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| **FIRST-TIER TRIBUNAL****ASYLUM SUPPORT**To: | 2nd FloorImport Building2 Clove CrescentLondonE14 2BEasylumsupporttribunals@justicegov.ukTelephone: 020 7538 6171Fax: 0126-434-7902

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| Appeal Number |  **AS/21/02/42852**. |
| Home Office Ref. | :  |
| Appellant’s Ref. | :       |
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# **IMMIGRATION AND ASYLUM ACT 1999**

**THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)**

**(SOCIAL ENTITLEMENT CHAMBER) RULES 2008**

|  |  |
| --- | --- |
| Tribunal Judge |   |
| Appellant |  |
| Respondent | Secretary of State |

#### STATEMENT OF REASONS

1. This Statement of Reasons is made in accordance with Rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the Tribunal Procedure Rules) and gives reasons for the decision made in the above appeal, heard on 21 April 2021, to substitute my own decision for the decision of the Secretary of State for the Home Department (SSHD) with the effect that the appellant is entitled to the provision of section 4(2) support*.*
2. In these proceedings, the appellant is represented by counsel Mr Simon Cox assisted by junior counsel Mr Donnchadh Greene of Doughty Street Chambers on the instructions of Deighton Pierce Glynn (DPG) solicitors. Also involved in the appellant’s representation are the British Red Cross Society and the Asylum Support Appeals Project. The respondent is represented by Ms Idelbi assisted by Mr Alan Payne QC, junior counsels Mr Ben Keith and Mr Jack Anderson (the respondent’s legal team) on the instructions of Government Legal Department. At the remote oral hearing, Mr Cox appeared for the appellant and Ms Idelbi appeared for the respondent with their respective instructing solicitors.
3. Although the appellant was expected to attend the hearing to give oral evidence, and an interpreter was booked to assist him at his request, the Tribunal was informed on 20 April 2021, that he would not be attending.

**The Decision under appeal**

1. The appellant is a years-old national of Afghanistan. He appeals against the respondent’s decision of 3 February 2021, refusing his application for asylum support under section 4(2) of the Immigration and Asylum Act 1999 (the 1999 Act), on the grounds that he is not destitute and fails to meet any of the criteria set out in regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (the 2005 Regulations).

**Grounds of Appeal**

1. On 22 February 2021, the appellant appealed the decision to refuse him asylum support. His appeal was out of time but subsequently admitted in the interests of justice. The grounds of appeal stated that:

a) the appellant is destitute;

b) it is necessary to accommodate him during a nationwide lockdown on public health grounds;

c) relying upon the judgments of this Tribunal in *PA and MA* - *AS/20/09/42386 & AS/20/09/42397 (PA and MA)*, the provision of support is necessary to avoid a breach of a person’s Conventions rights under paragraph 3(2)(e) of the 2005 Regulations;

d) the appeal was submitted late because the appellant did not the know of and did not receive the refusal decision of 3 February 2021 until his then solicitors filed a Pre-Action Protocol (PAP) letter to the Home Office.

1. On 15 March 2021, the appellant was given permission to advance an additional ground of appeal, namely that he should be accommodated for the time being under the section 4 power, whether or not he meets the criteria set out in regulation 3(2) because that is in the interest of public health as matters stand in the pandemic.

**Appellant’s Immigration and Asylum Support history**

1. The appellant claims to have entered the UK on 21 December 2017. On 22 December 2017, he approached the police and applied for asylum. His claim was refused on 4 October 2019, and his appeal against that refusal was dismissed by the First-tier Tribunal Immigration and Asylum Chamber (FTT-IAC) on 22 November 2019. An application for permission to appeal that decision was refused by the FTT-IAC on 13 January 2020, and by the Upper Tribunal Immigration and Asylum Chamber (UT-IAC) on 30 June 2020. The appellant became appeal rights exhausted on 22 July 2020.
2. On 19 October 2020, the appellant applied for section 4(2) support claiming he was street homeless. The application was refused on 21 October 2020, but the appellant did not exercise his right of appeal against the decision. On 2 February 2021, the appellant applied again for support. He stated his solicitor was preparing a “fresh claim” which would be submitted “within the week”, that he was unable to leave the UK owing to travel restrictions imposed in the pandemic and that he was entitled to support to prevent a breach of his Convention rights because he was street homeless.
3. According to Home Office records, the appellant had nothing outstanding on his asylum claim. The SSHD did not accept that the possibility of forthcoming further submissions could satisfy the requirements of regulation 3(2)(e). Subsequently, on 3 March 2021, the SSHD accepted the appellant’s destitution.

**Tribunal Directions of 2 March 2021 (the First Directions)**

1. On 2 March 2020, the Tribunal issued case management directions to both parties in which the appellant was directed to provide a copy of his further submissions made to the respondent, or alternatively, if they had not yet been submitted, to provide evidence from his solicitor explaining the substance of the further submissions to be made.
2. The respondent was directed to make written submissions addressing the Principal Judge’s decisions in *PA and MA* and specifically to address why the reasoning in paragraph 48, which concerned the eligibility requirement of regulation 3(2)(e) in cessation appeals during the COVID-19 pandemic, should not be applied equally to refusal decisions.
3. The respondent was also asked the following:

a) whether, in the opinion of the SSHD, there was currently a viable route of return to Afghanistan during the COVID-19 pandemic?

b) if so, to provide details of the route(s) available to Afghan nationals travelling to Afghanistan from the UK (with or without assistance from the SSHD);

c) whether the SSHD is currently enforcing removals to Afghanistan and if not, why not?

d) what steps, if any, the SSHD had taken to return the appellant to Afghanistan? and

e) what support, if any, can be provided to the appellant by way of an assisted voluntary return.

**The SSHD’s submissions and response to the first directions**

1. On 3 March 2021, the SSHD’s legal team, filed lengthy submissions challenging the lawfulness of *PA and MA* and submitted that:

a) there should be an oral hearing of the appeal;

 b) the SSHD should not be barred from taking further part in proceedings pursuant to rule 8(3)(c) and 8(7)(a) of the Procedure Rules;

b) unless the grounds of appeal specifically assert that refusal of support breaches the human rights of the wider community the issue should not be considered by the Tribunal of its own volition.

c) the analysis in *PA and MA* is obiter, flawed, not binding on other asylum support judges and should not be applied.

d) there is no legal basis for considering, in the context of a statutory appeal against the refusal of section 4 support, the impact of the decision on the human rights of the wider community.

e) alternatively, there is no legal or evidential basis for considering that this decision to refuse/withdraw support under appeal engages the rights of the appellant or the wider community under Articles 2, 3 and 8 ECHR.

**The appellant’s submissions and response to the first directions**

1. On 9 March 2021, Mr Simon Cox, filed his reply to the first directions, applied for further directions and for permission to advance additional grounds of appeal. Mr Cox submitted that the SSHD’s legal team had misled the Tribunal in suggesting that *PA and MA* were materially flawed and thatthe SSHD had invited the High Court to quash the decisions in judicial review proceeding by consentpursuant to CPR 54.18. According to Mr Cox, no judicial review proceedings were issued by the SSHD challenging the lawfulness of the Tribunal’s decisions. The only judicial review before the Administrative Court, he said, was issued by *PA and MA* (for whom Mr Cox also acted), and they did not consent to the decisions being quashed.
2. Furthermore, he maintained the SSHD had failed in her duty of candour and cooperation by not providing this Tribunal (and the Administrative Court in six related judicial review proceedings) with information relevant to the advice the SSHD had received concerning public health, and details of her policies and practices in exercising her section 4 powers to accommodate destitute failed asylum seekers.
3. Mr Cox sought to rely upon extensive evidence filed in two judicial reviews of the decisions of this Tribunal (*KMI and EW*) and the interim judgement of Lewis LJ and Garnham J in granting permission. He noted the provisional view of the Court, “without expressing any concluded view”, that the *KMI and EW* appeals (which related to refusal of support) concerned “an issue of real substance”.
4. However, *KMI and EW* have now been withdrawn by consent and the Tribunal remains for the time being without guidance from the higher Courts on this important issue. I note that the Administrative Court will consider the *PA and MA* judicial review application together with QBB (CO/3986/2020) and AKN (CO/4191/2020) at the permission hearing for all four claims on 5/6 May 2021.

**Tribunal Directions of 15 March 2021 (the second directions)**

1. At the case management hearing on 15 March 2021, it was agreed (on consideration of the written and oral submissions from the SSHD’s legal team) that the appeal required an oral hearing with the full participation of the SSHD. The appellant was given permission to raise an additional ground of appeal and directions were issued for the SSHD to provide further information, details of the SSHD’s current policy or practice of providing accommodation to destitute failed asylum seekers. Both parties were asked to file a composite paginated bundle of evidence and skeleton arguments.

Documentary Evidence

1. I have before me an 830-page Appeal Bundle and a 406-page Authorities Bundle. At page 210 of the Appeal Bundle is the expert report of Professor Coker on “[*t]he public health implications of refusing section 4 support and accommodation to failed asylum seekers during the COVID-19 pandemic*”. In addition, I received from Ms Idelbi, an opening note and skeleton argument. I also received a skeleton argument from Mr Cox. Additionally, on 20 April 2021, DPG solicitors sent to the Tribunal and the respondent a copy of the appellant’s further submissions drafted by his new immigration lawyers Duncan Lewis, together with proof of transmission to the Further Representations Unit (FSU) by email.

**Professor Coker’s Expert Report**

1. I have read Professor Coker’s expert report dated 26 March 2021. It was obtained for the *KMI and EW* litigation, but as the title suggests, it contains information relevant to an assessment of the risk posed to the failed asylum-seeking community of living in overcrowded accommodation with shared facilities (e.g. when sofa-surfing), street homeless or living in self-contained accommodation. What follows is a summary of Professor Coker’s findings.
2. COVID-19 is the disease caused by the coronavirus known as SARS-CoV-2. It is spread mainly via droplets, person to person but can also occur by touching infected surfaces. There is good evidence that it can be spread by those without symptoms. Aerosol transmission is also possible. Humans ordinarily expel particles from the mouth and nose while breathing, talking, singing and coughing. The virus can remain viable in suspended aerosols up to 16 hours post aerosolization and viable virus can be detected up to 4 metres from patients. In Professor Coker’s expert opinion, this means that “…spread within congregate settings is a substantial risk.” (1.8). Super-spreader events occur in poorly ventilated indoor spaces. The risk of ‘contracting’ SARS-CoV-2 is directly related to exposure. Poorly ventilated indoor spaces where overcrowding, lack of social distancing, mask adoption, and lengthy exposure have proven to be especially high-risk settings. The risk of exposure to a person is, thus a function of the environmental circumstances rather than the individual personal characteristics of that person. (4.2).
3. Research that examines the service use of migrants and asylum seekers (and failed asylum seekers) is limited. (4.3).
4. The risk of suffering, after exposure and infection, from severe disease and death is a function of personal characteristics primarily such as age, sex, and the presence of morbidities. But there are intersections with the wider environment too, for example with ethnicity (4.7). Death rates from COVID-19 were higher for Black and Asian ethnic groups when compared to White British. (4.10).
5. The risk of exposure and infection (with reference to *R,* the reproduction number) is greater for those living in overcrowded shared facilities (*R*5) than for those who are street homeless (*R*2) except when accessing services e.g. soup kitchens etc. (5.3). Risk is lower for those living in self-contained accommodation (*R* 0.5).
6. At 7.10, Professor Coker states the following:

*“Conversely, the Government would have known from the earliest days of the pandemic that congregate settings posed a substantial risk of exposure, infection and disease. Any policies that likely result in increasing the likelihood that people will congregate more, that is fail to socially distance, whether that be in detention centres, nursing homes, cruise ships, homeless shelters etc could and should have been seen to increase the risk to both individuals and the wider public health. As the pandemic unfolded through 2020, as evidence of clusters and the driving forces behind these clusters was increasingly well understood, the lessons around transmission were crystal clear. Currently, an exit from lockdown is probably some months away at a minimum, for reasons outlined above. In the interim, barriers to accommodation where social distancing is possible, as I note elsewhere in this report, will impede public health control of COVID-19 and also fly in the face of good public health practice given the epidemiological and health system challenges involved.”*

**The Appeal Hearing**

1. As stated above, the appellant did not attend the hearing of his appeal. I therefore proceeded to hear submissions from Ms Idelbi and Mr Cox.

**Submissions for the Appellant**

1. On behalf of the appellant, Mr Cox submitted that the primary issue in this appeal is whether the threat to public health of the COVID-19 pandemic justifies the provision of accommodation under section 4(2) of the 1999 Act to persons in the appellant’s situation “for the time being”. Mr Cox submitted that it does because section 4(2) confers a power to do so, either because the condition in Regulation 3(2)(e) of the 2005 Regulations is satisfied, or because, exceptionally, that is the proper course under section 4(2) in any event. Mr Cox accepted that this outcome is unlikely to be permanent because the Government’s vaccination programme may, “if successfully concluded”, reduce the risk of infection and consequent illness so that there is no longer a public health interest. He submitted that, on the current available evidence, it is not yet safe enough for destitute failed asylum-seekers to be refused accommodation.
2. Mr Cox identified four issues for determination in this appeal, namely:

a) Does regulation 3 prohibit the exercise of the section 4(2) power for a person in respect of whom the conditions stated in regulation. 3(2) are not satisfied? (**Scope of section 4(2)**).

b) Can regulation 3(2)(e) be satisfied in respect of an individual destitute failed asylum seeker because the threat to public health means that denial of section 4 accommodation to that individual would breach his human rights or those of the general public? (**Scope of regulation 3(2)(e)**).

c) Should the Tribunal consider only the public health effects of refusing accommodation to one appellant? (**The appellant in Isolation issue**).

d) Does the current threat to public health mean that section 4 accommodation should be provided to the appellant? (**section 4 accommodation on public health grounds**).

Submissions for the Respondent

1. The following comprises a summary of Ms Idelbi’s primary submissions:

a) the analysis in *PA and MA* is incorrect. The correct test to be applied when determining potential breaches of Articles 2, 3 and 8 ECHR rights arising out of the acts of a third party is set out [at paragraph 116] in *Osman v UK* [1998] 29 EHRR 245;

b) *PA and MA* taken at its highest requires an analysis of the risks and impact on the wider community’s rights under Article 2, 3 or 8 considering the evidence available concerning the situation in existence at the time of the appeal, as to the level of risk of harm to the wider community arising from the individual decision under appeal;

 c) the test to establish a breach of Articles 2 or 3 is a “stringent one which will not easily be satisfied”- *Van Colle c Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 [at paragraph 115];

d) the public health risk created by any one individual (particularly where that person is not infected with COVID-19) is likely to be minimal. The Tribunal will have to consider a multitude of factors in order to consider whether there is any particular risk to and created by a single individual being refused accommodation and failing to return to their country of origin;

e) public health is not the only relevant policy objective. There is and remains a compelling public interest in encouraging individuals to depart when they have no right to be in the UK, and not expending scarce public resources on persons with no right to remain in the UK and the option of going elsewhere.

f) there is also a compelling public interest in maintaining confidence in the integrity of the immigration and asylum system, which is undermined when individuals are enabled to live in the UK at public expense despite having no entitlement to do so; and

g) furthermore, accommodation is a scarce and expensive resource and should be reserved for refugees awaiting determination of their claim.

1. Turning to the facts of the appellant’s case, Ms Idelbi submitted that but for the presence of COVID-19, it would not be suggested that the appellant is entitled to section 4 support because:

a) his asylum claim has been rejected and he would be able to avoid any potential risk from non-state actors by relocating internally within Afghanistan;

b) there are currently flights to Afghanistan, although applicants must comply with a COVID-19 test;

c) the appellant has no lawful basis to remain in the UK;

d) he does not otherwise meet the criteria set out regulation 3(2);

e) the burden of proof rests on the appellant to demonstrate that there will be a breach of his rights and/or the rights of others;

f) *PA and MA* do not provide any support for the suggestion that a breach of the appellant’s convention rights alone would entitle him to support;

g) the appellant has not provided any evidence to suggest that the denial of accommodation to him specifically is likely to cause a breach of

his human rights or the rights of others.

**The Legislative Framework**

1. Section 4 of the 1999 Act (as amended) by Section 49 of the Nationality, Immigration and Asylum Act 2002 and Section 10 of the Asylum and Immigration (treatment of claimants, etc.) Act 2004 provides:

**Accommodation for Persons on Temporary Admission or Release**

(1) …..

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

(a) he was (but is no longer) an asylum-seeker, and

(b) his claim for asylum was rejected.

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

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

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

(6) The regulations may, in particular—

(a) provide for the continuation of the provision of accommodation for a person to be conditional upon his performance of or participation in community activities in accordance with arrangements made by the Secretary of State;

(b) provide for the continuation of the provision of accommodation to be subject to other conditions;

1. Regulation 3 of the 2005 Regulations, provides:

 **Eligibility for and provision of accommodation to a failed asylum-seeker**

‘(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are-

(a) that he appears to the Secretary of State to be destitute, and

(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.

 (2) Those conditions are that—

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

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

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

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

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

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

(iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of Supreme Court (Northern Ireland) 1980; or

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

1. Article 2 of the European Convention on Human rights (ECHR) which protects right to life, provides as follows:

1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

1. Article 3 ECHR, which deals with prohibition of torture, provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.
2. Article 8 ECHR provides as follows:

1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

1. Article 14, on prohibition of discrimination, provides for:

The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1. In so far as they are relevant to this appeal, the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, provide the following:

**Overriding objective and parties' obligation to co-operate with the Tribunal**

**2.**— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

1. Rule 8, sets out the Tribunal powers for striking out a party’s case and provides:

**Striking out a party's case**

**8.**—(1) …and (2) ….n/a

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) …..n/a; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) ……n/a.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent and may summarily determine any or all issues against that respondent.

1. Rule 18, sets out the Tribunal’s power to list “lead cases” and provides:

**Lead cases**

**18.**—(1) This rule applies if—

(a) two or more cases have been started before the Tribunal;

(b) in each such case the Tribunal has not made a decision disposing of the proceedings; and

(c) the cases give rise to common or related issues of fact or law.

(2) The Tribunal may give a direction—

(a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and

(b) staying (or, in Scotland, sisting) the other cases falling under paragraph (1) (“the related cases”).

(3) When the Tribunal makes a decision in respect of the common or related issues—

(a) the Tribunal must send a copy of that decision to each party in each of the related cases; and

(b) subject to paragraph (4), that decision shall be binding on each of those parties.

(4) Within 1 month after the date on which the Tribunal sent a copy of the decision to a party under paragraph (3)(a), that party may apply in writing for a direction that the decision does not apply to, and is not binding on the parties to, a particular related case.

(5) The Tribunal must give directions in respect of cases which are stayed or sisted under paragraph (2)(b), providing for the disposal of or further directions in those cases.

(6) If the lead case or cases lapse or are withdrawn before the Tribunal makes a decision in respect of the common or related issues, the Tribunal must give directions as to—

(a) whether another case or other cases are to be specified as a lead case or lead cases; and

(b) whether any direction affecting the related cases should be set aside or amended.

Discussion

1. I remind myself of the words of Lewis LJ and Garnham J [at 47] in the *KMI and EW* judicial reviews (now withdrawn by consent) that refusal of support to destitute failed asylum seekers during the COVID-19 pandemic concerns, “an issue of real substance”. The question, as identified by the Court was:

*“… whether in the light of the health emergency facing the UK, it was a rational and proportionate decision for the SSHD to limit the provision of accommodation to those who happen already to be accommodated and not extend it to those who are not. It seems to us that there are arguments of substance both at common law and under Article 14* *read with Article 8 of the Convention….”*

41. My understanding is that *EW* has left the UK and *KMI* has been provided with support by the SSHD. I do not know on what basis *KMI* finds himself in the fortunate position of being supported, but the above “issue of real substance”, which is likely to affect hundreds of destitute failed asylum seekers in the weeks and months ahead, will not now be heard by the Administrative Court. Be that as it may, the same issue arises in the case before me and it is incumbent on me to determine it.

42. There has been much discussion in this appeal, in other appeals before the Tribunal and apparently in judicial reviews proceedings (to be heard on 5/6 May 2021) on the lawfulness of *PA and MA*. On behalf of the SSHD, UKVI Presenting Officers and the respondent’s legal team have sought to challenge *PA and MA* before me but not, or so it would seem, before the Administrative Court, the only Court with jurisdiction to quash the decisions. Judicial review was issued by PA and MA but is limited to a consideration of two grounds. Firstly, whether the AST has power to allow an appeal under section 103 of the 1999 Act, on the grounds that an unlawful policy of the SSHD led to the decision under appeal; and secondly, whether the AST has a duty to determine the appeal on the facts found by the AST as at the date of the AST’s decision, and is not limited to those at the date of the appeal hearing.

43. Having failed to challenge *PA and MA* in the Administrative Court, the respondent’s legal team has twice attempted to circumvent the process by circulating a “note” to asylum support judges urging them not follow *PA and MA* and suggesting that the SSHD had invited the High Court to quash the decisions in judicial review proceedings, by consentpursuant to CPR 54.18. It would seem, however, that no such application had in fact been made, at least not to the knowledge of the Claimant’s solicitors and counsel, who confirmed that the SSHD had not approached them and they have not consented to *PA and MA* being quashed. The SSHD’s legal team has not produced any evidence in this appeal that such an application had been made.

44. Even assuming I accept the SSHD’s criticisms of PA *and MA*, which I do not, I can see no rational basis for revisiting at tribunal level a matter that is currently before the Administrative Court and soon to be decided.

***Are decisions of the Principal Judge binding precedent?***

45. It is suggested by the SSHD’s legal team in their note of 3 March 2021 that asylum support judges have wrongly treated *PA and MA* as binding precedent. This is incorrect. The Tribunal does not consider itself bound by its own decisions, including decisions of the Principal Judge that are treated as “landmark judgments”. Historically, the latter are treated as persuasive. The jurisdiction (then called the Asylum Support Adjudicators) was created under the 1999 Act by the Home Secretary. There is no statutory appeal to the Upper Tribunal and the only remedy is judicial review. Claims issued by unsuccessful appellants before asylum support judges are often withdrawn by consent upon the SSHD granting some form of leave or support to the Claimant (as it appears may have been the case in KMI), rendering the challenge academic, with the result that there is then a scarcity of asylum support jurisprudence.

46. In the absence of a statutory right of appeal and binding precedents from Superior Courts, there is need for some form of guidance for judges to avoid conflicting decisions on identical issues. That guidance is provided by me in my capacity as Principal Judge, in what is commonly referred to as “landmark judgments.” These decisions, unlike those listed as lead cases under rule 18 of the Tribunal Procedure Rules, are not intended to, and do not bind other tribunal judges. Lending support to the historical practice in this tribunal is the observation by Salmon LJ in *West Midland Baptist (Trust) Association v Birmingham Corporation* [1968] 2WLR 535, that such decisions are to be treated by the tribunal “with great respect and considered as persuasive authority.” They are scrutinised most carefully by other asylum support judges and if necessary, rejected, particularly in cases which raise points of law of outstanding importance with far reaching consequences. But I repeat, they are never treated as binding.

47. I turn next to deal with the four issues set out in paragraph 30 above on which I have received submissions from both parties. I will then address any additional matters raised.

**Scope of the section 4(2) power**

***Does regulation 3 prohibit the exercise of the section 4(2) power for a person in respect of whom the conditions stated in regulation. 3(2) are not satisfied?***

48. Mr Cox argued that section 4(2) confers on the SSHD a power to provide accommodation unfettered by regulation 3 of the 2005 Regulations, even if the conditions stated in regulation 3(2) are not met. He submitted that the language of section 4(5) only permits the making of regulations and not for the provision of accommodation to be subject to conditions. Otherwise, says Mr Cox, the SSHD would have no power under section 4(2) to provide accommodation, regardless of the public health need to do so, unless the public health needs were such that a denial of accommodation would breach the person(s) human rights.

49. Ms Idelbi disagreed with that analysis. She submitted that there is no power to provide section 4 support and accommodation to those who do not meet the eligibility criteria contained in regulation 3. If Mr Cox’s analysis is correct, says Ms Idelbi, this would have the result that an applicant also need not be destitute in order to qualify for support. She observed that Mr Cox has provided no authority to support his analysis of section 4(2) and section 4(5) and has ignored the plain English interpretation of “criteria” which is not of principles or indicators but standards by which you judge, decide about, or deal with something. They are requirements the SSHD is to consider when deciding “whether or not to provide accommodation” (section 4(5)(a)).

50. I do not agree with Mr Cox that the SSHD’s power under section 4(2) to provide accommodation can be exercised without regard to the 2005 Regulations. If that were true, failed asylum seekers could continue to claim entitlement to be supported even after they became appeal rights exhausted and would not need to demonstrate why they were unable to return to their country of origin. Without regulations and conditions, the SSHD would have no basis to refuse such applications in law. I am satisfied that the SSHD has made the 2005 regulations pursuant to section 4(5) and has made the exercise of her section 4(2) power subject to the conditions in regulation 3(2), as required by section 4(6). I am not persuaded that section 4(2) includes a power to provide support in wholly exceptional or compassionate circumstances to those who do not meet the requirements of destitution and the conditions in regulation 3(2), other than possibly under schedule 10 to the Immigration Act 2016. I have seen no authority to suggest that Mr Cox’s analysis has the support of the Higher Courts and I reject it.

***Scope of regulation 3(2)(e)***

***Can regulation 3(2)(e) be satisfied in respect of an individual destitute failed asylum seeker because the threat to public health means that denial of section 4 accommodation to that individual would breach his human rights or those of the general public?***

51. In *PA and MA*, I concluded that it would be unreasonable to discontinue support to persons in receipt of section 4 support who reside in Tier 3 areas subject to very high alert. I held that in these high alert areas subject to tough restrictions on movement, ending support to persons in receipt of section 4 support may again place them and others in their communities at greater risk of harm in breach of their Convention rights. I then went to state:

“49. Irrespective of whether such discontinuances would engage the high thresholds of Articles 2 and/or Article 3, they would certainly engage Article 8 in that any assessment of proportionality must have regard to the public interest, including public health considerations and in any assessment of proportionality the weight to be attached to such considerations would be very high.”

52. Mr Cox agreed with that conclusion. Ms Idelbi did not. I have not revised my view of *PA and MA* but will await the judgment of the Administrative Court. I will, however, address the arguments on public health in relation to Articles 2, 3 and 8 ECHR, as these are entirely new points.

**The appellant in Isolation issue**

***Should the Tribunal consider only the public health effects of refusing accommodation to one appellant?***

53. See paragraph 65 below.

**Section 4 accommodation on public health grounds**

***Does the current threat to public health mean that section 4 accommodation should be provided to the appellant?***

54. See paragraph 66 below.

**Articles 2, 3 and 8 ECHR**

55. Ms Idelbi cited cases of the Strasbourg Court laying down general principles governing the positive obligation on States when determining breaches of Articles 2, 3 and 8 ECHR arising out of the unlawful conduct of a third party. In *Osman v UK* [1989] 29 EHRR 245 [at 116] the Strasbourg Court held that the correct test to be applied when determining potential breaches of Articles 2, 3 and 8 required the claimant to establish to the Court’s satisfaction that the state knew or ought to have known at the time of the existence of a real and immediate risk to life and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk” (at paragraph 116). The test, said Ms Idelbi, is a stringent one which will not be easily satisfied (see *Cevrioglu v Turkey* (app.no.69546/12) [at 50]). However, an impossible and disproportionate burden must not be imposed on States without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources. (see *Vilnes and Others v Norway* [at 220]. (app.nos 52806/09 and 22703/10)).

56. In Ms Idelbi’s submission, the refusal of support to the appellant is not inherently dangerous to the general public as the risk relied on by him was too remote. In her opinion, there is insufficient evidence to establish a positive obligation under Articles 2, 3 and 8.

57. I do not consider that these authorities assist the respondent’s case. During the last 12 months, the UK has been in lockdown on three occasions. The first from March – July 2020; the second from November – December 2020; and the third from January 2021 and continuing. On each occasion, the UK Government has felt compelled to take drastic measures in the face of what it perceives as a real and immediate risk to life from COVID-19 and the message conveyed nationally to everyone who resides in the territory of the State has been to, “Stay home. Protect the NHS. Save lives. Anyone can get it. Anyone can spread it.”

58. The UK Government knew the risks; knew the priorities and knew the financial cost of imposing lockdown. It elected to shut down shops, pubs and offices; furloughed much of the country’s workforce; paid for government employees to stay and work from home; and accommodated a very large proportion, of its failed asylum seeker community, (if they were already in receipt of support at the start of the first lockdown). In so doing, the State acknowledged and proceeded to discharge its positive obligations to protect all those present in the UK, at considerable expense, both in terms of financial cost – apparently a loss of over £250 billion to the UK economy - but also the loss of 127,480 lives.

59. If further evidence was required of the State’s recognition of the real and immediate risk, the severity of the threat to the community from the COVID-19 pandemic and the urgent need to protect the community, this is apparent from Public Health England briefings, statements by Government officials, the Chief Medical Officer, and importantly, government regulations already in place, such as the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021(SI 2021/364), which came into force on 29 March 2021. The preamble to the latter Health Protection Regulations, states:

*“These Regulations are made in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England.*

*The Secretary of State considers that the restrictions and requirements imposed by these Regulations, and by the Health Protection (Coronavirus, International Travel) (England) Regulations 2020(*[***2***](https://www.legislation.gov.uk/uksi/2021/364/introduction/made#f00002)*), the Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020(*[***3***](https://www.legislation.gov.uk/uksi/2021/364/introduction/made#f00003)*) and the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020(*[***4***](https://www.legislation.gov.uk/uksi/2021/364/introduction/made#f00004)*) as amended by these Regulations, are proportionate to what they seek to achieve, which is a public health response to that threat.”*

60.. The UK Government would not have taken such draconian steps as to shut down the country on three separate occasions had it not been persuaded, on the available evidence, that COVID-19 presented a real, immediate and serious risk to everyone. In my judgment, that is powerful evidence. The State’s positive obligation is to protect *everyone* in its territory. This includes, for example, those lawfully detained in prisons but also, failed asylum seekers with no lawful basis to remain in the UK, who should return to their countries of origin once they have exhausted their appeal rights, but who have not done so. Based on Professor Coker’s expert findings, persons of Black or Asian ethnicity (as most asylum seekers and failed asylum seekers tend to be) are at greater risk from COVID-19, and that risk is magnified when they are forced to live in overcrowded accommodation, in homeless shelters or on the streets due to being refused section 4(2) support.

61. I note that the Strasbourg Court has recognised in the Article 8 context that adverse consequences for health and human dignity that effectively erode the core of private life and the enjoyment of a home can also trigger a State’s positive obligations, depending on the specific circumstances of the case and their level of seriousness: see e.g. *Hudorovic and Others v Slovenia* [at 116, 145 -146 and 158].

62. The issue *in this case*, is not the practicality of providing such protection, but only of ensuring that no section of the public is excluded from such protection. There is an obvious and proportionate measure that the SSHD is able to take to avoid a breach of her positive obligations to protect, namely providing section 4 support so as to ensure that the appellant, a failed asylum seeker, is not made street homeless and thereby unable to avoid exposure to the virus in the same way as persons living in accommodation. The public interest considerations referred to by Ms Idelbi in her submissions, namely the maintenance of effective immigration control and providing accommodation to persons who are lawfully present in the UK, do not outweigh the factors weighing in the appellant’s favour. Predominantly, a failure to accommodate the appellant would, in my judgment constitute a disproportionate interference in his Article 8 right to respect for private life, and not to be exposed during a pandemic and national lockdown to street homelessness. Street homelessness includes the risk of living in a homeless shelter regarding which Professor Coker has written (see paragraph 25 above) that:

*“[a]ny policies that likely result in increasing the likelihood that people will congregate more, that is fail to socially distance, whether that be in detention centres, nursing homes, cruise ships, homeless shelters etc could and should have been seen to increase the risk to both individuals and the wider public health.”*

63. There is also an Article 14 dimension read with Article 8 ECHR. Given that the State identifies the virus as a threat to public health, it cannot be said that there is an objective justification for excluding failed asylum seekers like the appellant from the category of the public.

64. Further, insofar as Ms Idelbi seeks to suggest that Strasbourg jurisprudence on protection of the wider community supports her position, it must be noted that even though Article 8 is a qualified right, two of its six grounds justifying interference by the State with the right to respect for private and family life, concern State conduct designed to protect health and the wider community: ‘for the protection of health or morals’ and ‘for the protection of the rights and freedoms of others’. There is therefore on the face of Article 8 itself, recognition that the State may have obligations to protect others. This reflects the fact that the ECHR imposes an obligation on the State to ‘secure to *everyone*’ the rights guaranteed by the ECHR (Article 1).

65. I therefore reject the submission that the proper boundary is to focus on the individual case and how the individual is affected, and not also at the impact of the pandemic on the wider community.

66. The available evidence demonstrates that the UK Government has taken and continues to take measures that are within the scope of its powers (*Osman* at 116) and its priorities and resources (*Cevrioglu*, at 50) to discharge its positive obligations to protect the public from the real, immediate and serious risk of harm from COVID-19. I acknowledge that there are positive signs of improvement with the number of deaths reducing daily; with over 34,000 people having received the first vaccination dose; and over 14,000 people having received both doses. But the Country remains in lockdown until at least 21 June 2021, when the government hopes to remove all legal limits on social contact. However, that is still some seven weeks away. Until then, the current threat to public health requires that section 4 accommodation should be provided to the appellant.

**Appellants’ Further Submissions**

67. In his application for asylum support on 2 February 2021, the appellant stated that his solicitor was preparing a “fresh claim” which would be submitted “within the week.” His further submissions were, however, submitted on 20 April 2021, some ten weeks after he said they would. I do not know the reason why he decided to change solicitors but even allowing for the time taken to transfer his physical file, ten weeks is a lengthy delay. I confirm I have read the further submission submitted by XX.

68. Mr Cox submits that even if I reject his primary submission that the threat to public health of the COVID-19 pandemic justifies the provision of accommodation under section 4(2) of the 1999 Act to persons in the appellant’s situation, I should allow the appeal on the basis firstly, that the appellant has put in further submissions that are not manifestly unfounded, or secondly, if he loses, because he will seek judicial review of my decision.

69. Both alternatives are too speculative, in my judgment, to justify the appeal being allowed. Without additional information of the appellant’s original asylum claim, I am not able to say whether the appellant’s further submissions are merely a repetition of his earlier application, rejected on 30 June 2020 and thus, “*obviously hopeless or abusive”* to use the words of Maurice Kay LJ[at 57], in ***(M) v Islington Borough Council* [2004] EWCA Civ 235.**

70. However, obviously hopeless or abusive claims apart, the SSHD should not refuse support if that would have the effect of requiring the appellant to leave the UK thereby forfeiting an arguable application for leave to remain on Convention grounds. (Dyson LJ [at 66] ***Birmingham City Council v Clue* [2010] EWCA Civ 460).**

**Barring the SSHD from taking part in appeals**

71. Finally, in the light of the criticism made by the SSHD’s legal team of the Tribunal’s use of rule 8(3)(c), it is useful, for reference in future cases, to set out how the rule operates. A decision to bar a respondent (where the Tribunal considers there is no reasonable prospect of the respondent’s case succeeding), is provided for under rule 8(3)(c) of the Tribunal Procedure Rules, but not without first providing the respondent an opportunity to make representations (rule 8(4)). Once a party is barred under rule 8(3)(c), the Rules do not allow the bar to be lifted or for late submissions to be taken into consideration (rule 8(8)). Other than in this appeal, the SSHD, has consistently failed to respond to Tribunal directions, to make timely submissions or request an oral hearing of an appeal when issued with notice of intention to bar her from taking further part in proceedings. If the SSHD does not wish to be barred, she must respond to directions.

72. It is worth stating that the SSHD is given the same time frame within which to respond to directions as appellants who are often unrepresented destitute (failed) asylum seekers. Be that as it may, I am satisfied that the threshold for making an order under Rule 8(3)(c) is high, and the strike out procedure should be reserved for when there is no realistic prospect of success. (*ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472). In this appeal, the SSHD legal team has established that her case is arguable and is not without a realistic prospect of success. Giving effect to the overriding objective in rule 2 of the Tribunal Procedure Rules, I accept that there is a public interest in allowing the respondent to participate fully in these proceedings.

**Findings of fact**

73. I make the following findings of fact:

a) the appellant is destitute;

b) he is temporarily accommodated by his Local Authority;

c) I have not seen a Pre-Action Protocol letter issued by his previous solicitors;

d) his asylum claim has been rejected;

e) he is appeal rights exhausted;

f) there are currently flights to Afghanistan, but the appellant has not returned;

g) the SSHD could also choose to remove him but has not done so;

h) the appellant has filed further submissions with the FSU. These remain outstanding;

i) there is insufficient evidence before me to decide whether the claim is obviously hopeless or abusive.

**My Decision**

74. The appellant is entitled to accommodation under section 4(2) and regulation 3(2)(e) because he is destitute and the provision of accommodation is necessary for the purpose of avoiding a breach of a person’s Convention rights, within the meaning of the Human Rights Act. In my judgment there is no objective justification for excluding failed asylum seekers who are not already accommodated from the category of the public. The appellant is entitled to accommodation only during the COVID-19 pandemic, in times of a very high alert, and national lockdown on public health grounds. Once lockdown comes to an end, which is presently expected to occur on 21 June 2021, the appellant’s entitlement under regulation 3(2)(e) will come to an end, unless he can satisfy one or more of the conditions in regulation 3(2) of the 2005 Regulations.

**Stayed appeals**

75. This case was listed as a lead case on 15 March 2021, under rule 18 of the Tribunal Procedure Rules. There are 41 related appeals stayed pending the outcome in this case. Rule 18(3) provides that this decision is binding on each of those parties, unless they apply for a direction that the decision does not apply to them. The Tribunal will send a copy of this decision to each party and will issue directions with the aim of determining each case as soon as reasonably practicable.

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| **Signed:*****Sehbasig*****Principal Judge****FTT – SEC Asylum Support** |  **Dated: 29 April 2021** |