private companies. Any contract, he pointed out, would have particular features. For example, a contract might have a fixed payment structure requiring anyone to be accommodated regardless of the cost to the contractor, working regionally, with performance monitored with KPIs and with potential financial penalties. This would generate a list of points for possible debate: why use a contractor; was it right to depend on the contractor’s ability to perform; were the incentives right; how do the incentives influence speed; why compartmentalise the country into regions? These would inform overall questions of fairness or of a systemic nature and the Courts were not well equipped to look at questions like that, he argued.
219. Mr Tam QC argued that in the present context the real constraint was not cost as such but the supply of housing. There were other authorities seeking to accommodate those with serious disabilities. There was competition from private individuals in what was a market economy. Moreover, he argued, it was not simply a question of finding housing. Consultation with local authorities was involved, as was regard to social and cultural considerations and to the availability of services. Some accommodation would take more time, including where work was needed to adapt it. There would be issues of prioritisation. If individual cases reached the point of requiring a pre-action protocol letter or proceedings that might draw attention to an aspect but did not show that there was systemic delay or that everything would be possible across a system.
220. Mr Tam QC said he was not suggesting all was working perfectly, but why it was not and where it was not was a question that it was very difficult for a Court to answer. Further, he asked rhetorically, how would intervention by the Courts work? If anyone was to undertake a proper systemic review then they would have to ask many questions:

were there better models; what were their disadvantages; should money be “thrown at the problem” and would that even work?

221. Of course, Mr Tam QC acknowledged that there were situations in other fields where the Courts became involved in a review that could be considered systemic. I gave the example of competition law. There will no doubt be better examples. But Mr Tam QC urged the these were exceptions, and unusual, and were where the tasks had been given to the Courts by Parliament, and where the operation of private enterprises was examined.
222. Reviewing some of the authorities on systemic challenges in judicial review of administrative action, Mr Tam QC argued that even if one were to take the claimants’ case at its highest, the most that they could hope to show is that there may well be “aberrant decisions and unfairness in individual cases”; but that is insufficient to justify a challenge to the system. This draws on language derived from R (Detention Action) v First-tier Tribunal [2015] EWCA Civ 840, [2015] 1 WLR 5341, Lord Dyson MR (Briggs and Bean LJJ concurring), and see also R (O & Anor) v Secretary of State for the Home Department [2019] EWHC 148 (Admin) at [93] (Garnham J).
223. Mr Tam QC cited R (Refugee Legal Centre) v Secretary of State for the Home Department [2005] 1 WLR 2219 at [20] to support the proposition that the question is whether the system operated by the Secretary of State "considered in the round" carried "an unacceptable risk of unfairness" to asylum seekers and R (Tabbakh) v Staffordshire And West Midlands Probation Trust & Anor [2014] EWCA Civ 827 at [24] and R (Detention Action) at [27] to support the proposition that the relevant threshold for intervention is high.
224. The latter authority was also cited by Mr Tam QC to support the proposition that in considering whether a system is a fair system, one must look at the full run of cases that go through the system. In Director of Legal Aid Casework & Anor v IS [2016] EWCA Civ 464, Laws LJ added the observation that “proof of a systematic failure is not to be equated with proof of a series of individual failures. There is an obvious but important difference between a scheme or system which is inherently bad and unlawful on that account, and one which is being badly operated.” The summary of legal principles by Hickinbottom LJ in R (Woolcock) v Secretary of State for Communities and Local Government and others [2018] EWHC 17 (Admin), [2018] 4 WLR 49, at [51]-[68] was also cited.
225. In R(BF (Eritrea) v Secretary of State for the Home Department [2019] EWCA Civ 872, [2020] 4 WLR Underhill LJ, in a case about policy and guidance, held that “[t]he issue is whether the terms of the policy themselves create a [real] risk [of a more than minimal number of unlawful decisions] which could be avoided if they were better formulated.”. In R(W) at [58] a test of this kind was described as “consistent with principle” in “the specific context of challenges to guidance”. See also R (MK and AH) v Secretary of State for the Home Department [2012] EWHC 1896 (Admin) at [152], citing the House of Lords in Munjaz v MerseyCare NHS Trust [2006] 2 AC 148.
226. Both Mr Goodman and Ms Leventhal drew attention to the very recent decision in R (Oleh Humnyntskyyi and Others) in which Johnson J considered the argument that it was necessary to consider the “full run” of cases where the test was: does the Secretary of

State's policy create a real risk of unfairness in a significant number (that is in more than a minimal number) of cases. He said at [275]:

“... I agree that it may not be sufficient to consider decision making in isolated cases, without reference to the policy. Errors in such decision making might be “aberrant”. I also agree that a finding of systemic unfairness should not be made unless there is a sufficient evidential basis for concluding that the unfairness is inherent in the system ... I do not, however, agree that it is necessary to consider the application of the policy against every possible factual permutation. Once it is demonstrated that there are legally significant categories of case where there is (as a result of the terms of the policy) a real risk of a more than minimal number of procedurally unfair decisions, the policy will be shown to be systemically unfair. In some cases it may be possible to demonstrate that the test is met by reference to the wording of the policy: for example, whether the written policy patently creates an unfair process and it is accepted that the written policy is applied in practice. The cases show that systemic illegality can sometimes be demonstrated without reference to the facts of a large number of cases – see [R(Razai) v Secretary of State for the Home Department] [2010] EWHC (Admin) (Nichol J) and [R(Q) v Secretary of State for the Home Department] [2003] EWCA Civ 364; [2004] QB 36] and [R (Help Refugees) v Secretary of State for the Home Department] [2018] EWCA Civ 2098; [2018] 4 WLR 168.]”

227. On the other hand, in R (MK) v Secretary of State for the Home Department [2019] EWHC 3593 (Admin), [2020] 4 WLR 37, Saini J addressed an allegation that the scale and extent of the delays in determining asylum applications by unaccompanied children was such that the court could conclude that the system itself was unlawful. After analysing the evidence, Saini J concluded at paragraph [121] and [125] that:

“I find that the evidence before me as to the serious delays in the making of asylum decisions in UASC cases does not enable me to infer that the system is unlawful. The evidence base relied upon by the claimant does not identify any safe average for the processing of such cases, and they are in themselves cases which may be more complex than adult cases. Indeed, the best interests of children in fact mandate the need for more complex procedures. [...].”

“... what the courts cannot do is embark upon a macro-economic and social policy designing exercise. At its core that is the real basis of the claimant's systemic attack, albeit finely and persuasively dressed in the clothes of a public law challenge.”

228. The present case, urged Mr Tam QC, concerned the discharge of Government functions and where there are overall established mechanisms for examining systemic issues. Parliament was very closely connected with issues of resources and the Courts are not. Parliament also worked through committees, inquiries, statutory investigations and reports from inspectors, with real change coming from these lines of work. The Courts could only work on what he termed a binary basis of what was lawful and what was not.
229. I fully understand these points, and the debate is valuable. In my judgment, in the present case the Court can appropriately confine its work. The Court is well equipped

to deal with the question of the legal requirements on the Secretary of State by reason of her duty, the meaning of “reasonable time” in context, the legal significance of monitoring, and the Equality Act issues. However, I also agree with Mr Goodman that the Courts may need to adapt, albeit carefully, so that they are able to address complex systems if that is what is required.

230. Ultimately, where the Secretary of State’s systems work in a way that cause her to be in breach of her legal duty it is proper for the Court to say that, because the law is not being complied with. The Court need not in the present case involve itself in an area that was of particular concern to Mr Tam QC, namely the choice of the Secretary of State to enter into contracts with private contractors, and the particular features of those contracts. The question for the Court is whether the Secretary of State is complying with her duty, not whether the contractors are complying with their contractual duties to her. Of course, this does not mean that the Court should not say if the reason why the Secretary of State is not meeting her duty is because of something that private contractors are doing that prevents or may be preventing her from meeting her duty.
231. What of Mr Tam QC’s point that it is enough that at each point a claimant is entitled to come to the Court and say that one of the steps had gone wrong, with the Court deciding the matter by order if the matter was not resolved? Obviously, this is what happens regularly, but the Court should be vigilant to identify where case by case decisions are necessary not because of a case specific dispute but because the system is operating unlawfully. If the system is operating unlawfully and the Court does not address that then its case-by-case involvement simply becomes part of the system. A system that reaches the point of depending on applications for judicial review to make it work may require particular scrutiny.
232. As some of the authorities cited show, the Court may be surer in examining a contention of systemic unlawfulness where what is involved is guidance or a policy, rather than the operation of a whole system. To take a recent example, in R (W) the “no recourse to public funds” regime under consideration by the Divisional Court was one that gave rise to a real risk of unlawful decisions in a significant number of cases, but this was because the regime “comprising [a rule and an instruction] read together was “apt to mislead caseworkers in [a] critical respect” (see in particular [14]-[27] and [[73]).
233. The challenges in the present proceedings admittedly concern the operation of a whole system, and specifically a system to implement decisions made. The individual cases of the claimants in these proceedings reveal a good deal, and it can be debated whether that is enough to show a systemic issue. However, the system-wide figures provided by the Secretary of State through her officials indicate the position across the system, and that the Secretary of State did not know the true position across the system; she believed the position to be one thing when in fact it was another. This is evidence from the full run of cases.
234. It is also true that while the process is as it is there is a risk to decision making. This is because where section 4(2) accommodation is not being provided within a reasonable time after a section 4(2) decision that there is a duty to provide it, and caseworkers are making the section 4(2) decision on an assumption that the section 4(2) accommodation will be provided within a reasonable time, the effect is that consideration is not being given “adequately [to] recognise, reflect or give effect to the Secretary of State’s

obligation not to impose, or to lift, the condition of “no recourse to public funds”” (see R (W) at [73]).

235. Where the Secretary of State’s systems work in a way that cause her to be in breach of her legal duty it is proper for the Court to say that, because the law is not being complied with. Where there is an aspect of the process that will necessarily cause or contribute to the real risk, both of unlawful decisions and of breach of duty, the Court should be prepared to declare it.

Failing properly to monitor

236. The relevant aspect of the process in the present case is the failure to capture data properly and, using that data, to monitor properly, so that the Secretary of State can know whether she is acting lawfully and in accordance with her duty, and can act immediately if there is a sign that either is not the case.
237. For all the performance management, provider monitoring and “hourly checks” described at paragraphs [121] to [138] above the Secretary of State through her officials was not aware that in the Midland and East of England, accommodation was not being provided within timescales she had set in 36% of all cases where a section 4(2) decision had been made on her behalf. The claimants’ cases provide examples, and, as best they can, they offer other examples in the evidence provided on their behalf. The degree of excess time across the 36% of cases is not known, and nor are the consequences for the individuals involved, and that reinforces the point.
238. Without proper monitoring the system is without a key means by which to identify and correct failure and to inform change to enable it to meet its purpose, to be found in section 4(2). It is a systemic issue that puts all those entitled to the “safety net” of section 4(2) accommodation at unnecessary risk. In the present case there is evidence of a real risk of a breach of the Secretary of State’s statutory duty in a significant number of cases.
239. In identifying this aspect of the process, I am not to be taken as saying that there are no other failings in the system, which if not corrected will place the Secretary of State in breach of her duties. It is simply that this is the aspect that will need to change, whatever other choices the Secretary of State will make in correcting the system so that she is not placed in breach of her duties. It is the foundation of ensuring that her duty is met. Given the context of (present or imminent) inhuman or degrading treatment, and the real risks involved (of unlawful breach of duty), there is no lawful system that does not capture data properly and, using that data, monitor properly.
240. A point to emphasise is that the monitoring negotiated for a contract will not necessarily be the same as the monitoring required to enable a Minister to perform his or her duty, assisted by officials. These proceedings illustrate this point well, and, with respect, when I stand back from the detail of this case, I have every sense that this point was being overlooked at the time, although in these proceedings it is now emphasised on behalf of the Secretary of State (see paragraph [208] above).

241. The AASC contracts with providers are set in a commercial context where the parties choose what obligations to take on. Regardless of the contract, the Secretary of State has her legal duty; the providers do not. The contracts have their incentive structures for the provider, but incentive has no place for the Secretary of State who has a legal duty. The contracts negotiated have chosen to fix the providers' performance times when the Secretary of State's duty is not similarly fixed. The contracts negotiated tolerate a degree of underperformance on the part of the provider by using KPIs; no like tolerance is available to the Secretary of State under the law. The contracts at times deal in averages, numbers and categories whilst the Secretary of State must deal with all relevant features of individual cases. The contracts envisage financial correction by the provider, and after the event, whereas the first concern of the Secretary of State is securing the provision of accommodation at the time and in the individual case because a breach of Article 3 is imminent.
242. Seen in its proper context, at least where a system is involved, monitoring is an essential element of a Minister's strategy to deliver as Parliament intended by its legislation; to deliver as the law requires.
243. What is monitoring "properly"? It is not of course for the Court to provide a design, but it is appropriate for the Court to say what it means. In the present case, it is not for the Court to provide a complete list or regime, but I am prepared to say that monitoring properly in relation to section 4(2) includes these features, to which no doubt others can valuably be added:
1. it has regard to the context, which is the performance by a Secretary of State of her accepted legal duty to claimants who are destitute, who face an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life, and who are "highly vulnerable";
 2. it identifies the characteristics of the individuals involved;
 3. it follows the progress of each case;
 4. it alerts cases that are at risk of exceeding a reasonable time in sufficient time for this to be addressed;
 5. it includes a regular review of where and why cases were at a risk of exceeding a reasonable time and what were the characteristics of the individuals placed at this risk;
 6. it records when a reasonable time was exceeded, and informs a case study of where and why that occurred, how long provision eventually took and what the consequences were for the individual involved;
 7. it identifies where and why and with what outcome an individual applied to the Court for an order;
 8. it allows trends to be identified and addressed, including by reference to the characteristics of the individuals involved;

9. it follows the circumstances of alleged “failures to travel”, including notification given of travel arrangement, reason given for not travelling, response to reason given, action taken, and the situation of the individual as a result;
 10. it reports on action of changes made to the system in light of the above and the effectiveness of those changes.
244. It will be clear that monitoring (like the data that is needed to enable it) is not just about numbers. And of course, the monitoring must be accompanied by arrangements to secure action by reference to the information it provides. The important thing is that the action will be informed.
245. It is worth reflecting, as Mr Goodman did in his argument, that even the period of 14 days in the contracts with providers or the period of 9 days within the Guidance may be too long if the Secretary of State is not to be in breach of her duty. I see this more as a point that illustrates how monitoring can help the Secretary of State know what contract terms she wishes to set if she wishes the contract to help her as far as it can towards meeting her duty. It is not at all clear how those periods were chosen in the contracts or the Guidance. The point is that the Secretary of State will not know if they are too long for her purposes if her officials do not monitor. At present they do not: in a letter dated 15 June 2020 the Government Legal Department wrote to the claimants’ solicitors in these terms:

“There is no data readily available as to the number of times that accommodation was requested in less than 14 days”.

Disability and equality

Grounds advanced

246. Ground 1 of AA’s challenges and Ground 4 of EN’s challenges allege discrimination under the Equality Act 2010 (“the Equality Act”).
247. The contention for AA and ELN is that the way in which section 4(2) of the 1999 Act has been and is being operated in the case of those who are severely disabled (including themselves) is discriminatory. It is also contended that there is a breach of obligations to make reasonable adjustments for disability, and of the public sector equality duty.

Legislation

248. Section 6 of the Equality Act defines disability for the purposes of the Act:

“(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

....”

249. Section 15 of the Equality Act addresses discrimination arising from disability:

“(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

250. Indirect discrimination is addressed by section 19 of the Equality Act in these terms:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

...

disability;

...”

251. Section 20 of the Equality Act addresses the duty to make reasonable adjustments:

“(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

...

(8) A reference in section 21 ... to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section ... to avoiding a substantial disadvantage includes a reference to—

- (a) removing the physical feature in question,
- (b) altering it, or
- (c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 ... to a physical feature is a reference to—

- (a) a feature arising from the design or construction of a building,
- (b) a feature of an approach to, exit from or access to a building,
- (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
- (d) any other physical element or quality.

(11) A reference in this section, section 21 ... to an auxiliary aid includes a reference to an auxiliary service.

...”

252. By section 21 of the Equality Act:

“(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

...”.

253. Section 29(7) of the Equality Act is in these terms:

“(7)A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.”

254. Section 149 of the Equality Act provides for a public sector equality duty. The section provides in part as follows:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

...

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

...

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

...

disability;

...

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

...”.

Disability

255. It is not in issue that AA has a disability for the purposes of the Equality Act.
256. Whilst ELN has a “mental impairment” (section 6(1)(a)), as described earlier, there is in my judgment insufficient detailed evidence to conclude that this had “a substantial and long-term adverse effect on [her] ability to carry out normal day-to-day activities” (section 6(1)(b)).
257. Thus, although ELN’s position sits alongside that of DMA, AHK and BK considered above, it is in respect of AA and not ELN that the equality and disability issues are engaged.

Needs

258. AA’s accommodation needs have been described earlier. They extend to mobility and medical dietary needs and access to a clinic providing kidney dialysis. On behalf of the Secretary of State it is denied that these needs are “things arising” from his disability, within section 15(1)(a) of the Equality Act. The point is not developed. I am satisfied that each is something arising in consequence of AA’s disability.

Unfavourable treatment

259. On behalf of the Secretary of State it is denied that there has been any “unfavourable treatment” within section 15(1)(a) of the Equality Act.
260. Looking at the facts of AA’s case, the Secretary of State realistically acknowledges that “there were issues in identifying suitable accommodation”. In argument on her behalf, it was sought to mitigate these issues.

261. The point was made that an initial application for AA sought a room on the first floor rather than the ground floor. However, this was no longer the case from 20 March 2019 following an assessment by a Dr Keen. The Secretary of State referred to advice of her Independent Medical Examiner in early 2019 on location, but this went only whether the location had to be in London.
262. It was argued for the Secretary of State that “on 8 April 2019 [AA] left his accommodation in Harrow and went to live with a friend”. This does not give the full and accurate picture. The Secretary of State by her officials had decided matters had reached the point at which the section 4(2) duty applied. As I find above, whilst that duty was still not being performed, for two months (from on or around 26 March 2019 until 28 May 2019), AA stayed on friends’ sofas or floors and was also street homeless, sleeping on streets near the clinic.
263. It was argued for the Secretary of State that efforts were made to address things. This argument referred to the making of requests by the Secretary of State by her officials to a contracted accommodation provider, to the use of priority levels, and to efforts by an accommodation provider to acquire property outside its portfolio.
264. This argument ignores the reality of the huge delay in AA’s case. AA’s case demonstrates the ineffectiveness of simply making requests of an accommodation provider. As to priority level, it is urged this was raised, to “level B” on 5 June 2019 although then reduced to “level C” before being put back to “level B” on 31 October 2019. But the problem is that this had no effect.
265. The accommodation provider said of its efforts “17 properties were identified, however 12 were deemed unsuitable due to layout or location and we were unable to reach an agreement with the Landlord/Agent in respect of a further 5”. However, no details are given of what the provider was prepared to pay for accommodation in these efforts. The argument does not deal with the evidence of Ms McLean, from the accommodation provider, that she could find “no reference of this booking being chased” from July to early November 2019.
266. The written argument for the Secretary of State refers to AA at one stage requesting accommodation that would allow AA to reach the clinic by public transport with a journey time of up to one hour, and to the subsequent arrangements made for transporting by vehicle to the dialysis centre. But without diminishing them, these are, ultimately, selective points when seen against the course of the 9 months as a whole as described above. There was a period when AA was transported by vehicle, but the dietary requirements of his disability were not met. The Court had to become involved twice over transport.
267. I cannot accept the argument of the Secretary of State that there has not been “unfavourable treatment” within section 15(1)(a) of the Equality Act.

The system

268. Addressing Mr Tam QC’s overarching submission on behalf of the Secretary of State about constitutional roles, Ms Leventhal’s contention for AA was that the Equality Act is properly an area for the Court, and I agree.
269. Mr Tam QC urged for the Secretary of State that the debate had now passed beyond what the Courts can deal with, and if the Court intervened it would be venturing into “areas of supervision” of the system. In my judgment it is for the Court to say if what is happening is lawful or unlawful; if that is an “area of supervision” so be it, but to perform that function is not to enter into “areas of supervision” generally.
270. To take the example in the case of AA, the Secretary of State accepts that there is no monitoring within the system of the numbers of disabled persons. The Secretary of State does not accept that there needs to be as a matter of law. The Court cannot simply leave things there. This is a matter to which I return separately below.
271. Beatson LJ in VC v Secretary of State for the Home Department (Equality and Human Rights Commission Intervening) [2018] EWCA Civ 57; [2018] 1 WLR 4781 at [144] put things in this way (with Arden and Lewison LJJ agreeing):

“On behalf of the Secretary of State, Ms Anderson submitted that the court should dismiss the claimant's appeal on the Equality Act ground because this is a “dynamic area in which many public bodies and NGOs are involved so it is inapt to seek to draw the court into an impossible general evaluation of all matters relevant to the equality position in the absence of the principal responsible bodies”. I reject this argument. As the body exercising the public function of detention it is for the Secretary of State to ensure compliance with the Equality Act in the exercise of that function. If the Secretary of State has breached that duty she cannot expect the court to decline to declare a breach because the context is complex or dynamic. Such an approach would risk exempting a significant proportion of government activity from the requirements of the Equality Act.”

272. Ms Leventhal argued that there is a “provision, criterion or practice” within the system which puts AA at a substantial disadvantage. In her contention, the delays and failings in the case of AA “are indicative of wider systemic failures” for severely disabled people. She accepted the constraints that followed where the Court did not have the ‘full run of cases’ before it and tailored her oral argument on systemic unlawfulness accordingly.
273. Ms Leventhal recognised in her argument that in the Policy (and also in the Secretary of State’s published guidance “Healthcare needs and Pregnancy Dispersal Guidance”) those acting for the Secretary of State are permitted to consider providing accommodation in a particular location or of a particular type where medical or healthcare needs are identified and to prioritise those needs. Ms Leventhal made clear that the focus of her challenge is on the practice of the Secretary of State rather than the policy; on “the [Secretary of State’s] practice in operating this policy, i.e. the focus being on the systems, methods and resources in place”.
274. I return later to the absence of monitoring of disabled people in the system. At this stage it is convenient to focus on evidence, tendered on behalf of the Secretary of State, from

Ms McLean, the Contract Compliance Manager at one of the accommodation providers.
Ms McLean acknowledges:

“For cases with specific needs or specific locations, it is unlikely that any [appropriate property] will be found within 14 days.”

275. Not every disabled person will have what Ms McLean terms “specific needs” (including for location). But the fact is that under the system disabled persons are unlikely to be provided with accommodation within the periods set out in the Guidance; in this respect the Guidance does not in practice apply to them. Of course, there is also evidence in these proceedings that the treatment of non-disabled people falls short of the claims made for the system on behalf of the Secretary of State. But the position is still relative.
276. It is argued for the Secretary of State that the system did not place AA (or like severely disabled people) at a particular disadvantage when compared to other groups offered for comparison. The first comparison offered was with “non-disabled asylum seekers (particularly those who are street homeless or imminently street homeless)”. The relevant comparison is however with non-disabled individuals entitled to section 4(2) accommodation. That comparison is adverse to the Secretary of State.
277. The second comparison offered was with “non-disabled failed asylum seekers [who have] special requirements as to their living arrangements and in particular whether their accommodation is accessible, e.g. non-disabled asylum seekers who are pregnant or have small children”. This is simply to identify another group that the system may place at a particular disadvantage; it does not avoid the relevant comparison.
278. The third comparison offered was with “disabled recipients of income support but who may also have to make long journeys several times a week to receive treatment”. This third comparison is again simply to identify another group (this time outside the area asylum and immigration) that may be at a particular disadvantage. For present purposes however it is sufficient to say that the comparison does not appear to keep in mind that an individual entitled to section 4(2) accommodation faces “an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life” and is prevented from addressing these needs in any other way including by recourse to public funds such as income support. This is the context in which the Secretary of State owes her section 4(2) duty.
279. In my judgment there is no question that the practice of the Secretary of State in operating a system that for cases with specific needs is unlikely to provide appropriate property within the period set by the Guidance places severely disabled people at an unfair disadvantage. Ms Leventhal is correct in her contention that the delays and failings in the case of AA “are indicative of wider systemic failures” for severely disabled people.

Limited resources

280. It is contended on behalf of the Secretary of State that the position is justified because of:

“... (i) the limited resources available to [the Secretary of State] and her accommodation providers in respect of accommodation in London;”

281. AA’s case allows the contention to be tested. AA required single room accommodation, at ground floor or with lift access, with washing and toilet facilities at the same level, and allowing self-catering so as to meet medical dietary needs, and in a location allowing for suitable travel access and arrangements to Tottenham for dialysis.
282. It is, with respect, impossible to accept that such accommodation is not available in London. It may attract a cost, but here it is important to note that the Secretary of State maintains, through her officials, that cost is not an issue (see paragraphs [113]-[114] above).

Immigration control

283. On behalf of the Secretary of State reference is also made to “the interests of immigration control ...”. It is argued on her behalf that the section 4 system that is in operation is a “proportionate means of achieving a legitimate aim” within the meaning of s19(2)(d) of the Equality Act.” She argued for a “wide margin of appreciation”.
284. This point is concisely, and in my judgment correctly, answered by Ms Leventhal. First, there is no rational connection between the interest of immigration control and unfavourable treatment of disabled people. Second, it is disproportionate to treat disabled people unfavourably in the interests of immigration control.

Supply and competition

285. Mr Tam QC suggested in the course of oral argument that the results for those with disabilities were simply facets of supply and of competition in supply. He gave the topical example of procuring surgical masks in the course of the Covid-19 pandemic.
286. Of course, this cannot sensibly explain the huge delays in AA’s case, but Mr Tam QC accepted that the point did not necessarily mean that AA would have failed in his claim. Mr Tam QC’s aim was instead to show that there were underlying reasons amounting to justification for the effects that the system produced.
287. The difficulty for Mr Tam QC’s argument is that the Secretary of State does not show that the time taken to provide accommodation is indeed because of supply and competition in supply. Indeed, the Secretary is unable to show that. There is no monitoring in this area, so she has no data. Nor, without proper monitoring, could the Secretary of State show, or know, that the results cannot be suitably addressed.

Reasonable adjustments

288. The reasonable adjustments for which Ms Leventhal contended match the failings that she said are in the system.

289. Appropriately, VC at [157] in the Court of Appeal was cited:

“It is well established that the duty to make reasonable adjustments includes the duty to make anticipatory adjustments for a class of people, as well as a continuing duty to make adjustments in individual cases: see for example Lord Dyson MR in Finnigan v Chief Constable of Northumbria Police [2014] 1 WLR 445, para 32. The Equality Act’s Statutory Code of Practice states (at para 7.20) that: “the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service ...”. At para 7.21 it states that: “Service providers should therefore not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them.”

290. On behalf of AA Ms Leventhal centred her argument on three aspects, distilled from five. First, a lack of any monitoring of disabled people within the system operated by the Secretary of State by her officials. Second, a lack of sufficient suitable accommodation for disabled people: she emphasises that here she addresses the means of supply of basic, not complex, facilities such as accessibility. Third, a lack of an effective system for prioritising claims.
291. I take these in turn in the sections of this judgment that follow but state now the conclusion that in failing to take the first and third step the Secretary of State acting by her officials did not take the steps it was reasonable to take to avoid the disadvantage to disabled individuals, including AA.
292. Mr Tam QC understandably highlighted that different claimants with a disability will have different needs by reason of their disability. He argued that what the system does is to make sure accommodation is found that is suitable for the specific individual and his or her needs, including as to location.
293. That argument may be debatable in individual cases. But it does not meet the issue under consideration in these proceedings which is the systemic issue of timing of provision.

Failing to monitor

294. As noted above, the Secretary of State accepts that there is no monitoring of the numbers of disabled applicants.
295. There is elaboration in a letter dated 15 July 2020 from the Government Legal Department to AA’s solicitors in which the following responses are given to a Part 18 Request dated 9 June 2020:

“i) whether a person in receipt of s.4 support is recorded as being disabled, and how or when this information is monitored (questions 1 and 2);

This information (whether a s.4 recipient is disabled) is not routinely recorded and when recorded is not done so as an easily extractable piece of data in a single location and it is not monitored. This is because references to an individual's disability are case specific and are related to their accommodation needs. Separate statistics on the number of disabled s.4 recipients are not held.

ii) whether the Home Office Performance Reporting and Analysis Unit records, documents or monitors whether recipients of s.4 support are disabled (question 3);

The HO Performance Reporting and Analysis Unit does not document or monitor whether s.4 recipients are disabled.

iii) the number of disabled and non-disabled people in receipt of s.4 support (question 4);

...

The number of disabled recipients is not specifically recorded and could only be collated by manually reading case records, which would be disproportionately time consuming and expensive.

iv) how both the Home Office and [the contracted accommodation provider], separately, record that a person is disabled when this information comes to light outside of the initial application for support, including copies of internal guidance, policies or practice (question 5);

See above answers

...

As explained above, statistics are not kept by reference to disability

..."

296. I have addressed earlier the Secretary of State's position that there are a number of ways in which, acting by her officials, she monitors contract compliance by the accommodation providers with whom she has contracted, including the position with KPIs and the service credit regime. The contract regime also provides for a complaints system for users.

297. On the particular point of the absence of monitoring of the numbers of disabled applicants, the argument on behalf of the Secretary of State continued:

"... that data would not necessarily be helpful to [AA] or to [the Secretary of State's accommodation provider] in ensuring that the individual and varying needs of s.4 applicants with disabilities are met. In addition, some s.4 applicants with disabilities may ultimately be accommodated by local authorities."

298. For AA, Ms Leventhal placed monitoring at the heart of what she said argued were the failings in the scheme operated. As she put it, if you do not monitor disability and the needs of those with a disability then you will not know the needs and the problems (and, I would add, the solutions).
299. Even at the basic level of numbers, an understanding of how many disabled people are entitled to section 4(2) accommodation, how many are not being accommodated within a reasonable period of time (and within what time), how many are being prioritised, how many are not being accommodated with the priority set, how many are having to make applications to court to compel performance of the section 4(2) duty, would be among obvious and essential requirements in any section 4(2) system. They would provide a start to making the system work for disabled individuals.
300. The reference in the argument on behalf of the Secretary of State to “some” “may ultimately be” accommodated by local authorities is of note. It should immediately prompt a concern to know how many and when. Without that it is not possible to see whether the reference is to a feature that is satisfactory or unsatisfactory.
301. The use of contractual KPIs and a service credit regime may have its part to play, although the evidence in these proceedings suggests that even these arrangements are not actively and successfully working. Even if they were working, they would not in themselves meet the requirements to monitor. They are well after the event and they are focused on the contractual position between the Secretary of State and the accommodation provider rather than on the legal obligations of the Secretary of State to those to whom she owes a duty under section 4(2) and to those who are disabled.
302. The risks in the light of the contract model chosen are not difficult to see, and underline again the imperative of monitoring. Accommodation for individuals with a disability may require adaptation of accommodation, ground floor accommodation or accommodation with lifted access, sole rather than shared accommodation, accommodation in a particular location or accommodation with particular facilities. The provider is paid a fixed rate for accommodation and KPI 2 allows performance at less than 100% measured across all provision. The economic incentives are such that the provision of accommodation for individuals with a disability will be less profitable for the provider (and even unprofitable), perhaps especially if the accommodation must be provided quickly. Yet there is no monitoring to see whether these incentives are having a negative impact and to allow that to be addressed.

A reserve stock of accommodation

303. As noted earlier, it may (or may not) be unrealistic, inefficient and ineffective for the Secretary of State to require providers to maintain a stock of suitable accommodation, when the locations and adaptations required cannot be predicted in advance.
304. Mr Mill’s evidence addressed this in the present context:

“The contract specified that in relation to initial accommodation, the provider must ensure that as a minimum, 5% of bedrooms within initial accommodation should be appropriately adapted to meet the needs of disabled individuals,

including step-free access for wheelchair users or individuals with conditions which limit their mobility. There is no corresponding requirement in relation to dispersal accommodation.

The reason for this is that initial accommodation is typically allocated at short notice to individuals who have recently come to notice or who have only recently begun to require accommodation under Home Office powers. Initial accommodation is therefore typically used for immediate housing, in contrast to dispersal accommodation, which is searched for after the individual's immediate housing need has been satisfied.

... On the longer-term basis on which disabled individuals are housed in dispersal accommodation, it is less likely to be fruitful for the provider to keep in hand a generic stock of "homes for the disabled" because of their differing needs. ...".

305. These are judgments for the Secretary of State to make with the assistance of her officials, although they are judgments that cannot reliably be made without monitoring. To take a simple example, where initial accommodation is to be used for a disabled individual who is entitled to section 4(2) accommodation, then to understand whether the 5% figure referred to by Mr Mill was suitable or unsuitable would require monitoring of the number (and needs) of disabled individuals.

Prioritisation

306. On behalf of the Secretary of State it is said that requests by her officials to accommodation providers are accorded different levels of priority.
307. However, this does not hit the true mark. The evidence in these proceedings contained examples of prioritisation, if used, not working. The figures provided to the Court on behalf of the Secretary of State showed that the Secretary of State acting by her officials understood that the system, including its use of priorities, was largely working overall, but it is now clear that understanding was wrong. In the case of disabled individuals, the absence of monitoring means that it cannot be fully understood why the use of priorities is not working and where, and what must be done about it.
308. The argument on behalf of the Secretary of State discussed the impracticability of a waiting list or of putting one request (say for an accessible room within a mile of London E8) either 'ahead' or 'behind' another request (say for an accessible room within a mile of London W12). This example, with respect, does not begin to appreciate the scale of the issue and the work needed.

Public sector equality duty

309. Section 149 of the Equality Act is set out above, so far as material. Thus, the law requires the Secretary of State, in the exercise of her functions, to have due regard to the need to eliminate discrimination. It also requires that, in the exercise of her functions, she have due regard to the need to advance equality of opportunity between

persons who share a relevant protected characteristic (such as disability) and persons who do not share it.

310. The latter involves having due regard, in particular, to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic, and to take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it.
311. Ms Leventhal contended the present case reveals a clear breach of the public sector equality duty that is provided by section 149. She again centred this contention on monitoring:

“... [T]here is a fundamental obstacle preventing [the Secretary of State] being able to have “due regard” to the need to eliminate discrimination, advance equality of opportunity and foster good relations in respect of disabled people within the s.4 scheme as required by s.149(1)(a), (b) and/or (c) and s. 149(4). That follows from the simple failure to undertake any form of monitoring of disabled [individuals] accessing the system.”

312. In my judgment, this goes to the heart of things.

313. In R (Brown) v Secretary of State of Work and Pensions [2008] EWHC 3158 (Admin) at [85], Aikens and Scott Baker LJ in a judgment to the Divisional Court to which both had contributed, held:

“... the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.” [original emphasis]

The passage addressed the Disability Discrimination Act 1995 as amended in 2005. It was cited with approval by the Divisional Court in R (Hurley & Moore) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin) at [89]-[90] Elias LJ and in turn by the Court of Appeal in Stuart Bracking and Others v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 at [26(8)], a decision on the Equality Act of 2010. The Equality and Human Rights Commission publishes valuable guidance on the public sector equality duty and the importance of information.

314. AA served evidence from individuals with experience and expertise at the Refugee Council (Ms Kama Petruczenko), Freedom from Torture (Ms Salma Iqbal), the Helen Bamber Foundation (Ms Zoe Dexter) and Bristol Refugee Rights (Ms Deborah Gubbay). This evidence was not answered on behalf of the Secretary of State. It shows that the needs of disabled persons are insufficiently identified, information about those needs is insufficiently shared, and those needs are insufficiently addressed within the system that is being used. There was further valuable evidence from Ms Sasha Rozansky of AA's solicitors.
315. Ms Petruczenko said this of assisting clients with “complex physical and mental health problems, and often a combination of both”:

“... delays in getting asylum support ha[ve] serious consequences. We see people disengaging with services, being forced to live in precarious conditions, and their physical and mental health deteriorating. Our psychotherapists report back that unless a client’s asylum support situation is resolved and they are properly supported, they cannot provide them with the necessary help to stabilise and overcome trauma. To the contrary, instability caused by asylum support delays is identified as a contributing factor, leading to poorer health outcomes ...”

316. Breach of the public sector equality duty was denied on behalf of the Secretary of State, for several reasons.
317. It was first argued that AA points to no evidence of any kind concerning the position of disabled recipients of section 4 support more generally. This is not correct, as will be apparent from the above.
318. It was said on behalf of the Secretary of State that the evidence base relied upon by AA does not identify “any safe or realistic average time” for accommodating individuals with disabilities in section 4(2) accommodation, where their accommodation needs may often be more complex than those without disabilities and meeting their accommodation needs may require the receipt and consideration by the Secretary of State of medical evidence, and the provider procuring accommodation outside their general portfolios and adapting it.
319. This is not about averages. It is about a duty to provide accommodation to an individual within a reasonable period of time, having regard to the fact that the individual faces “an imminent prospect of serious suffering” and is prohibited from addressing this by earning or by recourse to public funds.
320. It is also about monitoring for two purposes. First, to identify and resolve the problem where accommodation, that the Secretary of State has accepted through her officials there is a duty to provide to an individual, is not being provided. Second, to see whether the system is working and where it is not, to help in the identification of solutions. Where a system for section 4(2) accommodation will take longer for a person with a disability than a person without, the system requires examination to understand why and, where appropriate, to address the position.
321. It will be appreciated that the policy choices not to allow recourse to public funds (or earning) and only to engage the section 4(2) duty at the point where a disabled individual faces “an imminent prospect of serious suffering” are policy choices that contribute to the pressure of time if the Secretary of State is not to breach her Article 3, common law and Equality Act duties.
322. On behalf of the Secretary of State it was argued that AA’s challenge does not take into account the contractual provisions which require the accommodation provider to address the needs of service users, or the Healthcare Needs and Pregnancy Dispersal Policy which provides that “If an applicant’s healthcare need requires the urgent provision of dispersal accommodation, the application for support should be prioritised wherever possible”. However, these provisions do not appear to be working generally..

The Secretary of State through her officials does not show the working of the provisions in the case of AA, and on the figures put to the Court on her behalf the Secretary of State acting by her officials did not know the provisions were not working.

323. In oral argument, Mr Tam QC said that if one looked at all the evidence, here including the wealth of Parliamentary documentation (cf. paragraph [32]-[33] above), it is clear that proper regard has been had to the need to eliminate discrimination and to the need to advance equality of opportunity between persons who share the protected characteristic of disability and persons who do not share it. The system was, he argued, capable of working properly and if there are problems they are practical ones arising for various reasons which have created bottlenecks. He argued these problems can be readily detected, even without a formal Equality Impact Assessment.
324. The difficulty with this argument is that the problems, and their impact on those with a disability, cannot in fact be readily detected because there is no monitoring (including collection of data and evaluation) that would enable that.
325. As things stand, I have no alternative but to find that the Secretary of State is in breach of the public sector equality duty in failing, once she has reached a decision that she has a duty to accommodate under section 4(2) of the 1999 Act, to monitor the provision of that section 4(2) accommodation to individuals who have a disability. In this respect the Secretary of State has not, in the exercise of her functions, had due regard to the need to eliminate discrimination and to the need to advance equality of opportunity between persons who share the protected characteristic of disability and persons who do not share it.

Academic claims?

326. For the Secretary of State Mr Tam QC argued that the claims were academic. He emphasised that the claimants now have suitable accommodation. AA does not claim damages, he pointed out. The questions whether the Secretary of State had previously acted unlawfully towards the claimants, or whether the section 4(2) system operated unlawfully more generally, were now hypothetical as far as the claimants are concerned, urged Mr Tam QC. It was not the function of the courts “to decide hypothetical questions which do not impact on the parties before them” (Lord Hutton in R (Rushbridger) v Attorney General [2004] 1 AC 357 at [35]).
327. Mr Tam QC referenced the language of Lord Slynn when referring to appeals in R v Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450 at 456, that appeals “which are academic between the parties should not be heard unless there is good reason in the public interest for doing so”. On the authorities, there should be “exceptional circumstances such as where two conditions are satisfied” (R (Zoolife International Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2007] EWHC 2995 (Admin), cited with approval in R (Heathrow Hub Ltd and Another) v Secretary of State for Transport [2020] EWCA Civ 213 at [209]), namely:

“The first condition is ... that “a large number of similar cases exist or are anticipated” or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive.”

328. Referencing the first condition Mr Tam QC said that at best the evidence “shows a snapshot of cases facing similar types of delays to the Claimants, rather than a comprehensive record of the total number of these types of cases”. As to the second condition, he said that the claims are “highly fact specific”. Even of the further examples provided by AA, Mr Tam QC said from the details provided, it is not clear that they involve the same issues raised by this case.
329. As will be apparent, in my judgment there is sufficient evidence to show the use of a system that (a) fails to meet the legal requirement of the duty, to provide accommodation within a reasonable time, measuring reasonable in the context of imminent breach of Article 3, which (b) apparently the Secretary of State and her officials did not know, and where (c) there is no proper monitoring.
330. In R (Razai) where cases illustrated “generic issues which, the Claimants say, demonstrate the unlawfulness” of a policy of the Secretary of State” Nichol J observed at [68]:

“If this occasion is not taken to consider them, there is a risk of further delay and potential injustice before another case can reach a final hearing.”

Similarly, Johnson J faced with evidence that the issues in a challenge to the lawfulness of policy were recurring, said in R (Oleh Humnyntskyi and Others) at [198]:

“If they are not addressed in this case it is likely that other similar claims will be brought ... and the issues would soon need to be addressed in another case.”

331. The present cases concern process rather than policy. However, I have no doubt that it would be wrong to decline to reach any conclusions where the material allows me to do so, as it does. Of course, in cases such as these where matters have moved on for the individual claimants it is important to proceed cautiously and to decide only what is appropriate and what is possible. But ultimately it has to be useful to all concerned, including to the Secretary of State and her officials, to know whether and where they are acting unlawfully. To take again the example in the case of AA, the Secretary of State accepts that there is no monitoring of the numbers of disabled applicants but does not accept that there needs to be. The Court cannot simply leave things there.
332. Mr Tam QC’s observation that the evidence from the claimants does not include “a comprehensive record of the total number of these types of cases” is unpersuasive. Even with the support of the experienced legal team they have and of the witnesses approached and research undertaken, they could not do this. But the Secretary of State could, or if she could not then one of the fundamental points - that of monitoring - finds additional support from that very fact.

Remedies

Declarations

333. Suitably worded declarations will be made to the effect that the Secretary of State:
- (1) was in breach of her duty under section 4(2) of the 1999 Act as regards the claimants, in failing to provide accommodation to the claimants within a reasonable period of time;
 - (2) was and is in breach of her duties under section 4(2) of the 1999 Act and section 6 of the 1998 Act, in failing properly to monitor the provision of accommodation under section 4(2) of the 1999 Act;
 - (3) was and is in breach of the public sector equality duty in failing, once she has reached a decision that she has a duty to accommodate under section 4(2) of the 1999 Act, to monitor the provision of that section 4(2) accommodation to individuals who have a disability.
334. Subject to any further argument, which I will hear when the parties have considered this judgment on a day to be arranged after it is handed down, it is unnecessary, in my view, to make other case specific declarations. The findings and conclusions expressed in this judgment will suffice.

Mandatory orders

335. Mandatory orders are no longer required.

Damages

336. Damages are not claimed by AA. Under section 8(1) of the 1998 Act the Court “may grant such relief or remedy or make such order within its powers as it considers just and appropriate.”
337. Section 8(3) goes on to provide that: “No award of damages is to be made unless, taking account of all the circumstances of the case ... the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.” In Greenfield v the Secretary of State for the Home Department [2005] UK HL 14, the House of Lords emphasised that a domestic court could not award damages under s.8 of the 1998 Act unless satisfied that it was “necessary” to do so.
338. In DSD v Commissioner of Police for the Metropolis [2015] 1 WLR 1833 the Court (Green J) said the starting point is to ask whether a non-financial remedy is sufficient ‘just satisfaction’. To determine this the Court will ask firstly, whether there is a causal link between the breach and the harm which should be appropriately reflected in an award of compensation in addition to other remedies; and secondly, whether the violation is of a type which should be reflected in a monetary award.
339. Green J identified the range of factors that the Court would need to consider:

“118... the nature of the harm suffered and treatment costs; the duration of the breach by the defendant; the nature of the failings and whether they were operational and/or systemic; the overall context to the violations; whether there was bad faith on the part of the defendant or whether there is any other reason why an enhanced award should be made; where the award sits on the range of awards made by Strasbourg and in similar domestic cases; other payments; totality and ‘modesty’.”

Green J also noted that damages are not likely to be substantial and will generally be modest. In Lee Hirons v Secretary of State for Justice [2016] UKSC 46, the Supreme Court held that the victim must establish that the effects of the breach were sufficiently grave to merit compensation.

340. It was argued on behalf of the Secretary of State that even taking each claimant’s individual circumstances at its absolute highest, when considered against the factors set out by Green J in DSD no award of damages is necessary to afford “just satisfaction”. It was argued that “the nature of the harm suffered by each Claimant was nominal at best, the duration of any delay was minimal, there was no bad faith, the delay was not deliberate and there was no lasting breach of consequence [and as] such, a declaration in each Claimant’s case is sufficient to afford ‘just satisfaction’”. Mr Tam QC urged in oral argument that the present cases were not equivalent to the State withdrawing support to someone who was suffering.
341. In my judgment harm was suffered by reason of delay, and to vulnerable people. The harm suffered was not nominal and the delay was far from minimal. I accept that there was no bad faith. The delay was not deliberate, but it persisted and there was a choice not to do more about it. An award of damages is necessary but taken with the declarations, a non-nominal award of £1,000 to each claimant who claims damages is sufficient for ‘just satisfaction’. The case is not about money. It is the declarations that matter.

Reflections

342. In the result, this litigation shows monitoring (here, of provision) that could not be readily accessed, and then where accessed was thought to show that things were working when they were not working. It also shows an absence of monitoring (here, of disability) with the result that things were not known at all. This all highlights the importance of taking monitoring (including collection and capture of data, and evaluation) very seriously and doing it well.
343. It will be clear, as noted and here as an intensely practical point, that the challenges facing the Secretary of State and her officials in providing section 4(2) accommodation are made more difficult where the system is designed to act only at the point where the circumstances have become critical; where a breach of Article 3 is imminent and an individual is not permitted to try to resolve things by earning (where possible) or by recourse to public funds.

344. The present cases did not involve the pandemic. The pandemic will obviously have added to the practical challenges facing the Secretary of State and her officials, and also (as Ms Glynn discussed in her second witness statement made on 6 May 2020) for those in need of section 4 accommodation. It highlights further still the importance of monitoring, and the necessary and positive contribution that monitoring can make.
345. Finally, I add that I have been struck by how confrontational these cases have been. I have seen the same when sitting in the Administrative Court in other cases about accommodation, often applications seeking urgent interim relief. I dwell briefly on this in the final paragraphs below.
346. The present litigation concerned the provision of accommodation that the Secretary of State through her officials had agreed she was under a duty to provide and that she has agreed in these proceedings she had to provide within a reasonable period of time. Claimants in these cases will be “highly vulnerable” as the Home Office’s own evidence puts it. AA was seriously unwell and disabled.
347. Yet the claimants in these cases found themselves left to resort to interim applications to Court for urgent mandatory relief where there was delay. There was an unsuitable readiness to assume the claimants were at fault, with the “failure to travel” allegations discussed above. More broadly, the argument on behalf of the Secretary of State in this litigation inclined to reject challenge far more often than to acknowledge failings. And of course, very high performance was still being claimed on behalf of the Secretary of State right up to the hearing in July, despite the cogent evidence from Ms Glynn and Ms Rozansky, and others, to the effect that this could not be right.
348. Mr Tam QC opened his oral submissions on constitutional roles by saying that whilst decisions were for Government, “everyone else stands round criticising”. I understand the point, but it is critical of criticism, whereas criticism can help towards better, and lawful, decisions, if it is constructively advanced and if it is constructively received.
349. There is every scope for this, and there is a common objective. Mr Mills’ recent witness statement of 10 December 2020 on behalf of the Secretary of State speaks powerfully of the commitment and effort to ensure that accommodation is provided, with officials working harder than ever on this over the pandemic. This may not always be appreciated by others. I respectfully urge that everything that has happened in the cases before this Court helps show that what is needed now, on all sides, is cooperative, constructive, collaborative engagement, including over data and monitoring, towards a system that wins confidence and respect.