Neutral Citation Number: [2022] EWHC 18 (Admin)

Case No: CO/1385/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2022

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

The Queen on the application of Detention Action	**Claimant**
- and -	
Lord Chancellor	**Defendant**

- -
- -

Ben Jaffey QC, Shu Shin Luh and Daniel Clarke (instructed by **Public Law Project**) for the **Claimant**
Malcolm Birdling and Aarushi Sahore (instructed by **GLD**) for the **Defendant**

Hearing dates: 07 December 2021 - 08 December 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 13 January 2022 at 10:00 am

Mr Justice Calver :

A. BACKGROUND TO THE CLAIM

1. The right of access to legal aid is a fundamental part of the constitutional right of access to justice.

2. The Detained Duty Advice Scheme ("**DDAS**") is a publicly funded legal advice service available to those detained in immigration removal centres ("**IRCs**"). It provides 30 minutes of free legal advice, without the person having to satisfy the usual financial eligibility or merits tests under the legal aid rules.

3. The DDAS is the primary way in which the right of access to justice is achieved for a particularly vulnerable cohort of people, which include detainees who may have entered the UK lawfully but overstayed, who may have had their leave curtailed, who may have been trafficked to the UK, or who may be seeking asylum and protection in the UK. Detainees are reliant on being able promptly to access legal advice and assistance from competent lawyers who are able to advise on the full range of matters that are likely to arise in detained work.

4. Legal advice is provided by independent legal service providers (mostly firms of solicitors) ("**providers**") who are remunerated pursuant to the Standard Civil Contract 2018 (the "**Standard Civil Contract**"). The Standard Civil Contract was initially in place for three years until 31 August 2021. By this claim, the Claimant challenges the Lord Chancellor's decision dated 21 January 2021 to extend the Standard Civil Contract for a further twelve months (the "**Decision**").

5. The Claimant contends that it is the Defendant's duty to safeguard detainees' effective access to justice by the proper and effective management of DDAS (and the contracts awarded under it) through the monitoring, investigation, enforcement and sanction powers available to him, but that he is failing to discharge that duty.

6. Mr. Ben Jaffey QC appeared together with Ms Shu Shin Luh and Mr Daniel Clarke for the Claimant at the hearing of this claim. Mr. Jaffey argued that the evidence before the Court, including the statistical evidence, shows that the DDAS in its current operation poses a high risk of interference with the right of access to justice in particular in the following respects:

    a. a significant majority of DDAS providers are taking no or few steps to provide legal advice to more than 8,000 detainees;
    b. immigration bail advice, in particular, is routinely not provided to detainees by providers in breach of their contractual obligation to do so, resulting in individuals' detention being prolonged;
    c. incompetent providers are permitted to continue to provide legal advice and assistance to detainees (who have no choice about the lawyer they get on the DDAS).

7. This has come about, Mr. Jaffey submits, by reason of the fact that the Defendant's monitoring arrangements are inadequate and incapable of providing him with a full picture of the DDAS' operation in all aspects of legal work that providers are expected to carry out.

8. By the end of the hearing before me, the Claimant's grounds for judicial review boiled down to the following, namely that the Decision, being to extend the DDAS contracts for all providers regardless of their competence, is unlawful because:

   a. the Decision is in breach of the Defendant's statutory duties under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"), in that by taking the Decision he has failed to secure that legal services are made available and that effective access to justice is safeguarded for detainees;
   b. if the Claimant is required to show systemic error in the design of the monitoring scheme (which the Claimant does not accept) then there is such systemic error;
   c. in taking a blanket approach to the renewal of all contracts through the Decision, the Defendant has acted in a *Tameside* irrational way by failing to inform himself of all the relevant matters before deciding to apply an extension to each contracted DDAS provider, regardless of their level of competence and capability (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014).

9. By way of relief the Claimant accordingly seeks:

   a. A declaration that the Defendant's operation of the DDAS is unlawful;
   b. A declaration that the Decision to extend contracts for all providers was unlawful; and
   c. A mandatory order requiring the Defendant to consider what remedial action is necessary using his powers under the 2018 Standard Civil Contract.

10. Mr. Jaffey suggested that this was modest relief, which acknowledged the proper constitutional limits of judicial review. No quashing order is sought, and the relief recognises that it is for the Defendant to determine how to fix the problems with the monitoring system which the Claimant has highlighted. Since the contractual rights of third parties are involved, it is sufficient simply to disabuse the Defendant of the erroneous belief that he has complied with the law as laid down in *R (UNSION) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 and that the scheme operated to date is a lawful one.

B. THE STATUTORY FRAMEWORK

11. The statutory framework for legal aid is set out in LASPO and related delegated legislation.

12. LASPO provides in relevant part as follows:

> *"**1. Lord Chancellor's functions***
>
> *(1) The Lord Chancellor must secure that legal aid is made available in accordance with this Part.*
>
> *(2) In this Part "legal aid" means—*
>
> *(a) civil legal services required to be made available under section 9… (civil legal aid) …*

(4) The Lord Chancellor may do anything which is calculated to facilitate, or is incidental or conducive to, the carrying out of the Lord Chancellor's functions under this Part.

2. Arrangements

(1) The Lord Chancellor may make such arrangements as the Lord Chancellor considers appropriate for the purposes of carrying out the Lord Chancellor's functions under this Part.

(2) The Lord Chancellor may, in particular, make arrangements by—

…

(c) establishing and maintaining a body to provide services or facilitate the provision of services.

3. Standards of service

(1) The Lord Chancellor may set and monitor standards in relation to services made available under this Part.

(2) The Lord Chancellor may, in particular, make arrangements for the accreditation of persons providing, or wishing to provide, such services by—

(a) the Lord Chancellor, or

(b) persons authorised by the Lord Chancellor.

(3) Arrangements for accreditation must include—

(a) arrangements for monitoring services provided by accredited persons, and

(b) arrangements for withdrawing accreditation where the services provided are unsatisfactory.

…

4 Director of Legal Aid Casework

(1) The Lord Chancellor must designate a civil servant as the Director of Legal Aid Casework ("the Director").

(2) The Lord Chancellor must make arrangements for the provision to the Director by civil servants or other persons (or both) of such assistance as the Lord Chancellor considers appropriate.

(3) The Director must—

(a) comply with directions given by the Lord Chancellor about the carrying out of the Director's functions under this Part, and

(b) have regard to guidance given by the Lord Chancellor about the carrying out of those functions.

(4) But the Lord Chancellor—

(a) must not give a direction or guidance about the carrying out of those functions in relation to an individual case, and

(b) must ensure that the Director acts independently of the Lord Chancellor when applying a direction or guidance under subsection (3) in relation to an individual case.

(5) The Lord Chancellor must publish any directions and guidance given under this section.

(6) Directions and guidance under this section may be revised or withdrawn from time to time.

5 Delegation

(1) The following functions of the Lord Chancellor may be exercised by, or by employees of, a person authorised by the Lord Chancellor for that purpose—

(a) securing the provision of information under section 1(3), and

(b) setting and monitoring standards under section 3.

(2) Regulations may provide for a function of the Lord Chancellor under regulations made under this Part to be exercisable by, or by employees of, a person authorised by the Lord Chancellor for that purpose.

(3) The functions conferred on the Director by this Part may be exercised by, or by employees of, a person authorised by the Director for that purpose.

(4) Regulations may provide for a function of the Director under regulations made under this Part to be exercisable by, or by employees of, a person authorised by the Director for that purpose.

…

9. General cases

(1) Civil legal services are to be available to an individual under this Part if—

(a) they are civil legal services described in Part 1 of Schedule 1, and

(b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination)."

13. Civil legal services in relation to detention under immigration powers (and accordingly including bail applications) do indeed fall within Part 1 of Schedule 1 (in paragraphs 25-32A). Even where civil legal services do not fall within Part 1 of Schedule 1, there may be exceptional case funding available under section 10 of LASPO (essentially where a failure to make the services available would be a breach of the individual's Convention rights or retained enforceable EU rights).

14. The Legal Aid Agency ("**LAA**") is an executive agency of the Ministry of Justice. Under section 4(2) of LASPO it carries out functions on behalf of both the Lord Chancellor and the Director of Legal Aid Casework, who is a statutory officer appointed by the Lord Chancellor under section 4(1) of LASPO.

15. Legal aid generally requires satisfying a means test and a merits test. This is set out in sections 11 and 21 of LASPO, as well as the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 and the Civil Legal Aid (Merits Criteria) Regulations 2013.

16. There are two categories of civil legal aid work under LASPO:

    a. The first is Licensed Work. In broad terms, this involves representation in litigation, including claims for judicial review, appeals to the Upper Tribunal and other work in the Senior Courts. Licensed Work requires authorisation from the LAA. An application has to be made for a Legal Aid Certificate to undertake such

work. This is set out in Part 3 of the Civil Legal Aid (Procedure) Regulations 2012 ("**Procedure Regulations**").

b. The second is Controlled Work. Controlled Work primarily consists of Legal Help which, in broad terms, involves advice and assistance outside of court or tribunal proceedings, as well as "Controlled Legal Representation" for bail applications and statutory appeals before the First Tier Tribunal (Immigration and Asylum Chamber) ("**FTT**"). Providers are given delegated authority to start Controlled Work under Part 4 of the Procedure Regulations *without* having to apply to the LAA. Providers can decide whether the means and merits tests are satisfied and grant funding accordingly.

17. When a provider opens a Controlled Work case for a client it is often described as a "New Matter Start". I return to this below.

18. Remuneration of providers for these two types of work is governed by the Civil Legal Aid (Remuneration Regulations) 2013 ("**Remuneration Regulations**"). For DDAS providers, the Remuneration Regulations provide that £360 is the standard fee for advising 5 or more clients and £180 is the standard fee for advising fewer than 5 clients: Schedule 1, Part 1, para. 3, Table 4(d). If the provider creates a "Matter Start" for the provision of Legal Help, the additional remuneration is determined under Controlled Work rules.

C. THE CONTRACTUAL FRAMEWORK

19. The DDAS has been in operation in some form or another since 2005 (when it started as a pilot scheme). The Standard Civil Contract commenced on 1 September 2018 and formed part of the tender for a general immigration and asylum contract. Before the Standard Civil Contract, DDAS work was subject to a separate tender and a small number of firms were awarded the contract. But under the Standard Civil Contract, the Defendant changed the manner in which DDAS work was procured such that all providers who had successfully tendered for 300 and more new matter starts under the main Immigration and Asylum contract would receive Schedule authorisation to undertake DDAS work, subject to their meeting certain additional tender requirements, including (a) being *"able and willing"* to undertake Licensed Work in the Immigration and Asylum area (i.e. judicial review and appellate court work)[1], and (b) *"employ[ing] an Authorised Litigator"* with demonstrable experience in undertaking such work. This resulted in a significant expansion of DDAS providers from 9 to 77,[2] including 38 firms who had no prior experience with legal aid work at all and 64 firms with no prior experience of the DDAS. According to the Defendant, there are currently 46 DDAS providers (some having dropped out of the scheme over time).

20. The term of the Standard Civil Contract was 3 years, such that it was due to expire in August 2021. However, by taking the Decision on 21 January 2021, the Defendant made the general decision to extend all civil legal aid contracts by one year to 31 August

[1] See 2017/2018 Tender Information for Applicants ("**IFA**") §2.45; FAQs Q12.3.

[2] Ministry of Justice response to Freedom of Information Act (FOIA) Request – 190416015, dated 17 May 2019. Nine providers were additionally authorised to undertake work for detainees going through the Detained Asylum Casework ("**DAC**") process under which asylum claims could be considered and decided whilst a person remains in immigration detention.

2022. The contract authorisation for the DDAS was, on this basis, extended for all existing providers. Only those immigration and asylum providers who have been granted a specific Schedule authorisation by the Defendant are able to provide advice and representation to clients in an Immigration Removal Centre under the DDAS.[3] The exclusive arrangements of the DDAS mean that detainees have no choice as to which provider they see on the surgery rota, although they can see as many as they like for 30 minutes each time.

21. The Standard Civil Contract contains the standardised terms for all face to face legal aid services. It operates as an individual contract between each provider and the Lord Chancellor. The Standard Civil Contract for the purposes of providers on the DDAS consists of:

    a. The Contract for Signature;
    b. The Standard Terms which apply to all contracts ("**the Standard Terms**");
    c. The General Specification which applies to all contracts;
    d. The Immigration and Asylum Specification which applies to immigration work ("**Immigration Specification**"). The DDAS was established by Part E, paras. 8.106-8.122 thereof;
    e. The Schedule, which is the contractual document unique to each provider, listing the services it is authorised to provide.

22. The Standard Terms provide, by clause 10.1, that *"[the provider] must at all times perform Contract Work in a timely manner and with all reasonable skill, care and diligence*"; and by clause 10.2 [the provider] must at all times hold the Quality Standard (which is a reference to the Law Society's international practice management standard or other specialist quality mark standard specified by the Defendant).

23. Because the DDAS is based on exclusive contract arrangements (para 8.44 of the Immigration Specification), those providers authorised to participate *"must deliver"* the full range of contract work for detainees seen on the rota (ibid, para. 8.110) and *"must ensure"* that they have *"sufficient numbers of Caseworkers available to meet [their] IRC Rota obligations"* (ibid, para 8.111).

24. Paragraphs 8.117 to 8.122 of the Immigration Specification specify the following additional obligations for DDAS providers (emphasis added):

    8.117 You may provide a maximum of 30 minutes advice to a Client at a Detained Duty Advice Surgery without reference to the Client's financial eligibility.[4]

    8.118 The purpose of the advice session is to ascertain the basic facts of the Matter and to make a decision as to whether the Matter requires further investigation or whether further action can be taken.

[3] See paragraph 8.44 of the Immigration Specification to the Standard Civil Legal Aid Contract.

[4] The merits criteria are also in effect disapplied: *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin), [2021] 1 WLR 3815 per Swift J at para 5.

> *8.119 When attending a Client the Caseworker must always advise a Client in relation to … Bail and record the outcome of this advice on the file.*
>
> *8.120 On the conclusion of the Client's 30 minute advice session you must make a determination as to whether the Client qualifies for civil legal services … to ascertain whether you are able to continue to advise the Client under Controlled Work…*
>
> *8.121 You must record the time spent with each Client at a Detained Duty Advice Surgery on the Contract Report Form specified by us.*
>
> *8.122 You must ensure the client is given adequate information in a written format at the end of the Detained Duty Advice Surgery whether or not the matter requires further investigation. This information should sufficiently address the outcome of the Detained Duty Advice Surgery with details of the name of the Caseworker who has advised the client.* (emphasis added)

25. The specification accordingly requires advice on bail to be given, even where there are not sufficient merits to justify legal aid for the client's substantive immigration matter, and Controlled Legal Representation can be granted for the sole purpose of making a Bail application: paras 8.34–8.37.

D. DEFENDANT'S MONITORING AND ENFORCEMENT POWERS

26. Under section 3(1) of LASPO the Lord Chancellor has chosen to exercise his discretion to set and monitor standards in relation to the services made available under Part 1 of the Act. He does that in essentially four ways via the Standard Terms contained in the Standard Civil Contract, namely (i) the appointment of Contract Managers; (ii) an independent peer review process; (iii) the imposition of sanctions; (iv) auditing.

i. Contract Managers

27. Contract managers (**"CMs"**) are appointed for each provider and they oversee the Provider's performance under the contract (clauses 2.5 to 2.8). The Contract Management IRC Management Information Report guide (**"MI Guide for CMs"**)[5] is designed to support CMs in reviewing the performance of their providers in IRCs. In particular it identifies higher priority areas for CMs to review where it concerns provider performance, as follows:

    a. Providers who have reported high/low conversion rates from clients seen to New Matter Starts ("**NMS**") opened. This is a reference to the "**NMS conversion rate**", namely the proportion of clients seen by a DDAS Provider, for whom further work – in the form of opening a 'Legal Help' Controlled Work file – is undertaken by the Provider. This could entail opening a file to deal with bail, applications to the Home Office which remain within the scope of legal aid such as fresh asylum claims, or advice and preparation for a claim for judicial review. The CMs should investigate providers whose NMS conversion rate is less than 30% or over 70%;
    b. Providers with comparatively low proportions of claims that relate to bail advice. CMs should investigate providers who have reported a volume of bail

[5] Version 1 was issued in December 2019. In December 2020, the guide was updated to Version 2.

claims that equate to less than 20% of their claims for matters arising from a DDA surgery.

28. The MI Guide for CMs states that NMS data is *"vital"* not only to the CM's understanding the Provider's level of work and performance, but also *"in reviewing and monitoring [the DDAS], their effectiveness and to inform decision-making"* around the arrangements and operation of the DDAS. "*CMs are not expected to second guess, or go behind the advice given by providers, [but] we would expect the individual records to contain sufficient information to demonstrate why, as a minimum, a matter was not opened to advise on bail."*

29. Training slides for CMs (November 2018) direct that where a provider *"fails to meet their obligations"* under the DDAS rules of the Immigration Specification, the CM is required to investigate the provider to find out the reasons why, and if despite the provider's response, the CM considers that there indeed a failure to meet contractual obligations, then the CM *"should issue a Contract Notice"* to the Provider under the relevant contractual provision. The LAA, through the CMs, will need to *"take robust action against any firm that fails to deliver as per the contract"* because *"IRC detainees are vulnerable clients and detention of Immigrants is a sensitive political matter that attracts media interest*." The CM Immigration Training slides dated 4 March 2021 refer to an "*[e]xpectation that matters will be opened to advise on bail, if nothing else*."

ii. Independent Peer Review Process

30. Another important monitoring power of a provider's contract work *generally* (but not specifically its DDAS work) introduced by the Defendant is the Independent Peer Review process ("**IPR**"), contained in clauses 10.6-10.9 of the Standard Terms of the Standard Civil Contract, together with the Defendant's 'Independent Peer Review Process Document' (June 2017) ("**IPR Document**'). Unlike the CM investigatory work which does not seek to "second guess or go behind" the advice given by providers, the IPR Document explains that "*Peer Review is a system in which a panel of independent experienced legal practitioners assesses the quality of work of other professionals against a set of criteria and levels of performance agreed with the professional community. The intention of Independent Peer Review, as described in this paper, is to enhance the standards of legal work carried out under public funding*".

31. Clauses 10.6 to 10.9 of the Standard Terms provide as follows:

"*Independent Peer Review Process*

10.6 You agree to the standard of your Contract Work being assessed by the Independent Peer Review Process and promptly to provide such information, Matter files and case files as may be required for that purpose. Both you and we agree to accept the validity of the Independent Peer Review Process and to be bound by the outcome of the Independent Peer Review Process. The Independent Peer Review Process and an explanation of the ratings (1-5) are available on our website and from your Contract Manager.

10.7 In each Category of Law, your Contract Work must receive a rating of either 1, 2 or 3 as determined by the Independent Peer Review Process. If you receive a

rating of either 1, 2 or 3, we will not require you to reimburse us for the standard costs that are charged to us by those we instruct to carry out Peer Reviews.

10.8 If your Contract Work in any Category of Law receives a rating of either 4 or 5 as determined by the Independent Peer Review Process at the initial Peer Review, you may make representations in accordance with such process. If your original rating is upheld this is a material breach of Contract and, without limiting our rights to apply any Sanction in accordance with Clause 24.1, you will reimburse us for the standard costs that are charged to us by those we instruct to carry out that initial Peer Review. If your Contract Work in any Category of Law receives a rating of either 4 or 5 as determined by the Independent Peer Review Process at the second Peer Review, you may make representations in accordance with such process. If your original rating of either 4 or 5 is upheld, this confirms the outcome of the Independent Peer Review Process and is a Fundamental Breach. In these circumstances, and without limiting our rights to apply any Sanction in accordance with Clause 24.1, you will reimburse us for the standard costs that are charged to us by those we instruct to carry out that second Peer Review."

32. Consistently with the Standard Terms, the IPR Document at para 2.22 refers to IPR ratings of 1 (Excellence), 2 (Competence Plus), 3 (Threshold Competence), 4 (Below Competence) or 5 (Failure in Performance). The IPR Document further states that peer reviews are normally based on a review of a sample of 12-15 of the provider's files (IPR Document, para 5.3). In other words, it is essentially a spot check. However, a peer review can be carried out in respect of a smaller sample size of files where a provider has closed fewer than 15 files (*ibid*, para 5.16). There is no requirement to wait until sufficient files have been closed before the IPR process may be utilised. This is so whether it is the initial or second peer review: para 7.12.

33. In addition to its general powers of sanction (see below), the Defendant has the specific power to sanction providers who have been rated Below Competent (4) or who have incurred Failure in Performance (5), which indicates that the work has fallen below the standard required by the Standard Terms (in particular, clause 10.1 thereof):

    a. A rating of 4 or 5 on a first IPR, if upheld after any representations from the provider, constitutes a material breach of the Contract on its own without more, and gives rise to sanction powers set out in cl. 24.1 (see clause 10.8 of the Standard Terms). A Contract Notice will normally be issued (IPR Document, para 7.10).
    b. In such a case, in order to *"minimise the risk to existing clients"*, the provider should also undertake a file review of all open cases to ensure that the areas for improvement identified in the peer review report are considered, identified and acted on as quickly as is reasonably possible (IPR Document, para 7.11).
    c. Where a provider receives a rating of 5, the second peer review *"will be scheduled immediately"*. Where a provider receives a rating of 4, the second review *"will normally be scheduled after six months from the date of the initial first review report"* although it may be conducted earlier (IPR Document, para 6.35).
    d. A rating of 4 or 5 at the second IPR, upheld after representations, constitutes a fundamental breach (see clause 10.9 of the Standard Terms).

e. In cases of two consecutive ratings of 4 or 5, it will normally be appropriate to terminate the provider's right to conduct publicly funded legal services in the relevant category of law (IPR Document, para 7.14-7.15).
(emphasis added)

iii. Sanctions

34. Under clause 24.1 of the Standard Terms, where a provider is in material or persistent[6] breach of the contract, the Defendant may impose *any* of the sanctions under clause 24 including: (a) suspending or imposing restrictions on the type of contracted work that can be done (Sanction 1, clause 24.5); (b) suspending a provider from taking on new matters (Sanction 4, clause 24.8); (c) suspending or removing a provider's rota allocation on the DDAS (Sanction 6, clause 24.12); (c) terminating the Contract (Sanction 8, clause 24.14). Under clause 24.2, upon any breach the Defendant may also issue a contract notice requiring steps to be taken to remedy the breach and/or prevent further breaches. A failure to comply with such a contract notice constitutes a breach for the purposes of assessing persistent breach under cl. 24.1(b).

iv. Powers to audit

35. Finally, the Defendant has powers to audit a provider at any time during the Contract Period under clauses 9.2 and 9.6 of the Standard Terms, as well as power to (i) conduct mystery shopping under clauses 9.11 and 9.12 and (ii) conduct client satisfaction surveys under clauses 9.13 and 9.14.

E. Submissions of the parties on alleged failure to monitor the providers

i. Statistical evidence

36. The Claimant alleges that the most recent statistics disclosed by the Claimant (exhibited to and summarised in the third witness statement of Mr. Singh) demonstrate that there are serious problems with the DDAS system which are not being picked up by the Defendant.

(a) Poor NMS conversion rates

37. First, Mr. Jaffey submits that the statistics[7] show that in the first 18 months of the contract (September 2018 – February 2020) many firms failed to meet the Defendant's own standards which should have triggered investigation:
    a. 75% (47) of the 63 providers (for whom there is available data) opened NMS for fewer than 30% of the 7,916 detainees seen by them under the DDAS (being 73% of those seen under the DDAS in total during the relevant period).
    b. 6 firms did not open a single NMS for any of the 518 detainees who attended the 74 surgeries held by them.
    c. 9 others also opened NMS for fewer than 10% of the 1,994 detainees seen by them.
    d. These 15 firms saw a total of 2,512 detainees over the 18-month period, almost a quarter of 10,865 detainees seen by all DDAS firms.

[6] Defined as 3 breaches of the same term, or 6 breaches of the Standard Contract (without limitation to material and fundamental breaches) within 24 months: cl 24.1(b).

[7] At TRS/2

e. 12 other firms had an NMS conversion rate above 10% but under 20%. This translates to 214 new matter starts for 1,391 detainees.

38. The statistics also show that, over the course of the contract to August 2021, there are 5 firms with an NMS conversion rate of 0%; 9 firms with a rate below 5% and 15 firms with a NMS rate below 10%, despite the fact that those firms have seen a large number of clients at their DDAS surgeries. I was told that the 15 firms with an NMS rate below 10% have carried out 2,921 advice sessions and of those sessions they have only opened 151 NMS, being an average of around 5%. The conversion rates of these firms has not improved in the periods (i) September 2018 – February 2020 (pre-Covid) and (ii) February 2020 to August 2021. Mr. Jaffey submitted that the obvious risk is that these firms are simply not advising properly on the immigration matters arising.

39. When the performance of the current 47 firms with available data is considered across the whole period of the contract (up to August 2021 but excluding those firms who did not undertake DDAS work after February 2020):

a. More than half of the firms (26) had conversion rates under 30%, affecting 7,104 detainees, being nearly half of the detainees seen at DDAS surgeries;
b. 9 firms had an overall conversion rate under 10%, affecting 2,368 detainees. 2 of these firms opened no NMS for any detainees;
c. 6 further firms had an overall conversion rate of 10-20%, affecting 1,681 detainees.

40. Finally, Mr. Jaffey suggests that misreporting does not explain the poor conversion rates. Of 27 DDAS firms with a pre-Covid NMS conversion rate under 30%, the Defendant's analysis identified only 2 firms where there was possible (but unconfirmed) data misreporting.

41. In response, Mr. Malcolm Birdling (who appears together with Ms Aarushi Sahore on behalf of the Defendant) contends that it is dangerous to rely (and certainly to rely exclusively) upon statistics such as these, particularly when, he submits, there can indeed be shown to be data input errors by the providers. In particular:

a. There is no bright-line test to be applied by reference to the data in the NMS Spreadsheet. The 30% conversion rate figure, contained in the MI Guide, is indeed merely a guide for what might be expected; it was based on the review of the pilot and cannot be relied upon as some sort of fixed statistical threshold. These are internal guidelines which the LAA has provided to its CMs. Instead, a very low or very high NMS might be a point of concern for CMs which will then be discussed by them with the relevant provider, along with other issues which firms may be experiencing;

b. It is important to take timing into account. NMS data only became available to Contract Managers in September 2019, and the MI Guide was provided to them in December 2019. Discussions of historical data should be approached with care. In addition, issues which arise in the case of individual providers might not be straightforwardly revealed to CMs in the data they collect day to day. The data set is "live" and there can be a lag, or issues of mis-reporting. The artificiality of looking at long-range, comparative data now, as though Contract Managers have access to it generally, should be acknowledged;

c. In any event and crucially, there is no necessary correlation between firms with high or low NMS and their Peer Review scores. Some firms with strong Peer Review scores have very low numbers of, or no NMS and some firms with low Peer Review scores have high numbers of NMS. The reasons for this are obscure. This could be because more experienced and strong-performing firms are more careful/cautious in satisfying the means and merits criteria before opening a case. There does not, therefore, appear to be any evidence that a low NMS necessarily means a firm is conducting work of a low quality;

d. So far as NMS generally is concerned, only the real outliers should be considered. A provider may be providing accurate and effective legal advice whether it was achieving a 10%, 20%, 30% or 40% conversion rate. It is not feasible or appropriate for the LAA to interrogate every 30-minute session which takes place at IRCs and query each individual decision as to whether or not to open a new matter. To the extent that the Court is minded to entertain the inquiry, it should focus only on noticeable or persistent outliers rather than fixating on a particular percentage.

e. As to this, Ms Druker explains in paragraphs 124-126 of her first witness statement that the LAA has indeed already investigated or is currently investigating the position for all outlier firms. Some are no longer on the rota. Some have had issues of under-reporting and others have good peer review scores or have had conversations with Contract Managers which have satisfied them as to their competence. The LAA is accordingly satisfied that these statistics alone do not require sanctions, certainly at this stage.

(b) Absence of bail applications

42. Second, Mr. Jaffey submits that when the Defendant's bail data is analysed as a proportion of NMS opened by individual DDAS providers, it is apparent that there is significant variation across the 35 firms for which data is available, and the performance of many ought to have triggered investigation:

a. Bail claims constituted less than 20% of NMS for more than half of the firms (18 of 35);
b. 10 of these 18 firms have overall NMS conversion rates under 30%, meaning they are already firms requiring investigation for only undertaking further legal work (after the initial surgery appointment) for a small proportion of detainees;
c. 5 firms, who have opened very few bail claims, have been rated Below Competence (4) in a Peer Review.

43. The poor performance of DDAS providers in the context of bail claims for detainees is, Mr. Jaffey submits, even more stark when those claims are considered as a proportion of *detainees seen* by each DDAS provider (as opposed to NMS opened). This points to the wider problem of DDAS firms simply failing to undertake any further work following the initial 30-minute appointment:

a. For more than three-quarters of the firms (27 of 35), bail claims were opened for less than 20% of detainees seen on the DDAS by the firm, affecting 7,832 detainees.

b. 18 firms opened bail claims for 5% or less of the detainees seen by the individual firm, affecting 1,522 detainees;
c. 15 of the 27 firms are among those underperforming with NMS conversion rates below 30% and already need to be investigated;
d. 6 firms who had been rated Below Competence (4) in peer reviews are amongst the same 27 firms; all of them opened bail claims for less than 10% of the detainees seen. This affected 1,818 detainees seen on the DDAS rota for the duration of the contract up to June 2021.

44. Mr. Jaffey further suggested that the statistics exhibited by Mr. Singh show[8] that there are a significant number of providers who have recorded no or hardly any bail claims despite seeing numerous clients. 9 of them have never made a single bail application despite having carried out approximately 1,000 advice sessions in total. 22 providers only applied for bail in between 1-5% of cases. This is despite the fact that the guidance states that if a detainee is not immediately removed, then they will have good grounds for seeking bail. The number of bail applications should have increased significantly during the pandemic (but did not) because removal flights stopped and so detainees should have been granted bail in greater numbers (because there was less justification to detain them).

45. In contrast, on behalf of the Defendant Mr. Birdling points out that so far as bail claims are concerned, one must again be very cautious about jumping to conclusions simply by reference to statistics not least because of data errors. This can be seen from Mr. Singh's bail data[9] where, for example, one firm (Goodfellows) is recorded as having an NMS of 4 but also as having 14 bail claims, which is obviously a data error. There are other such errors. This is, Mr. Birdling suggests, once again because this is "live" data which is not intended to be pored over in a courtroom but rather is there to assist CMs in determining the broad areas which require to be investigated with the providers. It is information provided by the providers themselves and the Defendant relies upon them accurately entering the data, which they do not always do. Its real purpose is that it affords one piece of evidence which may assist in flagging up the "outliers" who need further investigation.

46. Indeed, Mr. Birdling points out that CMs have advised that the reasons why a client is not taken on for bail are various. These include the following: the removal date has already been set; bail advice had already been given in the last 28 days; there were poor chances of success; bail was not necessary because the substantive claim was quickly progressed, resulting in release from detention.

47. As to this, the Claimant's own evidence shows that there may be provider- or client-specific reasons why bail claims are not made in any particular case: see paragraphs 12-18 of Ms Burgess' second witness statement. In particular at paragraphs 13-14 of that statement she states:

> *"I note that Exhibit ED/23 records that we made 2 bail claims during the period 1 September 2018 to June 2021. I have no reason to doubt that figure, which would represent less than 20% of our total claims. I confirm that our contract manager has not raised any questions or concerns about this figure. There are several reasons why we have billed relatively few bail claims, but the overall theme has been that we have taken on a substantive matter and progressed that in a short*

[8] At TRS/6

[9] TRS/6

> *period of time, resulting in release from detention, such that a separate file for bail advice has not been required*."

48. In paragraphs 129-130 of her first witness statement, Ms Druker further explains that:

> *"129. In this context, it is not the role of LAA contract managers to opine on the judgment of qualified, accredited and regulated legal professionals These are ultimately matters for the legal regulators, and we have consistently advised the Claimant that they should refer an particular concerns they have identified, with named providers, to the Solicitors Regulation Authority (or OISC) as appropriate.*
>
> *130. More generally, there are inevitably limitations to such data sets where, for example, a detained individual may see multiple providers on different rotas, which is then reported several times, and where in each instance they may have been advised they do not have a case that meets the requisite merits criteria."*

49. In order to support his argument, the Defendant disclosed during the course of Mr. Birdling's submissions, a further document in the form of a one page spreadsheet containing the file findings of a CM in respect of four case entries for one particular firm, Goodfellows (being the firm referred to in paragraph 45 above). Mr. Birdling submitted, and I accept, that it showed that the recorded data (suggesting that bail had not been sought) was inaccurate and that in fact bail advice had been provided by the firm in two cases and in the other two cases bail was either being sought by another (private) firm or bail was to be revisited at a later date. This also showed that where it became aware of a problem with an individual "outlier" firm, the LAA followed up on the problem.

50. Mr. Jaffey observed in reply that this was a rather selective use of the documentary material available to the Defendant, but in any event he submitted that this document itself raised concerns about the quality of advice being given, as it appeared that in one case the client had not been given advice about the merits of their asylum claims and in another case the client should have, but apparently had not been advised that there was no need to pay a private solicitor for bail advice. However, it is impossible for the court to assess the merits of such arguments on the basis of this document alone.

(c) Ineffective Independent Peer Review Process

51. Third, so far as independent peer reviews are concerned, Mr. Jaffey refers to the fact that the Defendant describes the Independent Peer Review Process as an "integral" way to quality-assure the work of providers: IPR Document, para 1.2. However, he argues that the Defendant's evidence demonstrates that this mechanism is ineffectual in ensuring that DDAS work is competent. The peer review process is not a mechanism by which the Defendant is able to obtain an objective assessment of the quality of work carried out by providers in respect of clients seen on the DDAS. This is because, he argues (a) no peer review *at all* is carried out in cases where the firm has seen a detainee but not taken any further action; (b) there were and continue to be significant delays in carrying out peer reviews; (c) the Defendant has allowed providers, independently assessed to be incompetent, to continue to provide advice to detainees; and (d) there is no requirement to select DDAS files for review as part of the independent peer review process. This must also, he submits, be understood in the context of a DDAS which was expanded significantly (by extension) in September 2018, and (he suggests) the vast majority of providers have no

track record of any kind in providing legal aid immigration and asylum legal advice to detainees.

52. The most serious and basic defect in the peer review process is, Mr. Jaffey submits, that it does not cover a case where advice was given in the initial 30-minute DDAS appointment, but no further action was taken by the firm (i.e. no NMS was opened). Where this occurs, such cases are ignored in the peer review process because a failure to advise/or advice that the detainee has no remedy at the initial DDAS appointment is not considered to be a 'file', and so no file is opened. Yet, he submits, this is where one of the most serious problems with the DDAS seems to be occurring – advisers not taking on work at all.

53. The statistics[10] must be viewed against that background, the Claimant submits. So far as those statistics are concerned, in the case of those firms with a peer review score of 4 or 5 (incompetent) and also with an NMS rate of less than the historic average, and in particular less than 20%, the Claimant alleges that the Defendant has failed properly to investigate what was happening. TRS/3 showed, the Claimant submitted, that the Defendant's CMs either failed to raise the issue with the provider or simply accepted their explanation that "there were no IRC matter starts from the surgeries" [11] or that the poor NMS rate was caused by misreporting.

54. In response, Mr. Birdling observes that the most recent data shows that out of the 46 active providers, 4 firms have the top score of (1), 12 firms have a score of (2), 18 firms have a score of (3), 7 firms have a score of (4) and no firms have a score of (5), which shows that generally the system is functioning well. The Peer Review Scores Spreadsheet also shows that scores can improve after an initial Peer Review, and indeed that is the very purpose of the review. There are 5 firms which have not had peer review scores yet, but they are either in peer review, or dates have been set for reviews in early 2022. The Peer Review process is a time consuming process because it requires the peer reviewer to assess a number of files against a number of detailed criteria.

55. Mr. Birdling further submits that a minimum number of closed files reviewed is chosen by reference to an objective statistical analysis (i.e. the reviewer considers a statistically significant sample) in order to ensure fairness for firms undergoing what is an invasive and rigorous scrutiny of their overall standard of performance by their peers. A separate peer review purely for the DDAS would be disproportionate not least because the DDAS represents work done at pace in a difficult environment, and amounts to a small fraction of the LAA's overall portfolio of legal aid.

ii. Qualitative evidence

56. So far as what he termed "the qualitative evidence" is concerned, Mr. Jaffey points to the following.

57. First, as Mr Wilson states in his first witness statement served on behalf of the Claimant, immediately after the start of the Standard Civil Contract in 2018, the Claimant noticed an increase in the number of complaints raised by clients, primarily concerning their not receiving advice, representatives not taking cases forward on grounds of capacity and

[10] At TRS/3

[11] Druker (1), paragraph 124-125; 127-128

representatives not communicating with the client as to whether their case had been taken on and what next steps would be taken. He states in paragraph 50 of his statement that:

> *"The problems we have identified from our monitoring, raised with LAA in our correspondence and at meetings from June 2019 onwards, include:*
>
> *i. failing to advise on bail and/or refusing to represent client in bail applications.*
>
> *ii. refusing to act for clients due to insufficient capacity*
>
> *iii. failing to act diligently or promptly, or at all*
>
> *iv. appearing to lack competence*
>
> *v. failing and/or inability to advise on judicial review*
>
> *vi. failing to identify trafficking indicators and/or to refer into NRM*
>
> *vii. failing to provide written advice at the end of a surgery*
>
> *viii. clients not knowing if a Provider had taken on their case at the end of a surgery*
>
> *ix. clients believing their case had been taken on after a surgery, but being told weeks later that it had not*
>
> *x. ceasing to act for a client without providing adequate reasons*
>
> *xi. failing to communicate with client or respond to communications from client*
>
> *xii. requesting payment for legal services*
>
> *xiii. failing to use an interpreter where required*
>
> *xiv. failing to provide cover when solicitors/advisors with conduct of cases taken on from the surgery were absent due to e.g. annual leave or illness."*

58. Ms Lenegan, the Legal Director of the Immigration Law Practitioners' Association, summarises her concerns with the DDAS in her first witness statement at paragraph 125 as follows:

> "*<u>Access to legal advice and representation</u>*
>
> *a. Providers refusing to take on clients seen at DDA surgeries, citing capacity to do the work or because the cases are too complex (data provided by the LAA in February 2020 showed, for example, that 5 firms had not opened a single Legal Help file for any of the 292 clients seen at 41 DDA surgeries; 4 opened Legal Help matters for less than 5% of clients seen, 5 for more than 5% but less than 10%, and 8 for more than 10% but less than 20%) [SL1/6]. This suggests potential breaches of providers' warranties as to capacity and/or competence, and/or the expectation that providers will take on follow-on work for DDA rota clients where they are eligible for legal aid.*
>
> *b. Providers not attending their rota slots or attending late, in clear breach of paragraph 8.105 of the Immigration Specification.*

c. Providers unable to do judicial review work (often involving injunctive relief) because they are not authorised to do so by their regulator, in breach of the tender requirement (and so the associated warranty under cl. 18.1 of the Standard Terms) that a provider must be able and willing to conduct "the full range of licensed work in the Immigration and Asylum Category of Law".

Quality of legal advice and representation

d. Providers having been given a peer review rating of 4 ("Below Competence") or 5 ("Failure in Performance") (indicating that they are not competent to undertake any immigration and asylum work, let alone specialist detention work), constituting a material breach of contract on the first review and a fundamental breach on the second review (Standard Terms cl.10.8-10.9). Alarmingly, data provided by the LAA in February 2020 showed that one-sixth of the 36 firms that had been peer reviewed had been given a rating of 4 or 5.

e. Other matters suggesting breach of the obligation to "perform Contract Work in a timely manner and with all reasonable skill, care and diligence" (Standard Terms cl.10.1) and Part E of the Immigration Specification, amongst others:

i. Providers lacking experience and expertise in detention work to provide prompt and competent advice and representation to people with the kind of complex claims routinely encountered in DDA surgeries

ii. Providers not spending sufficient time with each detainee;

iii. Detainees not being clearly told at the end of their initial 30-minute session whether their case has been taken on by the rota provider;

iv. Providers taking on the case but not doing any substantive work on their clients' behalf, including failing to apply for bail;

v. Detainees not being able to contact their solicitor or legal advisor about the progress of their case."

59. The Claimant also relies upon three witness statements from contracted providers, namely Aisling Ni Chuinn of Wilsons Solicitors LLP; Nicola Burgess of the Joint Council for the Welfare of Immigrants and Toufique Hossain of Duncan Lewis solicitors. They make consistent complaints of their having to pick up DDAS cases at short notice very late in the day since the start of the Standard Civil Contract in 2018, where providers had erroneously failed to take on cases through wrong or inadequate advice. This has, they say, put immense strain on their respective organisations.

60. In addition, so far as the issue of bail is concerned, the Claimant relies upon the witness statement of Pierre Makhlouf, the Legal Director of Bail for Immigration Detainees ("**BID**"). He explains that the national average for successful bail applications before the FTT is around 30%, whilst BID's success rate is around 50-59%. That increased to 88-94% during the pandemic because removal from the UK was no longer imminent. This suggests, Mr. Jaffey submits, that the number of bail claims taken on by providers should be much higher than the statistics show.

61. The Claimant also relies upon the witness statement of Ms Karris Hamilton, Senior Advocacy Coordinator for the Gatwick Detainees Welfare Group. She states that she started to receive direct reports of concerns about the DDAS from detained people right from the start of the new contracts in September 2018. She says that "[*a]t first blush, it may seem that having a larger number of firms means greater choice for detained people in terms of legal representation. However, that is in reality not the case because:*

> *a. Detained people cannot choose who they see on the DDA rota. They make an appointment and see whichever legal representative from whichever firm happens to be allocated rota slots for that week; and*
>
> *b. what is needed is access to quality and effective legal advice and assistance. Increasing the number of providers does not, on its own, ensure that if the new providers lack expertise or capacity to appropriately advise on the complex areas of law affecting detained people*."

62. Ms Lisa Incledon, a Senior Caseworker at Medical Justice, gives evidence to like effect.

63. Mr. Jaffey accordingly submits that the overall picture which one gathers from this evidence is of a responsible group of professional people all of whom have serious concerns with how the DDAS is operating in practice. He argues that they have raised their concerns repeatedly with the LAA but the statistics suggest that no significant improvements in the DDAS have been made during the course of its operation and that matters have become significantly worse since the taking of the Decision. The evidence of these witnesses show, Mr. Jaffey suggests, "*what is going on beneath the statistics*".

64. Aside from these complaints generally about inadequate monitoring, Mr. Jaffey also contends that it has become apparent that there is also a particular problem with a gap in the monitoring, which is as follows. Under the Standard Civil Contract, paragraph 8.119, when attending a Client the Caseworker must always advise that Client in relation to bail and record the outcome of this advice on the file. However, unless a new matter is opened, this is not treated as a file which is then subject to potential peer review. The Claimant submits that negligent advice on bail or a failure to advise on bail may then not be picked up on any independent peer review. Similarly, where a provider erroneously advises the detainee that he has no case (whether substantive or bail related) after the 30 minute interview, no file will be opened and so there is again no file capable of being subjected to an independent peer review (although Mr. Birdling points out that it is should be borne in mind in both of these cases that detainees are in principle entitled to have as many 30 minute advice session as they wish, and may do so with different providers). Mr. Jaffey also suggested that in a case of negligent advice which does not result in a file being opened at all, this might also not be picked up by the provider's CM in view of the fact that, as Ms Druker states in her first witness statement, *"it is not the role of LAA contract managers to opine on the judgment of qualified, accredited and regulated legal professionals."*

65. In response to this qualitative evidence, Mr. Birdling refers to the fact that, as Ms Druker states, the decision - to expand the number of providers in 2018 - was taken in part in response to feedback from representative bodies that there should be greater client choice and that there were a number of providers interested in doing this work (whereas, since November 2010 there had only been a small number of providers undertaking this work).

66. The Decision was also taken, Mr. Birdling says, in the following circumstances:

a. The Ministry of Justice is presently in the process of reviewing access to immigration advice for individuals detained in prisons following the decision of Mr Justice Swift in *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin), [2021] 1 WLR 3815. This is a substantial cross-government exercise which has involved the Claimant and other stakeholders. The Lord Chancellor is committed to engaging with the issues that have been raised in these proceedings as a part of that Review. The Decision accordingly preserves the status quo while this review is ongoing.

b. The professional or regulatory issues raised are properly matters for the providers' regulatory bodies, namely the Solicitors Regulation Authority ("**SRA**") or Office of the Immigration Services Commissioner ("**OISC**"). Parliament has authorised those bodies independently to regulate legal professionals. The LAA has therefore already required providers to show that they satisfy minimum accreditation requirements. It would be inappropriate to cut across the independent regulatory oversight of legal professionals by requiring an executive agency to become a *de facto* regulator by taking a more invasive approach to oversight than is being taken already. Thus, the Law Society has introduced a specific bail and detention module in its Senior Caseworker Reaccreditation Programme and the LAA intends to include these requirements for future tenders. The monitoring scheme set up by the Defendant is accordingly intended to be supplementary to the role of the regulator.

c. Where issues have been identified with particular providers on the DDAS - for example, where they have become unable to conduct judicial review proceedings (such as Justice and Rights Law Firm) - then those problems have been addressed by the LAA (by the firm being suspended).

d. The DDAS is a carefully calibrated system which has to incentivise providers to take part in it while equitably allocating slots for all providers. The expansion of providers created more choice, allowing detainees to see more than one provider in a period of time, but it does necessarily bring with it an increased workload in terms of oversight of providers.

e. The LAA has accordingly adopted the reasonable approach of allowing providers to explain to their CM any perceived deficiencies in the service which they provide and to allow them to improve over time, rather than adopting a "kneejerk reaction" of immediately imposing sanctions on them. In the broader scheme of the Standard Civil Contract, the issues which have been identified affect a very small number of firms and do not necessarily affect the firm's entire work. They include situations where a firm has a good peer review score and no other red flags as part of its Contract Management.

f. It is also essential to recognise that the Covid-19 pandemic significantly slowed down the work of Contract Management and Peer Review. The LAA has sought to take a supportive approach with providers facing significant difficulties in the provision of their services to detainees as a result of the pandemic. Indeed, a number of providers have had to leave the DDAS because of commercial viability problems.

67. Mr. Birdling also pointed out that the Claimant is wrong to allege that some providers do not have sufficiently qualified personnel to handle DDAS work. For the 2018 Standard Civil Contract, there were 136 bidders to undertake DDAS work, and after a verification

process, 77 providers were awarded schedules for DDAS. The verification process required that the provider employ a supervisor who had accreditation under the Law Society Immigration and Asylum Accreditation Scheme at either the Senior Caseworker or Advanced Caseworker level and had additionally passed the Supervising Senior Caseworker Stage accreditation. The verification process also checked that the firm was regulated as required in the IFA. The Defendant is entitled to rely upon these professional regulators to ensure that the providers are competent to advise in their field.

68. Mr. Birdling submits that an illustration of the collaborative, constructive approach of the Defendant is also afforded by the change from weekly to daily rotas. Initially after the original tender for the DDAS contract, there were *weekly* rotas so that a provider would be allocated all of the advice days from a particular week at an IRC (although the number of days on which the scheme would run varied between 3 and 4 days each week). The rota was non-competitive so that the weeks were allocated among providers on a *pro-rata* basis. Some providers delivered services to multiple IRCs while others only worked at one.

69. However, the rota was changed to a *daily* rota after consultation with the Claimant and others in September 2020. This was done in order to increase the capacity of providers to take on work and to improve flexibility in terms of the times and dates when sessions were held. This had the effect that a larger distribution of providers was available to detainees, who may be detained for relatively short periods of time. The change to daily rotas allows for urgent advice more easily to be given. Since there is a different provider each day on the rota, the detainee can also book a number of different 30 minute sessions with different providers each week if they wish so as to get a second or third opinion on the advice given to them. This change involved a substantial amount of work and required close liaison with the Home Office and the individual IRCs to secure their co-operation.

70. This is not to say, the Defendant submits, that he does not take decisive action where necessary. Mr. Birdling refers to the fact that as Ms Druker states in paragraph 20 her second witness statement, "*providers who receive a first confirmed 4 or 5 [peer review score] are sent a letter which includes the wording "This letter is a notice under Clause 24.2 of the 2018 Standard Civil Contract Standard Terms requiring you not to repeat this breach" along with a detailed report setting out the recommendations and areas of improvement. They then have a period of time to improve before the second peer review…*". Mr. Birdling confirmed that a notice under clause 10.6/24.2 of the 2018 Standard Civil Contract is served in <u>every</u> such case with a requirement to improve. The CM then enters into discussions with the provider about the making of those improvements.

71. Ms Druker explains that in this respect a balance has to be struck:

> *95. There are a range of contract sanctions that can be taken against a provider and these are set out in the contract alongside which sanctions are appropriate in specific circumstances. The LAA's approach is to seek work with its contracted providers to allow them to understand where they need to improve and to give them an opportunity to do so. There are well publicised concerns about the sustainability of the civil legal aid market and where possible we wish to retain providers by working with them to improve. We have worked closely with consultative bodies under the Contract and wider stakeholders to ensure a proportionate use of sanctions, particularly in relation to the issuing of contract notices. We have in the past had complaints from stakeholders that we issued too many contract notices and we should be more judicious in their use. This has been discussed at the Civil*

> *Contract Consultative Group (CCCG) which is a quarterly meeting with a range of stakeholders to discuss operational and contractual issues.*
>
> *96. In any event, the use of sanctions needs to be proportionate. For instance, where provider volumes are very low, it may not be proportionate to issue a sanction. Equally, a contract manager may decide after a discussion with a provider that a sanction is not appropriate..."*

72. Ms Druker also explains in her first witness statement that contract management was paused in March 2020 because of the Covid-19 pandemic. It was resumed in August 2020, but only remotely. However as Ms Druker states in paragraph 91:

> *"Contract managers started to re-engage with providers in August 2020 regarding annual visit activity, prioritising their work based on risk. As noted above, contract managers have a portfolio of providers covering different areas of law funded by legal aid. Contract managers are a finite resource, and that being so, (particularly after the pause in contract management activities), contract managers were and are focusing their attention on the highest risk areas, which will vary depending on the providers in their portfolio."*

73. Mr. Birdling maintained that the LAA does act collaboratively with entities such as the Claimant by holding meetings where current issues concerning the DDAS are discussed. He said that if the LAA is made aware of a particular problem with a particular provider it will act swiftly; but if the Claimant and others will not name the providers about which they complain, it is difficult for it to take any follow up action[12]. Accordingly, as well as carrying out its own checks, the LAA does indeed rely upon others working within the DDAS to alert the relevant regulator (as well as the Defendant) to any specific problems with particular providers, as unless each individual provider is to be investigated by the Defendant in respect of their DDAS advice in every case (which is impractical), it is simply not possible for the LAA to identify every issue with the advice being given in each case by an individual provider.

74. Finally, so far as the alleged gap in monitoring is concerned, Mr. Birdling accepted that potentially there could be cases where inadequate advice is given in a 30 minute session and no file is opened such that the peer review will not pick up such a case. However, he pointed out that the purpose of the peer review is in any event to gain an overall view of the provider's competence rather than a detailed view of the merits of individual pieces of advice which is impractical; and whilst it is true that it is not the role of CMs to opine on the judgment of qualified, accredited and regulated legal professionals, the purpose of the visits by the CMs (utilising all of the information available to them, including the providers' statistical returns) is indeed to discuss apparent issues such as a failure to open bail cases and the reasons therefor, as one can see occurred in the case of the firm Goodfellows.

[12] There is a dispute about this. Mr. Jaffey showed the court in reply that the Claimant gave the Defendant a list in October 2019 of the providers about whom they had concerns, and this was prior to the disclosure of the NMS statistics. However, the Defendant responded to that list by confirming that he was conducting peer reviews of those providers. The scope of the checks conducted by way of peer reviews is addressed in the next paragraph.

F. THE LAW

The UNISON duty

75. In *R (UNISON) v Lord Chancellor* [2020] AC 869 the issue in the appeal was whether fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals ("**ETs**") and the Employment Appeal Tribunal ("**EAT**") were unlawful because of their effects on access to justice. Section 42 (1) of the Tribunals, Courts and Enforcement Act 2007 provided that the Lord Chancellor had a discretion ("may") by order to prescribe fees payable in respect of anything dealt with by (in particular) the ET and the EAT. Prior to the coming into force of the Employment Tribunals and the Employment Appeal Tribunal Fees Order ("**the Fees Order**"), a claimant could bring and pursue proceedings in an ET and appeal to the EAT without paying any fee. After its coming into force, issue fees and hearing fees became payable.

76. The Supreme Court held that the constitutional right of access to the courts is inherent in the rule of law [66] and it is one of a trilogy of rights which together constitute the right of access to justice, alongside the right of access to legal advice and the right to communicate confidentially with a legal adviser [82].

77. It did not have to be proved in *UNISON* that the fees prevented access to justice in specific cases [90]. Rather, while there was no conclusive evidence that the fees had prevented people from bringing claims, the court did not require conclusive evidence: it was sufficient in this context if a *real risk* was demonstrated [91]. The right of access to justice means not merely theoretical but effective access in reality [85]; and the effectiveness of the access has to be decided according to the likely impact of the arrangements (in that case, the fees) in the real world on access to justice [93].

78. At [78] Lord Reed stated as follows:

> *"…impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible. More recent authorities make it clear that any hindrance or impediment by the executive requires clear authorisation by Parliament. Examples include Raymond v Honey [1983] 1 AC 1, where prison rules requiring a prison governor to delay forwarding a prisoner's application to the courts, until the matter complained of had been the subject of an internal investigation, were held to be ultra vires; and R v Secretary of State for the Home Department, Ex p Anderson [1984] QB 778, where rules which prevented a prisoner from obtaining legal advice in connection with proceedings that he wished to undertake, until he had raised his complaint internally, were also held to be ultra vires."*

79. The question for the court is accordingly whether the claimant has demonstrated that there is a *real risk* that the executive action in question – in *UNISON* the Fees Order – has effectively prevented people from bringing claims and therefore having access to justice.

80. The evidence before the court in *UNISON*, which showed a dramatic and persistent fall in the number of claims brought in employment tribunals since the making of the Fees Order, established that the fees set by the Fees Order were unaffordable and rendered it futile to bring many claims, particularly those which sought no more than a modest financial award;

and that, accordingly, the Fees Order effectively prevented access to justice and was therefore unlawful at common law.

81. *UNISON* was considered in *R (A) v SSHD* [2021] UKSC 37, [2021] 1 WLR 3931 ("***R(A)***"). In that case, Lord Sales and Lord Burnett CJ (with whom Lord Reed, Lord Lloyd-Jones and Lord Briggs agreed) considered the various legal principles relied upon by Claimants in seeking to challenge the lawfulness of a policy document or statement of practice issued by the Government.

82. The main question addressed in the judgment was the applicable test where a claimant alleges that a policy is unlawful by reason of what it says or omits to say about the law. However, the court also addressed challenges to policies based on other legal principles, including on grounds of procedural unfairness (at [55]-[75]) and on the basis of the *UNISON* obligation ([80]-[83]). As to the former point, Lord Sales and Lord Burnett explained that the correct approach in these cases is not to ask whether a policy creates an unacceptable risk that an individual will be treated unfairly but instead is as follows:

> *"If it is established that there has in fact been a breach of the duty of fairness in an individual's case, he is of course entitled to redress for the wrong done to him. It does not matter whether the unfairness was produced by application of a policy or occurred for other reasons. But where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way.*"

83. In rejecting a broader basis for intervention, Lord Sales and Lord Burnett found that some of the cases which had endorsed such a broader principle are better understood as concerning the separate and distinct *UNISON* principle of access to justice, see e.g. at [66] of the judgment.

84. In that respect, Lord Sales and Lord Burnett considered *R(S) v Director of Legal Aid Casework* [2016] EWCA Civ 464, [2016] 1 WLR 4733 which concerned the legality of a legal aid funding scheme for exceptional cases of a kind where legal aid was not ordinarily available according to the standard rules. The scheme was constituted in part by regulations and in part by policy guidance, and there was a complex application form which deterred applicants from applying for legal aid. Although Laws LJ, who gave the leading judgment of the court in *Legal Aid Casework*, focussed on the test of "inherent unfairness" Lord Sales and Lord Burnett pointed out at [71] that:

> *"the issue in relation to the application form might have been argued on the basis that an administrative practice (adoption of an overly complex form) had created an impediment to gaining access to legal aid and hence to court in cases where there was a right to have publicly funded assistance. That, in substance, was the effect of asking whether the form was inherently unfair in impeding access to legal aid."*

85. Lord Sales and Lord Burnett then went on to address *UNISON* at [80]-[84], explaining in particular as follows:

    a. The issue with which *Legal Aid Casework* and *UNISON* are concerned is the lawfulness of measures which impede access to courts and tribunals, either by the imposition of fees (*UNISON*) or by placing a practical obstacle in the way of someone entitled to legal aid (*Legal Aid Casework*). In *UNISON* it was held that there is a fundamental right under the common law of access to justice, meaning effective access to courts and tribunals to seek to vindicate legal rights, which means that the executive is under a legal obligation not to introduce legal impediments in the way of such access save on the basis of clear legal authority.

    b. It is sufficient if a real risk of prevention of access to justice is demonstrated. This means that, in order to test the lawfulness of a measure on this basis, it is legitimate to have regard to evidence regarding its likely impact and the court has to make an overall evaluative assessment whether this legal standard is met or not (and statistics might have a part to play in making such an assessment).

G. DISCUSSION

86. In the present case Mr. Birdling contended on behalf of the Defendant that by section 1 of LASPO, the Defendant has a statutory duty to secure that legal aid is made available in accordance with that Part of the Act. It is in respect of that duty that the *UNISON* principle applies and the Defendant has complied with that duty by making legal aid available to detainees. Separately under section 3, he has a discretion – which he has exercised – to set and monitor standards in relation to the provision of the civil legal services. He is not under any *duty* to set and monitor standards. It follows that the exercise of that power is only susceptible to challenge on *Wednesbury* grounds and in this case any such challenge must fail as the monitoring scheme is rational.

87. I do not accept this analysis. Although it is correct that section 3 confers a power and does not impose a duty on the Defendant to set and monitor standards, in exercising that power the Defendant has determined that it is appropriate to establish and monitor standards in order to fulfil his duty under section 1 to make legal aid available. The exercise of the power under section 3 is accordingly the means by which the Defendant has sought to ensure that he fulfils his primary statutory duty under section 1. It is conceivable that the power could be exercised in a manner which gives rise to a practical impediment to access to justice. For example, the monitoring scheme could be set up in such a way that it dissuaded providers from taking on DDAS work at all, by setting the fee at too low a level or by making their appointment subject to excessive regulation, such that detainees could not obtain legal advice at all. That would engage the *UNISON* principle. It follows that the scheme must be assessed on the basis of the *UNISON* principle as well as on *Wednesbury* grounds.

88. Mr. Birdling did indeed accept in response to a question from the court, that a failure to monitor might, on the facts of a particular case, amount to a practical impediment (whilst maintaining that there was no such impediment here). I consider that he was right to make that concession.

89. It follows that the dispute between the parties falls to be determined by reference to the proper application of the *UNISON* principle. The question is whether in the present case the manner of the Defendant's operation of the DDAS in practice, and more particularly his alleged failure adequately to monitor it, creates a real risk of prevention of access to justice for detainees.

90. In my judgment it does not. The starting point is that the monitoring scheme in the present case is not by its nature an impediment to access to the courts. There is a factual distinction between the present case and cases where a particular measure has been introduced by the decision making body itself which directly impedes access to the courts, such as the imposition of fees (*UNISON*); or the introduction of a complex application form (*Legal Aid Casework*); or measures limiting the time available to an immigrant to obtain legal advice to challenge a removal direction (*R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710); or the removal of legal aid from certain categories of legal claims affecting prisoners (*R (Howard League for Penal Reform) v Lord Chancellor [2017] EWCA Civ 244*).

91. In the present case, the direct impediment to effective access by the detainees to the courts and tribunals (if any) arises from the (allegedly) negligent or inadequate advice given to them by certain providers. That advice is subject to the contractual requirement imposed by the Defendant that the providers must at all times be subject to professional regulation by the SRA or the OISC as the case may be. The setting and monitoring of standards under section 3 of LASPO in relation to services made available under the Act, in particular independent peer review and contract management, does not constitute in itself the imposition of an obstacle to effective access to the courts; on the contrary, its purpose and likely effect is to prevent or mitigate the risk of such impediments.

92. That stated, it is nonetheless possible that the way in which a monitoring scheme is set up and operated is sufficiently inadequate or unreasonable that it can be said that it is the scheme itself which gives rise to the impediment to access to the courts.

93. However, on the evidence I do not consider that to be the case here. I do not consider that the Claimant has established on the basis of either the statistical evidence, its qualitative evidence (much of which is in fact anecdotal evidence) or a combination thereof, particularly when viewed in the light of Ms Druker's evidence, that a real risk of an impediment to access to legal aid has been created by the operation of the Defendant's monitoring scheme.

94. First, there is an insufficient evidential base for the court to make findings as to the underlying reasons behind the statistics which may be many and varied. The Claimant relies heavily upon the NMS and bail statistics in support of its case. However, in my judgment considerable caution is required in seeking to interpret these statistics. NMS conversion rate figures are intended to act only as a *guide* to be used by CMs as part of the information gathering exercise in carrying out their work. They are based upon returns from the providers themselves which have been shown to be unreliable in a number of respects (not least as to the accuracy of the data inputting). It has been seen that there is not necessarily a correlation between firms with particularly high or low NMS conversion rates and their peer review scores. Moreover, the peer review scores of the 46 currently active providers suggest that the system is, by and large, functioning well.

95. Second, as described above, there are frequently perfectly reasonable provider or client specific explanations as to why the statistics look unfavourable in any particular case (in particular in bail cases) and it is the CMs' job to ascertain this (and they appear to be doing precisely that).

96. The qualitative evidence relied upon by the Claimant, which it is said supports the statistical evidence, also consists of generalised complaints about the allegedly poor standard of advice given by some providers. It is difficult for the Defendant to address this in view of the fact that it consists of generalised "high level" complaints of inadequate advice, rather than specific complaints against specific firms.

97. The Standard Contract terms which the Defendant has imposed upon providers ensures that they "*must at all times perform Contract Work in a timely manner and with all reasonable skill, care and diligence*" and that they must hold the Quality Standard (i.e. be accredited by their professional bodies) (clauses 10.1 and 10.2), which all providers do hold. Furthermore, in the case of those providers where the Defendant has been made aware that there is a potential problem with their performance (whether by way of its own monitoring process or by others), he has shown (and has confirmed) that he is willing to:

> (i) enforce this contractual obligation, by issuing a contract notice in <u>every</u> case where a peer review score of 4 or 5 is issued, with a requirement to improve; but
>
> (ii) nonetheless investigate the problem in a conciliatory way via his CMs, rather than immediately imposing sanctions, in order to obtain improvement from the provider (who may be performing satisfactorily in other areas which are peer reviewed). Such an approach is particularly appropriate during a pandemic in order to best ensure the continued and reliable provision of advice under DDAS to detainees. That stated, the evidence suggests that the Defendant is nonetheless (correctly) willing to take firm action where necessary: see paragraphs 70-73 above.

98. I also consider that there is insufficient evidence to criticise the promptness with which peer reviews are conducted or the number of files which are reviewed by peer reviewers and, to be fair to Mr. Jaffey, he did not press this point in oral submissions. The evidence in fact suggests that the peer review process is working well (see paragraph 54 above) and the number of files peer reviewed has statistical support (see paragraph 55 above). Likewise, in respect of the Claimant's criticism that there are appointed providers who are unable to conduct claims for judicial review, the Defendant has explained that either any such issues have been addressed by the LAA (by the relevant provider being suspended, as in the case of the Justice and Rights Law Firm) or there are ongoing discussions with defaulting providers to resolve any such issues.

99. In short, I do not consider that it is the right (or indeed fair) approach, in a case such as this, for the court to be asked to analyse the cases of specific providers in order to see whether or not they were likely advising properly in specific instances on bail claims or whether their conversion rates for NMS were up to the mark and if not why not, and then to be asked to conclude that, if they were (apparently) not, that it must follow that they were not being properly monitored by the Defendant (or their case might be a "monitoring gap" case) and/or that a sufficient sanction had not been applied to them. I accept Ms Druker's evidence regarding sanctions, namely that the use of sanctions needs to be proportionate,

such that where provider volumes are very low, it may not be desirable to issue a sanction as opposed to advising the provider to reform its behaviour. Equally, a contract manager may decide after a discussion with a provider that a sanction is not a proportionate response on the facts of the case. These are matters for constructive discussion rather than court intervention.

100. I consider that once the court starts analysing the underlying cases in the way undertaken by the Claimant, and asks itself whether sufficiently robust action has been taken by the Defendant against the provider (by reference to its guidance), there is a danger of the court usurping the judgment of the Defendant and assuming a role which it ought not to assume in such a case.

101. I accept Mr. Birdling's submission that the real value of the information provided by the statistics is that they are a tool for CMs, when taken together with other sources of information, to identify potential "outliers" which require investigation. Had the Defendant then made no attempt or an inadequate attempt in this case to investigate the position of these outliers, then Mr. Birdling might have been on difficult ground. But whatever may or may not have been the position in the past, the Defendant has made clear (through Ms Druker) that it will investigate and *is* investigating such outliers (through the CMs) and seeking an explanation from them as to why their statistical figures appear out of line. In these circumstances, it cannot be said that the Defendant is creating any impediment in the way of the detainees obtaining access to justice; on the contrary, the Defendant is doing its best to facilitate it.

102. Nor is this a case where a complete absence of monitoring information may mean that a public body is unable to show that a policy is being operated in a lawful manner ensuring access to justice (*R (European Roma Rights Centre) v Prague Immigration Officer* [2005] 2 AC 1 per Baroness Hale [91], cited at first instance in *Medical Justice No. 1* [2010] EWHC 1925 (Admin) per Silber J [107] and *Medical Justice No. 2* [2019] EWHC 2391 (Admin) per Freedman J [66]). The Defendant obtains monitoring information through the statistics, the peer reviews and the CM visits in order to prevent impediments to the access to justice by detainees. This system may not be perfect; but it cannot sensibly be said that it impedes access to justice. Moreover, the Defendant has endeavoured to *improve* detainees' access to legal aid and consequently the courts by agreeing in September 2020 to a daily rota scheme (allowing more frequent and urgent advice to be given) rather than a weekly rota scheme. Detainees can also obtain 30 minutes of free advice from more than one provider, thereby minimising the chances of their receiving negligent advice about the merits of their claim and minimising the prospect of any impediment to access to the courts.

103. True it is that the Claimant has identified one potential gap in the monitoring scheme (set out in paragraph 64 above). I say "potential" gap because it is possible that the CMs will pick these cases up, as has happened in the case of Goodfellows. In my view it is nonetheless sensible for that gap to be closed, by including within the peer review the possibility of sampling cases where a file is not opened but where advice has nonetheless been given under the DDAS scheme to a detainee, particularly on the first occasion in bail cases, in order to strengthen the prospects of independent peer reviewers and/or CMs picking up these cases of inadequate advice, although even then it clearly cannot be guaranteed that such individual cases of inadequate advice *will* necessarily be picked up. However, the existence of this potential gap does not lead to the conclusion that the existence and operation of the scheme itself creates an impediment to access to the courts;

and nor does it lead to the conclusion that there is systemic error in the design of the monitoring scheme, which scheme as a whole I consider to be entirely rational.

104. For completeness, I should mention that the Claimant also relied upon *R (DMA) v SSHD* [2020] EWHC 3416 (Admin), [2021] 1 WLR 2374. In that case, the Secretary of State accepted that she had a duty under section 4(2) of the Immigration and Asylum Act 1999 to provide accommodation for the five claimants, on the grounds that they were failed asylum seekers who were destitute and that the provision of accommodation was necessary for the purpose of avoiding a breach of each claimant's rights under article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms 2. Although the Secretary of State's guidance stated that such accommodation should be provided within a matter of days of the duty being accepted, the Secretary of State failed to provide the claimants with accommodation for periods of between 45 days and nine months. The claimants alleged that the Secretary of State had failed properly to monitor her system for providing accommodation for asylum seekers.

105. Knowles J stated at [237]:

> *"For all the performance management, provider monitoring and "hourly checks" … the Secretary of State through her officials was not aware that in the Midland and East of England, accommodation was not being provided within timescales she had set in 36% of all cases where a section 4(2) decision had been made on her behalf."*

As a result:

> *"there is evidence of a real risk of a breach of the Secretary of State's statutory duty in a significant number of cases."*

106. Thus, the Home Office's monitoring of the system was deficient. The system-wide data provided by its officials showed the position was different from that which the Home Office believed it to be: [233]. Without proper monitoring, the asylum support system was without a key means by which to identify and correct failures within the system: [238].

107. In addressing that issue, Knowles J. asked whether the system operated by the Secretary of State gave rise to "*a real risk of unfairness*." The case was decided before the Supreme Court's decision in *R(A)* discussed above. In the light of the Supreme Court's judgement, I consider that the present case falls to be determined on a different basis, namely by reference to the application of the *UNISON* principle. For the reasons I have given above, that principle is not infringed in the present case. Moreover, this is not a case, unlike *DMA*, where the data demonstrates that the monitoring system adopted by the Defendant itself impedes access to justice.

Tameside irrationality

108. The Claimant also submits that in taking a blanket approach to the renewal of all contracts through the Decision, the Defendant has acted in a *Tameside* irrational way by failing to inform himself of all the relevant matters before deciding to apply an extension to each contracted DDAS provider, regardless of their level of competence and capability.

109. In alleging that the Decision was *Tameside* irrational, Mr. Jaffey suggested that the Defendant could, for example, have granted a partial extension of the contract which did not cover those firms who were under-performing, but he failed to consider doing so but rather simply made a blanket extension, with no analysis of the potential consequences for DDAS in doing so. He failed to make proper enquiries into the facts before making the blanket extension.

110. However, both Mr. Jaffey and Mr. Birdling recognised that if the Defendant is not in breach of statutory duty then it is unlikely that the Decision would be found to be *Tameside* irrational.

111. In my judgment the Decision was not *Tameside* irrational. Since the Defendant did not create any impediment to access to justice by the detainees, it was not irrational for him to decide to extend the DDAS for a further year. In any event, I do not consider that the Defendant did apply an extension to each contracted DDAS provider, regardless of their level of competence and capability. At the time of the Decision, their level of competence and capability was being adequately monitored in accordance with the monitoring system which the Defendant had set up. For the same reason, I reject the submission that that the Defendant failed to take any adequate steps to ensure that proper contractual standards are maintained in respect of each provider by adopting the Decision.

H. CONCLUSION

112. In all the circumstances, and despite Mr. Jaffey's skilful submissions to the contrary, the operation of the DDAS is not unlawful and the decision to extend the exclusive schedule authorisations, via the Decision, was not unlawful. The claim is accordingly dismissed.