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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 3567 (Admin)

No. CO/1158/2022

Royal Courts of Justice

Monday, 31 October 2022

Before:

MRS JUSTICE FOSTER DBE

B E T W E E N :

THE KING
on the application of
ZOS — Claimant

\- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

ANONYMISATION APPLIES

MISS S MCGIBBON (instructed by Morrison Spowart Solicitors) appeared on behalf of the Claimant.

MR T TABORI (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

(Transcript prepared from a poor quality recording and without the aid of documentation)

MRS JUSTICE FOSTER DBE:

1 On 24 October 2022, I heard the adjourned application of the Secretary of State for the Home Department (referred to here as "the SSHD" or "the Defendant") for an extension of time within which to fulfil the obligations imposed upon her, with her consent, under a mandatory Order made by Mr Vikram Sachdeva KC, sitting as a Deputy Judge of the High Court, on 13 July 2022.

2 The Order required her to provide adequate accommodation to the Claimant and her two children, and was made after the hearing of a judicial review brought by the Claimant on the grounds that the SSHD was in breach of her known delegable duty to provide adequate accommodation under section 95 of the Immigration and Asylum Act 1999 and/or obligations under section 55 of the Border Citizenship and Immigration Act 2005.

3 The Defendant requested until 14 November 2022 to provide accommodation to the Claimant at the end of the hearing. I indicated that I was prepared to allow that extra time for provision of adequate housing, but until 1 December 2022, and would give my reasons on the first available date after the hearing, and also consider the Claimant's cross-application inviting the Court to make directions for a hearing to determine whether the SSHD had been in contempt of court by reason of her repeated failure to obey Court Orders. I indicated I would also consider the best mechanism for achieving the changed date. These are those reasons.

Background

4 The Claimant, who is known in these proceedings as Z-O-S, is an asylum seeker in this country. She has a very disabled son ("AS"), born on 26 April 2018, and a daughter aged about two. AS has severe cerebral palsy and cannot walk or stand properly or manage stairs. He suffers also from a number of conditions, including a speech and language disorder and developmental delay.

5 On 18 November 2021, the Claimant's request under section 95 of the IAA was granted by the Secretary of State, and she was afforded accommodation under the Act with her two young children, initially in a Clapham hotel. Thereafter, she was told to move to different housing provided through Clearsprings ("CRH"), the company engaged by the Secretary of State to provide accommodation in section 95 circumstances. She was removed to other accommodation on 26 November 2021. That accommodation was, however, inadequate. The bathroom and lavatory were up a flight of about fifteen stairs, unclimbable by AS, and the facilities were shared with four other families. AS could not practice his walking, or do his physiotherapy either.

6 Following protracted correspondence between the Defendant and the Claimant's solicitors on 7 January, the Secretary of State granted the move to different accommodation. Absent any action on this promised move, a pre-action protocol letter was sent by solicitors on 2 February 2022.

7 Despite the efforts at escalation by Migrant Help, by March 2022 no move had been effected. On the 23rd of that month, the Claimant slipped and injured herself carrying her son downstairs from the bathroom. An application for judicial review and interim relief were made on 30 March 2022.

After the Application for Judicial Review

8 On 23 March 2022, the Defendant had identified sixth floor accommodation to the Claimant with a lift and stated they were measuring wheelchair access. In early April, Poole J gave the Defendant a week to respond to the interim relief claim. An Acknowledgement of Service on 27 April maintained there had been no breach of the statutory duty under section 95 or section 55. The Claimant's enquiry as to progress from 26 April went unanswered.

9 On 10 May 2022, permission was granted in the judicial review and expedition ordered. Additional grounds and evidence from the Defendant was ordered by 31 May 2022 and finally delivered on 20 June, after a consensual extension until 14 June. The case was listed for 13 July 2022.

10 On 13 July, as stated, it came before Mr Vikram Sachdeva KC. On that occasion the Secretary of State admitted that Briar Avenue was not adequate and that further accommodation would be provided by 4.00 p.m. on 3 August 2022.

After the Judicial Review

11 The Order of 13 July had contained the following important recitals:

> "*And upon the Defendant accepting that the accommodation provided to the Claimant […][in] Croydon, London […] is not adequate, and accepting that it has acted in breach of its duty under section 95 of the Immigration and Asylum Act 1995;*
>
> "*And upon the Defendant also accepting that it has acted in breach of its duty under section 55 of the Borders, Citizenship and Immigration Act 2009;*
>
> "*And upon the Defendant accepting that the Claimant's family requires self-contained, wheelchair accessible accommodation in the London Borough of Southwark with sufficient space for the Claimant's son, AS, to continue his treatment and store the specialist equipment he requires, in particular his wheelchair;*
>
> "*And upon the Defendant indicating it is able to provide such accommodation within fourteen days of the hearing, absent 'special circumstances', by consent it is ordered …*"

12 I observe in retrospect, perhaps regrettably, liberty to apply on notice to set aside or vary this Order was also included. This was clearly a final mandatory Order. Moreover, it had been consented to by the Defendant, through counsel. In my judgement, that phrase was unnecessary and possibly misleading as to the character of the Order.

13 The progress of provision under the Order was the subject of enquiry by solicitors for the Claimant shortly after the 13 July hearing and again on 18 July, and they asked to be kept up to date. They received an email on 19 July saying that the new property needed a stairlift and was available. Having heard nothing, at 15:06 on 2 August, a day before the obligation was to have been completed, they wrote to the Government Legal Department asking for urgent confirmation that the Claimant would be able to move the next day. The Defendant replied at 12:50 on 3 August saying:

> "*I write to inform you that the SSHD regretfully will not be able to comply with the Court Order to provide the Claimant with adequate accommodation by no later than 3 August 2022. The SSHD intends to file an urgent application today to vary paragraph of Judge Sachdeva's* [sic] *Order dated 13 July 2022 so that the time for compliance is extended.*"

14 On 3 August, the Government Legal Department sought an extension of time within which to comply with the terms of the Order. The Secretary of State utilised the N463 urgent applications procedure and filed the application shortly before 4.00 p.m. There was no sworn statement in support. A letter was sent to the Administrative Court office dated 3 August 2022. It is headed, "Urgent Application to Vary Order" and states:

> "*The Defendant regrets to inform the Administrative Court that she is not in a position to provide the Claimant and her son with accommodation by today. The Defendant makes an application requesting the learned judge to vary his Order so that the time for compliance is extended. If the draft Order is not made, the Defendant would be prejudiced such that it would be unjust. Accordingly, the making of the draft Order would be in furtherance of the overriding objective.*"

15 It gave as the reason for the urgency the fact that there was a Court Order in place which was yet to be complied with. It was asserted there would be no delay; the application had been prepared as swiftly as possible. It recounted the history and also stated that, on 13 April 2022, the Claimant <u>had</u> been provided with suitable ground-floor accommodation, but nonetheless would be moved in due course – even though the inadequacy of the first property had been already expressly conceded (see above).

16 The application then stated that, on 13 July 2022, the date of the hearing before Mr Sachdeva KC, a two-bedroom flat, was proposed. The statement says:

> "*The first-floor flat requires a stairlift to be fitted.*"

17 The Defendant also said she could not give a date for compliance, but an update was offered to the Court for Friday, 5 August 2022. The Secretary of State requested, were she to need it, relief from sanctions under CPR 3.9 for the failure to comply with the 3 August Order. The Secretary of State accepted she was in breach of her obligations but said there was no suitable accommodation.

<u>After the Urgent Application</u>

18 After the urgent application had been made, it took the following course. On 4 August 2022, Morris J considered the Defendant's application on the papers. He ordered the Defendant to file and serve evidence in support by 4.00 p.m. on 5 August 2022. The Defendant failed to file and serve any evidence by 4.00 p.m. on 5 August 2022 as ordered, rather a letter was submitted to the Court. A further communication of that date, on behalf of the Treasury Solicitor, dated 5 August at 16:56 said:

> "*I have only just read your Order dated 4 August 2022.*"

19 The letter had been written without sight of the Court Order. There was limited evidence to be provided, said the Secretary of State, and a short extension of time was requested until 4.00 p.m. on 8 August 2022. No evidence had been filed in response to the Order which had required it by 4.00 p.m. on 5 August. A further Order was made by Morris J at close of play

on 5 August after considering submissions in opposition from the Claimant. The application was listed for a hearing on 10 August.

20 On 5 August, the Defendant informed the Claimant she would be moved that day to different accommodation, at the Travelodge on Union Street in Southwark. Unfortunately, when the Claimant was taken to the Travelodge late on 5 August, she was told there was no booking for her; she had to return to her previous accommodation. Late on 9 August, she was moved to the Travelodge with her family. The Defendant filed and served evidence that day confirming the move, but expressing no view as to whether a Travelodge was adequate, such as would comply with the final Order of Mr Sachdeva KC.

21 The hearing listed for 10 August was ineffective partly because of the Defendant's late delivery of evidence. Directions were made for an adjourned hearing, including that the Defendant file and serve a bundle of documents in relation to their application for an extension of time and relief from sanctions by 4.00 p.m. on 11 August 2022. At this ineffective hearing, the Defendant suggested the final Order of Mr Sachdeva KC should be varied to insert a date of 9 August 2022, namely the date upon which the Claimant was moved to the Travelodge. The Claimant resisted such variation and none was made. Evidence in support of the Defendant's application for an extension of time and relief from sanctions was served on 10 August 2022.

22 On 12 August, the Claimant was informed she was to be moved to accommodation at De Laune Street in Southwark, and was moved later that day. A hearing listed for 16 August was vacated by consent, with directions that both Claimant and Defendant file evidence in relation to the adequacy of the accommodation at a new location, which was disputed by the Claimant.

23 On 15 August, the Claimant had met AS's occupational therapist at Guys & St Thomas'. The therapist wrote a letter, sent to the Defendant, explaining the inadequacy of the accommodation given AS's needs and disabilities. The Southwark Parental Mental Health worker assigned to the Claimant reached a similar conclusion, which view was also conveyed to the Defendant. The 6 August hearing was adjourned for evidence on the issue of the adequacy of De Laune Street.

24 On 21 September 2022, Dr Kean, the Defendant's medical advisor, confirmed that the Claimant's family required further wheelchair accommodation, level access shower or wet room.

25 On 23 September 2022, the Claimant received a letter from the Asylum Support Casework Team, stating that they had considered her request to relocate to accommodation more suitable for her son's medical needs, and a request had been granted for "*wheelchair accessible accommodation with level access*". Once the accommodation provider had sourced a suitable place for accommodation near Southwark, the Defendant stated that the Claimant would be told.

26 On 29 September, six days after notification of the grant of the request, a dispersal request was raised for such accommodation. The adjourned hearing of the Secretary of State's application was fixed for 11 October 2022.

27 On 7 October 2022, in the skeleton argument filed for the hearing of 11 October, the Defendant said that:

> "*[the property] [was] adequate for the Claimant's needs within the meaning of section 95 of the Immigration and Asylum Act 1999.*"

28 The skeleton argument, clearly on instructions, goes on to assert that the Claimant's needs had changed from those submitted before the Order of 13 July 2022. The skeleton argument accepted that, on the basis of Dr Kean's indication, further wheelchair accommodation, level access and level access shower or wet room was needed. It also indicated that the Claimant would not now be moving because the Secretary of State was going to adapt the bathroom. An update was promised to the Court regarding the building works.

29 In the event, there was no evidence of such update available for the hearing. The Secretary of State argued in terms that the Defendant's position was now academic because the Claimant had been moved to adequate accommodation; building works would be undertaken "*in response to the further evidence that was submitted*". This is contrary, of course, to the position stated in Mr Kingham's first statement (see below) of 9 October 2022, where it was accepted that works would be needed.

Hearing on 11 October: Contempt of Court

30 On 11 October 2022, the Defendant Secretary of State appeared before me on the third-time adjourned application for an extension of time in which to obey the Order of the Court made by consent on 13 July 2022 and relief from sanctions, if necessary. The Claimant made a cross-application that the Court consider whether the SSHD should be held in contempt of court for breach of the Court's Orders. There was no statement on behalf of the Treasury Solicitor.

31 Regrettably, counsel who then appeared before me had no instructions as to the status of the accommodation which was the subject of the Secretary of State's obligations, although, as stated, the skeleton asserted the property had been adequate. The position, apparently, had changed.

Adjournment and Further Orders

32 Accordingly, on 11 October 2022, I adjourned the application for the Secretary of State to explain the initial failures to comply, the late applications and also the factual position on the ground at that time. I required the statements to be made by a person of sufficient authority and the evidence to be provided in an easily assimilable form. I set out the timetable for the submission of further evidence from the Secretary of State explaining these matters. I ordered that:

> "*The Defendant shall, by 4.00 p.m. on Monday, 17 October, provide evidence detailing, at least:*
>
> *(a) the reason for the delay in making the application;*
>
> *(b) the steps taken to secure adequate accommodation for the Claimant since the date of the Order;*
>
> *(c) the reason the deadline in the Order, to which the Defendant consented, was not met;*
>
> *(d) the basis of the information on which the Defendant took the view that [the property] was adequate;*

> (e) *the nature and timeframe of the works by which the Defendant suggests [the property] may be made adequate;*
>
> (f) *any reasons why an Order for costs on the indemnity basis should not be made against the Defendant in respect of any or all periods after 3 August 2022.*"

33 I also indicated the Claimant could file and serve any evidence in response by Tuesday, 18 October at four o'clock. The Defendant was ordered to serve a paginated bundle, including the evidence filed at paragraphs 1 and 2 above, by 4.00 p.m. on Wednesday, 19 October 2022. The Defendant was to file and serve a skeleton by 4.00 p.m. on Wednesday, 19, and the Claimant, if so advised, a skeleton by 4.00 p.m. on Thursday, 20 October, and the matter was to be listed for the first available time on 21 October or 24 October 2022, with costs reserved.

34 Regrettably, the deadlines which I set were not met by the Secretary of State. Further, the property in question appeared not ready for her to move into. It was stated that a wall needed to be knocked down, the bathroom needed adapting, there might be other remedial work to be done and the Defendant was not in a position to indicate an indicative timescale. Two days after the 17 October deadline for filing imposed by my Order, the Defendant applied to extend time for complying with the first three paragraphs. It sought time until 4.00 p.m. on 21 October, the Friday before what was the Monday hearing, allowing no time for the Claimant to respond. A statement dated 17 October was, as I understand it, served in time, but without exhibits. The matter came before me again on 24 October 2022.

The Evidence

35 Jonathan Kingham, an SEO in the Asylum Support Contract Team, currently acting as Grade 7, is the litigation lead for that team, based in Newcastle. He has made a total of four statements.

Kingham – First Statement – 9 August 2022

36 The first statement he made, dated 9 August, was described as "*to explain the steps that the Defendant has taken since 13 July 2022*". It is said that, on 13 July, the SSHD thought that a property at a new location would be available, and adequate, within two weeks. Home Office requests for an update were ignored by CRH (the providers) and then, on 1 August, CRH said it:

> "*... became aware, following discussion with owner, that the property will not be suitable ... owing to it not being able to have a stairlift over the three floors of the property.*"

37 It appears the next day, unaware of this, the accommodation was nonetheless chased by the Home Office and, remarkably, the Defendant was told by CRH that the property was "*still not ready*". In truth, it was known not to be suitable.

38 On 3 August, the day for fulfilment of the Court's Order, there is a note that CRH told the Defendant "the property is no longer considered suitable". Mr Kingham says the explanation was the property was in fact not structurally capable of being adapted to wheelchair use. No explanation of the disconnect between these various events is given. Mr Kingham explained the failure to move the Claimant on 5 August was because the provider's driver had not been given correct information, accepting this was a significant error. He also stated CRH were the only provider for the Southwark area, where it was accepted the Claimant had to be for her son's medical and other supervision. A proposed

alternative of the property was mentioned at which, to accommodate the Claimant, a wall needed to be knocked down and the bathroom required adapting. The works might be completed within 10 days, but there might be unanticipated and unscheduled works also.

39 Detailed but generic information about the unprecedented demand for asylum support accommodation was set out, reporting the changes between 2020 and the present time, together with lists of properties that were either unavailable to the Claimant or unsuitable for her family.

40 The last paragraph of Mr Kingham's statement says this:

> "*The Defendant considers this property […] to comply with the Court's Order (as requested to be varied), as it is self-contained, wheelchair accessible accommodation in the London Borough of Southwark, with sufficient space for the Claimant's son to continue his treatment and to store the specialist equipment he requires, in particular his wheelchair.*"

41 This paragraph must one supposes, be read as meaning the accommodation would be adequate once the works were completed. Somewhat laconically, in the last paragraph of the statement, Mr Kingham says:

> "*I apologise on behalf of the Defendant to the Claimant and to the court that we did not inform the court of the problems we faced in July 2022 earlier than we did, and that we were not in a position to accommodate the Claimant on 3 August 2022.*"

<u>Kingham 2 – Statement of 11 August</u>

42 A second witness statement was sworn by Mr Kingham on 11 August 2022. The purpose of that statement was to:

> " *... address concerns over the accommodation at the Travelodge Southwark, 202-206 Union Street.*"

The SSHD did not accept that the room was inadequate accommodation under the Act; at that point it was proposed to move the Claimant and her family within a few days, and she was content to remain until that happened. Guidance was given to the Claimant to contact Migrant Help. The issue that there was insufficient access for the wheelchair could not be answered. CRH had been asked to follow up, and some help with the storage of luggage was offered.

43 The next proposal, notified on 12 August, was, as stated, the move to the new property – the 16 August hearing was adjourned.

<u>Kingham 3 – Statement of 17 October</u>

44 Mr Kingham next made a statement, dated 17 October 2022, in response to my 11 October directions. I asked particularly to know of the state of the accommodation and the progress at the new property.

45 In the statement, Mr Kingham details the Home Office's correspondence and dealings with CRH in relation to provision of accommodation for the family. Among the points made were the following:

(a) Mr Kingham says he had asked for an account of the steps taken after February 2022 to source accommodation, but none had been provided.

(b) He said he had asked for details of the required works for the new propert and "*again, this information has not been provided with any level of detail*".

(c) Despite asking, the Home Office did not know why the property at the previous location was mooted at trial in July as possible accommodation within fourteen days, if in fact it could never have accommodated a stairlift.

(d) The Home Office also did not know why they were not informed earlier so that the Court and the Claimant could have been told in good time.

(e) Mr Kingham stated:
"*It is for this reason that the application to vary was made so late – in short, we were only made aware at a very late stage that the Order was unable to be fulfilled.*"

46 The evidence from Mr Kingham did not explain why, despite having given a fourteen-day indication to the Court of 13 July, no steps were taken to notify the Claimant or to request more time of the Court when, at 14 days, nothing had been forthcoming despite reminders to CRH.

47 There is no statement from the Treasury Solicitor explaining what steps were or were not taken then.

48 Mr Kingham accepted that medical evidence had been received in September and early October 2021 from the Claimant's therapeutic professionals that AS required a walker to aid mobility, and their own medical advisor had stated wheelchair accessible ground floor accommodation, or with a lift, was required. Although, initially, outside central London was stipulated, it had been accepted that central London was necessary for AS's supervision by central London hospitals and professionals.

49 Mr Kingham said, "*Following discussion between the Home Office and the solicitor*" a request was put to "*the appropriate case-working team*" and the instruction was to issue an accommodation request to the provider with the following details:

> "*Self-contained accommodation in Southwark.*
> *Ground floor/level access - all rooms on ground floor, including bathroom including bedroom for dependant aged three. Must have space for child to practice walking and other motor skills.*
> *Not sure if you can get all that from the ITP* [the request system for accommodation]*.*"

50 This instruction was then, however, issued to CRH on 21 December 2021 in the following material terms:

> "*Self-contained accommodation in Southwark, ground floor/level access - all rooms on ground floor, including bathroom, including bedroom for dependant aged three.*"

And Mr Kingham continued:

> "*Accommodation requests relating to dispersal accommodation are communicated via a secure online portal known as the Collaborative*

Business Portal ("CBP"). The relevant field of the CBP for accommodation requests includes a text box for additional details to be added, such as specific accommodation needs. There is a limit to the number of characters capable of being entered into this box, which is why the actual request was unable exactly to match the instruction provided by the member of staff."

51 As is obvious, no mention at all was made of the wheelchair accessibility in either the first or the second message. The second says simply, "*must have space for child to practice walking and other motor skills*", without any mention of AS's disability.

52 It is, to say the least, startling that the essential character of the accommodation, namely the ability for a wheelchair to be used in it, was omitted. Although Mr Kingham stated a failure to achieve dispersal by 5 January would, under the Home Office's agreement with CRH, constitute a breach of contract, there is no evidence offered of follow-up steps or interventions by the Defendant or of pressure put, nor steps taken against CRH.

53 By 21 February 2022, admittedly in response to the litigation, a further accommodation request was issued to CRH, and that did mention the child's wheelchair and gave the dimensions of it. Again, it appears no proposal was received from suppliers, and the instruction was cancelled on 3 March 2022.

54 Mr Kingham then states: "*As a response to the ongoing litigation*" CRH were asked in June/July to source a property which met the needs of the Claimant. Nothing particular is said about the period between February and June/July. It appears that, although the email traffic is repetitive and not chronological, there was a failed attempt at the end of March, then the matter was kick-started on 30/31 May 2022 after the grant of permission, and again on 14 June 2022. It is noteworthy that in an email, (possibly - much is blacked out - to the Litigation Team) of 20 June 2022, Mr Kingham emphasising the urgency states that the case was not one in which they had over-conceded. He states their own doctor's advice was consistent with the medical request, and the request was wholly in accordance with the policy.

55 I pause to say that careful reading of the correspondence shows Mr Kingham to have been active, diligent and concerned, with a keen awareness that responsibility lay upon the Home Office to provide timely adequate accommodation. In the event, the hearing took place and resulted in the 13 July Order, the property then in mind was Wivenhoe Close (as above).

56 CRH had apparently indicated the new property on 15 August to the Home Office, which was accepted by the Home Office on 16 August. It was considered adequate "*on the basis of an understanding that it was wheelchair accessible and that works were being carried out to allow the bathroom to be accessible*".

57 I expressed my views concerning the then current position of the unreconstructed property because the Secretary of State, before me, appeared to argue that the provision of both the Travelodge and the new property <u>unreconstructed</u> were adequate accommodation in terms of the Secretary of State's duty towards the Claimant. In my judgement, that was not the case, nor even arguably so. The property did not allow a wheelchair into the shower for AS, nor room for his toileting system or seat equipment; nor did it allow for him to do exercises or store his other specialised equipment. It also had a cooker at the end of the studio room which was to accommodate the mother and two small children. The Defendant accepts, following the hearing of 11 October 2022, that it is not adequate and have instructed CRH to source alternative Southwark accommodation, which is wheelchair accessible throughout on

the ground floor and has sufficient space for the Claimant's son's equipment and for exercise.

58 I made an Order, as stated above, on 11 October, which included provision of materials by certain dates and the Secretary of State was to file evidence for the purposes of today by 4.00 p.m. on 17 October 2022. I have been shown an email of 11.33 a.m. on 19 October 2022 where Mr Mbeko Sihwa, on behalf of the Treasury Solicitor, indicated "*The SSHD is minded to submit an application today for …*" and he details an extension of time and relief from sanctions in respect of late submission of their evidence due as above, and also an extension of time to 4.00 p.m. on Friday, 21 October, to serve a paginated hearing bundle (due on 19 October) and an extension of time to serve a skeleton argument also until 4.00 p.m. on Friday, 21 October. Again, time limits under a Court Order were breached.

59 There was also, curiously, a request to amend the Order drawn up by me to insert the word "*not*" into what I had recorded as a concession by the Secretary of State, that she was in breach of the Order to provide adequate accommodation by 3 August 2022. I note that no contention was maintained to that effect and that the Defendant accepted before me they were in breach of that Order. It is obvious to note that this Application was in fact late, time having already expired. In the event, a statement dated 21 October 2022 was filed by Mr Kingham.

Kingham 4 – Statement of 21 October

60 This statement contains another chronology, this time dating from 19 November 2021 to 21 October 2022, seeking to plug the gaps as to the steps taken and responses received in the course of sourcing accommodation, or seeking to, for the Claimant and her family. Again, lists of properties are given that were either unsuitable or unavailable or, it is said, in some cases, too large. But the materials reveal the confusion over the previous property, the property it was thought would be compliant with the Court Order of 13 July, but was incapable of being adapted for wheelchair use at all. It somehow took weeks to ascertain that.

61 Update requests of 21 July 2022 and 26 July 2022 from the Home Office team were not answered by CRH, even on 2 August, as noted. The statement reflects a comment from CRH to the effect that this occurred on 1 August 2022 and "*HO were immediately notified, following a phone call with the owner of the property*". Correspondence on 1 August from the West London Litigation Team at 10:30 a.m. however, indicated that an update request of 21 July 2022 and an email of 26 July 2022 were not answered by CRH, and, even on 2 August at 3.30 p.m. the Service Delivery Manager in the Asylum Accommodation and Support Directorate having rung CRH was told by them: "*the property is still not ready, there was an estimate of two weeks back mid-July but no firm commitment to the date from CRH*". Although in fact it was then known the property was not suitable and therefore not available. This disjunction is picked up by Mr Kingham in an internal email.

62 The internal correspondence reflects a recognition that the Home Office were in an extremely difficult position. "*We are completely defenceless here*" are the words used by Mr Kingham in internal communications.

Consideration

63 The Court has before it three applications today. One is for the date in the Order of Mr Vikram Sachdeva KC to be varied to 14 November. That is subject, on the Defendant's argument, to an application for relief from sanctions; alternatively an extension of time in light of the overriding objective and in order to do justice.

64 The Claimant has made an application under CPR 81 for this Court to set directions for a contempt hearing in respect of the breaches of Orders of this Court by the Secretary of State.

65 There are two aspects to this case. The first is the failure of the Home Office to provide accommodation under a mandatory Order in pursuance of its non-delegable public law duty; the second aspect is the current disregard for this Court's Orders by the Treasury Solicitor (the GLD).

66 I make the following observations on the evidence.

(1) It is very regrettable that when a fourteen-day indicative period for provision of adequate housing after 13 July was up and nothing had been said or provided that the Defendant did not take precautionary steps regarding the deadline on the mandatory Court Order.

(2) Given the history of failure to provide appropriate accommodation, it is remarkable that she then left it to the very day of compliance before applying to extend time. She could have had no confidence whatsoever, given the past history, and in any event ought to have been prepared, given the seriousness of breaching a mandatory Court Order to which she had consented before the Deputy Judge.

(3) It is further regrettable that the application was unsupported with evidence and, when ordered by Norris J on 5 August to provide that evidence, it is extraordinary that she failed to provide any. An email to the court is a casual and inadequate response to a Court Order.

(4) It is very regrettable that the Treasury Solicitor did not see fit to swear a statement at least offering a chronology of the efforts made to obey the Court's Orders, and some apology for the late application to extend time in August. The breach of the Order to produce evidence of 5 August and latterly, the breach of my Order of 11 October, requiring service of evidence by specific dates to give the Claimant an opportunity to consider the evidence. It is not clear to me that Mr Kingham is the correct deponent for these matters, nor that he has been in control of provision of documentation for the Court, or at least not entirely so.

(5) Even for the purposes of this hearing, the Secretary of State failed to meet the deadlines for submission of materials. It appears there was an application at some point on Thursday or Friday for an extension of time within which to serve the bundle evidence, but it did not find its way to me within time, and was very close to the deadline, once again.

(6) The context of this case is highly sensitive. A badly disabled child has been the beneficiary of a mandatory duty to house him adequately, with the Claimant. It is approaching a year ago the family was sent to the first of a series of admittedly and obviously inadequate places, including the original property. The longer time runs from the date when the SSHD is appraised of relevant information, the keener is the duty to provide the accommodation.

(7) The already burdensome duty on the SSHD has been immeasurably worsened by the use of providers who, on the evidence of this case, are demonstrably incapable of fulfilling their contract.

(8) The flow of information not only between CRH and the SSHD but also within the Home Office and to their legal advisors, appears, on the information before the Court, to be wanting. Conclusions previously reached are apparently reversed or are inconsistent and scant or inadequate instructions appear to have been given.

67 It is urged on me that the just course is to allow an extension of time for compliance with the Order that the Court has power under CPR 3 and the Case Management Guidance in the Administrative Court Guide [see 13.1.76 and elsewhere]. I have set out how I indicated at the end of the hearing that I was prepared to allow the SSHD until 1 December 2022 to provide the housing, either by way of an extension of time to the Sachdeva Order, or by way of a new Order. It was agreed that, whatever the mechanism, the fact would remain that the SSHD was and remained in breach of the Order of 13 July and any Order I made would not expunge that fact.

68 It seems to me that by ordering that the SSHD do provide the accommodation by 1 December 2022, I am, in effect, extending her time to do that. However, the better view in my judgement is that I am <u>not</u> extending time under the mandatory Order; that Order contained a requirement of the Court and it was broken. I will impose a separate requirement under a new Order. It was, as I have stated, inappropriate to add the liberty to apply to set aside or vary the Order: this was not an Order made of the Court's own motion without representations where a provision of that nature would be expected. Quite the contrary, it was made after submissions from both sides and, moreover, by consent. There was an obligation on the Defendant to bring the Consent Order before the Court again, if it appeared that it would prove impossible to fulfil or might be. Preferably by agreement with the Claimant. The Claimant had indicated she would not oppose a reasonable extension of the period if it proved necessary in order to achieve her accommodation. In the event, there was no time for that, given the lateness of the application.

69 Nonetheless, as was emphasised by counsel to the SSHD, and I acknowledge it, the application was just made in time, even if unsupported by evidence.

70 In my judgement, the Defendant ought to have come before the Court in time to allow the Court to consider the issue before the expiry of time to fulfil the obligation, and the Defendant should have explained in evidence that compliance with the Order was proving impossible and invited the Court to rescind it and make an appropriate new Order. The effect, of course, would be the same as asking for an extension of time of the original Order.

71 There has been a series of failures in this case which reflect an inappropriate approach by the Treasury Solicitor to the authority of this Court. I suspect – I have not been favoured with any evidence – that the lapses are the result of over-pressured junior team members compelled to gather evidence and materials under significant pressure from a variety of sources which are, themselves, unable often to provide it timeously. This is not likely to be the product of a contemptuous disregard for the authority of the Court, but it is nonetheless discourteous, and it is unacceptable.

<u>Further Steps</u>

72 The issue then becomes what further steps I should take, but I just add it appears to me it is inappropriate that the "urgents" procedure was used. This is not an "urgents" procedure case, as was said in the now well-known case of *DVP & Ors, R (on the application of) v Secretary of State for the Home Department* [2021] EWHC 606, by the President:

> "*The Administrative Court often deals with urgent applications. This is a very important part of its work in the public interest, and a High Court judge is always available to hear such applications. Thus, a High Court judge is always available in the Administrative Court during court hours in the week, to deal only with urgent applications. Cases which are so urgent that they need to be dealt with out of normal court hours, including weekends, public holidays and vacation, are dealt with by the High Court Judge on 'out of hours' duty.*
>
> "*It is of the utmost importance that this limited resource is not abused, and over the years, the courts have developed rules to ensure this does not occur. If cases that are not truly urgent displace those that are, this will have serious consequences for litigants who have a good reason for applying for urgent relief. Two things flow from this. First, those seeking to make use of the 'urgents' procedures are under a duty to the Court to satisfy themselves that the application they are considering really is urgent and to adhere, to the letter, to the rules of court which protect the procedure from abuse. This has always been the case. The fact that case papers can now be filed electronically has not altered the position. Secondly, any abuse of the 'urgents' procedures will not be tolerated by the court and will be met with appropriate sanction*."

73 It was accepted before me, properly, that it was an incorrect invocation of the "urgents" procedure, utilised to get a solicitor or other representative out of a time difficulty, arguably of their own making.

74 I say further this is not, in my judgement, a case where relief from sanctions applies. This is not an application in respect of a Court Order to which sanctions for non-compliance apply, it is not in the context of potentially bringing proceedings to an end (see *Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 1633). The balance has to be struck by the Judge analysing the importance of the Order and the seriousness of the breach. It is well established that breaches of imperative Orders of this Court are very serious indeed. It would be impossible properly to utilise that procedure in my judgement. That does not, in any way diminish the jurisdiction or the discretion which I have when deciding what to do in a case of this nature.

Contempt Application

75 The Claimant makes vigorous criticism of the Defendant's response to Court Orders and of her approach to her statutory obligations which precipitated breach of the mandatory Order of 13 July. In a comprehensive statement of 21 October 2022, Ms Emma Rix, solicitor, and a representative of the Claimant, has listed the occasions upon which the Secretary of State has failed to meet Court Orders timeously and refers particularly to an unfortunate lack of disclosure made apparent on 19 October, when exhibit JK3 was filed. That bundle contained two emails, one dated 18 November 2021 and one 31 December 2021, from the medical advisor to the Home Office. The second of them recommends wheelchair access accommodation near Southwark for the Claimant and her children: exactly the terms which were being asked for by the Claimant. The inconsistency between the receipt of those medical opinions from the Home Office advisor and the provision of 63 Briar Avenue, which, on their own analysis, failed to comply with those requirements, is obvious.

76 Ms Rix also highlights what she describes as a "*struggle*" to obtain meaningful and timely information from the Secretary of State. These factors, she argues, support the application

made for a declaration that the Defendant is in contempt of court, and that I should make directions for that issue to be determined.

77 In *Mohammed v Secretary of State for the Home Department* [2021] EWHC 240, Chamberlain J heard a directions hearing necessitated by the Secretary of State for the Home Department failing to comply with a mandatory injunction. He characterised the nature of the breach in this way at paragraph 23:

> "*First, paragraph 1 of Lang J's Order was not simply a procedural direction requiring a particular step in the litigation to be taken by a particular date. It was an interim mandatory injunction. The distinction between procedural directions and mandatory injunctions was explained by Johnson J in R (Humnyntski) v Secretary of State for the Home Department_[2020] EWHC 1912 (Admin) ... As is usual in the Administrative Court, the injunction as made on paper rather than at a hearing and no penal notice was attached. Neither of these features detracts in any way from its binding effect: see R (JM) v Croydon London Borough Council (Practice Note) [2009] EWHC 2474 (Admin) ... It is well established that the court has power to issue an injunction (including a mandatory injunction) with binding legal effects against a Minister of the Crown.*"

78 He said, further:

> "*Second and relatedly, when the court grants a mandatory injunction, it must be complied with by the time stipulated unless it is set aside before that time. If it is not complied with by the stipulated time, the obligation to comply remains. A pending application to discharge or vary it does not excuse a failure to comply. The obligation to comply remains unless and until the Order is set aside by a judge: see South Cambridgeshire District Council v Gammell [2006] 1 WLR 658 ... In this case, there was no application to set aside Lang J's Order. The application to vary it came some three days after the expiry of the deadline contained in its paragraph 1 and only after two further Orders for the court. it is not obvious that the concept of relief from sanctions applies at all to a mandatory injunction, nor that an injunction can in principle or should in the present circumstances be varied retrospectively. Given that the Secretary of State's application notice seeks both relief from sanctions and retrospective variation of Lang J's Order, these matters may have to be considered further in due course.*
>
> "*Third, on its face, paragraph 1 of Lang J's Order imposed an obligation of result, not merely an obligation to make reasonable efforts to comply. As Ms Da Costa's letter accepts, the Secretary of State was in breach of that obligation from 13.00 on Tuesday 2 February 2021. She remained in breach until at least the evening of Thursday 4 February 2021 and possibly the afternoon of Friday 5 February 2021.*
>
> "*Fourth, breach of an injunction is a matter which can result in proceedings for contempt. This is so even where the breach is by a Minister ... Indeed CPR r.81.6 obliges the court, where it considers that a contempt of court may have been committed, to consider whether to initiate contempt proceedings against the Defendant.*

> "*Fifth, however, not every breach of an injunction must necessarily result in proceedings for contempt - especially where, as here, compliance has been achieved (albeit late), there is an apology and a full explanation for the default is offered. In public law proceedings such as this, the appropriate course is to invite the Secretary of State to give a formal explanation of the breach, supported by witness statements; and then to allow a period of the Claimant and the Court to consider whether any further proceedings are necessary. That may depend on the explanation. If the evidence provides sufficient reassurance that the breach was not intentional and that measures have been put in place to avoid an recurrence, further proceedings may be unnecessary*."

79 It is also well established that proceedings for contempt of court are intended to uphold the authority of the Court and make certain its Orders are obeyed. I do not repeat here paragraphs 55 to 61 in the case of *JS (by his Litigation Friend KS) v Cardiff City Council* [2022] EWHC 707 (Admin), a decision of Steyn J. It is worth emphasising that it is not necessary to show that the Defendant intended to commit a breach, although the intention or lack of it is relevant to any penalty to be imposed once knowledge of the Order is proved and once it is proved the contemnor knew that she was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the Order. It is enough that, as a matter of fact and law, they do so put him in breach, per Rose LJ in *Varma v Atkinson* [2021] (Ch) 180.

80 I have considered long and hard whether it is proportionate and appropriate to proceed further with the consideration of the contempt of court application. It does not require permission, it arises out of breach of the Court's own Order, and I have before me what appears to be the complete available response from the Secretary of State and/or their legal advisors.

81 As is clear from the authorities, a deliberate intention to breach a Court Order is not necessary to found any finding of contempt. I am conscious of the background, explained in great detail by Mr Kingham, and conscious of the difficulties that the scarcity of accommodation presents. In the case of *JS* referred to above, at para.85, Steyn J, said this reflecting that inevitable dependence on others goes to mitigation of penalty not to a defence to contempt:

> "*I appreciate that the determination of the Claimant's future placement does not lie solely in the hands of the Council. The need to seek to agree a placement with the Claimant's parents, and in particular his Deputy, had the potential to create difficulty in complying with paragraph 5 of the December Order even if the Council had completed the process of identifying available suitable options to be considered at a best interests meeting prior to the 7 January. In the absence of any application to the court to vary the terms of the December Order, any difficulty of compliance goes to penalty, not to the question whether the Council has committed a contempt of court.*"

82 I have asked myself what is required to protect the public interest and in order for this Court to bring home to those in the position of the Defendant the importance of the Orders that it makes. I am shocked and surprised by the conduct of this case, and I am dismayed by the failures at an early stage to bring the matter back before the Court, in particular given the history of attempted provision to this Claimant. As I indicated in open court and previously,

no doubt considerations of inexperience and overwork have played into the slipshod regard for court directions and the mandatory Order, but I am sure that the frustrations of the failing asylum accommodation system have also played into the failures in this case. Nonetheless, the Secretary of State must stand rebuked by her handling of this case.

Conclusion

83 I have come to the conclusion that this public rebuke to the Secretary of State for the Home Department and her teams is sufficient, proportionately, to mark the failings in this case. I do take into account, as urged, that an attempt, albeit a feeble one, was made to seek to extend time for performance of the obligations under the Order of 13 July 2022, and an apology from Mr Kingham has been made in his statements. He has provided copious materials to seek to support, in a difficult context, the progress or otherwise of matters in the provision of this asylum accommodation. I note with disappointment that there has been no statement of any steps taken or to be taken on behalf of the Secretary of State to seek to improve the position in this area. The Secretary of State must take note.

84 In my judgement, the public interest is best served if the Secretary of State considers urgently the system of asylum accommodation providers and their relationship with the Home Department. This judgment is also intended to indicate that a more careful and courteous approach to a solicitor's obligations is necessary than was seen here. I have no doubt that that lesson will be well learned after the embarrassment of this judgment.

85 Bearing in mind these observations I shall not give directions that the matter goes further in the contempt jurisdiction.

86 I warn that if the Defendant were to be in further breach of its obligations under a Court Order of whatever nature in respect of this Claimant, it is unlikely in this case the Court will step away from utilising its contempt jurisdiction.

87 Very properly, the Defendant has offered to pay all of the costs up to and including those of today on the indemnity basis. That is appropriate.

88 In my judgement, it is also appropriate that I make a new Order which supersedes that of Mr Sachdeva KC, and the date to be inserted in that new Order is 1 December 2022.

<u>CERTIFICATE</u>

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge