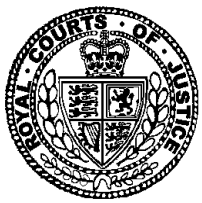

Neutral Citation Number: [2022] EWHC 56 (Admin)

Case No: CO/341/2021

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

Cardiff Civil Justice Centre

2 Park St, Cardiff, CF10 2ET

Date: 14/01/2022

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

THE QUEEN on the Application of AXG **Cla**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defe**

- -

- -

Shu Shin Luh (instructed by **Simpson Millar LLP**) for the **Claimant**

Hafsah Masood (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 5 October 2021

- -

Approved Judgment

Mrs Justice Steyn :

A.

Introduction

1.

This is a claim for judicial review. The claimant is an asylum seeker from Nigeria, and a single mother to a girl who is now six years old. Her application for asylum has not yet been determined. On 25 October 2019, the claimant and her daughter were granted asylum support pursuant to section 95 of the Immigration and Asylum Act 1999 (“the IAA 1999”). They were accommodated in full board initial accommodation from (about) 1 November 2019 until 28 June 2021 when they were provided with dispersal accommodation.

2.
The claim challenges a decision made by the Secretary of State on 19 October 2020, and announced on 27 October 2020 ("the October 2020 decision"), in accordance with which:

i)
First, the defendant paid the claimant and her young daughter a cash allowance of only £8 per person per week, in respect of the period from 27 October 2020 until 28 June 2021, whilst they were in hotel accommodation provided under s.95 of the IAA 1999, omitting to pay the (assessed) cost of £3.56 per week (or any sum) in relation to communications; and

ii)
Secondly, the defendant decided to pay the claimant and her daughter backdated payments of cash allowance:

a)
Limited in time to the period from 27 March 2020 to 26 October 2020, save to the extent that payments in respect of travel were further limited to the period from 1 July 2020, omitting to make cash payments:

I)
from 1 November 2019 to 26 March 2020 in respect of communications, travel, clothing/footwear, non-prescription medication and (to a limited extent) laundry;

II)
from 27 March 2020 to 30 June 2020 in respect of travel;

b)
Omitting the assessed (or any) sum in respect of the cost of communication; and

c)
Omitting the assessed (or any) sum in respect of the cost of non-prescription medication.

3.
Since I granted permission on 17 June 2021, in the light of the judgment of Farbey J in JM v Secretary of State for the Home Department [2021] EWHC 2514 (Admin), the issues between the parties have significantly narrowed.

4.
In JM, Farbey J found that the Secretary of State had not properly recognised or carried out her duty to provide asylum seekers in full board accommodation with the means of communication (in cash or kind) as an essential living need during the pandemic ([147] to [148]). In circumstances in which the claimant did not want the court to conduct an individualised assessment of his situation, the court declined to grant any relief relating to the claimant specifically ([155]), but considered it appropriate to make the following declaration:

"It is declared that the Secretary of State's decision of 19 October 2020 was unlawful in that she failed to have proper regard to the communication needs of asylum seekers supported in full board hotel accommodation under section 95 of the Immigration and Asylum Act 1999."

5.
In JM, the claimant also challenged the Secretary of State's decision relating to travel, in particular the imposition of a longstop date of 1 July 2020 for back-dated payments for travel in light of the

COVID-related restrictions that were in place nationally during the relevant period. Farbey J rejected this aspect of the challenge, finding that the Secretary of State's conclusion in respect of travel during this period was one she was entitled to reach, and there had been a sufficient discharge of her duties: [113] to [123].

6.
In this claim, both parties accept the applicability of Farbey J's conclusions in JM. The challenge referred to in paragraph 2 above (in respect of the communications allowance) is well-founded, but it is common ground that it is unnecessary for this court to grant relief. The court in JM left it to the Secretary of State to decide what needs to be done to address the unlawfulness found, and the claimant and her daughter will be encompassed in any such decision. The claimant does not pursue the challenge referred to in paragraph 2 above (in respect of the imposition of a long-stop date of 1 July 2020 for backdated payments for travel).

7.
Accordingly, the challenge is confined to two matters that were not in issue in JM, namely, (a) the decision not to include any sum in respect of non-prescription medication in the back-dated payments the Secretary of State determined should be made in respect of the period from 27 March to 26 October 2020 and (b) the decision to impose a longstop date of 27 March 2020 for back-dated payments.

B.
The legal framework

8.
This case concerns asylum seekers who are owed the s.95 duty. It is not concerned with support provided under s.98 of the IAA 1999 pending the Secretary of State's determination whether the applicant is entitled to support under s.95. There is no dispute between the parties that the legal framework is accurately set out in JM at [11] to [23], so it is unnecessary to do more than set out the key aspects of the legal framework in this judgment.

9.
Under s.95(1) of the IAA 1999, 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 1999, asylum support provided under s.95 has two key elements: accommodation and "essential living needs". The present claim, like JM, concerns the concept of essential living needs only, not accommodation.

10.
Although s.95 is expressed as a power to provide support, it is established and common ground that it is converted to a duty by Council Directive 2003/9/EC which laid down the minimum standards for the reception of asylum seekers: see JM at [15] to [16]. It was common ground, at the hearing, that the Reception Directive (as recast since Refugee Council) represented the position under English law at all times that are material to this claim.

11.
There is a hard-edged minimum standard to the essential living needs to be provided under ss.95 and 96(1)(b), which the court is required to ensure is not breached: see R (Refugee Action) v Secretary of State for the Home Department [2014] EWHC 1033 (Admin) in which Popplewell J held (at [85] and

[88]) that, applying the Marleasing principle, s.96(1)(b) had to be read as subject to a “minimum content” derived from the Reception Directive.

12.
Popplewell J observed at [85]:

“Provision for essential living needs must therefore be interpreted as including, as a minimum, provision of the minimum reception conditions required by the Directive. The minimum standard of living for which provision is required by the Directive is not a matter for the Secretary of State's subjective judgment but an objective standard. To this extent it is not open to her to treat essential living needs as having a lesser content than the objective minimum required by the Directive. Section 95 and 96 must be interpreted in such a way as to place such a view outside the range of reasonable judgments in order to be compatible with and give effect to the Reception Directive. If the Secretary of State were to make a judgment which treated essential living needs as something less than the minimum standard of living required by the Directive, it would be both irrational and unlawful.”

13.
Any provision for living needs beyond such minimum content is an evaluative judgement for the Secretary of State. Therefore there is a role for Wednesbury review, but it only comes into play after it is established that the minimum standards protected by the Reception Directive have been complied with: Refugee Council and R (JK (Burundi)) v Secretary of State for the Home Department [2017] 1 WLR 4567.

14.
Regulation 10 of the Asylum Support Regulations 2000 (2000/704) prescribes the kind and level of support that is required to meet an asylum seeker’s essential living needs for the purposes of s.95 of the IAA 1999. The version in force until 21 February 2021 reads, so far as material:

“(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 £37.75.

…

(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.”

On 22 February 2021, the amount prescribed in regulation 10(2) was increased to £39.63.

15.
The Secretary of State is free to use contractors to perform her duty to meet the essential living needs of destitute asylum seekers under ss.95 and 96(1)(b), but the duty remains hers: R (DMA) v Secretary of State for the Home Department [2021] 1 WLR 2374 at [99]-[100].

16.
If an individual, because of their particular circumstances, requires more support than it is assessed asylum seekers in general need, they can apply for support to be provided under s.96(2), which provides:

“(2) If the Secretary of State considers that the circumstances of a particular case are exceptional, he may provide support under section 95 in such other ways as he considers necessary to enable the supported person and his dependants (if any) to be supported.”

C.

The 2018 and 2020 Reviews

17.

In fixing the sum of weekly cash payments for essential living needs, the Home Office’s approach is “to identify all needs that are considered “essential” for average, able-bodied asylum seekers and their dependants and which are not covered through other arrangements” and then to assess the cost of meeting each of these essential needs. The Home Office undertakes periodic reviews to assess the cost in cash of the various elements.

18.

A review was carried out in 2017. Its findings and conclusions were published in January 2018 as the “Report on Review of Cash Allowance Paid to Asylum Seekers: 2017” (“the 2018 Review”). A further review was carried out in 2019-2020. It was concluded in October 2020 and its findings and conclusions were published as the “Report on the Allowances Paid to Asylum Seekers and Failed Asylum Seekers: 2020” (“the 2020 Review”). On 8 June 2020, ahead of the publication of the 2020 Review, but in light of its findings, the Home Office increased the weekly amount payable to those owed the s.95 duty to £39.60, ahead of the amendment of the figure prescribed in regulation 10(2) from £37.75 to £39.63.

19.

The amount for each element is worked out using a combination of the Home Office’s own market research and data collected by the Office for National Statistics about expenditure on each element by the lowest 10% income group among the UK population.

20.

In the 2018 and 2020 Reviews, the Secretary of State set out her view of what essential living needs are for the purposes of ss. 95 and 96(1)(b) and quantified the sums needed to provide for the identified essential living needs (if they are to be met in cash rather than in kind). The needs and the assessed sums are:

Categories of need	**Sum allowed per week (2018 Review)**	**Sum allowed per week (2020 Review)**
Food and drink	£24.70	£26.49
Adjustment for CPI		£0.40
Toiletries	£1.05	£0.69
Healthcare	£0.95	£0.35
Household cleaning items (changed to ‘Laundry/toilet paper’ in the 2020 Review)	£0.95	£0.43

Clothing and footwear	£2.80	£3.01
Travel	£4.30	£4.70
Communications	£3.00	£3.56
Total	**£37.75**	**£39.63**

21.
These Reviews are the only evidence-based analysis carried out by the Secretary of State for the purposes of (i) determining what essential living needs have to be met under s. 95 IAA 1999; and (ii) determining the “minimum” sum required to meet each identified essential living need.

22.
Annex A to both the 2018 and 2020 Reviews shows that the quantified cost of “healthcare” is assessed by reference to the need for “essential generic non-prescription medication” for headaches (paracetamol and ibuprofen tablets), indigestion and colds (cough linctus, hot drink sachets, nasal inhalers and decongestant/cold and flu capsules). Annex E to both the 2018 and 2020 Reviews addresses the cost of non-prescription medication for children. Items identified as “essential generic non-prescription medication” for “Baby/Kids” are Calpol and petroleum jelly. The Reviews note, in both Annexes A and E, that:

“Anything other than this should be provided via GP on free prescriptions.”

23.
The quantified sum for non-prescription medication is assessed taking into account that:

“many medicines for minor ailments can be obtained without a prescription from a wide range of participating chemists such as Boots, Superdrug and independent outlets under the “NHS Minor Ailments Scheme”. This service is intended to relieve pressure on the NHS by reducing the need to make appointments with General Practitioners where the person is suffering only from a minor ailment. Where the person qualifies for free prescriptions because they are on a low income, which includes asylum seekers, the products are also provided free.”

24.
In relation to clothing and footwear the 2018 Review noted:

“We have not used ONS data to assess the cost to an asylum seeker of making reasonable provision for their clothing and footwear, as the level of expenditure shown in the data is in our view excessive in terms of meeting the essential need.

We have therefore continued to follow the practice of previous years by assessing the costs of buying a basic wardrobe of clothes in various clothing stores. We consider that a basic wardrobe of three sets of clothing is sufficient to enable both men and women to be adequately clothed to ensure good health. Most asylum seekers of course already have at least one set of clothing, which provides the first of the three sets of clothing.”

The same approach was adopted in the 2020 Review.

25.
The 2020 Review notes:

“The needs of children are not identical to adults and the methodology recognises it is possible to envisage some circumstances where meeting the particular need of a child requires greater expenditure of cash than would be required for an adult (for example because children may need to replace clothes more often as they are growing).

The costs of a range of clothes for children of different age groups was researched in 2019 and, as has been found in past years, these are broadly similar to the costs for adults – though differing slightly in some cases.

It is not, however, considered that extra provision (i.e. over and above the standard rate given to an adult asylum seeker) needs to be made to account for children’s clothing, as any additional cost is more than offset by other factors.

In particular, many essential requirements for adults (for example the need to communicate with friends and families overseas) clearly do not apply in equal measure to their children, particularly if they are very young.”

26.
The 2018 Review emphasises that:

“Like all people, asylum seekers need to budget appropriately and plan their expenditure according to the income available to them. It is unlikely that they will always spend the same amount of money on the same things each week. The amounts we have assessed as necessary to meet each of the needs we consider to be essential are therefore no more than a general guide to the amount of money they will on average need to spend each week.”

D.
The facts: general

27.
Mr Simon Bentley, the official with lead responsibility within the Home Office for policy relating to support arrangements for asylum seekers, has explained how support was provided before the COVID-19 pandemic in the following terms:

“Before the COVID-19 pandemic and the events I go on to describe, asylum seekers entering the support system with an immediate accommodation need would be placed in an “initial accommodation” facility, generally a multi-person full-board hostel where food, toiletries and other assistance is provided on site. Hotels were also sometimes used as a contingency.

Typically, the average person would remain in the accommodation for 4-6 weeks, whilst their application for support under section 95 was being considered and arrangements made to source longer term “dispersal accommodation” (generally flats and houses) suitable for their needs. Some individuals remained in the initial accommodation for much longer times. Generally this was because they had complex needs and they required accommodation in a particular location or of a particular type that took longer to source.

For as long as the person remains in initial accommodation, support to cover their other “essential living needs” is provided by the accommodation provider in the form of full board in-kind provision, cash or vouches, 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.”

28.

As Farbey J observed in JM at [35]:

“Readers of this judgment will need no reminding that, from 23 March 2020, everyone in the United Kingdom became subject to restrictions on their movement and association because of what was to become a global Covid-19 pandemic posing risk to life. I take it as axiomatic that the Government had a duty to protect everyone in the country, including asylum seekers, from its effects.”

29.
At the end of March 2020, the Secretary of State took the decision to pause all cessations of asylum support after a claim had been resolved (whether positively or negatively), in light of public health guidance on Covid-19. This has been referred to in this claim as “the pause”. I gratefully adopt Farbey J’s summary of the evidence (which is the same evidence as that before me) describing the onset of the pandemic and the implementation of the pause:

“36. By letter to local government leaders dated 27 March 2020, the Parliamentary Under-Secretary for Immigration Compliance and the Courts, Mr Chris Philp MP (“the Minister”), announced a three-month suspension to requiring asylum seekers to leave s.95 accommodation even if their circumstances meant that they were no longer entitled to it. The letter stated:

“[W]e are currently facing an unprecedented global health emergency.

This crisis has had a significant impact on the asylum system, particularly in ensuring we have enough accommodation to meet the current needs of asylum seekers who require housing, as well as safeguarding the people we care for and the communities in which they live…we must do all we can to ensure that people remain in their homes and do not travel or move around unnecessarily, adding additional measures to support that. To that end, I have taken the decision that, for the next three months, we will not be requiring people to leave our accommodation because their asylum claim or appeal has been finally decided (as would normally be the case). This decision will be reviewed ahead of the end of June 2020.”

37. The benefits of that decision are plain. It reduced the risk of contagion by movement of people outside their homes. It reduced the risk of asylum seekers catching Covid-19 or spreading it.

38. Those who would ordinarily have had their asylum support terminated – after the conclusion of the asylum process - remained in dispersal accommodation. At the same time, new asylum seekers entered the support system and required housing. In order to meet the growth in numbers, the defendant’s officials asked its accommodation providers to source additional accommodation across the United Kingdom. The additional accommodation was largely in the form of hotels as this was the fastest way of meeting an ever-increasing and urgent need.

39. The pause on moving asylum seekers out of accommodation was intended to last for three months and to be reviewed in June 2020. However, the pandemic continued apace, causing significant operational impacts for the defendant which were difficult to predict in advance. As Mr Simon Bentley (the official with lead responsibility within the Home Office for policy relating to support arrangements for asylum seekers) says in his written evidence:

“the Home Office has had to try to respond as best it can as events have unfolded and to a dynamic situation with restrictions/steps imposed or lifted with very little advance notice. In practical terms the Home Office has had to procure several thousand emergency hotel places during lockdown to accommodate the extra people, the number of which [as at September 2020] are growing daily.”

40. … The defendant treated all those housed in hotels as living in initial accommodation – irrespective of whether they had received a s.95 decision. Mr Bentley's evidence is that "section 98 support is not synonymous with initial accommodation, and section 95 support is not synonymous with dispersal accommodation." That would seem to reflect what happened as a matter of fact because s.95 supported asylum seekers remained in initial accommodation until a place was found in dispersal accommodation. But it cannot warrant a policy which simply assumes the lawfulness of an undifferentiated approach to s.95 and s.98 cases.

41. … As they were treated as being in initial accommodation, they did not receive a cash payment from the defendant. A Home Office factsheet dated 3 July 2020 explained:

"Those who were already in the support system and accommodated in houses and flats will continue to receive a cash allowance to cover their other essential living needs. If they are accommodated in full board then all accommodation, utilities, meals and essentials are provided by the accommodation provider and a cash allowance is not paid.""

30.
On 4 August 2020, Mr Bentley provided a submission to the Home Secretary and the Minister recommending:

"a change to policy that would result in the individuals receiving a weekly cash payment of £12.11 if they have been assessed as eligible to receive support under section 95 or section 4(2) and have been housed in an initial accommodation centre or hotel for more than 35 days".

31.
The proposed figure of £12.11 was said to be calculated by removing the value for food (£26.89, adjusted for CPI) and the value for household cleaning (£0.43) from the weekly sum of £39.60 (although I note that the resulting figure is marginally higher). This proposal was made in circumstances where many asylum seekers were remaining in full board accommodation for long periods and it was recognised that in such accommodation provision was made for food and householding cleaning and some other essential items, but "not for the full range of other needs accepted as essential according to the 2014 methodology".

32.
This recommendation was, however, rejected, as Farbey J explained in JM:

"56. By email dated 10 September 2020, the Assistant Private Secretary to the Home Secretary informed relevant officials that the recommendation for a £12.11 weekly cash payment had been rejected:

"The Home Secretary and [the] Minister have reviewed and on balance are not content to proceed with this payment. They are of the view that the asylum system already appears more generous than European equivalents and do not want to further increase any possible pull factors. In addition, they commented that the department does not have the budget to fund this move and initial accommodation/hotel use is temporary. They therefore would like to see all the department's organisational/financial efforts focused on reducing hotel use rather than mitigating the impacts (with many of the items not necessary for very short-term stays)."

57. Both parties were content to refer to this email as the September 2020 decision and for the court to treat it as representing the decision on FBA cash allowances that was taken at that time. The email indicates that the defendant decided to prioritise the Home Office's organisational and financial

resources towards the movement of FBAs into ordinary dispersal accommodation rather than paying cash support to FBAs.

58. The email shows that there were in effect two policy drivers for the decision to reduce hotel use rather than to pay cash support: (i) ensuring that the United Kingdom did not take more than its share of asylum seekers in Europe; and (ii) financial considerations. Those are relevant factors which the defendant was entitled to take into consideration (at least to the extent that they are not inconsistent with her statutory duties) but they do not cast light on how the defendant viewed her statutory duties towards FBAs in the first place.

59. The email also shows that the September 2020 decision not to pay cash to FBAs was based on the proposition that FBAs would stay in hotels on a "very short-term" basis. In my judgment, the correct legal question was not whether FBAs would very shortly be moved out of hotels but whether the Secretary of State was under a duty to provide their essential living needs under s.95 at that time. As I have set out above, that duty endured in the pandemic. By providing support to FBAs in exactly the same way as to those temporarily supported under s.98, the defendant failed to recognise any distinction between the two groups. In my judgment, the defendant thereby misdirected herself in law.

60. The September 2020 decision was however short-lived in its effect and superseded by a further decision in the following month."

(The term "FBAs" was used as shorthand to refer to asylum seekers who have been granted s.95 support but were then kept in full board hotel accommodation: JM, [7].)

33.
On 13 October 2020, Mr Bentley provided a further submission to the Secretary of State and the Minister. It was noted that the timing was urgent because the Home Office was facing a number of judicial reviews on the issue of provision of cash support to those eligible for support under s.95 who continue to be accommodated in mostly full board initial accommodation centres. The submission recommended that the Secretary of State and Minister:

•
"**agree** to implement a change in policy so that individuals in accommodation where some services are provided in kind who have been assessed as eligible for support under section 95 of the 1999 Act receive a small weekly cash payment; and

•
agree that the payment to these individuals is £8 per week".

34.
Mr Bentley's recommendation was that the Secretary of State and Minister "consider a modified version of the option" recommended in August and rejected in September. The first reason given was:

"We are facing several judicial reviews that argue the support provided in the 'hotel' facilities is inadequate because it does not fully meet the essential living needs test. In particular, it is claimed that one someone has been judged to be entitled to support under section 95, we are obligated to provide support of £39.60 or the equivalent in kind."

35.
The figure of £8.00 was calculated by identifying three areas where there were gaps and adding together the quantified costs to produce a figure of £8.06 which was then rounded down to £8.00. It

was suggested that the accommodation provider would continue to meet the needs of those in their accommodation in respect of food, toiletries and communication. In the light of JM, and the court's finding (see paragraph 4 above), the Secretary of State does not defend the claimant's challenge to her decision in October 2020 in respect of communication.

36.
The submission addressed the proposal to make payments of £8 per person per week going forwards in the following terms:

"11. **The areas where there are gaps in provision and how these can be filled through the modified option are**:

•
Clothes – There is no current provision to meet this need in the facilities. £3.01 is factored into the £39.60 rate as the assessed cost of meeting clothing needs. It is not practical to provide for this need in kind, so we suggest that it is provided for in cash at the same level.

•
Non-prescription medicines – There is no consistent current provision. In practice, some of the individuals are obtaining provision by booking an appointment with a GP, which has prompted complaints from health professionals because of the waste of resources. Although it might be possible to ask providers to issue the items, it is easier to provide the small level of cash (£0.35) we assess is needed to buy the items.

•
Travel – Travel is only considered necessary as part of maintaining interpersonal relationships and some participation in social cultural and religious activities (e.g. to visit churches and mosques). £4.70 is allowed for this purpose within the £39.60 rate – based on the cost of a local return bus journey in most of the main dispersal areas. This amount is therefore the appropriate amount to use to bring parity with the group in dispersal accommodation.

12. [LPP redaction] **According to our methodology the combined amount is £8.06 per week; however, we propose the payment should be £8.00. Do you agree?**…

13. …**We propose to arrange the £8 weekly payment by issuing eligible individuals with an "Aspen card"** (the same debit card provided to those in dispersal card (sic) who receive the £39.60 payment)." (Original emphasis.)

37.
The submission then went on to address the need to make back payments in the following terms, recommending option (b):

"14. [LPP redaction] we will need to make some back payments but want to do this in a way that is administratively workable and avoids unnecessary further litigation. We also want to present the issue as being the result of Covid factors: specifically, the decision of 27 March 2020 to suspend cessations of support, which resulted in the lack of flow through the system and the inability to move people into dispersal accommodation. No back payments for events before that date will therefore be considered under the arrangement. We have therefore developed 2 options:

a) We backdate the full **£8** per week payment to either 27 March (if the person had been granted section 95 support by that time) or to the actual date when they were granted section 95 support.

b) We backdate at **£3** per week to cover the clothing need for all of the relevant period. The clothing amount is calculated by the amount needed, over a full year, to buy a full wardrobe of necessary clothes. To do this, the individuals need to save and budget appropriately. There is therefore a powerful case that the individuals are missing the necessary funds to do this. But we do not backdate fully for travel needs as for most of the relevant period travel was generally inappropriate (until around the end of June when lockdown eased). Under this option the usual payment becomes **£3.00** until 30 June and **£7.70** thereafter. We do not consider it necessary to backpay for non-prescription medicines as the evidence tends to show the need was being met in some way (see paragraph 11).” (Underlining added.)

38.
In the light of JM, the Secretary of State acknowledges that it was also wrong not to include a sum in respect of communication in calculating the back-payments. On the other hand, the decision in respect of travel back-payments was justified.

39.
The decision which is the subject of challenge, the October decision, was made on 19 October 2020 when the Private Secretary to the Home Secretary informed Mr Bentley and other relevant officials by email that:

“Ministers … agreed with the recommendations in the [submission] i.e. … to pay a weekly cash payment of £8 for those assessed as eligible for support but are in accommodation where some services are already provided. They also agreed with he back-dating proposals (option B).”

40.
Mr Bentley has given evidence in this claim as follows:

“When assessing which essential needs were being met by providers it was noted that they are under a contractual obligation to provide for food and toiletries. There was also no need to make provision for household cleaning products, as providers are responsible for the upkeep of the IA facility and the cleaning arrangements.

…

The approach taken, whether in setting the rate for those in DA or IA, is to consider the needs of the average individual and to then, if necessary, use procedures for exceptional payments where an individual has needs over and above the average.”

41.
In relation to the scheme for backdated payments, Mr Bentley states:

“15. Having decided in October 2020 that it would be appropriate to make backdated payments, it was considered necessary to provide certainty regarding the period during which individuals would be eligible to receive backdated payments. As I explain in my statement dated 10 September 2021, the Government decided to pause cessations on 27 March 2020. As this was the primary cause of the individuals remaining in IA for significantly longer periods, it was decided that this would be a rational date to use as a “longstop” for backdated payments relating to clothes.

16. A longstop date of 1 July 2020 in respect of payments for travel needs was used because travel for social purposes was not appropriate between late March and 31 June 2020 due to restrictions imposed as a result of the ongoing COVID-19 pandemic. Given that the travel need relates to travel

for social purposes, and since travel for social purposes was restricted during this period, it was decided that it would not be appropriate to make a backdated payment for the period to meet a need that did not exist at the time.

17. I refer to paragraphs 11 and 14 of the 13 October submission to the Minister, which address the provision of non-prescription medicines and the reason why it was decided not to backdate the relevant payment (£0.35 per week) to cover the need. Para 14 states: that "[w]e do not consider it necessary to backpay for non-prescription medicines as the evidence tends to show the need was being met in some way". The evidence regarding non-prescription medicines was a series of complaints made by health professionals about individuals asking to see GPs for minor ailments in order to obtain medication for which a prescription was not needed.

18. The reason for limiting the backdated payments to the cost of clothing and travel was because these were the only relevant needs that were not being met over the period in question. As I have explained, it was considered other relevant needs were either being met or did not arise (for example, travel until 31 June 2020) during the period." (Emphasis added.)

42.
Those engaged by the Home Office to provide asylum accommodation and support are contractually bound to adhere to the Statement of Requirements in Schedule 2 to the Asylum Accommodation and Support contract. The Home Office's preference is for "Initial Accommodation to be provided on a 'full board' basis" (§2.3.5). Where it is provided on that basis, the provider is required to provide the services as defined in §4.1.14 which identifies what food provision under the full board service should include and states:

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

a. baby care equipment and disposable nappies; and

b. personal toiletries and feminine hygiene products."

43.
Mr Bentley has given evidence in this claim that "the average person would typically remain in "initial accommodation" for 4-6 weeks whilst their application [for] support under section 95 was considered and arrangements made to secure longer term "dispersal accommodation". However, he states:

"In practice there might be a number of reasons why dispersal had not happened in the expected timeframe (including the actions of the individual in question, such as their refusal to travel to the proposed location). Rather than setting up a system to provide cash payments to those still in IA (which might result in individuals receiving payments where delay was due to their own actions), or a system whereby each individual's circumstances would [be] assessed to determine the reasons for the delay (which would have involved disproportionate cost), the approach taken in such cases was to resolve the reasons why a move had not taken place and to take steps to arrange dispersal in a reasonable timeframe."

44.
The National Audit Office comment, in a report published on 25 June 2020 entitled "Asylum accommodation and support" at paragraph 3.15:

"The Department told us that it expects people with straightforward needs to move into dispersed (longer-term) accommodation within 35 days of their arrival in initial accommodation. Department

data suggest that on average, asylum seekers spent 26 days in initial accommodation before leaving, between September 2019 and February 2020. Some people have stayed much longer. For example, the Department's data showed that 981 people who had arrived by the end of December were still in initial accommodation on 24 March 2020, a stay of at least 86 days."

E.

The facts: claimant-specific

45.

The claimant has made a claim for asylum which has not yet been determined. After a period living with her brother and his family, the claimant and her daughter were asked to leave. She applied for asylum support. The application was initially rejected, but later granted on 25 October 2019.

46.

The claimant and her daughter spent nearly 20 months in full board accommodation under s.95 of the IAA 1999 at the following locations:

i)

Bell Hotel in Epping for around 5 days from about 1 November 2019;

ii)

Tanes Hotel in Cardiff between about 6 November 2019 and 6 March 2020;

iii)

Flexistay Reading West Aparthotel in Reading from 6 March 2020 for about two weeks;

iv)

Bell Hotel in Epping from about 20 to 30 March 2020;

v)

Stonebridge Hotel in Croydon between 30 March 2020 and 28 July 2020; and

vi)

The Mercure Hotel in Bristol from 28 July 2020 to until 28 June 2021.

47.

There are some discrepancies in the evidence as to the precise dates. For example, the Secretary of State suggests the claimant first moved into initial accommodation on 8 November 2019. The differences are minor and not material to my resolution of this claim.

48.

In accordance with the Secretary of State's longstanding approach, the claimant and her daughter received no cash payments when they moved into full board accommodation at the beginning of November 2019.

49.

The claimant and her daughter were due to be moved to dispersal accommodation on 19 November 2019, however, unfortunately, the wrong address was input into the system and so the driver went to the wrong address to collect them. The transfer did not take place and, in the event, they remained in initial full board accommodation for a further 19 months. As a consequence of this planned transfer, the claimant and her daughter were, mistakenly, paid a cash allowance of £37.75 each per week from

19 November 2019 for nine weeks, until the payments were stopped on 11 January 2020. The payments were made to the claimant on an Aspen card, with which she was provided.

50.
The Home Office sought to transfer the claimant and her daughter to dispersal accommodation in Luton in February 2021, after they had been in initial accommodation for more than 14 months, but ultimately made an offer of accommodation which enabled them to remain in Bristol so that the claimant's daughter could complete the academic year in her school, before moving to a new school closer to her new home.

51.
The claimant and her daughter received no cash payments from 11 January until 30 November 2020. On 30 November, the claimant and her daughter were given £40 each, representing payments of £8 per person per week for the five weeks from 27 October 2020. Thereafter, in accordance with the October decision, they continued to receive the payment of £8 per person per week (paid in a lump sum every five weeks) throughout their remaining seven months in full board accommodation.

52.
The claimant and her daughter moved into self-catered dispersal accommodation on 29 June 2021. On their transfer into self-catered accommodation, they began receiving the weekly sum of £39.63 per person (which increased to £41.48 on 12 July 2021).

53.
In her evidence, the claimant has described the difficulties that she and her daughter faced, receiving no cash payments at all for the first 13 months that they were accommodated by the Secretary of State under s.95 (save for the mistaken payments that were made for nine weeks, to which I have referred).

54.
It is unnecessary to consider the evidence of the claimant and of Mr Chesters, on behalf of the defendant, in response, regarding the food and drinks available in the accommodation. Although the claimant raises various complaints regarding the food, and the difficulty of having no cash and so being unable to supplement the food provided with healthier meals or snacks for her daughter, these matters are not relied on as founding any ground of challenge. The claimant accepts that food and drink were provided in kind in the full board accommodation and so it was lawful for the Secretary of State not to make cash payments of the sum quantified in the Reviews in respect of food and drink.

55.
The claimant's concern about the period of time she and her daughter spent in full board accommodation, and the impact on her daughter's education and more generally, of the frequent moves, is readily understandable. But, again, no ground of review is founded on those matters.

56.
The essential needs which are the subject of this claim are (i) clothing/footwear, (ii) non-prescription medication, (iii) communication, (iv) travel and (v) laundry. In summary, the claimant gives evidence in relation to these matters as follows:

i)
Clothing/footwear: the claimant describes being reliant on friends and local charities during the winter in Cardiff to provide essential warm winter clothing. Her daughter grew out of the clothes and

shoes rapidly and so needed new clothes and shoes when they reached Bristol. In Croydon, an Islamic relief organisation gave the claimant some trousers and tops, but they did not have any clothes for her daughter. While they were in the Mercure Hotel, a charity brought clothes to the hotel, but the charity did not have most of the items they needed or clothing of the right sizes for them. When they were in Bristol, the claimant's daughter's shoes became too small for her and began to pinch and hurt her feet. The claimant was unable to find shoes for her from a charity, but friends they had made in Cardiff helped by giving her a pair of shoes.

ii)

Healthcare/non-prescription medication: the claimant's evidence is that she was not able to take any supplementary iron tablets, as recommended for her as she suffers from anaemia, or to buy any vitamins for her daughter (as she would have liked to do because of her concerns that her daughter's diet was less healthy and varied than the claimant wished). Nor was she able to buy Calpol, or other over-the-counter medication, such as for headaches (from which the claimant suffered) and indigestion (from which her daughter suffered). Items such as Vaseline and children's toothbrushes and toothpaste were not provided by the hotels. The claimant was only able to obtain these from friends in Cardiff who continued to help after they were moved from Wales. Nor were items such as nail scissors provided.

iii)

Communication: The claimant describes having no money to put credit on her telephone, and so being unable to speak to her family in Nigeria. Sometimes she was able to communicate with them via WhatsApp, but the combination of her family's limited internet access and the poor or inconsistent Wi-Fi connection in some of the hotels they stayed in made this difficult. After they had left Cardiff, when Covid-19 restrictions were at their height, the claimant wished to join weekly Zoom church services and choir sessions with the church they had joined in Cardiff, for the emotional support the community provided (particularly during the pandemic) and because it was important to her in view of her faith. She was only able to access these events, while they were in Croydon, because a friend from Cardiff bought mobile data to enable her to do so.

iv)

Travel: The church and choir that the claimant joined in Cardiff would arrange cultural trips and events. The claimant and her daughter had to rely on the help of these organisations to cover the cost of travel, to enable them to attend on some occasions. They would have attended more often if they had had money for travel. The location of the hotel in Reading was such that the claimant could only get around by using public transport, but as she had no money she did not travel anywhere, including to church or to enrol her daughter in school.

v)

Laundry: the claimant's evidence is that they were unable to access any laundry facility during their two stays (lasting about 6 days and 10 days) at the Bell Hotel, and no washing detergent was provided. Consequently, she had to wash clothes in their bathroom using hand soap. Other hotels provided laundry facilities. The claimant and her daughter had a skin reaction to the detergent used at the Mercure Hotel (where they stayed for 11 months), but were told no other detergent could be provided. The claimant also found it difficult to use the laundry service because they had so few clothes that they were not able to wait the three days that it took for items to be returned to them. Consequently, while in the Mercure Hotel, the claimant washed their clothes by hand in their bathroom, using laundry detergent purchased with vouchers provided by Bristol Refugee Rights and fabric conditioner given to her by friends in Cardiff.

57.
The claimant made an application under s.96(2) on 24 September 2020 for additional financial support to meet the costs of toys, books, educational material and clothes for her daughter and food supplements for herself, but this was refused on 10 November 2020. This decision is not challenged.

58.
Mr Chesters manages the London Interim Accommodation contingency estate. His evidence is that the Bell Hotel provided access to three washing machines and a tumble dryer on-site. A service wash was also provided. In relation to the Mercure Hotel, he states that if the claimant had made the staff members at reception aware that the detergent provided irritated her and her daughter's skin, different detergents (e.g. biological or non-biological) would have been provided. He states that the accommodation providers were not responsible for supplying clothes to service users, but the claimant was entitled to contact charities to obtain suitable clothing.

F.
Analysis and decision

(1) Omission of any sum in respect of healthcare/non-prescription medication in the back-dated payments scheme

59.
The first element of the claim raises a narrow issue. In JM, Farbey J determined that the Secretary of State had not properly carried out her duty to provide asylum seekers in full board hotel accommodation during the COVID-19 pandemic with the means of communication, in cash or kind, to cover their essential living needs. As Farbey J observed in JM at [59], the correct legal question was not whether asylum seekers in full board accommodation would very shortly be moved out of such accommodation but whether the Secretary of State was under a duty to provide their essential living needs under s.95 at that time. The answer was that she was required to provide for their essential living needs as the s.95 duty endured in the pandemic.

60.
In the October 2020 decision, the Secretary of State proceeded on the basis that back-dated payments only needed to be made in respect of two of the seven identified needs, namely (i) clothing and footwear and (ii) travel (and in relation to a shorter period for travel). JM addressed the omission of back-dated payments in respect of communications, an essential living need that was not fully met by full board accommodation providers. The question whether the omission of back-dated payments in respect of non-prescription medication was not raised in JM and so has not been determined.

61.
I accept the claimant's submission that it was unlawful not to include the quantified sum in respect of healthcare given that the Secretary of State has identified it as an essential living need and it was not being met by full board accommodation providers (or otherwise).

62.
There was no evidence that could rationally form the basis for a conclusion that this essential living need was being met in full board initial accommodation during the period from 27 March to 26 October 2020. It was not a need that providers were contractually required to meet (see paragraph 42 above). The ministerial submission recognised that there was no consistent provision to meet this essential living need. In determining the weekly sum to pay in respect of the period from 27 October

2020, going forward, the ministerial submission identified this as one of the areas where there was a gap in provision (see paragraph 36 above).

63.
The only “evidence” relied on as “tend[ing] to show the need was being met in some way” was in the form of some complaints from health professionals about the waste of resources caused by some individuals booking GP appointments in order to obtain non-prescription medication. Mr Bentley describes this, somewhat opaquely, as a “series of complaints”. At most, this indicated that some individuals with asylum support, but no cash allowance, had sought to obtain non-prescription medication via GPs. It is a wholly inadequate basis on which to found a conclusion that the essential living need of healthcare was being met for those in full board initial accommodation.

64.
The fact that asylum seekers receive free prescriptions and the existence of the NHS Minor Ailments Scheme provides no answer to this challenge. Those were factors that were taken into account in the Reviews (see paragraphs 22 and 23 above) and, nevertheless, it was determined that there remained an essential healthcare need that was not already met and so had to be quantified.

65.
In accordance with regulation 10(5), where accommodation is provided in a form which also meets other essential living needs, the amount specified in regulation 10(2) should be reduced to reflect those essential living needs that are being met. However, it should not be reduced further than this. For example, if the only essential living need that is met by the accommodation provider were food and drink, the amount specified in regulation 10(2) should only be reduced by the sum quantified in the relevant review in respect of that need.

66.
The sum involved is very small: the figure of £0.95 per person per week was reduced to £0.35 on 8 June 2020 (see paragraphs 18 and 20 above). So the total loss for the claimant and her daughter is £33 (calculated on the basis of 10 weeks at £0.95 and 20 weeks at £0.35 for two people). However, as Farbey J observed in JM at [21], a small deduction in cash or kind will be significant in circumstances in which a person’s entire needs have to be met from asylum support – all the more so where, as here, the deduction results in no cash payment being made at all. Any deduction from the amount assessed by the Secretary of State as needed to meet the essential living needs of those entitled to s.95 support has the effect, where that need is not met in kind, that the asylum seeker receives a lower level of asylum support than is intended and required by s.95 and the Regulations.

67.
There was no evidence that could rationally form the basis for a conclusion that the “healthcare” need was an essential living need that was being met by the full board accommodation providers, or otherwise. It follows that there was no lawful basis for making a deduction in respect of this need when quantifying the back-payments required to comply with s.95 and the Regulations in respect of the period from 27 March to 26 October 2020. Accordingly, the claimant succeeds on this aspect of her claim.

(2) The limitation of the back-dated repayments scheme to the pandemic period

68.
Much of Ms Luh’s argument, on behalf of the claimant, focused on the contention that in making no cash payment to the claimant and her daughter from 1 November 2019 until 26 March 2020 (save for

the two month period when payments were mistakenly made) the Secretary of State failed to meet their essential living needs in respect of (i) clothing and footwear, (ii) travel, (iii) communication, (iv) non-prescription medication and (v) household cleaning items (for some periods, in relation to laundry).

69.
It is plainly right that the full board accommodation providers did not meet the need for clothing and footwear. Nor did they meet the travel need; and the lack of such a need for a short period in 2020 when Covid-19 restrictions were at their height obviously did not apply to the pre-pandemic period. Although JM did not address the pre-pandemic period, as a matter of logic and on the evidence, the finding that it was not shown that the communication need was fully met for all those owed the s.95 duty by full board accommodation providers (see JM, [144]) applies equally to the period prior to 27 March 2020, as the provision appears to have been the same. I have addressed non-prescription medication above in relation to the period from 27 March 2020. My conclusion that the “healthcare” need quantified in the 2018 and 2020 Reviews was not met applies equally to the period before that date.

70.
I do not accept, however, that the accommodation providers did not meet the “householding cleaning items” need. For the most part, the claimant acknowledges that they did. In relation to the Bell Hotel where she had two relatively brief stays, I accept Mr Chesters’ evidence that provision for laundering clothes was made available (see paragraph 58 above). In relation to the Mercure Hotel, it is common ground that a laundry service was provided. The claimant’s evidence that it was difficult to make use of the service because she and her daughter had too few clothes to be able to wait three days for them to be returned illustrates the importance of meeting the clothing need for any person who is eligible for s.95 support, irrespective of whether they are in initial or dispersal accommodation, but it does not show that the accommodation provider was failing to meet the laundry need. Nor does the claimant’s evidence that the particular detergent provided irritated their skin show that the accommodation provider was not meeting this need. The Secretary of State was entitled to determine whether the need was being met by reference to the generic information as to the provision made by the accommodation provider. I accept Mr Chesters’ evidence that alternative detergent would have been provided on request and, in any event, as the need for a different detergent was specific to the claimant an application for exceptional support under s.96(2) of the IAA 199 could have been made.

71.
I do not accept the Secretary of State’s contention that the anticipated short-stay nature of initial accommodation provides a basis for failing to meet any of the essential needs of a person who has been assessed as entitled to s.95 support until they are transferred into dispersal accommodation. The s.95 duty applies from the moment a determination is made that it is owed. Each of those living needs has been determined to be essential. The needs are the same irrespective of the nature of the accommodation in which an asylum-seeker is housed – the only difference is the extent to which they are provided in kind. Regulation 10 does not permit the Secretary of State to deduct from the prescribed sum specified in regulation 10(2) any amount due in respect of an essential living need that is not being met by the accommodation provider.

72.
Neither the 2018 Review nor the 2020 Review provides any evidential support for the suggestion that an asylum seeker has lesser essential living needs while in initial accommodation than following dispersal. The need for clothes and footwear applies irrespective of where a person lives and it is

recognised that the amounts provided are such that those in receipt of s.95 support will need to save up and budget to buy clothes and footwear. The same is true of the needs to travel and to communicate. Equally, the need for non-prescription medication is no less likely to arise while a person is in initial accommodation than it is after they have been dispersed.

73.
However, I agree with Ms Masood, counsel for the Secretary of State, that it is important to focus on the decision that is the subject of challenge in this claim. The claimant has not brought a claim alleging failure to comply with the s.95 duty during the pre-pandemic period from 1 November 2019. Any such claim would have been highly likely to have been found to have been brought out of time, given that the claim was filed on 29 January 2021.

74.
In the claim form, the date of the challenged decisions was given as 29 November 2020 and ongoing, on the basis that that was the date on which the claimant first received the cash allowance of £8 per person per week in respect of the period from 27 October 2020. As I indicated at the outset, the decision challenged is, in fact, the October 2020 decision.

75.
Although the decision to set up a scheme for making back payments was clearly made in the light of the pressure of pending judicial review claims, nonetheless, it was a scheme that the Secretary of State voluntarily chose to set up. In my judgement, the decision not to extend this scheme to the period before 27 March 2020 was a rational one.

76.
It was rational to conclude that a scheme that provided for back payments from the date of the decision to suspend cessations of asylum support would meet the aims of being administratively workable and avoiding unnecessary further litigation. I accept Ms Luh’s point that making payments to asylum seekers in initial accommodation has not been shown to be administratively difficult. The payments can be put onto an Aspen card in the same way as for those in dispersal accommodation. The only difference is the amount uploaded. But it seems to me that the administrative workability of the back payments scheme is concerned more with identifying those who are entitled to back payments and in respect of what periods. The scheme adopted, in respect of a six month period, is no doubt easier to administer than a scheme covering a longer period.

77.
Although there were people prior to the pandemic, such as the claimant and her daughter, who had been in initial accommodation for lengthy periods, it was undoubtedly the case that the 27 March 2020 decision resulted in the lack of flow through the system and the inability to move people into dispersal accommodation. The claimant did not contend that there was any other more logical longstop date that ought to have been imposed. The logic of her argument was that there should not have been a longstop: the scheme ought to have covered the making of back payments to anyone who had wrongly not received their full entitlement under s.95 of the IAA 1999. Or at least, if it was considered necessary to have a longstop, it should have been prior to 1 November 2019 (with the consequence that her entitlement to back-payments would not have been limited by it). In my judgement, given the aims of the scheme, the problem created by the pause, and the time limit for filing a judicial review claim provided by CPR r.54.5(1), the decision to set up a scheme covering the limited period of time from 27 March 2020 was lawful and rational. It was not incumbent on the

Secretary of State to go further and voluntarily introduce a scheme for back payments in respect of the period prior to the pause.

78.
Although I accept that cash payments ought to have been made to the claimant and her daughter during the pre-pandemic period in respect of the four essential living needs that I have identified (clothing/footwear, communication, travel and non-prescription medication), the failure to do so is not the decision challenged in this claim and it is not a failure that the scheme for back payments that the Secretary of State chose to set up in October 2020 lawfully had to remedy. Happily, as a result of the mistaken payments, the claimant did not in fact suffer financially (overall) during the pre-pandemic period, although I appreciate that the way in which the payments were made, the cessation of payments without warning, and the long periods when no payments were made, would have made it very difficult to budget.

79.
For the reasons that I have given, I reject the contention that the October 2020 decision was unlawful in limiting back payments to the period from 27 March 2020.

G.
Relief

80.
In relation to the underpayment in respect of the communication need for the period from 27 March 2020 to 26 October 2020, and also for the period from 27 October 2020 to 28 June 2021, which follows from JM, it is accepted by the claimant that it is appropriate to leave it to the Secretary of State to address the unlawfulness found and declared. I have found for the claimant on one aspect of the claim, namely the failure to include any sum in respect of the need for non-prescription medication during the period from 27 March 2020 to 26 October 2020. In my judgement, in relation to this small sum, in respect of the same period as falls to be addressed in respect of the communication need, it is also appropriate to make a declaration and leave it to the Secretary of State to address the unlawfulness that I have found. As this is the conclusion that I have reached as a matter of discretion, I have not found it necessary to address the argument as to whether, in principle, the claimant is entitled to relief in the form of a monetary remedy.

H.
Conclusion

81.
The October 2020 decision was unlawful insofar as it failed to incorporate any sum in respect of the essential living need identified as “healthcare” in the 2018 and 2020 Reviews, but the imposition of a longstop on back payments of 27 March 2020 was lawful.