Neutral Citation Number: [2023] EWHC 1551 (Admin)

Case No: CO/2493/2020

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

Birmingham Civil Justice Centre
33 Bull St, Birmingham, B4 6DS

Date: 23/06/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

THE KING on the application of PM	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Samantha Knights KC and Miranda Butler (instructed by **Bindmans LLP**) for the **Claimant**
Alan Payne KC and Colin Thomann (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 22 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

A. Introduction

1. The claimant is a victim of modern slavery. She is also an asylum seeker whose application for refugee status has yet to be determined. There are separate financial support regimes for victims or so-called 'potential' victims of modern slavery and for asylum seekers. This judgment concerns the financial support provided to the claimant in the period when it had been determined that there were reasonable grounds to believe that she was a victim of modern slavery (prior to the conclusive decision that she is a victim), and she had been assessed as eligible for support pursuant to s.98 of the Immigration and Asylum Act 1999 ('the IAA') (prior to the determination that she was eligible for support pursuant to s.95 of that Act).

2. By her claim, the claimant challenged the Secretary of State's cessation, on 6 July 2020, of support payments ('trafficking support') to victims or potential victims of modern slavery in 'initial' full-board asylum-seekers' accommodation ('the cessation decision'). By her amended claim, she also challenged the re-instatement of financial support on 28 August 2020 at a significantly lower level. As the parties have done, I shall refer to victims or potential victims of modern slavery, together, as 'victims' and to the financial support provided to them in that capacity as 'trafficking support', while recognising that modern slavery encompasses more than trafficking.

3. The three grounds of claim are:

   i) The Secretary of State unlawfully failed to pay financial support to the claimant, and those in a like situation, in accordance with §15.37 of the *Modern Slavery Act 2015 – Statutory Guidance for England and Wales* (version 1.01, published on 24 March 2020 and in force until 27 August 2020; 'the Guidance');

   ii) The Secretary of State unlawfully failed to consult and/or make appropriate inquiry when reinstating financial support at a significantly lower rate in an amended version of the Guidance which came into force on 28 August 2020 (version 1.02; 'the Amended Guidance'); and

   iii) The Secretary of State failed to provide adequate financial support to meet the *essential* living needs of victims in initial accommodation, including the claimant.

4. On 15 March 2021, Pepperall J granted permission on Grounds 2 and 3, but refused permission on Ground 1. On 5 November 2021, Fordham J stayed the claim pending the judgment of the High Court in *R (JB) v Secretary of State for the Home Department* [2021] EWHC 3417 ('*JB*'). On 11 March 2022, I stayed the claim pending the outcome of the appeal in *JB*. The Court of Appeal gave judgment on 25 October 2022: *JB (Ghana) v Secretary of State for the Home Department* [2022] EWCA Civ 1392 ('*JB (Ghana)*').

5. I granted permission in respect of Ground 1 at the outset of the hearing, the Secretary of State having conceded, in light of *JB (Ghana),* that permission should be granted to pursue that ground. With respect to Ground 1, the parties agree that *JB (Ghana)*, in

which the court held that the Secretary of State had unlawfully failed to make payments of £65 per week to those supported under s.95 of the IAA in initial accommodation, resolves the claimant's claim regarding the failure to make payments to her pursuant to that provision but they disagree as to her entitlement to support under s.98 of the IAA. Until a few days prior to the hearing, it was agreed that the claimant was supported under s.95 from 23 June 2020. However, in a statement dated 21 March 2023, Steve Smyth, Chief Caseworker in the Secretary of State's Asylum Financial Support team provided evidence that the claimant was only granted s.95 support on 1 December 2020. That is now common ground.

6. Neither the Guidance nor the Amended Guidance which is the subject of this claim remains in effect. On 1 March 2023, following the completion of a review, the Secretary of State issued a new version of the statutory guidance.

7. As the Modern Slavery Victim Care Contract 2020, issued by the Secretary of State, records in section 2.2 of schedule 2.21,

> "Modern slavery is a serious and brutal crime in which people are treated as commodities and exploited for criminal gain. … Modern slavery includes human trafficking, slavery, servitude and forced and compulsory labour. Exploitation takes a number of forms, including sexual exploitation … and victims come from all walks of life. … In few other crimes are human beings used as commodities over and over again, for the profit of others. Victims endure experiences that are horrifying in their inhumanity."

As a victim of modern slavery, the claimant is entitled to anonymity: ss.1 and 2(1)(db) of the Sexual Offences (Amendment) Act 1992.

B. Applications to admit late evidence and submissions

8. On the eve of the hearing the Secretary of State applied to adduce further evidence in the form of the statement of Mr Smyth to which I have referred and an accompanying exhibit. It is in the interests of justice to grant permission to rely on that late evidence, not least as it includes evidence provided pursuant to the Secretary of State's duty of candour, on which the claimant relies.

9. Following the hearing, the claimant filed an application on 4 May 2023 seeking permission to rely on an undated letter from Serco ('the Serco letter'), the fifth witness statement of the claimant dated 3 May 2023, and a further note from Counsel for the claimant dated 4 May 2023. In a written response, dated 12 May 2023, while criticising the claimant's failure to disclose the Serco letter earlier, in compliance with her duty of candour, the Secretary of State does not object to the claimant's application. In the circumstances explained in the letter from the claimant's solicitors, and having regard to the clear relevance of the Serco letter, it is appropriate to admit this late evidence, and the parties' submissions addressing it.

C. Factual and procedural background

10. The claimant is a Kenyan national. She was (on her case) subjected to female genital mutilation ('FGM') at about the age of 12; and came to the United Kingdom as an adult, on 20 April 2002, in circumstances where her uncles and elders from her family village were pressuring her to continue her mother's work performing FGM. She paid an agent to facilitate her journey to the UK. On arrival she was taken to a brothel where she was sexually exploited for a period of 10 months.

11. On escaping the brothel in February 2003, she was given a place to sleep by an African woman she met on the street and subsequently lived for a number of years in Leicester with a friend of that woman. In 2007, she began living with a man ('S') with whom she had started a relationship the year before. She made applications for leave to remain as the partner of a settled person in 2008 and 2014, both of which were refused.

12. In 2015, the claimant disclosed to her GP that she had been subjected to FGM in Kenya and forced sexual exploitation in the UK. She was diagnosed as suffering from post-traumatic stress disorder (PTSD).

13. On 29 May 2018, the claimant submitted an application for leave to remain on private and family life grounds, providing a detailed account of what she had been through. That application was rejected as she did not have a passport. However, in light of the disclosures made by the claimant in her statement, in early February 2019 the Home Office referred the claimant to the National Referral Mechanism ('NRM'), which is responsible for determining whether she is a victim of modern slavery, and treated her application for leave to remain as a claim for asylum.

14. On 8 February 2019, the Competent Authority within the Home Office determined that there are reasonable grounds to believe that the claimant is a victim of modern slavery ('the Reasonable Grounds decision'). As a result, the claimant became entitled to support and assistance as a potential victim.

15. The claimant was assigned an Outreach Support Worker employed by Ashiana, Sheffield, an organisation which has been sub-contracted by the Salvation Army to provide support and assistance to victims of modern slavery. The Salvation Army is the Prime Contractor funded by the Secretary of State pursuant to the Victim Care Contract ('VCC') (which was renewed and retitled the Modern Slavery Victim Care Contract ('MSVCC') in January 2021), by which means the Secretary of State seeks to discharge her duty to support victims. Ashiana is one of 12 subcontractors which provide support. The claimant first met her Support Worker on 20 February 2019.

16. From the end of February 2019, the claimant began receiving £35 per week as a potential victim of modern slavery. At that time, she was still living with S, and so she did not require accommodation. Her Support Worker also provided the claimant with emotional support and arranged counselling sessions for her.

17. The claimant had not previously disclosed her experiences of trafficking and sexual exploitation to her partner. When he read the statement she had provided to the Home Office in around May 2019, their relationship began to break down. About a year later, on 7 May 2020, the claimant was rendered homeless when S told her to leave his house for good. The claimant initially stayed with a friend. Her Support Worker,

whom she informed of her changed circumstances, made an application to the Home Office for the claimant to be provided with accommodation as an asylum seeker.

18. On 13 May 2020, the claimant was granted support under s.98 of the IAA. She moved into 'initial accommodation' at the Britannia Hotel in Nottingham ('the Hotel'). She lived in the Hotel for more than nine months, until 24 February 2021. I address the evidence as to the support and payments she received from the Hotel in the context of addressing the grounds below. Initially, following her move to the Hotel, the claimant continued to receive £35 per week trafficking support.

19. The timing of the claimant's move into the Hotel was in the early stages of the Covid-19 pandemic. "*Pre-pandemic, an individual could typically be expected to live in initial accommodation for only a short time*": *JB (Ghana)*, [31]. On 27 March 2020, in view of the pandemic, the Secretary of State suspended for a period of three months the requirement for those who were no longer entitled to asylum support to leave the accommodation provided pursuant to the IAA. As Bean LJ stated in *JB (Ghana)* at [33]:

> "In consequence, the Secretary of State was left to source additional accommodation for asylum seekers coming into the support system on an urgent and every-increasing basis. This was achieved, largely, by accommodating those entrants in hotels."

20. On 6 July 2020, the Secretary of State made the cessation decision by which she stopped all trafficking support payments to victims or potential victims of trafficking who were in initial accommodation, whether it was provided to them pursuant to s.95 or s.98 of the IAA . On 8 July 2020, the claimant was informed by her Support Worker that her trafficking support would be discontinued.

21. On 15 July 2020, this claim was filed, together with an application for interim relief. On 16 July 2020, HHJ McCahill (sitting as a judge of the High Court) made an interim order requiring the Secretary of State to pay the claimant £65 per week (the figure claimed pursuant to §15.37 of the Guidance), and arrears. On 23 July 2020, the Secretary of State applied to vary the interim order to reduce the reinstated weekly payment (and the sum to be paid in arrears) from £65 per week to the sum of £35 per week that the claimant had been receiving prior to the cessation decision. The claimant did not oppose that application. An order to that effect was made by Eady J on 18 August 2020. By the same order, this claim was joined with the case of LT (CO/2551/2020). LT has since withdrawn his claim as, following the grant of refugee status, he is no longer eligible for legal aid.

22. On 27 July 2020, the Secretary of State resumed paying the claimant £35 per week, and she has been paid arrears of £105 in respect of the three-week period following the cessation decision during which she received no trafficking support payments.

23. On 24 August 2020, the Secretary of State filed summary grounds of defence.

24. On 28 August 2020, the Secretary of State replaced the Guidance with the Amended Guidance. Paragraph 15.37 of the Amended Guidance provided for financial support in the sum of £25.40 per week to be provided to any "*potential victim or victim of*

modern slavery receiving VCC support" who was also receiving support under ss.95, 98 or 4 of the IAA .

25. Since 27 October 2020, those supported under s.95 or s.4 of the IAA in initial accommodation have been eligible to receive a payment of £8 per week to cover the costs of buying items to meet their needs relating to clothes, non-prescription medication and travel. In *JM v Secretary of State for the Home Department* [2021] EWHC 2514 (Admin), [2022] PTSR 260 Farbey J held that the Secretary of State had not properly recognised or carried out her duty to provide those supported pursuant to s.95 of the IAA with the means of communication.

26. On 17 November 2020, the Secretary of State reduced the claimant's trafficking support to £25.40. Although that reduction accorded with the Amended Guidance, no application to vary the interim order requiring the Secretary of State to make payments in the sum of £35 per week had been made. However, Counsel for the Secretary of State, Mr Payne KC, informed me that in view of the interim order, the claimant was in fact paid trafficking support at the rate of £35 per week throughout the period she was in the Hotel, and indeed beyond, albeit in respect of the period from 17 November 2020 she received the difference of £9.60 per week by way of a back payment after she had left the Hotel.

27. The claimant filed an amended Statement of Facts and Grounds ('SFGs'), and further evidence, on 4 November 2020. On 1 December 2020, Pepperall J granted the claimant permission to rely on her amended SFGs and additional evidence, and gave the defendant the opportunity to file amended grounds of defence.

28. On 1 December 2020, the claimant was granted support pursuant to s.95 of the 1999 Act. At this point she became eligible to receive a weekly payment of £8.24 per week in respect of her needs relating to clothes, non-prescription medication, travel and communication, although she only in fact received these payments in arrears nearly a year after she had left the Hotel. On 24 February 2021, the claimant was provided long-term self-catering accommodation, at which point she started to receive asylum and trafficking support in the sum of £65 per week.

29. On 15 March 2021, Pepperall J made the permission decision to which I have referred. On 31 March 2021, the claimant applied to renew her application for permission on Ground 1. The parties agreed the renewal should be dealt with at the substantive hearing of the claim and, as I have indicated, the Secretary of State ultimately conceded permission should be granted. The Secretary of State filed detailed grounds of defence ('DGDs') on 30 April 2021.

30. By letter dated 11 November 2022, the Home Office notified the claimant of the Conclusive Grounds decision in the following terms:

> "On 8 February 2019 we said there were Reasonable Grounds to accept that you may be a victim of modern slavery (human trafficking and/or slavery, servitude or forced or compulsory labour).

> Following further enquiries into your case, the Single Competent Authority has decided that you are a victim of modern slavery.
>
> **Our decision**
>
> We found the following types of exploitation occurred: forced prostitution and sexual exploitation in the UK in 2002-2003."

Once it was conclusively determined that the claimant was a victim of trafficking, she ceased to be eligible for the trafficking support element that she had previously been receiving. The sum she received weekly reduced to £40.85 (later raised to £45: see paragraph below).

31. As I have said, the hearing of this claim was stayed pending the judgments of the High Court and Court of Appeal in *JB/JB (Ghana)*. On 20 October 2021 and 2 February 2023, the claimant applied to adduce further evidence. Those applications were granted by Andrew Baker J on 15 March 2023, subject to such permission being "*without prejudice to any question of weight or, to the extent the same consists of evidence of opinion, admissibility as expert evidence*". On 29 December 2022, the defendant filed amended DGDs and the second statement of Mark Ryder, an Adult Victim Support Policy Manager working in the Home Office's Modern Slavery Unit, pursuant to a consent order dated 24 November 2022.

32. On 17 and 22 February 2023, the Secretary of State adduced further documents in response to requests made by the claimant. At the outset of the hearing, as I have said, the Secretary of State applied to adduce the statement of Mr Smyth.

D. The legal and policy framework

Asylum support

33. Part VI of the IAA makes provision for subsistence support to be provided to asylum seekers, including, but not limited to, those who are victims or potential victims of modern slavery.

34. Under s.95(1) of the IAA, the Secretary of State may provide or arrange for the provision of support to asylum seekers who appear to the Secretary of State to be destitute or likely to become destitute within a prescribed period. In accordance with s.96(1) of the IAA, asylum support provided under s.95 has two key elements: accommodation and "*essential living needs*".

35. Temporary asylum support is provided for by s.98, pending determination of eligibility under s.95. Section 98 of the IAA provides, so far as relevant:

> "(1) The Secretary of State may provide, or arrange for the provision of, support for –
>
> (a) asylum-seekers, or
>
> (b) dependants of asylum-seekers,

> who it appears to the Secretary of State may be destitute.
>
> (2) Support may be provided under this section only until the Secretary of State is able to determine whether support may be provided under section 95.
>
> (3) Subsections (2) to (11) of section 95 apply for the purposes of this section as they apply for the purposes of that section.
>
> …"

36. Although ss.95 and 98 are expressed as *powers* to provide support, they were converted to duties by Council Directive 2003/9/EC which laid down the minimum standards for the reception of asylum seekers: *R (JM) v Secretary of State for the Home Department* [2021] EWHC 2514 (Admin), [2022] PTSR 260, [15] to [16]; and regulation 5 of the Asylum Seekers (Reception Conditions) Regulations (SI 2005/7).

37. As pleaded by the Secretary of State, ss.95-98 of the IAA are supplemented by the Asylum Support Regulations 2000 (SI 2000/704) ('the Regulations') which make provision as to the concept of "*essential living needs*" for those who are "*destitute*" within the meaning of both s.95 and s.98. Regulation 9 provides:

> "**9.— Essential living needs**
>
> (1) The matter mentioned in paragraph (2) is prescribed for the purposes of subsection (7)(b) of section 95 of the Act as a matter to which the Secretary of State may not have regard in determining for the purposes of that section whether a person's essential living needs (other than accommodation) are met.
>
> (2) That matter is his personal preference as to clothing (but this shall not be taken to prevent the Secretary of State from taking into account his individual circumstances as regards clothing).
>
> (3) None of the items and expenses mentioned in paragraph (4) is to be treated as being an essential living need of a person for the purposes of Part VI of the Act.
>
> (4) Those items and expenses are–
>
> (a) the cost of faxes;
>
> (b) computers and the cost of computer facilities;
>
> (c) the cost of photocopying;
>
> (d) travel expenses, except the expense mentioned in paragraph (5);
>
> (e) toys and other recreational items;

> (f) entertainment expenses.
>
> (5) The expense excepted from paragraph (4)(d) is the expense of an initial journey from a place in the United Kingdom to accommodation provided by way of asylum support or (where accommodation is not so provided) to an address in the United Kingdom which has been notified to the Secretary of State as the address where the person intends to live.
>
> (6) Paragraph (3) shall not be taken to affect the question whether any item or expense not mentioned in paragraph (4) or (5) is, or is not, an essential living need.
>
> (7) The reference in paragraph (1) to subsection (7)(b) of section 95 of the Act includes a reference to that provision as applied by section 98(3) of the Act and, accordingly, the reference in paragraph (1) to *"that section"* includes a reference to section 98." (Emphasis added.)

38. Regulation 10 provides:

> **"10.— Kind and levels of support for essential living needs**
>
> (1) This regulation applies where the Secretary of State has decided that asylum support should be provided in respect of the essential living needs of a person.
>
> (2) As a general rule, asylum support in respect of the essential living needs of that person may be expected to be provided weekly in the form of a cash payment of £40.85.
>
> ..
>
> (5) Where the Secretary of State has decided that accommodation should be provided for a person by way of asylum support, and the accommodation is provided in a form which also meets other essential living needs (such as bed and breakfast, or half or full board), the amount specified in paragraph (2) shall be treated as reduced accordingly." (Emphasis added.)

39. The sum of £40.85 referred to in reg.10(2) is the rate that has been in place since 21 February 2022. However, it has been increased, administratively, to £45, backdated to 21 December 2022, in compliance with a mandatory order made by Fordham J in *CB v Secretary of State for the Home Department* [2022] EWHC 3329 (Admin). In the period from 6 February 2018 until 8 June 2020, the sum specified in regulation 10(2) was £37.75. On 8 June 2020, a temporary exceptional increase to the general rate of asylum support was made, increasing the rate from £37.75 to £39.60. On 20 February 2021, the figure stated in reg.10(2) was increased to £39.63.

40. The rate of weekly support payments made under the asylum support regime has been the subject of detailed judicial consideration: *JB (Ghana)*, [29], citing *R (SG) v SSHD* [2016] EWHC 2639 (Admin), [2017] 1 WLR 4567, [7]-[8].

The Asylum Accommodation and Support Services Contract

41. For those in full-board accommodation, providers are required to provide services in line with the "*Statement of Requirements*" in Schedule 2 to the Asylum Accommodation and Support Contract ('AASC'). A statement from Simon Bentley of the Home Office's Asylum and Family Policy Unit, dated 10 September 2020 (adduced in *R (MLK and SG) v SSHD,* and disclosed in these proceedings on 17 February 2023), states:

> "20. Section 2.3.5 states that: 'The Authority's preference is for Initial Accommodation to be provided on a "full board" basis'. However, Section 2.6.5 states that the persons may be provided with either:
>
> - *full board accommodation of at least three (3) meals per day and essential personal hygiene items and toiletries; or*
>
> - *accommodation and cash to the appropriate value, as advised by the Authority.*"

42. The Statement of Requirements makes no distinction between asylum seekers in initial accommodation by reference to whether they were supported pursuant to s.95 or s.98.

The recognition of victims of modern slavery

43. The process of recognition of victims of modern slavery, including human trafficking, involves two stages. The first involves determining whether there are 'reasonable grounds' to believe that the person in question is a victim of modern slavery (a so-called 'potential' victim). The second stage, which is only reached if a positive reasonable grounds decision was made, involves deciding on 'conclusive grounds' whether the person is a victim of modern slavery.

Trafficking recovery support

44. The European Convention on Action Against Trafficking in Human Beings 2005 ('ECAT') is the principal international measure designed to combat trafficking in human beings. Among other matters, it is concerned with the treatment of those in respect of whom there are reasonable grounds to believe that they are victims of trafficking and the support to be provided to them by Contracting States. The UK signed ECAT in March 2007 and ratified it on 17 December 2008, but it has not been incorporated into UK law. Whilst individuals cannot enforce its provisions directly, insofar as the Secretary of State has adopted parts of ECAT as her own policy in guidance, she must follow that guidance unless there is good reason not to do so: *R (EM) v SSHD* [2018] EWCA Civ 1070, [2018] 1 WLR 4386, [19]; *JB (Ghana)*, [9].

45. As Bean LJ observed in *JB (Ghana)* at [11]:

> "Analogous provision was made under Article 11 of the EU Anti-Trafficking Directive (Directive 2011/36/EU), prior to the UK's withdrawal from the European Union at the end of the transition period. The scope of this duty was examined by the Court of Appeal in the *EM* case. Peter Jackson LJ held at [65] as follows:
>
> > 'The general duty on the State under Arts. 11(2) and (5) of the Directive is to provide assistance and support to a PVoT [potential victim of trafficking] by mechanisms that at least offer a subsistence standard of living through the provision of appropriate and safe accommodation, material assistance, necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services.'" (Emphasis added.)

46. It is common ground that until the entry into force of s.68 of the Nationality and Borders Act 2022 on 30 January 2023, the rights contained in the Directive were retained EU law under ss.2(b) and 4 of the European Union (Withdrawal) Act 2018.

47. As Underhill LJ recounted in *R (MD) v Secretary of State for the Home Department* [2022] EWCA Civ 336 [2022] PTSR 1182 at [27], an episode in March 2018 "*casts light on the Secretary of State's obligations as regards subsistence payments*". With effect from 1 March 2018 she reduced the amounts payable to service users who had been receiving an essential living needs payment from the Home Office under regulation 10(2) of £37.75 together with a "*top-up*" payment from the Salvation Army (though funded by the Home Office) under the VCC of £27.75, from a total of £65 to £37.75. This change was made on the basis that the Secretary of State "*believed that it was wrong that they should receive more than was received by asylum-seekers for essential living needs*". Underhill LJ continued:

> "27. … In *R (K and M) v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin), [2019] 4 WLR 92, … Mostyn J held that that reduction was unlawful because it was based on a misunderstanding of the concept of 'subsistence' in the Directive, to which the VCC was intended to give effect. In the context of the Directive the term 'subsistence' went beyond the minimum required to stave off destitution, i.e. essential living needs, and also covered pecuniary assistance with the recovery needs which were peculiar to victims of trafficking; and the 'top-up' in the subsistence payment reflected that element. …
>
> 31. …the financial support provided for is intended to not only meet the essential living needs of victims but also to assist more widely with their 'social, psychological, and physical recover' (a phrase deriving from Article 12.1 of the ECAT)."

48. In *R (K and another) v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin), [2019] 4 WLR 92 ('*K & AM')*, in a passage cited with approval by the Court of Appeal in *JB (Ghana)* at [14], Mostyn J considered the scope of

"*subsistence*" needs as provided for under article 12.1 of ECAT and article 11 of the EU Anti-Trafficking Directive ('the Directive'). He observed at [29]:

> "[Counsel] drew my attention to regulation 9(4) of the Asylum Support Regulations 2000 which excludes, among other things, the cost of computers (which would include smartphones), travel, recreational items and entertainment in the assessment of 'essential living needs' for the purposes of asylum support. But some money for these purposes is surely reasonably required by a person in the highly vulnerable and distressing position of a victim of trafficking. This has recently been in effect conceded by the Home Secretary through the contract change of 1 November 2018…"

The Statutory Guidance

49. The Guidance was first published on 24 March 2020 (*JB (Ghana)*, [15]), pursuant to s.49 of the Modern Slavery Act 2015. It remained in effect until it was replaced on 28 August 2020 by the Amended Guidance. "*Annex F – Detail of support available for adults in England and Wales*" of the Guidance provided details of "*the support available to adult victims of modern slavery*" (§15).

50. Annex F (§§15.1-15.29) addressed the provision of accommodation to adult victims of modern slavery under the headings "*Emergency Accommodation*", "*Accommodation provided through the Victim Care Contract*", "*Accommodation provided through the asylum system*", "*Accommodation provided through Local Authority services*", "*Self-supported accommodation*" and "*Other accommodation*". Paragraph 15.13 provided, under the heading "*Accommodation provided through the asylum system*":

> "Outreach support and financial support payments provided through the Victim Care Contract are available for potential victims and victims in Asylum accommodation during their time in the NRM."

51. Under the heading "*Outreach support*", §15.30 provided:

> "Outreach support refers to the services provided to victims who enter VCC support but who are not in VCC accommodation. This support includes access to all support usually available to victims in VCC accommodation, except for the accommodation-related elements."

52. The key paragraphs of Annex F of the Guidance provided so far as relevant:

> **"Financial Support**
>
> 15.35 Potential victims and victims of modern slavery who have entered the NRM, received a positive Reasonable Grounds decision and are in VCC accommodation or outreach support, will be paid financial support. This payment will

> continue while they remain in VCC support for as long as they are assessed to have a recovery need for this assistance. Financial support is intended to meet the potential victim's essential living needs during this period and assist with their social, psychological and physical recovery.
>
> 15.36 The current rate of financial support payable by the Home Office to potential victims or victims of modern slavery receiving VCC support depends on the accommodation they are in. The rates are as follows:
>
> - £65 per week for those in self-catered VCC accommodation
> - £35 per week for those in catered VCC accommodation
> - £39.60 per week for those receiving outreach support in other accommodation
> - …
>
> **Financial support for potential victims who are also receiving asylum support**
>
> 15.37 The payment rates will be adjusted if the potential victim or victim of modern slavery receiving VCC support is also an asylum seeker or failed asylum seeker receiving financial support under sections 95, 98 or section 4 of the Immigration and Asylum Act 1999 ('Asylum Support'). In these circumstances, the individual will receive £65 per week, made up of payments from asylum support and a further payment from the VCC to take the total payment to £65 per week." (Emphasis added.)

53. In the Amended Guidance, the key paragraphs of Annex F were amended to provide (so far as relevant, and with the new wording shown underlined):

> "**Financial Support**
>
> 15.35 Potential victims and victims of modern slavery who have entered the NRM, received a positive Reasonable Grounds decision and are in VCC accommodation or outreach support, will be paid financial support. This payment will continue while they remain in VCC support – until they have received a Conclusive Grounds decision. Where an individual has received a positive Conclusive Grounds decision, they will continue to receive financial support for as long as they are assessed to have a recovery need for this assistance through a Recovery Needs Assessment, subject to the RNA guidance. Where an individual receives a negative Conclusive Grounds decision, they will receive support as set out in paragraph 7.2. Financial support is intended to meet the potential victim's essential living needs during this period and assist with their social, psychological and physical recovery.

> 15.36 The current rate of financial support payable by the Home Office to potential victims or victims of modern slavery receiving VCC support depends on the accommodation they are in. The rates are as follows:
>
> - £65 per week for those in self-catered VCC accommodation
> - £35 per week for those in catered VCC accommodation (only for exceptional circumstances where the individual is assessed as requiring catered accommodation as they are not capable of preparing their own food due to disability, debilitating illness or ongoing treatment for severe substance use and addiction).
> - £39.60 per week for those receiving outreach support in other accommodation
> - …
>
> **Financial support for potential victims who are also receiving asylum support**
>
> 15.37 The payment rates will be adjusted if the potential victim or victim of modern slavery receiving VCC support is also receiving support under sections 95, 98 or section 4 of the Immigration and Asylum Act 1999 ('Asylum Support'). In these circumstances, the individual is receiving asylum support because they have been assessed as destitute or an assessment is being made on whether they are destitute. In both cases support is provided by asylum support to meet their essential living needs. Generally, support to cover essential living needs is provided through a payment of £39.60 per week, but in some cases essential living needs are met through in-kind assistance or a combination of in-kind assistance and payments. A further payment will be made from the VCC of £25.40 (calculated at £65 per week minus the current essential living rate of £39.60 provided by asylum support) to assist with their social, psychological and physical recovery from exploitation."

54. The Amended Guidance has been amended on a number of occasions since it was published in August 2020. The current statutory guidance is not in issue in this claim.

Victim Care Contract

55. The version of the VCC which was in effect at the material time in 2020 provided as follows in Schedule 2 to Volume 3, which is entitled "*Authority Requirements: Provision of Adult Victims of Modern Slavery Care & Consultation Services*":

> "6. ***Subsistence payments***
>
> F-001. The Contractor shall provide Service Users with Subsistence Payments in cash and these Subsistence Payments are to be paid to Service user [sic] on the following basis:

a. On a Weekly basis (same day every week), payable pro rata for part weeks;
b. The first Subsistence Payment being payable to the Service User within 48 hours of entering the Accommodation; and
c. The Subsistence Payments shall cease when the Service User exits the Service.

The table below provides details of the Subsistence Payments that may be payable to Service Users:

Service User Type	**Value of Subsistence Payment**
Service User in Catered Accommodation provided by the Contractor	£35
Service User in Self-Catered Accommodation provided by the Contractor	£65
Service user accommodated by the Authority, and in receipt of Subsistence Payments through that Service	£65 minus the amount of Subsistence received by the Authority
Service user Not Accommodated by the Contractor or the Authority (e.g. Living with friends or family)	£35

…

F-002 The Contractor shall:

a. Keep complete, accurate and auditable records for each and every Subsistence Payment made to Service Users;
b. Ensure that these records are available for inspection by the Authority; and
c. Electronically transmit these records to the Authority within 5 working days of a request for the records being made by the Authority".

56. The reference in the table to accommodation provided by the "*Contractor*" is to accommodation provided either by the Salvation Army directly or indirectly through its subcontractors. As Underhill LJ observed in *MD* at [24]:

> "'The Authority' is a reference to the Secretary of State. It is common ground that the reference to 'the amount of subsistence received *by* the Authority' is a slip for '*from* the Authority'. Even as corrected, the language is rather opaque, but it is not in dispute that the effect is to require the deduction

> of sums received under the Asylum Support Regulations by victims of trafficking who had made asylum claims. Thus a victim receiving asylum support would receive an essential living needs payment from the Home Office under regulation 10 (2) together with a 'top-up' payment from the Salvation Army (though funded by the Home Office) under the VCC to bring the total to £65; for the period from 6 February 2018, for example, the two payments would be respectively £37.75 and £27.25. It is necessarily implicit in that approach that a 'subsistence payment' under the VCC is intended to cover more than essential living needs…"

The Frequently Asked Questions document

57. On 29 January 2020, the Head of the VCC at the Home Office sent a 'Frequently Asked Questions' document to the Salvation Army "*to be cascaded to support providers in order to address common questions*". The document, entitled "*FAQS about subsistence*", was re-sent on 6 April 2020. It included the following questions and answers:

> "**2. Subsistence for catered accommodation clients:**
>
> **a) Are we correct in understanding that Catered Accommodation clients are entitled to and should get £35 pw regardless of benefits or income from work etc.?**
>
> Yes – unless they are receiving support from the asylum support system, in which case their financial support should be £65 pw minus the NASS [i.e. National Asylum Support Service] payment.
>
> …
>
> **4. Subsistence for outreach NASS clients:**
>
> **a) Are we correct in understanding that Outreach NASS clients are entitled to and should get £65 pw minus the NASS payment? eg. If client receiving £37.75 from NASS then they are only entitled to the £27.25 top up from the VCC. This is regardless of any other income?**
>
> This should be the position for all clients who are also receiving financial support from NASS, regardless of where they are accommodated. Any other income should be declared to the asylum support system."

58. In *JB (Ghana)* Bean LJ referred to question and answer 2, quoted above, and observed at [35] that when the Guidance was issued:

> "the Head of the Victim Care Contract at the Home Office understood paragraph 15.37 to apply to all asylum seekers in receipt of cash asylum support, regardless of whether they were

> accommodated in full-board or self-catered accommodation." (Emphasis added.)

JB (Ghana)

59. In *JB (Ghana)* the claimant sought judicial review of the Secretary of State's failure to pay him £65 per week during the period from 31 March 2020 to 28 August 2020. Throughout that period JB was supported in initial accommodation pursuant to s.95 of the IAA. The claim succeeded in the High Court before Peter Marquand (sitting as a Deputy Judge of the High Court) who held at [29]:

> "There is no ambiguity in the policy and there is no lacuna. The policy is clear as it states that a person who is both a Potential Victim and an asylum seeker receiving financial support under, in this case, section 95 IAA will receive a total of £65 per week. This sum is to be made up of payments from asylum support plus a further payment from the VCC. … It makes no difference that the Claimant did not receive, as a matter of fact, the financial support under section 95 IAA that he was entitled to, in whole or part, during the relevant period…"

60. His judgment was upheld on appeal. Bean LJ (with whom Peter Jackson and Baker LJJ agreed) stated:

> "64. In my view the judge was right for the reasons he gave. Paragraph 15.36 of the March 2020 Guidance does draw a distinction between catered and self-catered VCC accommodation and, if the matter ended there, the Claimant would not have been entitled to payments of £65 per week. But the matter did not end there, because of the inclusion in the document of paragraph 15.37. <u>This states in categorical terms that if a potential victim of trafficking is also an asylum seeker and receiving asylum support, a further payment is to be made to him to make a total (including the asylum support) of £65 per week.</u> Nothing is said about any offset for the value of meals provided in catered accommodation; nor is any distinction made between claimants who are in catered accommodation and those who are in self-catered accommodation. It would not have been difficult to draft a paragraph making such a distinction, and an amended scheme was introduced five months later.
>
> 65. It seems to me a reasonable inference that the reason why paragraph 15.37 in the March 2020 version reads as it does is because (as noted by Farbey J in the *JM* case) the practice before the onset of the pandemic was that people in JB's position would typically spend only a short time (we were told 4-6 weeks was a common period) in catered accommodation before being moved on. Although the document was issued on 24 March 2020, it had been drafted before the onset of the pandemic and the beginning of the series of lockdowns which

we all remember. But that is not a reason to change the plain and obvious meaning of paragraph 15.37.

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

67. It is well established that in construing a policy document a court should not subject the wording to the kind of fine analysis which might be applied to a statute or a contract: see *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983 per Lord Reed. But the document must still be interpreted objectively. …

68. The principle set out in cases such as *Raissi* and *Mahad* is that documents of this kind should mean what they say, and should be interpreted as they would be read by a reasonable claimant or support worker or advisor. …

69. I am entirely unable to accept the argument that paragraph 15.37 contained an obvious error within the terms of *Inco Europe Ltd vs First Choice Distribution* [2000] 1 WLR 586 …

71. In the present case it is not obvious what the substance of para 15.37 would have been if the drafter had not made what Ms Giovannetti submits is an obvious error. Moreover, it is far from obvious that the drafter did *not* intend a claimant in JB's position to receive a top-up to bring his total payments to £65 per week. The construction of para 15.37 which the judge found to be correct is consistent with the terms of the Victim Care Contract between the Home Office and the Salvation Army; and also with the answer given to question 2 in the FAQs document first issued by the Home Office in January 2020 and re-issued soon after the promulgation of the guidance on 6 April 2020. It is impossibly ambitious for the Secretary of State to contend that there was an obvious mistake of the *Inco* type in all three documents. As Mr Buttler put it, pithily and correctly, a flaw in the design of a policy is not the same as a drafting error." (Emphasis added.)

61. Finally, I note that at [73] Bean LJ, having stated that the lawfulness of the Amended Guidance issued on 28 August 2020 was not in issue, made the following (*obiter*) observation:

> "I will only say that as at present advised I can see no reason why the Secretary of State should have been precluded from making the amendment which she did."

E. The evidence regarding payments to the claimant and in general to those supported pursuant to s.98

62. I shall consider the general evidence regarding payments to those supported pursuant to s.98 of the IAA before addressing the specific evidence of payments made to the claimant. The Secretary of State's preference is for initial accommodation to be provided on a full-board basis, but as Mr Ryder acknowledged in his first statement, cash payments can be made where essential living needs are not otherwise fully met by the accommodation provider.

63. In his second statement, dated 29 December 2022, Mr Ryder stated:

> "9. It remains the position that individuals supported under s.98, including victims of modern slavery, and in initial accommodation generally have their needs met through in-kind support provided for by full board accommodation. …
>
> 10. S.98 support is intended to be provided on a short-term basis. Those housed in initial accommodation would generally not receive a cash Asylum Support payment from the Home Office for essential living needs because either those needs would ordinarily not arise on a short-term basis, or they could adequately be met by the full board basis of the accommodation. …" (Emphasis added.)

However, the evidence of Mr Smyth dated 21 March 2023 was adduced by the Secretary of State in part to "*provide further clarification on paragraphs 9 to 11 of Mark Ryder's second witness statement*".

64. At paragraphs 49 to 59 Mr Smyth stated:

> "**Payments under s.98**
>
> Historical Payments under s.98 of the Immigration and Asylum Act 1999
>
> 49. At paragraph 9 of MR 2 it was stated, inter alia, that 'Those housed in initial accommodation would generally not receive a cash Asylum Support payment from the Home Office for essential living needs…'
>
> 50. For transparency purposes I wish to clarify that historically, the SSHD has provided subsistence payments to those supported under s.98.

> …
>
> 52. Prior to the introduction of ASPEN cards (introduced in November 2016 and by May 2017 it had superseded other means of centralised payment), the SSHD had a fund set up called the Accommodation Gatekeeper Hardship Fund ('AGH Fund').
>
> 53. This was a mechanism set up to make one-off subsistence payments to those individuals who (allegedly) did not have any funds but had accommodation, whether private or otherwise.
>
> 54. Those who sought payment under the AGH Fund were advised that they would need to submit an ASF1 (s.95 application) to be considered for ongoing support and that the AGH Fund was a one-off payment.
>
> 55. Once ASPEN cards were introduced, this fund ceased to operate as the SSHD now meets her obligations under s.98 by way of the provision of full-board accommodation which meets an individual's essential living needs.
>
> Other Limited circumstances in which payments made to s.98 individuals
>
> 56. Under Schedule 2 of the Asylum Accommodation and Support Contract ('AASC'), the SSHD's preference is for accommodation providers to provide accommodation on a full board basis. However, the SSHD will consider alternative methods of delivery by the accommodation provider such as self-catered or half board provision.
>
> 57. In the half board and/or self-catered situations, the accommodation provider can and in some cases shall, under the AASC, provide payments to individuals who are in receipt of s.98 support to meet their essential living needs.
>
> 58. This however is distinct from a direct s.98 payment by the SSHD to the individual. These payments are contractual in nature, rather than statutory, in order for the provider to meet the requirements of the AASC because, for whatever reason, the provider is unable to provide full-board accommodation.
>
> 59. As set out below, the SSHD accepts that she has a discretion to make payments to individuals in receipt of s.98 support however, she does not do so. There may be exceptions to this however, without doing a case by case analysis she would be unable to say when such exceptions have been applied."

65. In his statement in *MLK and SG* (see paragraph above), Mr Bentley stated:

"9. For as long as the person remains in initial accommodation, support to cover their 'essential living needs' is provided by the accommodation provider in the form of full board in-kind provision, cash or vouchers, or a mixture of both. The accommodation providers are contractually obliged to provide the support to meet the 'essential living needs' of those they accommodate. How the support is provided varies from provider to provider (depending on the type of accommodation and the facilities which are provided). I go on to explain this in more detail in paragraphs 19-22 below.

10. I should emphasise that this applied whether the person was supported under section 98 (i.e. pending consideration of an application for section 95 support) or under section 95 (i.e. having been found eligible for section 95 support but awaiting a move into dispersal accommodation).

…

[Having explained the content of sections 2.3.5 and 2.6.5 of the Statement of Requirements in Schedule 2 to the AASC (see paragraph above), he continued:]

21. Where the provider is unable to meet a need by providing it directly, they provide a cash allowance or voucher. For instance, where the provider does not have a washing machine on site, they may provide a cash payment so that the service user may use a laundrette off site. This cash allowance is not a portion of the weekly cash payment referenced by the Claimants; the provider will be fulfilling their contractual obligations by making this payment, which is why it is in cash and not by way of the Aspen card.

22. Both of the claimants are currently accommodated in hotels in areas of the country where Serco is the accommodation provider. The full package of support provided by Serco in hotels consists of:

- 3 meals per day, including non-alcoholic beverages.
- A laundry service.
- Free wi-fi.
- Access to healthcare.
- Access to a phone which allows them to contact Migrant Help via a freephone number who provide advice and support. …
- A cash allowance to enable the persons to buy essential items, such as hygiene and sanitary products. They are

> free to spend money in the way they wish. Currently, £5 per week is provided to males and £10 to females."

66. The sub-contractor which provided the claimant's accommodation throughout the relevant period was also Serco.

67. The Secretary of State also relies on a statement (adduced by the claimant) made by Rachel Smith, a Project and Communications Coordinator at the Human Trafficking Foundation, dated 14 August 2020, in which Ms Smith said:

> "Asylum seekers in catered section 98 accommodation do not receive any financial support and did not prior to July 2020 when subsistence payments for asylum seekers who are also victims of trafficking were discontinued.
>
> On 26 June 2020 the HTF was alerted by a caseworker working in the asylum sector in the West Midlands to problems with the payment of subsistence payments for asylum seekers who were also potential victims of trafficking within the National Referral Mechanism (NRM) who were in catered section 98 accommodation. …
>
> This caseworker advised that people in this situation were being provided with either only £5 (men) or £10 (women) weekly as a gift in kind or in lieu of financial support they would otherwise be receiving in section 95 support (currently £39.60 per week for a single adult). HTF has since gained clarity that this payment is not given in all catered accommodation, but is seemingly paid on discretion of the accommodation provider."

68. In her first statement, dated 14 July 2020, made after she had been in the Hotel for about eight weeks, the claimant stated that she "*received £40.00 from the people at the Hotel*" when she moved in on 13 May 2020 and, she had "*not received any other money from them since then*". Reliance is also placed by the Secretary of State on a statement from the claimant's Support Worker (which is unsigned and undated, for reasons explained by the claimant's solicitor, but which was served with the claim on 15 July 2020), which states:

> "It is my understanding that [the claimant] was given a one-off payment of £40 by the Hotel within the first two weeks. I am not sure who gave this to her and why. [The claimant] has not received any payments from the Home Office under section 98. It is my understanding that they are not providing any cash allowances to anyone in section 98 accommodation."

69. In her third statement dated 20 October 2021 the claimant said, "*I have received certain ad hoc payments, but I don't have a record of these*". In her fourth statement dated 2 February 2023, the claimant said:

> "The asylum accommodation was a hotel. I was not entitled to any financial support under section 98 asylum support, so the only money I received at this time was my £35 of weekly trafficking support (as well as a couple of one off payments, as I mentioned in my previous statements)." (Emphasis added.)

70. With her fifth statement dated 3 May 2023, the claimant adduced the Serco letter. This letter states:

> "To whom it may concern,
>
> **Withdrawal of weekly cash support**
>
> This hotel contingency site has been giving service users £5 per week to purchase essential items that are not provided by the hotel.
>
> From week commencing 14th December, we will cease providing this weekly cash support for service users. We will, instead, be providing service users with the essential items that they require. This change will bring us in line with other contingency sites across the country.
>
> The essential items that we are now providing includes:
>
> - shower gel
> - shampoo
> - deodorant
> - toothbrushes
> - toothpaste
> - razors
> - sanitary towels
>
> Should you require any of these items, please speak to the on-site staff and they will arrange this for you. Provision of these products will be monitored."

71. The Serco letter is undated. As the claimant was in the Hotel from 13 May 2020 to 24 February 2021, and I accept she was provided with a copy of this letter while she was there, the reference to the cessation of cash support from 14 December must be a reference to 14 December 2020. This is also consistent with the claimant's third statement in which she said:

> "I would also like to highlight that the hotel began offering toiletries such as shampoo, shower gel, female hygiene products and toothpaste in November 2020. We had to go down to the office to collect them. They also started washing our clothes. Before this they only provided us with toilet tissue."

72. In her fifth statement the claimant states that she is unsure whether she provided the Serco letter to her former solicitors, and unable to check her messages due to a change of phone. Having provided it to her current solicitors on 22 March 2023 in response to

a request for information about her application for s.95 support (which arose in light of Mr Smyth's evidence that her application was not determined until 1 December 2020), they raised questions with her as to whether she had received the payments referred to in the Serco letter. The claimant states:

> "On 26 April 2023, I responded to my solicitors by email to confirm that I did remember receiving cash payments from the hotel, although I did not know what they were for. It seems these payments may not have been clear from previous statements. I would like to clarify them.
>
> After the initial £40 payment I received on arrival at the hotel, I remember receiving sporadic payments of cash from the hotel. The hotel staff would tell us when payments were being made and to attend the Reception to collect the payments. I do not remember when these started. Sometimes it would be £5 a week, sometimes it would be £20 to cover four weeks. I was not told and did not understand what this was for. I would use the money for buying food or topping up my phone.
>
> Around the end of November 2020, the hotel started providing toiletries and doing our laundry following the intervention of the Red Cross. After this, we stopped receiving any cash from the hotel.
>
> The time in the hotel was very stressful for me and I did not always understand the different cash payments I was receiving from trafficking support and the hotel: the payments being at different times and different amounts and not being explained, the trafficking support stopping for a while in July 2020 and the amounts varying during my time in the hotel. Everything was in cash and it was hard to keep track. My depression also got worse during my time in the hotel, which made it hard to remember things. All I know that the little money I did receive from the hotel and from trafficking support was never enough and I was constantly stressed about not having basic essential items."

F. The evidence regarding sufficiency of recovery and essential living needs support

73. The claimant received trafficking support of £35 per week throughout the period that she was living with S, that is, from the end of February 2019 until 13 May 2020. The claimant's evidence is that during this period she would use the money to travel to see her GP, attend the Wellbeing Centre (fortnightly) and to buy sleeping tablets, toiletries and topping up her phone. Prior to the onset of the pandemic she also used it to travel (fortnightly) to the reporting centre, which cost about £20 per month, and to travel to see her counsellor, using a bus pass that cost about £20 per week. Initially her Support Worker had travelled to see her weekly or fortnightly to provide her with the £35 per week payment in cash, but from around April/May 2020 the payments were pre-loaded onto a card, enabling the claimant to withdraw money at a cash point.

74. While she was in the Hotel, the claimant received trafficking support of £35 per week from 13 May 2020 until 17 November 2020 (although for a three-week period following the cessation decision she received no trafficking support payments, but a back payment has been made). From 17 November 2020 until she left the Hotel on 24 February 2021, the claimant received trafficking support payments in the sum of £25.40 per week.

75. The claimant also received non-financial trafficking support from her Support Worker who provided the claimant with emotional support, liaised with her legal representative and arranged counselling sessions. The counselling sessions helped to some extent with the claimant's experience of flashbacks, nightmares and difficulty sleeping but they stopped shortly after she moved to the Hotel. She had three sessions on the phone before being told by her Support Worker that there was no further funding.

76. The Hotel provided the claimant with:

    i) Accommodation;

    ii) Three meals per day, including non-alcoholic beverages at meal times;

    iii) Free wi-fi in the reception area for 20 minutes per day;

    iv) From November 2020, a laundry service; and

    v) From November 2020, toiletries, including sanitary pads.

    vi) Until mid-December 2020, a cash allowance of £5 per week to enable her to buy essential items such as toiletries: see paragraphs 123. to below.

77. On 31 July 2020 the Independent Anti-Slavery Commissioner, Dame Sara Thornton, wrote to the Minister for Safeguarding at the Home Office, Victoria Atkins MP, expressing her concerns about the termination of trafficking payments for those in initial accommodation. She explained that:

> "Whilst providing full-board emergency accommodation may meet a person's essential living needs, it does not recognise their status as a potential victim of modern slavery. I am aware that there is an expectation that any further essential needs, such as travel costs and toiletries are expected to be met by asylum support, but I am concerned as to whether this is happening routinely in practice.
>
> My office has been contacted by multiple organisations within the sector who have expressed significant concerns regarding this recent change. I understand that some are having to provide supermarket vouchers to survivors to enable them to meet their essential needs and I have been sighted on a case where an individual has resorted to begging following their loss of financial support. This is not only detrimental to their recovery, but also puts them at risk of further exploitation."

78. The claimant has explained the effect of the cessation decision on her, albeit she was affected for only three weeks because her representatives were able to obtain interim relief:

> "On 6 July 2020, my weekly trafficking payments were suddenly stopped. I was therefore receiving no financial support whatsoever. This was an incredibly difficult and stressful time for me. While £35 was not enough, it was at least something. I did not have money on my phone so I could not call or even text. I could not contact my support worker, which made me feel very anxious and isolated. I could not buy any of my own food. I would sometimes be so hungry I could not sleep and I would have flashbacks to the time I was trafficked. During this time, my depression worsened and I had to call the doctor, who increased my depression medication and prescribed 9 days' worth of sleeping tablets. Having no money or freedom to buy what I desperately needed made me feel like I lost all control over my life."

79. During the period that the claimant received £35 per week trafficking support, her evidence is that she used it to buy:

i) *Sanitary pads and toiletries, such as toothpaste, lotion, oil for her hair, shampoo and shower gel*: until November 2020, the Hotel provided no toiletries other than toilet tissue. In her first statement the claimant said she spent approximately £10 per month on toiletries and sanitary pads. In her second statement she said that she spent about £4 per week on toiletries, but no longer needed to buy sanitary pads as the Hotel had begun providing them. From late November 2020, the Hotel began providing toiletries.

ii) *Meals and snacks*: in her first statement the claimant said food cost her about £20-£30 per month. She explained that although the Hotel provided three meals a day sometimes she could not eat what was on the menu so she would order takeaway at a cost of about £6.50. She does not eat fish, having never liked it from a young age, and the Hotel provided fish and chips or fish cakes for dinner about two or three times per week. She asked the Hotel if she could have just the side dishes (e.g. a bowl of chips) without the fish, but they refused. The claimant said that the Hotel provided cereal in the morning and crisps, a banana or chocolate in the afternoon, but she still felt hungry and so would "*always top up on the food*".

iii) *Drinks*: the claimant said drinks, including water, cost her about £5 per week. She said that the Hotel provided orange juice with a meal but she would get thirsty during the day. There was no kitchen sink from which she could get water to drink. She said the Hotel told her to drink the water from the bathroom tap but she could not do so as it triggered memories of having to do so while she was held in the brothel.

iv) *Phone top up*: the claimant said that she spent about £5 per week (or £20 per month) on topping up her phone so that she could contact her friends and family. She acknowledged that the Hotel provided free wi-fi in the reception

area, but explained that it was only free for the first twenty minutes, after which time it cost £7. In addition, she felt that she could not have a private conversation with her legal representative, support worker or friends in the Hotel reception area; and there were Covid measures in place requiring people to socially distance. There was a telephone in her room, but it could not be used to make outgoing calls, only to call reception. There was a telephone at reception but on the one occasion when she had asked to use it to call Migrant Help (a free call), as her phone had broken, the Hotel refused. In any event, she did not feel comfortable discussing her experiences or how she was feeling using a phone located in a reception area.

v) *Travel*: in her first statement the claimant said her bus fare to and from her friend's house was about £15-20 per month. As meeting friends was an important part of her recovery, she had done so since the easing of lockdown, to keep herself distracted and to focus on the positive side of things. In her second and fourth statements the claimant said that travel to visit her friend and to see her GP cost about £10-15 per week. She also said her local church had referred her to a counselling service, with the first session due to take place on 24 November 2020, and the return ticket would cost £7. In her fourth statement, the claimant said the Hotel helped with some travel costs, paying for a taxi when she had had to report to the Home Office and on an occasion when she had to go to hospital.

vi) *Clothes*: the claimant said she could not afford clothes and had to make do with what she had. But when she had to buy new clothes, such as winter clothes or boots, she had to avoid spending money on other purchases, such as not topping up her phone that week or not travelling to see friends. While she was in the Hotel, she was provided with shoes and a dressing gown by the Red Cross.

vii) *Postage and photocopying*: the claimant said sometimes she had to pay to make photocopies of documents and pay for postage, so that she could post documents to her legal representative as she did not have an email address.

viii) *Medication*: the claimant said she had to pay for medication, such as paracetamol and sleeping tablets. She also bought stress relief tablets costing £2 for a pack of 24 which lasted about eight days.

ix) *Laundry products*: the Hotel only began washing the claimant's clothes from November 2020. Before then, she bought laundry products for about £3.50 and washed her clothes in the sink, hanging them around the room to dry. This too reminded her of being trafficked.

80. The claimant said that when she was receiving £35 per week trafficking support it was "*barely enough*" to meet her "*essential living needs let alone to facilitate recovery*". In her fourth statement, the claimant described the reduction of her trafficking support, on 17 November 2020, from £35 to £25.40:

> "The previous amount was barely enough to survive on. To lose nearly £10 a week was really significant to me, as it was nearly 1/3 of all the money I received each week. As I had less

> money, I had to speak to my friends less, which was very hard as my friends are an important part of my recovery. I also could not afford to buy any of my own food any more and went hungry whenever I could not eat the food provided by the hotel."

81. On 1 December 2020, the claimant was granted s.95 support. She became entitled to £8.24 per week asylum support but this was not paid until January 2022, nearly a year after she had left the Hotel, when she received it as a back-payment. Although there was a lengthy delay between the claimant's application for s.95 support and the decision that she was eligible, in the context of this claim, no complaint has been raised that this delay was unlawful. It appears that her application was initially refused on 10 June 2020 for failure to provide bank statements. The claimant appealed and on 23 June 2020 the decision was withdrawn, and at the same time the Secretary of State sent a request for information to the claimant at the Hotel. However, the claimant only responded after request for information was uploaded onto the Home Office's MoveIT system on 11 November 2020. The Secretary of State received the claimant's response on 26 November 2020.

82. Mr Smyth has given evidence that the average time for determining whether an individual is entitled to s.95 support, from the moment of grant of s.98 support has varied over the last few years (summarising his evidence) as follows:

Time period	**Processing time**
March 2020	5.69 days
November 2021	17.10 days
February 2022	45.53 days
August 2022	5 days
December 2022	8.99 days
January 2023	9.79 days

He states that despite a large increase in the volume of applications for s.95 support over the last three years, "*at any one time the total number of applications awaiting a decision is rarely more than a few days worth of intake*".

83. The claimant has adduced evidence from specialist organisations working with victims which address the harm caused by the cessation decision and support the claimant's case that the financial support provided by the Secretary of State fails to meet victims' essential living and recovery needs.

84. The statements of Rachel Smith of the Human Trafficking Foundation and Anna Sereni, of Anti-Slavery International are primarily directed at addressing the impact of the cessation decision. Given that decision is not defended, and arrears have been paid, it is unnecessary to describe that evidence. However, in discussing the level of financial support given to victims, Ms Smith states:

> "Although the £35 per week was less than what is stipulated in the SSHD's policy the amount helped to pay for clothing, phone data, toiletries, etc. The Foundation is still concerned that the subsistence payments simply amounted to the minimum sum needed to stave off destitution."

85. Anti-Slavery International have provided a letter in support of this claim dated 2 October 2020. The letter addresses the cessation decision and then describes the setting of the rate of £25.40 under the Amended Guidance:

> "We do not know how this rate was decided on or the methodology or assessment of needs used to arrive at this amount. The MSSIG Victim Support Group [Modern Slavery Strategy and Implementation Group: see paragraph below] was not consulted with regarding the rate. While we understand that this rate applies to people in temporary catered accommodation we consider it too low. As this is initial accommodation, it is likely that people will need to buy basics including clothes, toiletries, a phone and data on top of ongoing expenditure. As above, it is our understanding that the subsistence payments provided to people in the NRM and supported by the Victim Care Contract are to support recovery. This is different to survival or meeting basic needs and should be enough to allow for recovery including recreation, travel and entertainment."

86. Clare Moseley, Director and Founder of Care 4 Calais, provided two statements. In her first she states that "*the facilities and items available to residents varies between hotels and locations*" and that the following items are not widely available: clothes and shoes; mobile phones; children's items, including nappies and prams; sanitary products and toiletries; additional food, particularly for children as there is a lack of suitable food provided; and transportation. She states that "*messages of extreme concern for the mental wellbeing of residents [in initial accommodation] are frequently received by volunteers. Messages regularly display extreme hopelessness, suicidal thoughts, signs of depression and severe anxiety*". She concludes that "*these asylum seekers are at risk of destitution, further exploitation for those that are also victims of trafficking and there are serious concerns that prolonged stay in these hotels without adequate support will lead to a deterioration of their mental health.*" In her second statement, Ms Moseley said that there had been some changes, such as a slight improvement in the food provided in initial accommodation, the reduction in confiscation of asylum seekers' phones, and the provision of £8.24 per week to those in receipt of s.95 support in initial accommodation, but she expressed the view that,

> "the very limited financial support [does] not even begin to meet the essential needs of asylum-seekers in initial accommodation".

87. The Refugee Council reported in April 2021 that their staff were "*extremely concerned about gaps in support for people, and have often had to step in to provide basics like shoes and coats and make sure people receive the food they need*". The report stated that:

> "The majority of people living in hotels are accommodated on a 'full board' basis so have no access to cash, making it impossible for them to buy or replace essential items. Refugee Council staff often receive requests for items such [as] plasters, paracetamol, umbrellas, nail clippers, combs, pens and

> notebooks, none of which can be considered luxuries but are not supplied to them…
>
> People in hotels have limited access to the internet and many do not have mobile phones. This situation has been made worse by the widespread confiscation of people's mobile phones by the Home Office in arrival in the countries. This means many people have to rely on charities such as the Refugee Council providing mobile handsets. Mobile phones are not a luxury item – they are needed to access vital information, contact Migrant Help, advice agencies or connect with health services."

88. In July 2022, the Refugee Council published an updating report which contains a number of specific findings noting that those in initial accommodation lack access to clothing, essentials, appropriate and nutritious food, as well as phones and the internet.

89. Farbey J's observation in *JM* at [130] applies with equal force to the statements adduced by the claimant in this case:

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

90. As in *JM* ([131]), these witnesses have not

> "been put forward as giving expert evidence in accordance with CPR Pt 35; and the court's permission would have been needed to do so (CPR r 35.4(1)). Their views are expressed in generalised language … Their statements … amount to the sort of material that Popplewell J has called 'a partial body of relevant evidence, in both senses of the word' (*Refugee Action* [2014] EWHC 1033 (Admin) at [134])."

91. Mr Ryder states with respect to the £35 trafficking support rate for those in catered VCC accommodation:

> "I understand that responsibility for victim support policy was passed from the Ministry of Justice to the Home Office in 2014. Based on discussions with my predecessor when I took up this role in May 2021, the rationale behind the £35 rates under the previous VCC is not clear and we do not know what the policy intention was at the time from contemporaneous documentation or corporate memory."

92. With respect to initial or full board asylum accommodation he states:

> "It remains the position that individuals supported under s.98, including victims of modern slavery, and in initial asylum accommodation generally have their needs met through in-kind

> support provided for by full-board accommodation. In initial accommodation, provided under s.98, it is expected that support is provided, consisting of food and drinks, which includes three meals a day, plus a food service for babies and small children, which is available whenever necessary. The food must include options which cater for special dietary, cultural or religious requirements. Additional provisions include baby care equipment and disposable nappies, plus personal toiletries and feminine hygiene products. All bills and any taxes are covered by the Authority/Home Office/Provider. Providers also provide travel assistance, which may include transport to attend appointments including doctor, dentist, hospital, birth or death registry appointments. Some sites have Wi-Fi, broadband, and phones with Sim cards including data.
>
> S.98 support is intended to be provided on a short-term basis. Those housed in initial accommodation would generally not receive a cash Asylum Support payment from the Home Office for essential living needs because either those needs would ordinarily not arise on a short-term basis, or they could adequately be met by the full board basis of the accommodation. It is for the same reasons that it is sufficient for the MSVCC to provide a payment of £24.15 to individuals supported by s.98 to assist their social, psychological and physical recovery."

93. Mr Ryder states that trafficking support is provided "*to assist*" victims with their social, psychological and physical recovery from exploitation. As recovery needs vary widely, it would be very difficult, or nearly impossible, for the Secretary of State to set a specific 'one-size fits all' trafficking support payment if she were required to *meet* each victim's recovery needs, rather than *assist* in their recovery.

94. Mr Ryder states:

> "Support and material assistance provided by the MSVCC to 'assist' victims in their recovery should be viewed holistically as a package, rather than focussing on financial support as the sole means of assisting a victim's social, psychological and physical recovery."

He states that victims could apply with the assistance of their Support Workers, via a purchase order, for the cost of wider travel needs related to their modern slavery experiences to be met through the VCC. In March 2022, the Home Office updated the statutory guidance, setting out in detail what additional recovery costs victims, including those receiving asylum support, can claim through the MSVCC, and the procedure for doing so.

95. With respect to the reduction in trafficking support from £35 to £25.40, Mr Ryder states that claimants had been receiving £35 "*due to an unintended anomaly in the previous VCC*". The change

> "brought the claimants in line with how other victims who were receiving Asylum Support, but who were not in catered asylum accommodation, were already being treated by the VCC financial support policy. This payment of £25.40, when combined with what the claimants would have already been receiving through Asylum Support (through payments or in-kind assistance, or both), ensured that they were receiving the same overall amount as a victim receiving £65 a week from the VCC and i) that their essential living needs were being met (by Asylum Support) and ii) that they were being assisted with their social, psychological and physical recovery from their modern slavery experience (through their £25.40 VCC payment).
>
> The claimants were able to use this recovery related financial support payment (£25.40) towards assisting their recovery as they saw fit, and alongside the additional recovery costs assistance … available to all victims. A reduction in the recovery payment does not in and of itself mean it becomes insufficient in *assisting* victims towards their recovery, particularly when considered holistically alongside the wide range of other material assistance and additional recovery costs support the SSHD makes available to all victims of modern slavery to assist their recovery through the MSVCC, which since March 2022, has been set out clearly in published Statutory Guidance (originally published in version 2.8)."

96. Mr Ryder has provided evidence that on 12 November 2021, Ministers agreed to begin engagement with the Salvation Army to implement a new financial support policy pursuant to which there will be two rates:

    i) An "*Essential Living Rate*" which will be the same as the rate of Asylum Support for those in dispersal accommodation (currently £45). This rate will be adjusted where the victim is staying in catered accommodation.

    ii) A "*Recovery Rate*" or ('RR') "specifically for the purpose of assisting victims in their social, psychological and physical recovery".

97. Mr Ryder states:

> "The RR has been determined through Home Office market research into the cost of different items and services that may be needed by victims of modern slavery to assist their recovery. These services and items were identified through the stakeholder engagement process I outline in my 1st WS …, namely through a call for evidence sent to over 1,000 key Modern Slavery stakeholders on 18 June 2020, with responses correlated on or around 17 August 2020, with follow up workshops and engagement.
>
> Using the market research, we have identified a reasonable and rational RR to assist with victim's recovery, which is to be used

> alongside the direct funding of additional recovery costs available through the MSVCC…
>
> To give a robust indication of the cost of these items and services which make up the RR (travel, communication, distraction activities such as health and fitness, or wellness classes and a miscellaneous amount), across England and Wales, we assessed the costs of items and services in each area where there is currently MSVCC safehouse accommodation. For example, with respect to transport, the amount was reached by considering the average price of the maximum day ticket price identified in each safehouse location. In areas where two or more providers were identified and where locations offered a localised and wider area day ticket, the highest ticket price was used to calculate the average cost across the safehouse locations. This methodology was quality assured and approved by the Home Office Analysis and Insight.
>
> We reviewed the evidence base underpinning the RR in April 2022 and then again in October 2022 considering inflation rises in the UK. On 30 November 2022, Ministers agreed that the RR should be set at £26.14 per week and reviewed annually and amended if necessary to coincide with the annual review of the Asylum Support rate..."

98. Mr Ryder explains that the new Recovery Rate is based on the following breakdown, although it is a matter for any victim how they choose to spend this trafficking support:

Recovery item/service	**Amount**
Travel	£5.64
Communication	£3.00
Health/Fitness/Wellness	£7.50
Miscellaneous	£10.00
Total	**£26.14**

G. Ground 1: Correct Construction of paragraph 15.37 of the Policy

The issues

99. The agreed issues in respect of Ground 1 are:

> "Whether the Defendant unlawfully failed to make payments of £65 per week to the Claimant (and those in like situation to her) as a victim of trafficking supported under s.98 Immigration and Asylum Act 1999 pursuant to the *Modern Slavery Act 2015 – Statutory Guidance for England and Wales* (as in force until 28 August 2020) ('the Guidance')?

> a. Did PM receive 'financial support' pursuant to s.98 IAA 1999 and/or was she in a position provided for under paragraph 15.37?
>
> b. If so, was she entitled to receive £65 per week pursuant to §15.37 of the Guidance (minus the amount of financial support received pursuant to s.98 IAA 1999) for the period 13 May 2020 [to] 28 August 2020?"

100. In relation to the claimant personally, the question is whether she was entitled to payments of £65 per week from 13 May 2020 to 27 August 2020, rather than the lesser payments of £35 per week which she received.

The parties' submissions

101. The claimant submits the interpretation of §15.37 of the Guidance adopted by the Court of Appeal in *JB (Ghana)* is binding. That case raised a substantially similar question and largely answers the issue of interpretation raised by Ground 1. The facts of JB's case were strikingly similar to the claimant's case; the only point of distinction being that JB was granted s.95 support much more quickly than the claimant. Paragraph 15.37 of the Guidance expressly refers, in undifferentiated terms, to financial support provided pursuant not only to s.95 but also s.98 (and s.4) of the IAA.

102. The evidence demonstrates that the claimant received cash payments from the accommodation provider which payments must have been made to provide for the claimant's essential living needs pursuant to s.98 of the IAA. Indeed, the Secretary of State expressly pleaded in her Amended DGDs that on admission to the Hotel, the claimant "*received a one-off payment of £40.00 [provided] by her accommodation provider*". The claimant submits the only sensible inference is that the payment was made as part of the support package. The Serco letter provides further proof that the claimant was provided with financial support pursuant to s.98. In the circumstances, the claimant submits that her case falls squarely within §15.37 as interpreted by the Court of Appeal.

103. The Secretary of State accepts that, in accordance with *JB (Ghana)*, if the claimant had been accommodated in the Hotel pursuant s.95 of the IAA during this period, she would have been entitled to £65 per week. The only deductions that the Secretary of State would be permitted to make from the weekly figure of £65 would be to reflect any financial payments of asylum support received (and not support provided in kind by way of full board accommodation). However, the claimant was supported throughout the relevant period under s.98, not s.95. The Secretary of State contends the entitlement to £65 per week referred to in §15.37 of the Guidance did not apply to her. In support of this submission the Secretary of State contends, first, that the claimant was not in "*accommodation*" as defined in §15.36 and therefore §15.37 does not apply; secondly, the claimant did not receive financial support paid pursuant to s.98.

104. The first of the Secretary of State's two arguments runs as follows:

i) There is no express provision in the VCC for any payment by the Salvation Army to victims supported in full board accommodation under s.98. This is because the third entry in the table at F-001 (paragraph above) addresses the position of victims accommodated by the Secretary of State "*and in receipt of subsistence payments through that service*". There is no entry in the table to address the position of those accommodated by, but not receiving subsistence payments from, the Secretary of State.

ii) The reference to "*payment rates*" in §15.37 of the Guidance must be a reference to the rates referred to in §15.36.

iii) Paragraph 15.36 does not stipulate the rate of financial support payable to those supported under s.98 of the IAA. The claimant was not in any of the types of accommodation identified in the first three bullet points in §15.36 of the Guidance.

iv) Paragraph 15.37 is concerned with *adjusting* the payment rates of those who are identified as eligible under §15.36. It follows from (iii) that §15.37 does not apply to those such as the claimant who were supported in full board accommodation under s.98 of the IAA.

v) The Secretary of State contends that in *JB (Ghana)* at [35] the Court of Appeal has misread paragraph 2 of the FAQs document (see paragraphs 57.-above), as the capitalised term "Catered Accommodation" was a reference to VCC catered.

vi) In circumstances where the Guidance made no provision for trafficking support payments to be made to victims in full board accommodation provided pursuant to s.98 of the IAA, the Secretary of State reasonably exercised her discretion to make payments of £35 per week, on a par with the provision for victims in catered VCC accommodation.

105. The claimant submits that the Secretary of State should not be permitted to pursue the argument that §15.37 of the Guidance needs to be construed by reference to the categories of individuals identified in §15.36 of the Guidance, as it has not been pleaded even in the Amended DGDs served on 29 December 2022. It was first raised in the Secretary of State's skeleton argument. In any event, the claimant contends that it is a bad point, essentially for the reasons with which I agree and explain in my analysis below.

106. The second basis on which the Secretary of State contested Ground 1 concerns the characterisation of "*ad hoc"* cash payments made by the accommodation provider. The Secretary of State submits such payments may have been discretionary, rather than contractual. For example, the accommodation provider could have chosen to provide a "*welcome package*" in the exercise of its discretion rather than to fulfil its contractual obligation to provide for service users essential needs.

107. But even if they were provided pursuant to the accommodation provider's contractual obligations, such *ad hoc* payments are not "*financial support*" provided by the Secretary of State. As Sir Duncan Ouseley observed in *MK v Secretary of State for the Home Department* [2020] EWHC 3217 (Admin) at [2]:

> "… the Home Office does not pay, and has not paid, a cash allowance to those living in full-board accommodation. A cash allowance may be paid by the accommodation provider, pursuant to its contract with the Secretary of State, but it is not the Secretary of State who makes those payments."

Consequently, such *ad hoc* payments cannot properly be regarded as "*financial support*" provided pursuant to s.98 of the IAA.

108. On the basis of the claimant's first witness statement in which she said she received a single cash payment of £40 on entering the Hotel, the Secretary of State submits that even if such a payment constitutes "*financial support*" within the meaning of §15.37 of the Guidance, it would only result in an adjustment for the single week when the claimant received that payment.

109. The claimant submits that the Secretary of State's submissions merely repeat arguments that were made unsuccessfully in *JG (Ghana)*; and it is plain and obvious that cash payments made by the accommodation provider were made with a view to fulfilling the Secretary of State's obligation under s.98 to provide for essential living needs that were not being met in kind.

Analysis and decision

110. The approach to be taken to the interpretation of the Guidance is that described by Bean LJ in *JB (Ghana)* at [67]-[68] (quoted in paragraph above), and taken by the Court of Appeal in construing the very same paragraphs of the Guidance that are in issue in this claim.

111. The first of the Secretary of State's bases for resisting Ground 1 was not pleaded. Although there is considerable force in the claimant's objection to it being raised so late, it is a point of interpretation of the Guidance which has been fully argued. The court inevitably has to consider §15.37 of the Guidance in context and so, in circumstances where there is no prejudice to the claimant, I do not consider that the Secretary of State should be precluded from placing reliance on §15.36 of the Guidance.

112. However, I agree with the claimant that the point is unsustainable. First, the argument that the claimant was not in a type of accommodation identified in §15.36, and so §15.37 did not apply, would have applied – if it were a good point – to the claimant in *JB (Ghana)*. Victims such as JB who remained in 'initial accommodation', although they had been assessed as eligible for s.95 support, were in precisely the same type of full-board asylum accommodation as victims such as the claimant who were accommodated pursuant to s.98 of the IAA. The argument is inconsistent with *JB (Ghana)* and with the Secretary of State's pleaded concession that the claimant and LT were entitled to £65 per week in respect of any period prior to the publication of the Amended Guidance during which they were supported pursuant to s.95 of the IAA.

113. Secondly, the types of accommodation identified in §15.36 and the opening words of §15.37 stating that the "*payment rates will be adjusted*" have not been altered in the Amended Guidance, and yet it is acknowledged that §15.37 of the Amended

Guidance made provision for victims in full-board accommodation, whether supported pursuant to ss.95, 98 or 4, to receive trafficking support payments in the sum of £25.40 per week.

114. Thirdly, in *JB (Ghana)* – by which I am, of course, bound - the Court of Appeal considered §15.36 when interpreting §15.37, and rejected essentially the same submissions as are now pursued before me:

i) Leading Counsel for the Secretary of State in *JB (Ghana)*, Ms Giovanetti KC, submitted that the correct interpretation of the Guidance turned on "*the nature of the accommodation provided*": *JB (Ghana)*, [42].

ii) Ms Giovanetti made the same submission that the VCC does not address payments to be made to victims in full-board asylum accommodation: *JB (Ghana)*, [45].

iii) She also submitted, by reference to both §15.36 and §15.37, that the Guidance does not address payments to be made to "*the cohort of Potential Victims in full board asylum accommodation*": *JB (Ghana)*, [43], [45] and [48].

iv) The point that the *question* in the FAQs document, question 2, concerned "*those in VCC accommodation*" was also made to the Court of Appeal: *JB (Ghana)*, [50].

115. The Court of Appeal agreed with Mr Marquand that there was "*no lacuna*" in the Guidance (*JB*, [29]; *JB (Ghana)*, [36] and [64]). The Court of Appeal also agreed with Mr Marquand that there was "*no ambiguity*" (*JB*, [29], *JB (Ghana)*, [36] and [64]), Bean LJ observing that the judge's construction of §15.37 - the "*categorical terms*" of which were identified at [64], and clearly apt to cover those receiving financial support pursuant s.98, as well as s.95 (see paragraph above) - was consistent with the terms of the VCC and the *answer* given to question 2 in the FAQs document ([71]).

116. In my judgment, even taking these reasons alone, the Secretary of State's first basis for contesting Ground 1 inevitably fails. Moreover, fourthly, in *K & AM* Mostyn J had criticised the Secretary of State's failure to comply with the statutory duty under s.49(1) of the Modern Slavery Act 2015 to issue guidance: *K*, [4]-[8]. The Guidance was subsequently published to fulfil that duty, and in circumstances where Mostyn J had made the determination as to the meaning of "*subsistence*" in the context of ECAT and the Directive to which I have referred, and his decision was not appealed (paragraphs 47.-above). The Guidance reflected Mostyn J's conclusion in stating unequivocally at §15.35 that:

> "Potential victims and victims of modern slavery who have entered the NRM, received a positive Reasonable Grounds decision and are in VCC accommodation or outreach support, will be paid financial support."

117. The claimant was "*in outreach support*", and being provided with such support throughout the relevant period by, and through, her "*Outreach Support Worker*". The term "*outreach support*" was defined in §15.30 of the Guidance. Mr Ryder confirmed in his evidence that where "*a potential or confirmed victim is not accommodated in*

MSVCC accommodation, they will receive outreach support" within the meaning of §15.30 of the Guidance.

118. The Guidance clearly and unambiguously specifies that, among others, victims in outreach support will receive financial support (§15.35). In §15.36, having said that the rate of financial support depends on the accommodation the victim is in, the Guidance gives differing rates for those in VCC accommodation, depending on whether it is self-catered (£65) or catered (£35) and then provides the rate of:

> "£39.60 per week for those receiving outreach support in other accommodation".

119. The Secretary of State has merely asserted that the claimant was not in any of the types of accommodation specified in §15.36 of the Guidance. On the face of it, the term "*other accommodation*" refers to accommodation other than VCC accommodation. The starting point was that those such as the claimant who were not in VCC accommodation and who were receiving outreach support were entitled to a trafficking support payment of £39.60 per week. But that entitlement was adjusted by §15.37 for "*potential victims who are also receiving asylum support*".

120. Even if this last point were wrong, the Court of Appeal held that if consideration of the payment due to JB ended with §15.36, he would not have been entitled to £65 per week (*JB (Ghana*, [64]); and the same is true of the claimant. But "*the matter did not end there*" because §15.37 – which I note appears under a new heading ("*Financial support for potential victims who are also receiving asylum support*"):

> "states in categorical terms that if a potential victim of trafficking is also an asylum seeker and receiving asylum support, a further payment is to be made to him to make a total (including the asylum support) of £65 per week."

121. Given that §15.37 expressly refers to ss.95, 98 and 4, without differentiation, that conclusion applies with as much force to those who were supported pursuant to s.98 as it does to those supported pursuant to s.95, leaving only the question whether the claimant was receiving "*financial support*" pursuant to s.98 of the IAA.

122. In light of the evidence to which I have referred above, it is clear that providers of initial accommodation were contractually required to provide for the essential living needs of asylum seekers, whether they were supported under s.95 or s.98, and that they could do so by making provision in kind, in cash or through a combination of both. It is also evident that throughout the period from 13 May 2020 until 14 December 2020, Serco adopted the approach of making provision through a combination of in kind and cash support.

123. Even without the Serco letter, I would have inferred that the £40 paid to the claimant on entering the Hotel was not a payment made by Serco as a matter of discretion but that it represented a payment, in respect of several weeks, to meet those of the claimant's essential living needs that were not met in kind at the Hotel. I would also have found, in light of the claimant's third and fourth statements, that she received more than one such payment (albeit the amount and timing of any further such payments was opaque). I acknowledge that Ms Smith's understanding was that such

payments were at the discretion of the provider, and the claimant herself referred to them as *ad hoc*, but it is inherently unlikely that Serco would have made payments to asylum seekers that it did not consider itself contractually obliged to make in order to meet their essential living needs.

124. I note that Mr Bentley's evidence and Ms Smith's evidence both referred to Serco making payments of £5 to men and £10 to women. This is consistent with the evidence before Farbey J in *JM* that "*Serco hotels provided … a cash allowance of £5 for men and £10 for women*". The Serco letter that the claimant received and has adduced gives the figure of £5, rather than £10, per week. It is addressed "*[t]o whom it may concern*" and so may not have given the accurate figure for women in the Hotel. But the claimant's most recent evidence is that she was paid £5 per week by the Hotel, either in the form of £20 payments representing £5 per week for four weeks or in the form of £5 for a single week. I do not regard her recollection in this regard as entirely reliable: she acknowledged in her third statement, which was made much closer to the time than her fifth statement, that she found it difficult to remember what she had received. So it is possible that she may in fact have received £10 per week from the Hotel. However, the rate of £5 per week is consistent with the claimant's contemporaneous evidence in her first statement that at that point, eight weeks after she had entered the Hotel, she had received only one payment of £40 (which would have represented eight weeks' worth of payments at £5 per week). Accordingly, I conclude that she received £5 per week from the Hotel in cash. Those cash payments were stopped with effect from 14 December 2020.

125. The cash payments were not "*one-off*" or "*ad hoc*", although it is understandable that they were perceived by some, including the claimant, as *ad hoc*, given the variation in the number of weeks paid at any one time, and the lack of explanation as to their purpose.

126. It is true that these cash payments were provided by Serco and not by the Secretary of State. But in my judgment the Secretary of State's submission that these payments were not paid pursuant to s.98 of the IAA is misconceived. The Secretary of State's statutory duty was to provide for the claimant's "*essential living needs*". As Mr Payne KC accepted, that duty is non-delegable, albeit the Secretary of State can, as she did, discharge it through contractors and sub-contractors.

127. The Secretary of State's reliance on the fact that the cash payments were not made directly by the Home Office, in support of the submission that the claimant did not receive "*financial support under sections 95, 98 or section 4*" (§15.37), appears, in effect, to be a veiled attempt to resurrect the contention that "*financial support*" in §15.37 refers to those in receipt of a payment pursuant to regulation 10(2) and not to those whose essential living needs were met in full-board accommodation through a combination of in-kind and cash support: see *JB*, [20] and [25]. That submission was rejected by the High Court (*JB*, [20]) and not pursued before the Court of Appeal (*JB (Ghana)*, [58]). In any event, it is plain that the Court of Appeal accepted that the receipt of "*very modest cash payments towards essential living needs*" amounted to the receipt of "*financial support*" within the meaning of §15.37 of the Guidance (*JB (Ghana*), [66]). There is no proper basis on which the modest cash payments towards essential living needs which the claimant received from the Hotel can be distinguished from the modest cash payments towards essential living needs which JB should have received (albeit in fact he did not).

128. Given the terms of §15.37, the same type of payment, provided for the same purpose, to asylum seekers housed in the same type of accommodation cannot be "*financial support*" if provided under s.95 (as the Court of Appeal held it was) and yet not "*financial support*" if provided under s.98. Indeed, the Secretary of State does not go so far as to contend for such a distinction. Her argument is that the cash payments the claimant received were not provided under s.98, but for the reasons I have given I reject that contention.

129. I accept that this interpretation creates the anomaly that a victim in initial support who received their asylum support entirely in kind would have been entitled to £39.60 per week trafficking support, whereas a victim in initial support who received (or was entitled to receive) their asylum support through a combination of in kind and financial support would be entitled to £65 per week (less the value of the financial support). But the type of asylum financial support the claimant received from the Hotel is indistinguishable from that received by JB, so the analysis in *JB (Ghana)* clearly applies.

130. Accordingly, the claimant succeeds on Ground 1. I conclude that during the period 13 May 2020 to 27 August 2020 the Secretary of State unlawfully failed to make payments of £65 per week to the claimant, as a victim of modern slavery supported under s.98 of the IAA, pursuant to the Guidance. The claimant received £35 per week (recovery support payment) and £5 per week (cash payment towards essential living needs) during that period, and so she was underpaid £25 per week.

H. Ground 2: Lawfulness of the reduction in the level of financial trafficking support

The issues

131. The agreed issues in respect of Ground 2 are:

> "Whether the Defendant's Amended Guidance published on 28 August 2020 for those in the Claimant's position (VOTs receiving support under s.98 IAA 1999) was unlawful. In particular:
>
> a. Whether the Defendant was obliged to consult before implementing the Amended Guidance and, if so, whether there was adequate consultation and/or enquiry;
>
> b. Whether the level of financial support under the Amended Guidance unlawfully failed to meet victims' recovery needs consistent with the Defendant's obligations under ECAT and the EU Directive; and/or
>
> c. Whether the Amended Guidance unlawfully discriminated contrary to Article 4 and 14 ECHR against victims of trafficking in initial accommodation by providing them with less financial support than to other victims."

The evidence regarding the introduction of the Amended Guidance

132. On 4 August 2020, officials in the Home Office's Modern Slavery Unit put a written submission to the Secretary of State ('the Ministerial Submission') which stated:

> "**Issue**
>
> The provision of interim financial support for the cohort of potential and confirmed modern slavery victims who are housed in 'initial accommodation' provided through asylum support (generally full-board accommodation), and the provision of back payments.
>
> **Timing**
>
> **Immediate** – We are being legally challenged as a result of the absence of a policy position on financial support for this cohort of modern slavery victims. In addition, we are receiving critical media and stakeholder interest, including correspondence from the Independent Anti-Slavery Commissioner, on our current position. An early response would enable The Salvation Army to implement proposed changes as soon as possible [REDACTION].
>
> **Recommendation**
>
> That you:
>
> - **Agree** to introducing an interim weekly payment of £25.40 for potential and confirmed victims of modern slavery who are initial accommodation until the new wider financial support policy is introduced.
>
> - **Agree** that changes should be implemented as a matter of urgency through a contract change notice with The Salvation Army, an update to the Modern Slavery Act 2015: Statutory Guidance for England and Wales and an announcement through the Modern Slavery newsletter to stakeholders.
>
> - [REDACTION]
>
> - **Agree** as per our legal obligation that in principle, any potential or confirmed victims of modern slavery who were in initial asylum accommodation and who did not receive appropriate financial support from the VCC up until the date when the interim policy is implemented, should be granted back payments at a rate of £35 per week. …
>
> **Equality Duty: Has a Policy Equality Statement been completed?** Yes
>
> …

Discussion

1. **The case of K & AM v SSHD [2018] considered whether the cessation of additional payments to potential and confirmed victims of modern slavery who were in receipt of asylum support, was unlawful.** The judgment in this case held that the Victim Care Contract (VCC) did not intend for potential/confirmed victims of modern slavery who are also supported under s95 Asylum and Immigration Act 1999 accommodation to only receive payments through the asylum support system and that the reduction in support was unlawful. As a result of the judgment, those in s95 asylum support continue to receive a total financial assistance package of £65 per week; this is currently made up of payments from the asylum support system (£39.60) and the VCC (£25.40). The £39.60 payment is framed as a way of meeting ordinary 'essential living needs', whilst the £25.40 covers other needs related to recovery from exploitation.

2. **However, there is currently a gap in the VCC in relation to financial support for the cohort of potential modern slavery victims who are receiving asylum support in the form of 'initial accommodation'**. [REDACTION]

3. [REDACTION]

4. **The new financial support policy that you (Minister Atkins and Home Secretary) agreed in March this year, will ultimately address this gap by ensuring this group are entitled to apply for individualised financial support to meet their recovery need.** Whilst other aspects of the policy can be, and have been, brought in sooner, the process to apply for individualised financial support for recovery from exploitation requires careful planning and implementation, including face-to-face conversations between service users and support workers, and the introduction of a new case-working process and team. Transition to the new policy is planning for winter as part of the operationalisation of the new Modern Slavery Victim Care Contract.

5. **Initial accommodation is a form of temporary support within the asylum system.** It is generally provided as full-board, with food and toiletries provided on-site in-kind, but in some instances the persons receive vouchers to buy their own toiletries or food (in cases where cooking facilities are available in the accommodation). In normal times, this form of accommodation is used to house asylum seekers under the provisions of section 28 of the Immigration and Asylum Act 1999 while consideration is given to whether they qualify for support under section 95 of the 1999 Act (i.e. they are destitute as claimed). If the section 95 application is granted the person

is moved to 'dispersal accommodation' (generally flats and houses) and starts to receive the £39.60 per week standard asylum support payment and the £25.40 top up, from the VCC, if they are also a potential or confirmed victim of modern slavery. It should be noted that the level of the weekly asylum cash allowance for those in s95 support is reviewed annually, using a methodology developed in 2014 which has been accepted by the Court of Appeal as rational and lawful.

6. **Due to pressures created by COVID-19, the asylum estate is at full capacity, and nearly all new asylum seekers entering asylum support are being placed in initial accommodation or more commonly hotels, with no cash payments, including those who have been approved for section 95 support.** …

7. **It follows that the pressure on the asylum accommodation estate has impacted the VCC.** More victims of modern slavery than would ordinarily be affected by this gap in policy and contractual provision may now be disadvantaged by it, making the case for change even more pressing. The increased numbers in emergency hotels/hostels with no cash payments has highlighted the inconsistency in the VCC financial support for this cohort, and there has been a significant increase in interest/pressure from stakeholders. We have not received seven pre-action protocol letters and three judicial review claims on this issue. [REDACTION], that the SSHD is obliged to make payments, reflecting her enhanced obligations under the Trafficking Directive, not only to those potential and confirmed victims in dispersal accommodation but also to those in initial accommodation.

8. **Given timeframes,** [REDACTION] **and increased pressure from stakeholders we consider it necessary to make an immediate change to the VCC to provide cash payments to potential/confirmed victims of modern slavery whilst they are in initial accommodation.** This immediate change will only be in place until the wider changes to financial support are rolled out later in the year. The following options have been considered for this interim approach.

Option 1

9. **Option 1 would be to provide these individuals with a cash payment of £35 per week in line with the current VCC rate for service users accommodated in catered VCC accommodation.** [REDACTION]

10. **However, most other victims in the asylum support system are in dispersal accommodation only and receive £25.40 from the VCC to cover recovery needs (in addition**

to £39.60 from the asylum support system, bringing their total weekly payment to £65). The difference between the proposed £35 and £25.40 paid to other victims could therefore be construed as an acknowledgment that the package of support provided in full-board facilities does not fully meet the 'essential living needs' test. [REDACTION]

11. We do not recommend this option as it would have the effect of providing potential/confirmed victims of modern slavery in initial accommodation a higher level of support than those in dispersal accommodation, [REDACTION].

Option 2

12. **Option 2 would be to treat this group the same as other asylum seekers who receive a 'top up' of £25.40 from the VCC.** This approach would make an assumption that the package from initial accommodation (made up of full or partial in-kind) accommodation is equivalent in value to £39.60 in cash payments and is therefore enough to meet the individuals' basic essential living needs, whilst leaving £25.40 to cover other recovery related needs. It is important to maintain that full-board accommodation is considered sufficient to meet the essential living needs of individuals for a temporary period, and that some items covered essential for those in dispersal accommodation (e.g. needs related to keeping the accommodation clean) don't apply to those in full-board accommodation. As stated in paragraph 5, some forms of initial accommodation are not full-board in all respects, as food vouchers are provided to purchase food. However, the value of the package of support provided is intended to be the same regardless of how it is provided. This option would also align this group with other asylum seekers who are also potential/confirmed victims and supported through the VCC. The £25.40 payment would continue to be paid regardless of whether the essential living needs element continued to be provided fully or only partially in-kind (if the Minister for Immigration Compliance and the Courts and Home Secretary Agree the proposal to provide some of it in cash after the 35 days period).

13. [REDACTION]

14. [REDACTION] It should be noted however, that there are currently only c.28 individuals in VCC catered accommodation – and that this accommodation is provided where an individual is unable to provide food for themselves, e.g. due to disability, or substance addition. The two groups are not therefore in reality the same. In addition, VCC catered accommodation only provides food and some household cleaning, and therefore does

> not necessarily provide the same level of in-kind support as initial accommodation.
>
> ***Option 3***
>
> 15. **Option 3 would be to do nothing. This is not recommended for the reasons set out in this advice.**
>
> ***Recommendations***
>
> 16. **Option 2 (top up rate of £25.40) remains the recommended** [REDACTION] Current estimates are there are approximately 8,000 individuals in asylum full-board accommodation. Given how data on the NRM and asylum support systems are collated and stored, we do not have an accurate record of how many victims of modern slavery are in asylum full-board accommodation, however, we have approximately 2,360 potential/confirmed victims of modern slavery who are supported by the asylum support system. For the avoidance of doubt, this top up payment would only be paid to potential/confirmed victims of modern slavery for the duration of their residency in full-board accommodation.
>
> **Do you agree that we should proceed with Option 2: Providing a weekly payment of £25.40 for potential/confirmed victims of modern slavery who are in initial accommodation in line with our international legal obligations following the judgment in K & AM, as an intermediate temporary approach ahead of wider financial support changes?**
>
> …"
>
> (Underlining added (save in §8), bold in the original. All references to redactions are to information removed by the defendant on the grounds it benefits from legal professional privilege.)

133. The recommendation was accepted and, as I have said, the Amended Guidance which reflected it was published on 28 August 2020.

134. The evidence given by Mr Ryder in his first statement was that:

> "it is not currently, nor at any time has it been the case that asylum-seeker potential or confirmed victims of trafficking accommodated in full board/fully catered asylum accommodation would receive £65 per week in modern slavery financial support payments.
>
> Ahead of the policy change it is my understanding that asylum seeking potential victims not accommodated by the VCC and not in dispersal accommodation under asylum support, were

> paid a single payment of £35 per week from the VCC as per section 6 of Schedule 2 of the previous VCC."

The first sentence quoted above is now subject to the caveat that following *JB (Ghana)* the Secretary of State has paid arrears to bring the rate up to £65 per week for victims who were supported pursuant to s.95 of the IAA in initial accommodation before 28 August 2020. But I accept that when the Amended Guidance was brought in, irrespective of the terms of the Guidance, there was not in fact any history of any victims in such accommodation receiving trafficking support of £65 per week.

135. Mr Ryder also said in his first statement:

> "It is my understanding that … the amendment to the [Guidance], formulated in August 2020, was intended to be an interim amendment formulated on an urgent basis in response to the judgment of Mostyn J, and head of wider financial support policy reform, including stakeholder engagement."

136. I accept that the Amended Guidance was introduced on an interim basis in circumstances where a full review was under way. But it is obviously wrong to suggest that any urgency was as a result of the need to respond to Mostyn J's judgment in *K & AM*. That had been handed down on 8 November 2018, more than 21 months before the Amended Guidance was published.

137. As I have said, on 6 July 2020, the Secretary of State made the cessation decision by which she stopped all trafficking support payments to victims who were asylum seekers in initial accommodation. In response to my question whether the Secretary of State accepts the cessation decision was unlawful Mr Payne KC stated that his instructions were not to oppose the challenge on that issue.

138. The cessation decision was unlawful and, given the clear effect of *K & AM*, which the Secretary of State had chosen not to appeal, absolutely indefensible. Although arrears calculated by reference to the £35 per week rate that was in fact being paid prior to the cessation decision have been paid, it is nonetheless important to recognise not only that the cessation decision was unlawful but also how clear and obvious that was when the Amended Guidance was under consideration. When the Amended Guidance was introduced, victims in initial accommodation were *in fact* receiving no trafficking support (unless, as in the claimant's case, they had secured interim relief from the court). But the only reason they were not still receiving £35 per week was due to the patently unlawful decision that had been made seven weeks earlier.

139. The immediate urgency in August 2020 was to remedy the situation created by the unlawful cessation decision; not to respond to a judgment given in 2018.

140. The Secretary of State acknowledges in her grounds and evidence that there was no consultation prior to publication of the Amended Guidance. In her summary grounds, in response to a request for documents "*relating to any consultation undertaken with stakeholders, and relating to the Equality Act prior to taking the decision*", the Secretary of State responded:

> "No such consultation took place, nor was there an Equality Act 2010 assessment. The direction [i.e. the Amended Guidance] was considered to be a clarification of the contractual position."

141. Mr Ryder explained in his second statement:

> "23. In August 2020, the Home Office published updated Statutory Guidance clarifying that potential and confirmed victims of modern slavery, who were also receiving Asylum Support, whether in the form of a subsistence payment, or in kind through virtue of being accommodated in catered accommodation, or a combination of both, should receive £25.40 per week from the VCC. This was an update to clarify the existing interplay between VCC support and Asylum Support, to ensure that different parts of the Home Office were not duplicating support provision.
>
> I understand that the claimants had previously been receiving £35 a week due to an unintended anomaly in the previous VCC, which from a Home Office perspective at the time, was not the correct VCC rate for them because they were receiving Asylum Support (whether in-kind support or subsistence payments or both) and also residing in Asylum Support accommodation. This change therefore brought the claimants in line with how other victims who were receiving Asylum Support, but who were not in catered asylum accommodation, were already being treated by the VCC financial support policy. This payment of £25.40, when combined with what the claimants would have already been receiving through Asylum Support (through payments or in-kind assistance, or both), ensured that they were receiving the same overall amount as a victim receiving £65 a week from the VCC and i) that their essential living needs were being met (by Asylum Support) and ii) that they were being assisted with their social, psychological and physical recovery from their modern slavery experience (through their £25.40 VCC payment).
>
> …
>
> The August 2020 policy clarification was not a policy change. It was the correction of an unintended effect of the wording of the then policy document. The SSHD did not consider it necessary or appropriate to consult on this correction by way of amendment, which removed an anomaly and brought the claimants in line with other victims in receipt of Asylum Support (those not in catered asylum accommodation). As explained in my 1st WS…, the Home Office then went on to engage stakeholders to gather evidence to inform development of the new financial support policy."

142. The lack of any consultation prior to the introduction of the Amended Guidance is also supported by the claimant's evidence, but in view of the Secretary of State's acknowledgment that there was no consultation it is unnecessary to provide any further outline of that evidence. The Secretary of State's evidence is that she had already begun engaging with stakeholders in July 2020, but that was for the purpose of introducing and developing a new financial support policy. In terms of inquiry, the Secretary of State has adduced evidence of a costed analysis of recovery needs that has been undertaken in the context of that review. However, it is acknowledged no such exercise was undertaken prior to the introduction of the Amended Guidance.

The parties' submissions on Ground 2(a) (consultation/Tameside duty of inquiry)

143. The claimant submits that where an established benefit is being withdrawn, there will usually be an obligation to consult beneficiaries before withdrawal: *R (A) v South Kent Coastal CCG* [2020] EWHC 372 (Admin), [57], citing *R (LH) v Shropshire Council* [2014] EWCA Civ 404, [21]. She contends this case falls within the fourth category identified by Hallett LJ (giving the judgment of the court) in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB), [2015] 3 All ER 261 at [98](2), that is, "*a failure to consult would lead to conspicuous unfairness*".

144. The claimant also submits that the Secretary of State unreasonably failed to take <u>any</u> steps to acquaint herself with information relevant to her decision to cut trafficking support. She was under a legal duty to meet victims' recovery needs (*inter alia* through the provision of financial support) but failed to identify and consider those needs when cutting support, in breach of the *Tameside* duty: *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020 at [58] and [145].

145. The claimant submits that in this case the established benefit was either (a) £65 per week that ought to have been paid in accordance with the Guidance (for the reasons given in respect of Ground 1); or (b) £35 per week that was in fact paid. The effect of the cessation decision and the reintroduction of trafficking support at the lower level of £25.40 per week was to cut trafficking support:

    i) by £9.60 per week (i.e. 27%) compared to the *status quo ante* of £35 per week); and

    ii) (if the court accepts Ground 1) by £39.60 per week (i.e. 113%) compared to the sum of £65 per week payable pursuant to the Guidance.

146. The evidence of the claimant's solicitor, Elizabeth Barratt, is that trafficking support was first introduced in 2009. Whereas there is an annual review of asylum support, and the amount payable increases in line with inflation, the trafficking support element had never increased prior to the cessation decision, so far as the claimant is aware. In any event, it had been paid at the rate of £35 per week to victims in initial accommodation for at least five years. On the basis, as I understand it, that trafficking support for this cohort was £35 per week when it was first introduced, Ms Barratt has calculated that if it had been adjusted for inflation, using the Consumer Price Inflation ('CPI') tables, the current value would be £89.18. She recognises that this figure reflects inflation for all items, including some, such as the purchase of vehicles, which are irrelevant. By reference only to the categories she suggests are reasonably related

to recovery (namely, clothing and footwear, health, transport services, communication, education, recreation and culture, restaurants and personal care), Ms Barratt calculates that if trafficking support had increased in line with inflation the current value would be £81.19.

147. In providing this evidence, the claimant does not seek to assert what the level of trafficking support should be, but she submits that the fact that it had been severely cut in real terms was a matter that the Secretary of State should have identified pursuant to her *Tameside* duty. And it increased the importance of consulting stakeholders - such as the Modern Slavery Strategy and Implementation Group (MSSIG), which consists of charities, NGOs and some statutory bodies, including Anti-Slavery International, Human Trafficking Foundation, the Salvation Army and the Independent Anti-Slavery Commissioner's Office – in order to obtain information about the impact that substantially reducing trafficking support would have on the recovery of this cohort of victims.

148. The claimant emphasises that even a small deduction would have been significant given that her entire needs as a victim and as an asylum seeker had to be met by the asylum support she received in the Hotel together with the trafficking support payment. But the deduction was not small. Even the lower of the two figures (referred to above) is significant as a proportion of the amount she (and others in a like situation) received.

149. The claimant contends that it is not tenable in light of *JB(Ghana)* for the Secretary of State to say the Amended Guidance corrected an error in the Guidance. There may have been a "*flaw in the design*" of the Guidance, but that was not the same as a "*drafting error*" (*JB (Ghana)*, [71]). The Amended Guidance represented a new policy approach. The Secretary of State has provided no cogent reason as to why it was necessary to cut support on an urgent basis, without undertaking a legally adequate inquiry or consultation. The Secretary of State's intention to review the policy cannot, the claimant submits, justify taking decisions prematurely and without consultation prior to the outcome of that review.

150. The Secretary of State submits that the guidance given by the Court of Appeal in *Plantagenet Alliance* shows that for the court to impose a duty to consult is exceptional. Given the nature of the decision to issue the Amended Guidance, no duty to consult arose.

151. First, the Secretary of State relies on the fact that it was *interim* guidance pending the full review that was in progress. Its interim nature was evident from the Ministerial Submission: see "*The Issue*" and "*The Recommendations*". The claimant has not identified any authority in which a duty to consult on an interim policy has been imposed. The notion that the Secretary of State had to undertake a consultation both in relation to interim measures and in relation to her longer-term policy is, in this particular context, misconceived.

152. The second key characteristic that the Secretary of State relies on is that the introduction of the Amended Guidance did not constitute a shift in policy or a change in approach. It was designed to correct an anomaly by which one category of victims were receiving far more than others, and to achieve the previous policy objectives by making clear the position the Secretary of State had previously understood to be

applicable. The Amended Guidance clarified the position in the interim pending the full review that was in progress, removing any ambiguity or unintended effect of a literal reading of the Guidance which resulted in duplication of support.

153. The Secretary of State contends that the claimant's argument that the amendment resulted in the withdrawal of an "*established benefit*" goes too far as there had not, prior to the pandemic, been any established practice of paying this cohort £65 per week. The figure of £35 per week had been set by the Ministry of Justice before responsibility transferred to the Home Office in 2014. In the context of the review, the Secretary of State had not been able to ascertain how that figure had been arrived at or the particular recovery needs it was intended to meet as there was no breakdown. All that could be said was that the Secretary of State for Justice must have thought it was an appropriate amount at that time, but it could not be said he had decided it was the "*minimum*" appropriate to assist recovery: *K & AM*, [30].

154. The Secretary of State submits that it was not irrational to start from the figure of £65 per week that victims in dispersal accommodation were receiving, and deduct the value of the essential living needs component that those in initial accommodation were receiving in kind (at least in the main). This brought the support for victims in initial accommodation into line with the support being provided to victims in dispersal accommodation, meaning that all asylum-seeking victims received the same level of support. The claimant's evidence regarding inflation is irrelevant to this policy of alignment.

155. Further, the Amended Guidance needed to be issued rapidly and without delay because of (i) the extended periods individuals were having to remain in initial accommodation as a result of the pandemic; and (ii) the absence of any specific provision for trafficking support for this cohort within the VCC and Guidance.

156. With respect to the *Tameside* duty, the Secretary of State relies on the principles identified by the Divisional Court in *Plantagenet Alliance* at [99]-[100], which fall to be applied in the specific context which she again emphasises was interim guidance being produced, pending the completion of the ongoing review of the financial support policy, to correct an identified anomaly. The Secretary of State relies on Bean LJ's observation in *JB (Ghana)* at [73] that he could see no reason why the Secretary of State should have been precluded from making the amendment which she did (paragraph above).

Analysis and decision – Ground 2(a): consultation/Tameside

157. The Secretary of State was not under a *statutory* duty to consult. The question is whether a duty to consult arose at common law. There is no general duty to consult at common law: *Plantagenet Alliance*, [98(1)]. As the Divisional Court observed in *Plantagenet Alliance* at [98(2)]:

> "There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will

> be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68–82], especially at [72]).” (Emphasis added.)

158. In this case, the claimant does not contend any duty to consult arose by reason of a promise to consult, or a practice of doing so. No reliance is placed on the concept of legitimate expectation. In these circumstances, a conclusion that a duty to consult arises is exceptional. Where there has been no promise or practice giving rise to a legitimate expectation (whether procedural or substantive), the common law will be “*slow to require a public body to engage in consultation*” (*Plantagenet Alliance*, [98(3)]).

159. As the Divisional Court observed in *Plantagenet Alliance* at [99]:

> “A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the *Tameside* duty since the principle derives from Lord Diplock’s speech in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 at 696, [1977] AC 1014 at 1065, where he said: ‘[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?’”

160. In *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, the Court of Appeal (Underhill, Hickinbottom and Singh LJJ) approved *Plantagenet Alliance* at [99]-[100] and described the relevant principles which are to be derived from the authorities since *Tameside* in the following terms at [70]:

> “… First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or

> involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

161. In my judgment, the question whether this aspect of Ground 2 is made out falls to be viewed primarily through the lens of the *Tameside* duty. A duty to consult outside bodies may arise, as the Court of Appeal observed, from the duty to carry out sufficient inquiry.

162. I agree with the claimant that the Secretary of State unreasonably failed to take any adequate steps to acquaint herself with information relevant to her decision to cut trafficking support. The decision that it was unnecessary to consult, or to make further inquiry, was based on a flawed conception of the nature of the decision.

163. First, on proper analysis, the decision was to *reduce* the amount victims had been receiving, and were entitled to receive, in trafficking support. There is no evidence, and no sign in the version of the Ministerial Submission provided to the court, of any recognition that the proposal was a *reduction* of support. Instead, the Ministerial Submission refers to a *gap* in support which the *introduction* of the proposed payment is intended to fill.

164. Secondly, victims in initial accommodation had been receiving £35 per week. The only reason they were not still receiving that sum was due to the unlawful cessation decision a few weeks earlier. There is no recognition in the Ministerial Submission that what was proposed was a *very substantial* reduction in support, even taking the figure victims had in fact been receiving prior to the cessation decision, rather than their considerably higher entitlement under the Guidance.

165. Thirdly, the decision that it was unnecessary to consult was in part based on the *interim* nature of the guidance. However, although it was introduced at a time when the Secretary of State was undertaking the review, and so intended to publish a further version of the guidance once that review was complete, the decision was not interim in a sense that was of any relevance in deciding whether it was necessary to consult or undertake further inquiry. The reduction of trafficking support for all those victims in initial accommodation who were in receipt of it during the years that the Amended Guidance was in force was not *provisional* on any decision to be taken following the review. I agree with the claimant that the Secretary of State's intention to review her policy could not rationally justify a premature decision, taken without consultation or adequate inquiry, to reduce trafficking support substantially prior to the outcome of that review.

166. Fourthly, the decision that it was unnecessary to consult was also based, in part, on the fallacy that the decision to reduce the trafficking support for this cohort to £25.40 per week involved no change of policy, amounting to no more than a clarification or correction of an error in the Guidance. It cannot be said that it had ever been the Secretary of State's policy to pay that rate to victims in initial accommodation. She had never done so. Her argument in *JB(Ghana)* was that her policy, on a proper

understanding of the Guidance, was to pay victims in initial accommodation £35 per week, in line with the entitlement of those in catered VCC accommodation, and with the payments she had in fact made. There was a flaw (or flaws) in the design of the Guidance which led to anomalies in the amount of trafficking support paid to distinct groups of victims. But it was not obvious from the Guidance what the substance of the policy would have been if its design had been properly thought through: see *JB (Ghana)* at [71]. Consequently, the decision to accept the recommendation in the Ministerial Submission and to publish the Amended Guidance self-evidently involved a choice and the adoption of a new policy.

167. Fifthly, the premise in the Ministerial Submission that there was a "*gap*" in the Guidance, leaving the cohort of victims in initial accommodation without any trafficking support, and so creating an *urgent* situation, was misguided. There was no gap: they had an entitlement to support in accordance with the Guidance. The only reason they were not receiving any trafficking support was because of the unlawful cessation decision. The urgent problem could have been remedied by withdrawing the cessation decision.

168. That said, I accept that once it was identified in the claims that were filed following the cessation decision that the Guidance provided for victims in initial accommodation to receive £65 per week less the small amount of financial support they received, it was open to the Secretary of State to take the view that she needed to act swiftly to avoid continuing to pay £65 per week to this cohort. If the Secretary of State wished to remove the entitlement to £65 per week before consulting or undertaking an assessment, it would have been open to her to have withdrawn the cessation decision and amended the Guidance to reflect the reinstatement of payments of £35 per week (even if only on a temporary basis while the appropriate rates for all victims was the subject of consultation and review). As that would not have involved a *de facto* reduction in trafficking support it would have been justifiable to proceed in that way without first undertaking a consultation or further inquiry.

169. But in my judgment the urgency of the need to reinstate trafficking support was not capable of justifying making a substantial *de facto* reduction in trafficking support without taking any steps to inquire as to the impact that would have on those affected, or to identify, assess and evaluate the recovery needs that trafficking support payments should assist in meeting. Mr Ryder states that the rationale underlying the original introduction of the £35 per week rate was unclear but it was only long after the Amended Guidance was introduced that any attempt to ascertain the rationale was made.

170. Once the nature of the decision the Secretary of State took is properly understood, in my view it is clear that the failure to consult outside bodies such as MSSIG, or otherwise to gather any information as to the impact that a (*de facto*) 27% reduction in trafficking support would have on the recovery of victims, breached the *Tameside* duty. Accordingly, I conclude that the Amended Guidance was unlawful.

The parties' submissions on Ground 2(b) (recovery needs)

171. The claimant further submits that the Amended Guidance is unlawful because the trafficking support of £25.40 per week unlawfully failed to meet victims' recovery needs.

172. The claimant contends that the Secretary of State's argument that her obligation is only to "*assist*" victims in their recovery appears to amount to a suggestion that "*any level of trafficking support, however low, will assist with recovery and therefore meet the Defendant's international obligations*". The claimant submits this is not the case. Article 13 of ECAT requires that potential victims of trafficking should be able to "*recover and escape the influence of traffickers*". The preamble to the Directive provides that victims should receive assistance and support including "*at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers*". Jurisprudence of the European Court of Human Rights emphasises that measures to safeguard the rights of victims must be "*practical and effective*": see, e.g. *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, [284]-[285]. This includes a positive "*protection duty*" which has the aim not only of protecting the victim from further harm but also of facilitating recovery: *Chowdhury v Greece* (App. No. 21884/15), *VCL and AN v UK* (App. Nos. 74603/12 and 77587/12, [153] and [159]. These standards are considerably higher than mere assistance.

173. The claimant submits that the cut in support "*reduced financial assistance below the level previously acknowledged to meet recovery needs*"; and it did so in circumstances where the level of trafficking support had been subject to an ongoing real term cut, as it had never been adjusted in line with inflation.

174. The claimant contends the level of trafficking support provided under the Amended Guidance failed cover the items set out in the *Slavery and Trafficking Survivor Care Standards* ('the Care Standards'), which were adopted by the Secretary of State in October 2017. The Care Standards stipulate that victims require a range of material support, including the following: (i) at least three changes of clothing; (ii) sufficient funds in order to be able to travel as needed; (iii) a mobile phone; (iv) Wi-Fi; and (v) access to a computer and printer.

175. The claimant draws attention to Mr Ryder's evidence that mobile phones, credit, coats and winter boots are not provided "*as standard by the contract*", and that for clothing accommodation providers and support workers are "*expected to use charitable donations*". The claimant submits that he tacitly acknowledges that victims in initial accommodation do not receive three sets of clothing, mobile phones, access to computers, and there is not automatic access to internet or phones with data. So the items identified by Mostyn J and the Care Standards are not supplied.

176. The claimant contends that the Secretary of State has failed to show that the level of trafficking support provided under the Amended Guidance met the recovery needs identified by Mostyn J in *K & AM*. The claimant submits that the Secretary of State cannot rely on a policy review which took place after the Amended Guidance was introduced. Such *ex post facto* evidence regarding future changes to trafficking payments is irrelevant and cannot change the lawfulness of payments made to date.

177. The claimant submits that the Secretary of State's reliance on the possibility of a victim securing additional recovery payments from the Home Office is misplaced given that no reference was made to that possibility until March 2022, victims and those advising them were unaware of this possibility until recently, and *ad hoc* payments would not satisfy the long-term needs.

178. The Secretary of State submits that, as regards the level of support provided to victims with respect to their recovery needs, the obligation under Article 12 is one of "*assisting*" their recovery. In *R (ZV) v SSHD* [2018] EWHC 2725 (Admin) Garnham J at [122] described the support envisaged under article 11 of the Directive and article 12 of ECAT as:

> "modest levels of assistance [comprising of] measures, for example, capable of ensuring the subsistence and to emergency medical support, rather than to the more sophisticated support treatment for which Ms Knights contends."

With respect to Garnham J's observations as to the *modesty* of support payments to be made, Mostyn J in *K & AM* observed at [30] that he did not disagree that "*such a level should be the minimum*" (although he otherwise disagreed with the quoted passage).

179. The Secretary of State contends that the claimant's reliance on the mere fact that a higher rate was previously provided cannot assist given the absence of institutional memory as to how the rates were originally set, and the lack of evidence that the earlier rates represented an assessment of the "*minimum*" level necessary to assist recovery.

180. The Secretary of State submits that it was reasonable and rational to bring the level of trafficking support for victims in initial accommodation into line with that provided to victims in dispersal accommodation. She relies on the detailed work undertaken in the context of the review as demonstrating that there is no basis for the contention that the rate adopted in August 2020 was insufficient to meet the Secretary of State's obligations. That review identified the items which trafficking support should cover and the likely costs involved, and arrived at a rate of £26.14, closely approximating that paid by way of trafficking support to victims in August 2020.

181. The Secretary of State relies on the second statement of Mr Ryder in rebuttal of the claimant's contention that the Care Standards were not met. Mr Ryder states that (i) the MSVCC ensures that victims have three sets of clothing, including any existing clothing, and provides three sets of clothing if necessary; (ii) travel to a wide range of recovery related appointments is directly funded pursuant to the MSVCC; and (iii) "*Asylum support and MSVCC payments meet communication needs*". With respect to Wi-Fi and access to a computer and printer, Mr Ryder states:

> "Victims can use their MSVCC recovery payments to access Wi-Fi or to help access to a computer and printer, for example by going to a library or an internet café. If a victim already has a smart phone when they enter MSVCC support they can access public Wi-Fi."

182. Support for recovery was not provided solely in the form of trafficking support payments. Victims received other support, such as free healthcare via the National Health Service ('NHS') (including free prescriptions, dental treatment and sight tests), the practical and emotional assistance of an Outreach Support Worker, support with travel (as described above), and where appropriate, as in the claimant's case, psychological support such as counselling may be provided. The Secretary of State

also contends that the Amended Guidance envisaged a case-by-case assessment pursuant to which additional support of a financial or in-kind nature could be sought and made available.

183. The Secretary of State notes that the current rate of £26.14 rate of trafficking support reflects an adjustment to account for inflation. The fact that £35 rate had not been adjusted for inflation does not render the Amended Guidance unlawful in view of the lack of any evidence as to the rationale for setting that rate and the lack of any significant change to the CPI index in 2019-2020 or to inflation price indexes between March and August 2020.

Analysis and decision – Ground 2(b) (recovery needs)

184. It is clear, in accordance with the authorities cited in paragraphs 44. to above, that the Secretary of State is required to provide victims with some financial support, going beyond the support provided to meet their essential living needs, as part of the package of measures designed to assist victims in their physical, psychological and social recovery. As Mostyn J observed in *K & M* "*some money*" for purposes such as travel, recreation, entertainment and use of a computer or smartphone is reasonably required to assist in such recovery. The Secretary of State is not obliged to provide more than modest levels of assistance for these purposes.

185. The fact that the aim is to "*assist*" victims in their recovery does not mean, and Mr Payne did not contend it means, that the Secretary of State could rationally set the rate at any level at all, no matter how low, on the basis that any sum at all might be said to "*assist*". It is for the Secretary of State to set the rate, as primary decision-maker. But her decision is subject to review on *Wednesbury* grounds, and there would undoubtedly come a point at which, if that approach were taken, the rate would be found to be below the minimum rationally required to comply with ECAT, the Directive, the Secretary of State's policy and the authorities to which I have referred.

186. However, I am not persuaded that the Secretary of State's determination in August 2020 that a rate of £25.40 per week trafficking support was sufficient to assist in meeting the recovery needs of victims in initial accommodation was irrational.

187. First, there is no evidence as to how the rate of £35 per week for those in catered VCC accommodation was adopted. It is clear that the trafficking support for victims in dispersal accommodation was already the lower figure of £25.40, and the higher sum to which those in initial accommodation and receiving financial support pursuant to ss.95, 98 or 4 were entitled was a result of a flaw in the decision of the Guidance. In these circumstances, the fact that the new rate represented a significant reduction in the trafficking support paid to victims in initial accommodation does not, in and of itself, show that it was irrational for the Secretary of State to determine that it was sufficient (together with the non-pecuniary support that is available) to assist in meeting the cohort's recovery needs.

188. Secondly, it seems to me that I can place little weight on the evidence of Ms Barratt as to the extent of the real term cut, having regard to inflation for these reasons. (i) Ms Barratt's evidence is not expert evidence adduced pursuant to CPR Part 35. (ii) Her calculations are based on inflation from 2009, whereas the evidence is not clear that the rate was £35 in 2009. The evidence before me is that the rate had been £35 for at

least five years prior to August 2020. So any calculation of the effect of inflation ought to begin from 2015, not 2009. (iii) The higher levels of inflation in the period since August 2020 are not relevant to this challenge to the lawfulness of the setting of that rate on 28 August 2020.

189. I accept that the rate of £35 per week was not adjusted by reference to inflation in the five years prior to August 2020. However, as inflation was low during that period, to the extent that the £35 rate itself reflected a cut in real terms compared to five years earlier, it appears to have been relatively minimal compared to the figures put forward by Ms Barratt.

190. Thirdly, while the Secretary of State cannot rely on evidence of the subsequent review in the context of Ground 2(a), and would not be able to rely on such *ex post facto* evidence if this were a reasons challenge, it does not seem to me that she is precluded from relying on it in the context of this claim that the court should find that by setting the rate at £25.40 the Secretary of State failed to meet the claimant's recovery needs. That evidence provides strong support for the Secretary of State's submission that it was reasonably open to her to decide that the rate of £25.40 was sufficient to assist in meeting the recovery needs of victims in initial accommodation.

191. Fourthly, the claimant's evidence as to the use to which she put the trafficking support that she received does not demonstrate that the rate of £25.40 was unlawful. I have borne in mind the evidence adduced by the claimant that she, and others in a similar position, felt that they had to use their trafficking support to meet their essential living needs. However, first, the question as to the adequacy of the support for *essential* living needs is separate (and I address it in the context of Ground 3). Secondly, given that the support provided to meet the essential living needs of asylum-seekers is purposely set at a level comparable to the lowest 10% income group in the UK (see *CB v Secretary of State for the Home Department* [2022] EWHC 3329 (Admin), Fordham J, [22]), it is unsurprising that victims may choose to put their trafficking support towards meeting their living costs. But that does not detract from the point that the trafficking support is an additional payment that victims may choose to spend as they wish.

192. The claimant was able to use her trafficking support to travel to meet friends and to communicate with them using her phone. She was also able to use her trafficking support to supplement the food and drinks provided by the Hotel in circumstances where three meals a day (including a choice) and non-alcoholic beverages were provided, but as a consequence of her recovery needs the claimant understandably wished to have more control over what she ate, and to avoid drinking tap water from the bathroom. On the figures that she provided, taking her initial figure of expenditure of £15-20 per month on travel rather than her later claim that she had spent £10-15 per week on this item, and bearing in mind that her expenditure on toiletries and laundry was met by the cash payment from the Hotel, it came to just short of the rate of £25.40 even when she was receiving the higher rate.

193. The evidence does not demonstrate any failure to comply with the Care Standards in the claimant's case. She had been in the UK for nearly two decades when she entered the Hotel. She had a phone. There is no evidence to suggest that she was lacking three sets of clothing; and she was provided with some clothing and footwear with the

support of her accommodation provider. The Hotel also paid for taxis for the claimant to attend appointments.

194. Accordingly, I reject the claimant's contention that the level of financial support under the Amended Guidance unlawfully failed to meet victims' recovery needs.

The parties' submissions on Ground 2(c) (discrimination) and s.31(2A) Senior Courts Act 1981

195. The third basis on which the claimant contends the Amended Guidance was unlawful is that it unlawfully discriminated contrary to Article 4 and 14 ECHR against victims of trafficking in initial accommodation by providing them with less financial support than to other victims.

196. The claimant relies on *Thlimmenos v Greece* (34369/97) (2001) 31 EHRR 15 at [46] (a case which was applied by the Supreme Court in *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289, [44]) for the proposition that article 14 of the European Convention on Human Rights ('ECHR') requires like cases to be treated alike, and persons whose circumstances are significantly different to be treated differently. It is well-established that victims, potential victims, asylum-seeking victims, all constitute an "*other status"* under article 14: *R (JP and BS) v SSHD* [2020] 1 WLR 918, [146] and [150].

197. On the face of it, under the Amended Guidance, the financial support for victims in initial accommodation was materially inferior to the financial support provided to victims in other forms of accommodation. In particular, the claimant draws attention to the significantly lower trafficking support rate for a victim in initial accommodation compared to a victim in catered VCC accommodation or a victim in receipt of outreach support whilst living in accommodation other than VCC or asylum accommodation (e.g. living with friends). She submits that the recovery needs of the victims are the same irrespective of the nature of their accommodation.

198. The claimant contends that having established *prima facie* discrimination, the burden rests on the State to provide a justification: *JP and BS*, [151]-[152]. The court must apply the fourfold proportionality test outlined by the Supreme Court in *R (Tigere) v Secretary of State for Business Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, [33].

199. The claimant particularly emphasises that there was no good reason to differentiate between victims who were in full board accommodation, on the basis that one was also an asylum seeker (in initial accommodation) and the other was not (and was in VCC accommodation). The claimant acknowledges that a victim in catered VCC accommodation will have high needs, but submits that the claimant too has complex and specialist recovery needs. Indeed, Mr Ryder's evidence shows that those in catered VCC accommodation have greater material provision made for them, undermining any argument that they have a greater need than those in initial accommodation for financial support.

200. The lack of any principled reason for the difference in trafficking support rates in the Amended Guidance is evident, the claimant submits, from the fact that the Secretary of State has now introduced a policy which provides the same level of trafficking

support (now £26.14) irrespective of the accommodation in which the victim is living. For this additional reason, the claimants submit the Amended Guidance was not lawful.

201. The Secretary of State acknowledges that under the Amended Guidance there was a difference between the trafficking support payments received by those in catered asylum accommodation (£25.40 per week), those in catered VCC accommodation (£35.00 per week), and those living in other accommodation (not provided pursuant to the IAA or the VCC) receiving outreach support (£39.60). The Secretary of State submits, first, that the contention that no distinction was justified is mistaken given the high and specialist recovery needs of those in catered VCC accommodation and the fact that those living with friends are in a materially different situation as they do not benefit from having their essential living needs met by way of in-kind and financial support.

202. Secondly, the Secretary of State submits that the Amended Guidance was an interim step in the process that she has undertaken to iron out the anomalies in the Guidance. The Policy Equality Statement attached to the Ministerial Submission noted:

> "It is recognised that this approach (top up of £25.40) may result in differences between those in different types of catered accommodation, however, this is an interim approach ahead of wider changes to the financial support system that will ensure all potential/confirmed victims of modern slavery supported through the VCC receive the financial support they require based on an assessment of recovery need. However it is considered that the recommended approach will result in greater consistency than the alternative option of a rate of £35 per week, considering the numbers of individuals accommodated in the different cohorts. In June 2020, it is estimated that approximately 28 individuals were in VCC catered accommodation, compared to approximately 2,360 individuals who are potential/confirmed victims of modern slavery who are in some form of asylum support accommodation. VCC catered accommodation is provided where the service user is not capable of preparing their own food due to disability, debilitating illness or ongoing treatment for severe substance use/addition."

The Secretary of State acknowledges that there were anomalies in the policy, but denies that these rendered the (interim) Amended Guidance unlawful.

203. Thirdly, the differences identified by the claimant have been rectified with effect from March 2023: there is now a single Recovery Rate. The argument is, therefore, academic and the Secretary of State submits that the court should apply s.31(2A) of the Senior Courts Act 1981 to this limb (and Ground 2 generally).

Analysis and decision – Ground 2(c) (discrimination) and s.31(2A) Senior Courts Act 1981

204. In view of my conclusion that the Amended Guidance was unlawful for the reasons that I have given in respect of Ground 2(a), and in circumstances where the Secretary

of State has further amended the statutory guidance to provide a single rate of trafficking support (or Recovery Rate as it is now called), I agree with Mr Payne that any consideration of whether the distinctions between victims based on the type of accommodation in which they were living were justifiable has been rendered academic. The Secretary of State has reduced the level of trafficking support for those in catered VCC accommodation or receiving outreach support while in non-asylum and non-VCC accommodation to the level of victims living in asylum accommodation. In these circumstances, I consider it unnecessary to add further to the length of this judgment by addressing this limb.

205. However, I reject the contention that relief should be refused in respect of Ground 2(a) on which the claim has succeeded pursuant to s.31(2A) of the Senior Courts Act 1981. In my view, if the unlawful cessation decision and the subsequent failure to make due inquiry or consult before reducing trafficking support below the previously paid level of £35 had not occurred, it is not highly likely that the Secretary of State would have reduced trafficking support to victims in initial accommodation to the level of £25.40 at the point in time when she did. On the contrary, she would first have undertaken the review which has ultimately led to the new single Recovery Rate.

I. Ground 3: whether the essential living needs of victims of trafficking are met in initial accommodation

Scope of the issue

206. The agreed issue in respect of Ground 3 is:

> "Whether the Defendant has failed to provide adequate financial support to meet the essential living needs of victims of trafficking in initial accommodation in breach of her obligations under ECAT and the EU Directive."

207. The claimant contends that she and other victims in catered accommodation did not have their *essential* living needs met. Although the issue is stated as a failure to meet the essential living needs of victims in initial accommodation, in fact, and as a matter of logic, the claimant's submission encompassed all asylum-seekers supported pursuant to s.98 of the IAA in initial accommodation.

208. Mr Payne submits that this court is being asked to undertake a similar analysis in respect of those supported pursuant to s.98 of the IAA to that which was undertaken by Farbey J in *JM*, but without any comparable evidence. This case is fundamentally a challenge to the Amended Guidance and the court does not have developed submissions on the questions as to which needs are essential living needs in the context of short-term support pursuant to s.98. He urges me not to embark on such an analysis. As Farbey J observed in *JM* at [30]:

> "Judicial review claims are brought by individual claimants: neither solicitors nor counsel may properly claim to act on behalf of groups of people from whom they do not have instructions (*R (DV)) v Secretary of State for the home Department* [2021] 4 WLR 75, paras 51 and 70 per Dame Victoria Sharp P)."

209. In reply, Ms Knights accepted that it would be difficult for the court to make a broad finding in respect of this ground. Nonetheless, she submitted that there is sufficient evidence before me to make general findings that there were widespread issues at the particular time with which this claim is concerned of failure to meet the travel and communication needs, and failure to provide toiletries, to those supported in initial accommodation under s.98 of the IAA.

210. I agree with the Secretary of State that the broad issue that the claimant seeks to raise is not one that I should entertain on the basis of the limited evidence and submissions on this issue that I have received and heard. I consider that in addressing this ground I should go no further than considering whether the evidence demonstrates any failure to meet the claimant's essential living needs.

Analysis and decision

211. The essential needs that the claimant submits were not met in her case were for: (i) toiletries; (ii) laundry; (iii) food and beverages; (iv) Wi-Fi; (v) clothing; and (vi) travel to attend appointments.

212. The need for toiletries obviously is an essential need for those supported pursuant to s.98 of the IAA: it is not a need that can be said to arise only in the longer term. In the claimant's case the evidence demonstrates that the need was met:

    i) From May to mid-December 2020 the Hotel met this need by providing the claimant with £5 per week which exceeded the sum she required to spend on toiletries. *JM* shows that the Secretary of State's detailed analysis of the cost of "*toiletries/healthcare/household cleaning items*" in mid-June 2020 was £1.55 (adjusting £1.52 for 1.7% inflation): *JM*, [53]. The claimant's own evidence in her first statement was that toiletries (including sanitary pads) cost her £10 per month (i.e. about £2.50 per week). Surprisingly, this increased in her next statement to £4 per week (excluding sanitary pads which were by then being provided by the Hotel). But even the higher figure was lower than the financial support she received from the Hotel.

    ii) From November 2020 to February 2021 the Hotel met this need by providing the claimant with toiletries. She has not suggested that her need for toiletries was not met once the Hotel began providing them.

213. The need to be able to wash clothes is also, plainly, an essential need for those supported pursuant to s.98 of the IAA. In the claimant's case, the evidence demonstrates that the need was met:

    i) From May 2020 to mid-December 2020, the financial support provided by the Hotel also covered the purchase of laundry detergent which the claimant was able to use to wash her clothes in her bathroom.

    ii) From November 2020 the Hotel provided the claimant with a laundry service. She does not suggest that there was any failure to meet this need once the Hotel began washing her clothes.

214. Although the claimant understandably found it triggered memories of her exploitation to have to wash and dry her clothes in her room, in the way that she did before the Hotel provided a laundry service, I do not consider that this amounts to a failure to meet her essential living needs while she was supported under s.98. She had the choice, if she wished or considered it necessary for her recovery, to direct part of her trafficking support to using a laundrette. By the time she was supported pursuant s.95, the Hotel was providing a laundry service.

215. The provision of food and non-alcoholic drinks are also, of course, essential living needs for those supported under s.98. The evidence is that the Hotel provided the claimant with three meals per day (giving a choice, including a vegetarian option) and non-alcoholic drinks at each meal. Although the claimant chose to spend some of her trafficking support on takeaway food, snacks and drinks (as she was of course entitled to do, it being a matter for her how to spend the money she received), I do not consider that this demonstrates a failure on the part of the accommodation provider to meet this essential living need. The claimant has said that fish was often served which she did not like, but she has not addressed the evidence that the provider offered a choice.

216. The ability to communicate using a phone or Wi-Fi was an essential living need for the claimant while she was supported pursuant to s.98, as well as subsequently when she became eligible for s.95 support. This essential living need was not as extensive as her *recovery* need for contact with friends (to which she directed some of her trafficking support), but even in the context of short-term support she at least needed to be able to contact her Support Worker, her legal representative, Migrant Help and a family member (if any) who she wished to inform of her new situation. Given that the claimant was supported under s.98 for a period of more than six months, her essential living need extended beyond this to the ability to communicate also with friends.

217. The evidence is that the Hotel provided free Wi-Fi for 20 minutes per day in the reception area. Although this was not a secluded area in which the claimant could have a conversation over the phone, she would have been able to communicate privately via email, WhatsApp, or another messaging or webchat platform. In addition, there was the possibility that the claimant could have made use of free Wi-Fi available outside the Hotel, although again such public places would have enabled private messaging but not private phone conversations.

218. In my judgment, given the lengthy period for which the claimant was supported under s.98, the ability to have some private phone conversations was an essential living need. It was not met in-kind by the Hotel through Wi-Fi being available in her room, or through any financial support provided by the Hotel to enable her to top up her phone. Nor was this need met by making Wi-Fi available only in the reception area as the kinds of conversations that she needed to have with her legal representatives and Support Worker, and even with friends about how she was feeling, entailed the need to be able to speak privately. I note that the payments to which she became entitled on being assessed as eligible for s.95 support did not cover the communication need: see *JM*.

219. However, as a result of being a victim in receipt of trafficking support, the whole package of support that the claimant received as a victim and an asylum seeker did ensure that her essential communication need (as well as her more extensive recovery

need in this area) was in fact met. Although this does mean that a small part of the trafficking support that the claimant used to top up her phone was directed to meeting an *essential* living need. But in circumstances where the claimant in fact received £35 per week trafficking support, and I have rejected the contention that the rate of £25.40 was too low to comply with the obligation to assist in meeting her recovery needs, looking at the overall picture I conclude that the claimant's essential living need in respect of communication was met.

220. The claimant had been in the UK for nearly two decades before she entered the Hotel, and for most of that time she had been living either with a friend or a partner. There is nothing to suggest that she lacked three (or more) sets of clothing, or footwear, when she moved into the Hotel. While she was in the Hotel, she was provided with shoes and a dressing gown, and the evidence is that the Hotel was able to source other charitable donations of clothing, if required. Once the claimant became eligible for s.95 support, she became entitled to a weekly payment which was calculated to meet her essential living needs in respect clothing and footwear (as well as travel and non-prescription medication). Although the claimant has referred to saving her trafficking support to buy winter clothes or boots, I am not persuaded that there was a failure to meet her essential living need for clothing and footwear.

221. As regards travel, the evidence is that the Hotel did pay for taxis when the claimant needed to report to the Home Office and on one occasion when she went to hospital. There is no evidence that the claimant had other appointments beyond ordinary walking distance for which she was provided no assistance with travel. As I have said, the s.95 payments included a sum to meet her travel need.

222. Accordingly, I conclude that the Secretary of State met the claimant's essential living needs and reject this ground of claim. However, I note that a source of difficulty for the claimant, and more generally for those in a similar position, was that on occasions payments were made in arrears. It is obviously vital that sums of money that are intended to meet a victim's or an asylum seeker's essential living needs are made available at the point in time when those needs arise. It is also fair to note, however, that this case concerns events during the early stages and first year of the pandemic, and at a time when the number of people in initial accommodation was rapidly rising due at least in part to protective Covid measures.

J. Conclusion

223. The claim succeeds on Grounds 1 and 2(a). The remainder of the claim is dismissed.