Neutral Citation Number: [2022] EWHC 3041 (Admin)

Case No: CO/3495/2022, CO/3481/2022,
CO/3493/2022, CO/3497/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL
29th November 2022

**Before**:
**MR JUSTICE FORDHAM**

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**Between:**

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| **THE KING (HZ, MK, HR, FM)** | **Claimants** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant** |
| **- and -** | |
| **THE LONDON BOROUGH OF SOUTHWARK** | **Interested Party** |

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**Martin Westgate KC, Raza Halim, Tessa Buchanan, Ollie Persey** and **Alex Schymyck**
(instructed by Public Law Project, Deighton Pierce Glynn and Shelter Legal Services)
for the **Claimants**
**Cathryn McGahey KC, William Irwin** and **Anisa Kassamali**
(instructed by Government Legal Department) for the **Defendant**
The **Interested Party** did not appear and was not represented

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Hearing date: 29.11.22
Judgment as delivered in open court at the hearing

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# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

## MR JUSTICE FORDHAM:

Permission

1. I am going to grant permission for judicial review in these cases. I am satisfied, after the very considerable assistance that I have had in writing and orally from Counsel on both sides, that the threshold of arguability is crossed. I also consider these to be important cases which raise issues of importance. The arguments that have been ventilated – for which to a large extent this hearing has now been a dress rehearsal – warrant ventilation with complete evidence at a substantive hearing. There is, in my judgment, no permission-stage issue which warrants being left open for the purposes of directing a "rolled-up" hearing. The observations which I will now make are simply by way of explanation of my decision to grant permission, in light of the points that have been made to me.

Observations

2. The central questions in these cases, as I see them, are these: (i) whether there were public law duties, to elicit information, and to evaluate that information, in arriving at the relevant decisions, applicable to those decisions and that decision-making; and (ii) if so, whether those public law duties were or were not discharged. The key "information" in these cases concerned education and in some cases employment, and the educational and employment position which had been established over an extended period during "bridging accommodation" under the Afghanistan "Resettlement Schemes". The Schemes are known as ARAP (the relocations and assistance policy) and ACRS (the citizens resettlement scheme). The Claimants' families had arrived in this country in August 2021. They were told, at the beginning of August 2022, that they were to be relocated. Final individual "decision letters", in response to pre-action correspondence, were written in their cases on 15 September 2022. Interim relief was refused, and they were moved to Manchester on 28 September 2022. The "information" relates to their position, as established over that period, and the implications for education and employment of the relocation.

3. Two key legal sources are relied on by the Claimants. One is the familiar common law duty of reasonableness. It embraces a duty to undertake a reasonably sufficient enquiry, and a duty to have regard to obviously relevant considerations and evaluate those matters in arriving at a decision. The second legal source relied on is a statutory provision namely section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children) for which the international setting is Article 3 of the UN Convention on the Rights of the Child. I am satisfied that it is arguable that the decisions taken in this case, the decision-making process, and the decision-making approach, fell within the scope of that statutory duty as a "function" relating to (or "in relation to") "immigration, asylum and nationality". That is in the context of a statutory provision imposing a duty in relation to "any" such function where, at least arguably, the reach of section 55 extends to "powers" which are "ancillary" (albeit that the section 38 definition of "function" using those words is not directly applicable). These are Resettlement Schemes, with indefinite leave to remain granted, to those resettled in the United Kingdom pursuant to those Schemes. The accommodation arrangements are, at least arguably, an integral part of the Schemes. They have a repeatedly stated purpose in relevant documents. Those published documents and other communications include an announcement on the Government's "news" website page and a "Fact-Sheet"

together with other materials. They describe the Resettlement Schemes as having at their heart the purpose of being "committed to ensuring that every Afghan citizen who [is] resettled here has the support they need to rebuild their lives, find work, pursue education, and integrate into their local communities". The Secretary of State herself, in describing the Schemes said: "As part of the New Plan for Immigration I committed to providing refugees who make their home here the ability to rebuild their lives in the UK with essential support to integrate into the community, learn English, and become self-sufficient." At least arguably, in my judgment, the reach of section 55 is informed by placing it alongside section 11 of the Children Act 2004 and asking whether there is – or is not – a gap in the present case between accommodation under these Schemes as overseen by the Secretary of State and the position which would apply if responsibility were directly that of local authorities.

4. I am also satisfied that it is arguable that the public law duties at common law which are relied on were applicable; and moreover that it is arguable that the duties under section 55 and by reference to common law reasonableness (with its ancillary duties) have in these cases been breached. There is a hot controversy between the parties as to whether documents (or "instruments") relied on are properly described as "policy" documents and whether it matters. Within those 'instruments' can be located the description of what are called "criteria" which, it is said, will be taken into consideration based on evidence provided by the families. That is a description of the decision-making stage at which individuals and families are "matched" to "accommodation", meaning after "bridging accommodation" has come to an end. Among those "criteria" are "education needs" and "employment". Moreover, reference is made – for example – to the Home Office taking into consideration "the location of any paid employment that has already begun". All of that, in my judgment, brings into sharp focus the questions which arise in the context where "bridging accommodation" is replaced with new "bridging accommodation" but with a significant relocation and after a significant period of time. Standing back from these cases, in my judgment – at least arguably – core values of public law which require public authorities to find out information, to ask questions, to listen, and to address concerns and relevant considerations, and then to make a decision (values which inform many of the grounds on which judicial review can be sought) are engaged in the present cases.

5. In the discharge of its secondary and supervisory jurisdiction, the judicial review Court will always recognise latitude for judgment on the part of the Secretary of State and the Home Office, including as to policy decisions and operational actions. The Court, in the exercise of its supervisory jurisdiction, will also have close regard to practical realities faced by the Home Office and the Secretary of State but also the practical realities faced by the Court itself. All of this is acutely and directly relevant in these cases, not least because families have been moved to Manchester. Indeed, no substantive hearing is taking place at this stage and so there will necessarily be a need for a further period of time before that stage is reached. However, notwithstanding all of those features and the points properly emphasised by Ms McGahey KC (with Mr Irwin and Ms Kassamali) for the Secretary of State the claim for judicial review is in my judgment viable and arguable and requires a substantive hearing.

Questions

6. One important question which arises, as it seems to me, concerns the interrelationship between (i) decisions which are relocation from "bridging accommodation" to "final

accommodation", where it is accepted and recognised on behalf of the Secretary of State that careful consideration needs to be given to continuity and education and employment; and (ii) decisions where "bridging accommodation", after a substantial period, is replaced with relocation and further "bridging accommodation", which is said on behalf of the Secretary of State to be distinct.

7. Another important question of interrelationship which arises in these cases, in my judgment, concerns the interrelationship between (i) a "policy decision" and (ii) the individual "decision letters". The policy decision has been described, vividly, in the submissions on behalf of the Secretary of State today. It is also reflected in the evidence. It was a decision, on policy grounds relating to cost and what is called "migration pressure" to move all those in London "bridging accommodation" to other parts of the UK, as I understand it at this stage primarily to other "bridging accommodation" there. The implications are described in terms of the numbers: approaching 10,000 people and the numbers of hotels in London that were providing the "bridging accommodation". As it seems to me, to a substantial extent, the arguments on behalf of the Secretary of State in this case proceed from the platform that that policy decision was the "given", against which the actions in August and September and the individual Decision Letters then flowed. But, in my judgment, both in section 55 terms and in terms of common law public law duties, it is at least arguable that consideration needs to be given to whether giving that "policy decision" that momentum is compatible with applicable public law duties of enquiry and evaluation. In other words, the idea – as it was put by Ms McGahey KC, of "having to move so many people out of London" may beg an important question as to the crystallised "policy" position and the extent to which it could "drive" individual decisions and the decision-making process.

8. A further question about an interrelationship which is of significance, in my judgment, is this. Decisions, no doubt linked to the overarching "policy decision", were made and communicated to the Claimants and others. There was then a stage at which "concerns" could be raised, albeit described in the Decision Letters as concerns relating to the "closure" of a "hotel". Then, in these cases, with the advantage of legal representatives able to write pre-action letters, there were then the individual Decision Letters and pre-action letters of response. Mr Westgate KC very fairly has accepted, in principle, that those individualised Decision Letters were at a stage where in principle it was open to the Secretary of State to reconsider her decisions and comply with what he says were her public law obligations, by changing decisions. He submits that there is in this case a legal inadequacy, when all these interrelated parts of the chronological jigsaw are put together. That, as it seems to me, is another key theme which is of significance in analysing the public law position in these cases.

9. I record that it is accepted on behalf of the Claimants that there was no breach of common law duties of procedural fairness and accepted by them that there was no breach of any substantive or procedural duties arising under Article 8 ECHR. In those circumstances, one question which arises concerns the room that is left for finding a breach of the statutory and common law obligations to which I have referred, if it is the case that that those other obligations have been complied with.

10. Finally, I am acutely conscious that a question that will arise at the substantive hearing in this case, is this: were this Court to find that there was any breach of any applicable public law or statutory obligation, what remedy – if any – would be appropriate in the circumstances of these cases?

11. I have considered its appropriate to explain openly what key questions, as it seems to me, arise in the present claims. All of this and everything else will be a matter for argument and consideration by the Court at the substantive hearing of these claims for judicial review.

My Decision

12. As I said at the outset, the only question that I have needed to address and decide is whether the threshold of arguability is crossed. I will grant permission for judicial review on all grounds and in all cases. With Counsel's assistance I will now deal with the important question of expedition.

Expedition and directions

13. Having again had considerable assistance from Counsel on both sides, I am going to grant heavy expedition in this case. I will give a time estimate for the substantive hearing of 1½ days. Having been able to consider the position with Lead Counsel on both sides, I consider it may be possible to have a substantive hearing as early as 17/18 January 2023 or, if not that, then 7/8 February 2023. I am not making any direction that the hearing will be on those dates because I need to liaise with the Administrative Court Office Listing Department, to see what the Court is able to offer alongside the other cases with which the Court is dealing. I will do that and ensure that there are communications from my clerk to the legal teams. There is only one direction, in my judgment, that it is necessary for me to make beyond expedition and liberty to the parties to apply in writing on notice for any further direction, with which it may be possible for me to deal on the papers. The one direction I make is that the Secretary of State shall have until 4pm on 20 December 2022 to file any further evidence. I am grateful to the Home Office and Government Legal Department for putting forward a truncated, yet realistic, timeframe for that stage. All parties have indicated that they may need to consider further the position in relation to the earlier "policy decision", its implications and nature, and any point arising from it. But what goes into any further evidence from the Secretary of State, or for that matter any proposed reply evidence from the Claimants is a matter for them and their teams. At present, it is envisaged that the Secretary of State will be able to rely on the existing Grounds of Resistance.

14. Once a hearing date has been fixed, the parties will need to liaise and cooperate and work on a 'countback' basis on a set of directions, agreed to the extent possible, which will enable the Court to have in good time the finalised materials for the substantive hearing. Everybody in this case recognises that a large amount of the relevant work has already been done and the materials that the Court will need for the substantive hearing are already substantially before the Court. It may be that it is possible simply to supplement what is already there and avoid having to re-paginate references. But all of that can be left to the good sense of the parties providing they do not leave the Court in a position of having papers too late to be able to prepare and pre-read. For the substantive hearing, the new provisions about an agreed list of issues, a chronology and a list of essential reading will apply. It is vitally important that the Court has a focused, realistic and properly cross-referenced pre-reading list, together with a pre-reading time estimate. Costs are reserved.

29.11.22