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FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

To: **PA & MA**

Appeal Number: AS/20/09/42386
AS/20/09/42397

UKVI Ref:

Appellant's Ref:

IMMIGRATION AND ASYLUM ACT 1999
THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)
(SOCIAL ENTITLEMENT CHAMBER) RULES 2008

Tribunal Judge	Ms Sehba Haroon Storey
Appellants	**PA and MA**
Respondent	Secretary of State

STATEMENT OF REASONS

1. This Statement of Reasons is made in accordance with Rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and gives reasons for the decisions made in the above appeals heard on 16 October 2020 in which I **substitute my own decisions for the decisions appealed against with the effect that the appellant should be provided with Section 4 support**.

2. The above appeals were heard together because they raise common issues, but the appellants are otherwise unconnected.

3. **The first appellant (PA)**, is a 32-year-old Iranian national. He appeals against the respondent's decision of 23 September 2020, to discontinue his support for the following reasons:

a) His further submissions to the Home Office were rejected and he no longer meets the conditions set out in paragraph 3(2)(e) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (the 2005 Regulations);
b) In the light of the easing of restriction on movement due to Covid, it is no longer accepted that he is unable to leave the UK or that he is unable to resolve any practical problems that prevent him from leaving;
c) There is no evidence that he has applied for assistance to leave the UK via the Home Office Voluntary Returns Service (VRS);
d) He can avoid the consequences of being left without accommodation or other support by leaving the UK. Support is not therefore necessary to avoid a breach of his human rights; and

e) He does not meet any of the other conditions of regulation 3(2) of the 2005 Regulations.

4. **The second appellant (MA)**, is a 40-year old Iraqi national. He appeals against the respondent's decision of 22 September 2020 to discontinue his support for the reasons expressed in identical form to that set out in paragraph 3 above, save that his further submissions were rejected in December 2019.

5. Both appellants were represented by counsel Mr Simon Cox on the instructions of the Asylum Support Appeals Project (who in turn are instructed by the Manchester Law Centre). The respondent was represented by Ms Bello.

6. The appeals were listed for a remote oral hearing over the telephone. I heard oral evidence from the PA and MA. Both appellants were assisted to give their evidence through an official interpreter appointed by the Tribunal.

PA's Immigration and Asylum Support history

7. PA claims to have applied in the UK in December 2006. He applied for asylum on 8 January 2007. His claim was refused on 8 February 2007 and following an appeal and subsequent unsuccessful application for judicial review, he became appeal rights exhausted on 23 November 2007.

8. Thereafter, he made further submissions on five occasions, namely, 23 October 2008, apparently refused on the same date; 19 September 2011 refused on 12 October 2011; 6 March 2017 refused on 9 March 2017; 29 June 2018, refused on 13 August 2018; and 5 October 2019 refused on 21 July 2020. The refusal of all five further submissions did not attract a right of appeal.

9. I do not know for what period(s) the appellant has received section 4 support since he became appeal rights exhausted on 23 November 2007. It is possible that he was granted section 4 support on making further submissions. I do not know how PA supported himself in the intervals between refusal of his further submissions and the making of the next further submissions. These periods total in excess of 9 years.

10. He was last granted support on 8 November 2019 under Section 4(2) of the Immigration and Asylum Act 1999 (the 1999 Act), following receipt of his October 2019 further submissions. The rejection of the further submissions on 21 July 2020 triggered a review by the respondent of his continued eligibility for asylum support and on 23 September 2020, a decision was made to discontinue his accommodation with effect from 7 October 2020 on the ground set out in paragraph 3 above.

11. PA gave oral evidence at the hearing. He told me he has no friends or family in the UK – "nobody" - and that having left Iran 14 years ago, he has no friends and family in his country of origin either. As such, he argues he has nowhere to go and no one who can offer him accommodation in the UK or in Iran.

12. PA confirmed that he has never voluntarily taken any steps to return to Iran and does not wish to do so; he does not have any medical conditions that prevent him from leaving the UK; he has no outstanding judicial review applications, although he intends to make further submissions again. Although he has been encouraged to take voluntary steps to leave the UK, his own position is that he has not attempted to do so. Finally, PA avowed that at no stage during almost 13 years

since he became appeal right exhausted has the respondent attempted to enforce his removal to Iran.

13. Included in the Home Office bundle is the Secretary of State's decision of 21 July 2020, rejecting PA's further submissions of 5 October 2019. The Consideration of Submissions (document 022), records that PA was, "…remanded for a criminal case on 17 June 2011, for which [he is] still awaiting trial". Ms. Bello was asked for more information about this but was not able to provide any details.

14. Finally, I note that on 6 October 2020, Manchester Law Centre issued a pre-action protocol (PAP) letter to the respondent placing her on notice of their intention to issue judicial review proceedings in the Administrative Court in order to challenge the lawfulness of her policy decision to resume negative cessation decisions in the course of the pandemic and her application of this change in policy to PA.

MA's Immigration and Asylum Support history

15. MA applied for asylum on 8 May 2015. His claim was refused on 30 September 2015 and his appeal was dismissed by the First-tier Tribunal Immigration and Asylum Chamber on 22 June 2016. Permission to appeal that decision was refused by the Upper Tribunal Immigration and Asylum Chamber on 27 October 2016 and the appellant became appeal rights exhausted.

16. Thereafter, MA has made further submissions on two occasions, namely, 18 May 2017 refused on 19 August 2017; and 12 February 2019, refused on 13 December 2019. I do not know whether the refusal of 19 August 2017 attracted a right of appeal, but the 13 December 2019 refusal did carry a right of appeal but one the appellant did not exercise.

17. I do not know for what period(s) MA has received section 4 support since he became appeal rights exhausted on 27 October 2016 save that he was last granted support on 12 February 2019 following receipt of his further submissions. These were refused on 13 December 2019 with a right of appeal. Accommodation was withdrawn on 22 September 2020 with effect from 7 October 2020, on the grounds set out in paragraph 3 above, but additionally on the grounds that he did not have any outstanding appeals in relation to his Asylum claim.

18. MA gave oral evidence at his hearing. He told me he has no friends or family in Iraq and no one who can offer him accommodation in the UK. His wife and two children came to the UK independently of him and his wife has applied for asylum. He said they are not living together because his wife "blames" him for her situation and for abandoning her and the children in Iraq 4 years ago. He said that although they remain married, his wife does not want to live with him, and he "understands" her reasons. He said she has told him they may live together in the future.

19. MA referred to his health problem, including "stomach ulcers" and "bleeding from the intestines." He said he attends hospital for treatment, that this can be checked but he did not have medical evidence available at the hearing. He said his health was one reason he could not return to Iraq, but he insisted that he could not return in any event because he would be prosecuted [*sic*] if he did so.

20. Asked why he had not challenged the refusal of his further representations in December 2019, MA explained that he had difficulty finding a lawyer willing to represent him because he lacked the means to pay the cost of his representation,

but that he had now found a lawyer willing to represent him *pro bono* and he therefore intended to make further representations.

21. MA confirmed he knew of the Home Office VRS scheme and that he would be offered financial assistance if he agreed to return voluntarily. He accepts that he has been encouraged to take voluntary steps to leave the UK, but his position is that he has never attempted to do so previously and does not intend to do so now.

22. Finally, I note that on 6 October 2020, Manchester Law Centre issued a PAP letter to the respondent on behalf of MA in identical terms to the letter issued on behalf of PA (see paragraph 14 above).

CLOSING SUBMISSIONS FOR THE RESPONDENT

23. On behalf of the respondent, Ms. Bello submits that I have no jurisdiction to decide or comment on the lawfulness of the decision to discontinue support at policy level to asylum seekers/failed asylum seekers and their dependants. She is also of the view that I have no jurisdiction to address the merits of any outstanding asylum claims. She submits that my jurisdiction is limited to deciding the issues in the appeals before me, namely, the reasons for the Secretary of State's discontinuance of support to PA and MA under regulation 3(2). She states that both appellants were provided with support under the provisions of this regulation because of the risks posed by the pandemic but as these are now "easing", a decision has been taken, confirmed at Ministerial level, to bring such support to an end. If the appellants wish support to continue, says Ms. Bello, they have the option to sign up for voluntary return.

24. At the conclusion of the hearing, Ms Bello stated that she had information relating to an appellant's arrest and conviction. In fairness to Ms. Bello, she was responding to a query from me concerning an entry in PA's Home Office bundle (document 022). Instead, I was informed that MA was arrested on 18 January 2017 for a sexual offence for which he received a non-custodial sentence (a restraining order) and his name was placed on the "sex offenders register" until 26 July 2022.

CLOSING SUBMISSIONS FOR THE APPELLANTS

25. Mr Cox accepts that PA and MA are not entitled to the provision of support under regulation 3(2)(a) – (d). The focus of his submissions was regulation 3(2)(e). He submits that the 27 March 2020 policy to accommodate all destitute failed asylum -seekers was adopted for reasons of public health safety, in accordance with the Secretary of State's duties under section 6 Human Rights Act 1998 and under regulation 3(2(e) not to breach the human rights of destitute asylum-seekers and the general public, contrary to Articles 2 and 3 of the European Convention on Human rights (ECHR). He submits that the situation has not changed for PA and MA who reside in areas that were designated High Alert Tier 2 (at the date of the respondent's decisions) under the Health Protection (Coronavirus, Local COVID-19 Alert Level (High) (England) Regulations 2020. Schedule 2 of the said regulations appears to prohibit PA and MA from residing in a person's home unless they are a member of that person's household and it is a criminal offence for anyone to contravene these provisions without reasonable excuse and offer them temporary accommodation.

26. Mr Cox submits that having adopted the policy she did in March 2020 to accommodate PA and MA, the Secretary of State has failed to demonstrate that the withdrawal of such support is human rights compliant. In his view, it is not enough to simply state that PA and MA can return voluntarily to Iran and Iraq, respectively, because they have consistently demonstrated that they will not do so. He added that in the absence of evidence that the Secretary of State intends to enforce their removal (which has not been attempted), the decision to evict them from their accommodation, without evidence of consultation with public health bodies, is unlawful under regulation 3(2)(e).

THE LEGISLATIVE FRAMEWORK

27. Section 4 of the 1999 Act (as amended) by Section 49 of the Nationality, Immigration and Asylum Act 2002 and Section 10 of the Asylum and Immigration (treatment of claimants, etc.) Act 2004 provides:

> **Accommodation for Persons on Temporary Admission or Release**
> '(1) …..
>
> (2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—
>
> (a) he was (but is no longer) an asylum-seeker, and
> (b) his claim for asylum was rejected.

28. Regulation 3 of the 2005 Regulations, provides:

> **Eligibility for and provision of accommodation to a failed asylum-seeker**
>
> '(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are-
>
> (a) that he appears to the Secretary of State to be destitute, and
> (b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.
>
> (2) Those conditions are that—
>
> a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;
>
> b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;
>
> c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
>
> d) he has made an application for judicial review of a decision in relation to his asylum claim –

(i) in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998,

(ii) in Scotland, pursuant to Chapter 58 of the Rules of the Court of Session 1994 or

(iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of Supreme Court (Northern Ireland) 1980; or

e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998.

29. Article 2 of the European Convention on Human rights (ECHR) which protects right to life, provides as follows:

1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

30. Article 3 ECHR, which deals with prohibition of torture, provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

31. Article 8 ECHR provides as follows:

1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Discussion

32. When considering whether the provision of support to failed asylum-seekers in relation to regulation 3(2)(e) is necessary in order to prevent a breach of a person's Convention rights it will be necessary for the public body concerned to have regard to all relevant circumstances, on a case by case basis, with each case

considered on its own merits. *R(NS) v First-tier Tribunal* [2009] EWHC 3819 (Admin) *(R(NS)*.

33. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. (*Mandalia v SSHD* [2015] UKSC 59).

The Tribunal's jurisdiction

34. I accept that this tribunal does not have jurisdiction to decide the vires of the Secretary of State's policy to grant support to persons who do not otherwise qualify for it under regulation 3(2). Nor by the same token does it have jurisdiction to decide the vires of her policy to withdraw support from those granted it in March 2020.

35. However, I am satisfied that I have jurisdiction to consider whether the application of the Secretary of State's withdrawal of her policy to PA and MA is contrary to their human rights. In doing so, I am not limited to consideration of the Convention rights of PA and MA, but I can, pursuant to section 6 of the Human Rights Act 1998, consider the consequences of PA's and MA's decisions on the human rights of others.

36. The relevance of the human rights of others in the context of regulation 3(2)(b) was accepted by the Secretary of State in *R (SSHD) v Osman (and others)* [2006] EWHC 1248 (Admin), wherein a question arose whether a person suffering from contagious tuberculosis was unable to leave the UK. Holman J noted (*obiter*) [at 31]:

> ". The Secretary of State has acknowledged in argument today that if, on the facts of a particular case, there is a strong risk of contagion of serious illness **to other passengers,** in particular on an aeroplane, then in his view that might indeed amount to a "medical reason" making the contagious person for the time being "unable to leave the United Kingdom". That seems to me to be no more than commonsense."

Covid-19 policy of March 2020

37. Applying the same type of approach to the coronavirus pandemic, Chris Philp MP, Parliamentary Under Secretary of State for Immigration Compliance and the Courts, stated in his letter of 27 March 2020 to A. Fraser of the British Red Cross Society, *that in the interest of "safeguarding the people we care for and the communities in which they live,"* he had decided that for the next three months, "…those who would ordinarily have their support stopped because their asylum claim or appeal has been rejected, will remain accommodated." He added, for measure, that the Prime Minister was clear, "…*we must do all we can to ensure that people remain in their homes and do not travel or move around unnecessarily*." (My emphasis). Clearly, the policy was always intended to be a temporary measure of finite duration.

Local Covid Alert Levels

38. The policy decision of 27 March 2020 was taken at a time when the infection rate was very high, and the UK was in total lockdown. Whilst that situation appears to have eased in many parts of the UK, in some areas there remains in place

varying degrees of restrictions ranging from Tier 1, a state of medium alert; Tier 2, a state of high alert and Tier 3, a state of very high alert and the imposition in the latter of the strictest restrictions and limitations on movement due to the rapidly increasing rate of infections and deaths from Covid-19 and resulting impact on public services.

39. As at the date of decisions, namely 22 and 23 September 2020, and at the date of hearing on 16 October 2020, the areas in which PA and MA resided were both in Tier 2 (High Alert).

40. The Health Protection (Coronavirus, Local COVID-19 Alert High) (High) (England) Regulations 2020 (the High Alert Regulations 2020), came into force on 14 October 2020. Schedule 1 to the High Alert Regulations 2020, prohibits an indoor gathering of two or more people except where they are members of the same household or linked households. Schedule one further prohibits a resident of a high alert area from participating in a gathering of more than two persons outside that area. A person commits an offence (punishable on summary conviction by a fine), if without reasonable excuse, they contravene a provision of these regulation.

41. In the short interval between the hearing of these appeals on 16 October 2020 and my decision, PA's local area has been raised to Tier 3 – very high alert and MA's local area is also be in Tier 3 from 23 October 2020. The relevant regulations are the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (the Very High Alert Regulations 2020). As the label suggests, the restrictions in place in areas of very high alert are commensurate with *inter alia* the very high level of infection rates in these areas and the potential strain on public services.

Regulation 3(2)(e), Article 2 and Article 3

42. Where the Secretary of State decides to discontinue support to a person, the burden of proof is on her to demonstrate a relevant change of circumstances to justify the decision. In these appeals, that change is said to be the easing of restriction on movement due to Covid and the consequential withdrawal of the Secretary of State's March 2020 policy with effect from September 2020, on the grounds that persons who were previously accepted as unable to leave the UK were now able to do so.

43. Mr Cox submits that the Secretary of State has failed to produce any evidence that she consulted Public Health England (PHE) before deciding to withdraw the provision of accommodation. In PHE's letter of 29 July 2020 to the Scottish Refugee Council, it is said that PHE has not produced guidance for the Home Office relating to asylum support and accommodation for asylum seekers. (I would observe that if PHE has been consulted and has produced such guidance, it has not been disclosed to me).

44. Mr Cox further submits that the instructions concerning the withdrawal of the Secretary of State's policy, as outlined in the UKVI letter of 29 September 2020 to Lucy Smith of No Accommodation Network (NACCOM) on how cases will be selected for cessation of support is "unclear and not properly published." The letter states that all Local Authorities (LAs) are subject to the policy and cases are chosen based on:

1) availability of routes of return with assistance from VRS;
2) do not include families with dependants under the age of 18;
3) LAs not having significant rough sleeping pressures; and (initially):
4) not being in LAs subject to "regional restrictions/lockdowns."

Mr Cox submits that these instructions are unclear because they are said to be "assessed/reviewed daily/weekly" in order to take account of the above factors and are not properly published because they are subject to change so there is no definitive guidance.

45. I accept that the reasons for the decision to end support in September 2020 could have been better communicated to Local Authorities, Charities and lawyers assisting persons in receipt of support and indeed the Tribunal. But lack of clarity does not, in my judgement, make the policy underlying it unlawful or unworkable. The current situation remains fluid and ever changing. It is therefore not surprising that there is no definitive published policy available. However, I am satisfied that the March 2020 policy to grant support was always intended to be for a period of three months and that period came to an end in June 2020. Decisions to discontinue support however, did not commence until late September – almost a further three months after the policy was due to expire.

46. Taking a commonsense approach, and noting that in many areas of the UK, the public has returned to work, children and young adults are back in schools and universities, businesses, shops, pubs and restaurants etc. are slowly opening for business, whilst taking sensible precautions, I can see little reason, (save as stated below), why persons in receipt of section 4 support who have otherwise exhausted their appeal rights, should not now be required to comply with the requirements of regulation 3(2) and either demonstrate an entitlement to section 4 support, or otherwise take all reasonable steps to leave the UK.

47. In respect of the generality of cases, I am satisfied that for those who reside in Tier 1 or Tier 2 locations and who are appeal rights exhausted, it remains reasonable to require them to take steps to leave or place themselves in a position in which they are able to leave the UK. This includes contacting the Home Office VRS for help to facilitate their departure. Alternatively, they have the option to qualify for support by bringing themselves within other regulation 3(2) conditions.

48. However, it seems to me unreasonable to discontinue support to persons in receipt of section 4 support who reside in Tier 3 areas subject to very high alert. These areas are subject to the toughest restrictions with households banned from mixing indoors and outdoors, in hospitality venues or private gardens, and advised against travelling into or out of the area, much like the position in March 2020, when the respondent implemented her policy to safeguard the public and the communities in which they live. On that basis, I find that in areas now subject to very high alert and the same tough restrictions on movement, ending support to persons in receipt of section 4 support may again place them and others in their communities at greater risk of harm in breach of their Convention rights. That risk to health and wellbeing applies to everyone, whatever their immigration status. It cannot however, apply to PA and MA because at the date of decision (22/23 September 2020) and at the date of hearing (16 October 2020), their home towns were still in Tier 2 high alert areas.

49. Irrespective of whether such discontinuances would engage the high thresholds of Articles 2 and/or Article 3, they would certainly engage Article 8 in that any assessment of proportionality must have regard to the public interest, including public health considerations and in any assessment of proportionality the weight to be attached to such considerations would be very high.

FINDINGS OF FACT IN PA'S APPEAL

50. I make the following findings of fact:

a) The appellant has a protracted immigration history. He has been in the UK for almost 14 years, but significantly, 13 years of that period has been unlawful. During this time, he has submitted multiple further representations, without success. He has no further outstanding applications and there are no medical reasons to prevent him from returning to Iran. There are open flight routes to Iran, but there is no evidence that PA has taken advantage of these to leave or seek assistance to leave via the Home Office VRS;

b) PA maintains that he will not take voluntary steps to leave the UK. Clearly, he can avoid the consequences of being left without accommodation or other support by leaving voluntarily. I accept that he will not do so. I therefore find that if evicted from his accommodation, PA will not, as a matter of fact, contact the Home Office VRS to arrange a voluntary departure. He will instead seek out other shelter in breach of the regulations in place in his local area. This is a criminal offence for which he may be arrested and fined.

c) I reject his claim that he has no friends in the UK. After almost 14 years residence, it is highly improbably that he has made no friends whatsoever. However, I accept that he does not have any family here. The absence of friends is of little significance since friends are prohibited from accommodating him unless they are part of his household.

d) Lastly, the respondent states that on 17 June 2011, PA was remanded "for a criminal case" for which, it is said, he is still awaiting trial. I have not been provided with any information concerning this offence, whether there is to be a trial or why the matter remains outstanding nine years after the commission of the offence. I am unable to make any finding of fact concerning the offence.

e) At the date of decision, on 23 September 2020, following withdrawal of the Secretary of State's March 2020 policy, I find that PA was not prevented by the Tier 2 high alert level in his area from taking steps to leave the UK or to resolve any practical problems that prevented him from doing so, by cooperating with the Home Office VRS.

FINDINGS OF FACT IN MA'S APPEAL

51. I make the following findings of fact:

a) The UKVI bundle of documents appear to suggest that MA may have entered the UK illegally on two separate occasions: firstly, on 8 May 2015 and secondly on 19 January 2017.

b) MA did not appeal the refusal of his fresh claim for asylum in December 2019. He says he did not exercise his right of appeal, because he did not have money to pay his lawyer. I accept his explanation, although it has no bearing on my decision. He is therefore appeal rights exhausted.

c) He appears to have had some involvement in the past with the Home Office VRS for assistance to leave the UK voluntarily but declined to complete the process.

d) MA's wife and two children have applied independently for asylum in the UK. MA remains legally married to his wife, but they live in separate accommodation to him. The UKVI bundle makes no mention of MA's family. I do not know when the family arrived, what stage the wife's claim/appeal has reached or the level of contact the appellant enjoys (if any) with his children. There is no evidence before me that the Secretary of State has considered the welfare of MA's children as required by section 55 of the Borders, Citizenship and Immigration Act 2009 or MA's Article 8 rights.

e) I do not accept that the appellant has no friends or family in the UK. The absence of friends is of little significance since friends are prohibited from accommodating him unless they are part of his household. However, I accept (for the moment) that he is not able to be accommodated with his wife and children.

f) I accept that MA is currently under hospital treatment for "stomach ulcers" and "bleeding from the intestines." But in the absence of medical evidence detailing the nature and severity of his condition and how it affects him, he is not unable to leave the UK by reason of a physical impediment to travel or for some other medical reason, pursuant to regulation 3(2)(b).

g) I accept that MA has a conviction for a sexual offence and is required to register his details with the police until 26 July 2022.

h) At the date of decision, on 22 September 2020, following withdrawal of the Secretary of State's March 2020 policy, I find that MA was not prevented by the Tier 2 high alert level in his area from taking steps to leave the UK or to resolve any practical problems that prevented him from doing so, by cooperating with the Home Office VRS.

My Decision

52. On the evidence before me, I am satisfied that for the purposes of deciding the regulation 3(2)(e) issue, that the respondent's March 2020 policy (introduced at the height of the pandemic and at a time of complete national lockdown), for a specified period of three months, was lawfully withdrawn from PA and MA with effect from 7 October 2020. Whilst it may be that the withdrawal of the said policy could have been better handled and been clearer in terms of communication and publication, that is not a matter upon which this Tribunal can comment.

The Decision in PA's appeal

53. Based on my above findings of fact, PA is not entitled to the provisions of support under regulation 3(2)(a) –(e). It cannot, in my judgement, be right that a person who has remained unlawfully in the UK for 13 years, who has wilfully refused to mitigate the consequences of being left without accommodation by not taking all reasonable steps to leave the UK, can nevertheless require the Secretary of State to support him under the ECHR simply by refusing to leave.

The Decision in MA's appeal

54. Based on my above findings of fact, as at the date of hearing on 16 October 2020, MA is not entitled to the provisions of support under regulation 3(2)(a) - (d). However, it seems to me that in relation to regulation 3(2)(e), the

Secretary of State has firstly: failed to demonstrate whether, and if so how she exercised her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to take account of the need to safeguard and promote the welfare of MA's children in the UK and to consider whether the impact on the children of her decision was unduly harsh. *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. Secondly, if it is correct that the appellant is a convicted sex offender, it has not been demonstrated to me that the Secretary of State exercised her duty of care to the community in which MA resides to ensure that if evicted as a result of her decision of 23 September 2020, that his movements and whereabouts will always be known to the police. This duty of care is a public interest consideration of potential relevance to an assessment of the Article 8 balancing exercise. The Secretary of State has not explained how this will be achieved.

55. Based on the above, I would normally dismiss PA's appeal and remit MA's appeal to the Secretary of State for further consideration of the outstanding matters in paragraph 54.

Pre-Action Protocol Letters of 6 October 2020

56. However, I am aware that Manchester Law Centre has served PAP letters on behalf of PA and MA on the respondent challenging the vires of the Secretary of State's September 2020 decision to withdrawal her March 2020 policy. In *R(NS) v First-tier Tribunal* [2009] EWHC 3819 *(R(NS)* [at 12–14], Stadlen J considered whether a person who has sent a PAP letter to the Secretary of State for consideration should be granted accommodation under regulation 3(2)(e). Recognising that the issue was a difficult one to resolve because in many cases, persons whose appeal rights are exhausted, may seek to make representations which are entirely without merit, for the sole purpose of seeking to delay the moment at which they are removed, he nevertheless accepted that in meritorious cases, the grant of section 4 support under regulation 3(2)(e) should be considered.

57. In PA's and MA's appeals, the PAP letters seek to challenge the lawfulness of the Secretary of State's decision to withdraw accommodation from persons who continued to receive it in March 2020 because of coronavirus and whose support has now been terminated. It seems to me that the proposed judicial review raises an important issue which can only be challenged before the Administrative Court, and the appellants' representatives ought to be allowed the opportunity to make an application for permission to the Administrative Court and present their argument. Applying the rationale of *R(NS)* to the appeals before me, and solely on account of the proposed judicial review concerning the legality and rationality of the Secretary of State's decision to withdraw support from PA and MA in September 2020, I conclude that the provision of accommodation is necessary under regulation 3(2)(e) for the purpose of avoiding a breach of their Convention rights within the meaning of the Human Rights Act 1998.

Signed: **Dated: 23 October 2020**

S.H. Storey

Principal Judge
FTT – SEC Asylum Support