Failure to monitor accommodation delays for pregnant asylum seekers found unlawful

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***DXK v SSHD* [2024] EWHC 579 (Admin)**

Introduction

1. Around 1,500 babies are born each year to women who receive asylum support from the Home Office.[1,2] Many spend their first days, weeks and months of life living out of full-board hotels where their health and nutritional needs are at risk of going unmet,[3] often in breach of several interlocking statutory duties.

2. It is not possible to know at any given time quite how long many families are living in these conditions. That is because the Home Office does not obtain and monitor sufficient reportable data on the vulnerable asylum seekers in its charge, despite authoritative Court judgments requiring it to do so.

The case of 'DXK'

3. At 7 months' pregnant, in 2020, DXK was provided with asylum support accommodation in the form of *'a single room which was said to be damp, dirty, unhygienic and infested with cockroaches and she had to share a bathroom with nine others, including men.'* (§9).

4. After 105 days in hotels, DXK was dispersed to self-contained asylum support accommodation, shortly after issuing judicial review proceedings.

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[1] See https://www.gov.uk/government/publications/asylum-accommodatoin-support-transformation-policy-equality-statement/asylum-accommodation-support-transformation-policy-equality-statement. Also see *DXK* at §168.

[2] Subsistence support and/or accommodation provided under sections 4, 95 and 98 of the Immigration and Asylum Act 1999 that is designed to prevent asylum seekers (or certain refused asylum seekers) who are prohibited from working, claiming benefits or begging, from being subjected to destitution and/or breaches of article 3 of the ECHR.

[3] See Independent Chief Inspector of Borders and Immigration ('ICIBI') report '*An inspection of contingency asylum accommodation*' (12 May 2022) at 9.18-9.23, 10.3 & 10.25.

5. DXK brought a systemic challenge to the system of allocation of asylum accommodation to pregnant women and new mother asylum seekers and refused asylum seekers ('PNMAS') under sections 4(2) and 95 of the Immigration and Asylum Act 1999.

A protracted procedural history

6. The case was stayed while the Defendant sought to remedy significant defects in his asylum support system and his monitoring of the same, as identified in the judgment of Robin Knowles J in *R (DMA and others) v SSHD* [2021] 1 W.L.R. 2374 (December 2020).[4]

7. A trial listing in July 2022 was vacated after the Defendant agreed to implement a new system to monitor the allocation of accommodation to PNMAS. The claim was stayed again (although the Defendant was directed to file evidence of the new system). The Claimant disputed that the new system was lawful and the case eventually came to trial before Paul Bowen KC sitting as a Deputy High Court Judge in December 2023.

8. Unusually, the Defendant made a CPR Part 18 Request for Further Information requiring DXK to explain further what aspect/s of the Defendant's system she was challenging. (Such use of Part 18 by a defendant in judicial review proceedings may serve as a useful riposte to public authorities that frequently cite *R (Bredenkamp) v SSfFCA* [2013] Lloyd's Rep. F.C. 690 to dampen resort to claimant's Part 18 requests).

9. By the trial, the individual challenge had become '*academic*' as the claimant had been provided with adequate dispersal accommodation. Systemic grounds, including breaches of the HRA 1998 and indirect discrimination under the Equality Act 2010 ('EqA 2010'), were also dismissed as academic (despite the Defendant not taking that procedural point). The HRA 1998 grounds were dismissed because DXK did not satisfy the *'victim'* test in section 7. Nor did DXK have standing to bring the indirect discrimination claim. The less fact-sensitive grounds relating to the duty to have due regard to the best interests of children and a breach of the public sector equality duty in section 149 of the EqA 2010 were permitted to be determined and were fully argued.

[4] For the author's summary of DMA, see: https://lawmostly.com/2021/01/30/high-court-finds-huge-delay-in-the-home-office-provision-of-asylum-support-accommodation-priti-patel-barracks-covid-19-coronavirus-human-rights-equality-discrimination/.

The evidence

10. Personnel from all three of the Defendant's third-party accommodation contractors (Clearsprings, Serco and Mears) provided witness evidence. Available data suggested that PNMAS faced delays to dispersal over 5 times longer than pre-pandemic levels. The Court noted that a range of factors increased the risk of dispersal delays, including:

    - the lack of any contractual obligation on the accommodation providers to notify the Home Office of any individual failure to provide dispersal accommodation within the timeframe in key performance indicators, nor any enforcement mechanism to avoid breaches of statutory duty (§28);
    - a cap on the volume of dispersal accommodation that can be provided under the contract, further impeding provision (§29);
    - Providers were permitted to fail to meet the timescales in 2 per cent of cases, with hard cases concentrated in that segment (§§30 & 44);
    - The SoS took a *'light touch'* approach to enforcement, with no incentive for contractors to meet their targets and no sanctions for persistent breaches (§§31 & 34);
    - The fixed price of accommodation meant that vulnerable groups like PNMAS were at risk of being disproportionately affected by delays. There was no financial incentive to prioritise vulnerable persons (§§33-34);
    - The Secretary of State had not implemented a system to provide individual case monitoring (to identify when accommodation providers failed to propose dispersal accommodation) or statistical data monitoring (to identify how long certain categories of vulnerable individuals were spending in hotel accommodation) - §35.

11. The Court also noted the likely adverse physical and mental health impacts of prolonged hotel accommodation / delayed dispersal on PNMAS (§§36-41).

12. Having assessed the Defendant's evidence of steps taken to remedy the unlawfulness identified in *DMA*, at §59, the Court reached a conclusion as stark as it will be unsurprising for those familiar with the subject matter. In summary, 3 years on from *DMA*, there had been no substantive progress:

    '…there is no statistical data monitoring in relation to vulnerabilities including disability (with which DMA was concerned) or PNMAS and no immediate plans to introduce such monitoring. The SSHD has not honoured his earlier undertakings to introduce such monitoring. Despite serving much late evidence, he has produced none explaining

why he no longer proposes to introduce such monitoring. DMA is clear authority that he is required to conduct statistical data monitoring in relation to the protected characteristic of disability, and the SSHD remains in breach of that obligation over three years later.'

The Court's findings on the grounds of challenge

13. In dismissing DXK's systemic grounds, the Court provided a succinct overview / reminder of the correct approach to systemic challenges as informed by the UK Supreme Court authorities on the matter (at §§ 83-88). Applying those principles to the complex evidence in this case did not yield a straightforward result:

    'It is not immediately clear how the Gillick principle is to be applied where a range of systemic factors that are challengeable and other factors that are unchallengeable combine in such a way.' (§94)

14. The point did not fall to be decided as the issue was academic. However, the Court observed *obiter* that the task of determining a systemic challenge would be very difficult if not impossible without one or preferably several individual cases through which it could assess whether the system under challenge would inevitably result in unlawful breaches of statute or policy (§§95-96). In other words, there is some safety in numbers. The Court also made a range of non-binding suggestions as to how the Defendant could go about rectifying present flaws in its system of allocating accommodation to PNMAS (§103).

15. On the public sector equality duty ('PSED') ground, the Court drew a distinction between the flexibility of the common law duty of inquiry and the narrower discretion available where an authority is required to have due regard to the equality objectives under section 149(1) of the EqA 2010 (§§134-136). The Equality and Human Rights Commission's non-statutory guidance on the PSED in the provision of public services and the exercise of public functions was a mandatory relevant consideration for decision-makers (§132) – and underscored the need to obtain and monitor *'Adequate and accurate equality evidence'* (section 5.17 of the guidance).

16. Again, unsurprisingly, the Court held that the Defendant is in breach of the PSED owing to his ongoing failure to ensure statistical data monitoring of PNMAS and their infants who are disproportionately impacted by delays in the allocation of dispersal accommodation. The Defendant could not therefore detect trends and/or assess the effectiveness of his interventions and policies by reference to the equality objectives (§§144-151, 154.iii) &

156-157). In addition, the Defendant had not considered and addressed the EHRC Guidance, without good reason (§154.i)). In view of the Defendant's continuing failure to comply with the declarations made in *DMA*, the Court made a mandatory order requiring the Defendant to introduce a system of statistical data monitoring with certain minimum requirements *'as soon as it is reasonably practicable'* (§§174-175).

17. The Court dismissed the Claimant's further ground alleging breach of the duty to have due regard to the best interests of children. Regard for such interests was adequately reflected in the policy and contractual documents applied by the Defendant's decision-makers and accommodation providers (§§166-167).

Comment

18. Progress in the enforcement of public law duties in systemic challenges can be agonisingly slow. Whether down to strategic obduracy, entrenchment of outdated database software or other unspecified *'IT limitations'*,[5] change tends to come in small increments and at considerable public cost. Reassurances, undertakings, judgments and declarations may all be dishonoured with seemingly little in the way of legal consequences.

19. That is why the mandatory order in DXK matters. Although it lacks a timetable for compliance and lacks any bespoke mechanism for the Court to supervise its implementation, it does illustrate that the Court is prepared to bite a little harder on those public authorities who, year on year, disregard the constitutional convention to heed the terms of its prior declarations.

[5] See *DXK* at §152.i).

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