Neutral Citation Number: [2019] EWHC 1523 (Admin)

Case No: CO/2710/2017 & CO/382/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2019

Before :

MRS JUSTICE MAY DBE

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Between :

MA	**Claimant 1**
BB	**Claimant 2**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervenor**

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Stephanie Harrison QC & Alex Goodman (instructed by **Duncan Lewis**) for the **Claimant 1**
Nick Armstrong & Jesse Nicholls (instructed by **Deighton Pierce Glynn**) for the **Claimant 2**
Lisa Giovanetti QC & Julian Blake (instructed by **GLD**) for the **Defendant**
Dan Squires QC (instructed by **EHRC**) for the **Intervenor**

Hearing dates: 2 & 3 May 2019

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Approved Judgment

The Hon. Mrs Justice May DBE:

Introduction

1. On 7 September 2017 the BBC's *Panorama* programme aired a documentary entitled "*Undercover: Britain's Immigration Secrets"* (*"*the *Panorama* programme*")*. It showed footage recorded secretly by a Detention Officer working at Brook House, an immigration detention centre operated by G4S located just behind Gatwick Airport.

2. The covertly recorded material showed scenes later described by the Immigration Minister as "*appalling*": a detainee with mental health issues being ridiculed and physically assaulted, an officer describing to a room of other staff his assault on a detainee, detainees being spoken of in depersonalised and derogatory terms using arguably racist language, a collective decision not to record use of force. Events seen in the footage are set out in more detail later in this judgment.

3. The misconduct filmed secretly at Brook House appeared to involve managers as well as regular officers, also medical staff. Further, in the period over which events were recorded there were no concerns raised by the Independent Monitoring Board (IMB) or Home Office staff located at Brook House, nor by Her Majesty's Inspectorate of Prisons (HMIP) which had visited during the relevant period and concluded that Brook House was making "excellent progress".

4. The first Claimant ("MA") originally issued proceedings under the "Urgent Applications" procedure in June 2017 seeking urgent interim relief in the form of an order for his release from custody, which was granted. Thereafter, and following the airing of the *Panorama* programme, proceedings were amended and later consolidated with those issued by the second Claimant ("BB"). MA and BB initially sought to challenge the failure of the Secretary of State for the Home Department ("SSHD") to order an investigation in compliance with his duty under Article 3. An Acknowledgement of Service was lodged by the SSHD on 20 February 2018 indicating an intention to contest the claim, on the basis that his investigatory duty (the existence of which, on the facts of this case, was not in dispute) had effectively been discharged by a number of separate enquiries undertaken by different bodies following the airing of the *Panorama* programme. Details of these enquiries are given later in this judgment.

5. Permission was granted by Holman J at a hearing on 22 May 2018, after which the Equality and Human Rights Commission ("EHRC") applied for, and was granted, permission to intervene.

6. The cases were listed for substantive hearing on 17 October 2018 but were adjourned by consent. This followed a decision by the SSHD to ask the Prisons and Probation Ombudsman ("PPO") to conduct a bespoke Special Investigation into the matters raised by the *Panorama* programme.

7. The issues that now remain between the parties concern the extent of the powers which it is said that the PPO should have now to ensure that her investigation fully discharges the SSHD's duty under Article 3. The Claimants and the EHRC contend that a compliant inquiry in the circumstances of this case necessitates (i) the power to compel the attendance of witnesses (ii) the obligation to hold at least some hearings in public

and (iii) properly funded representation for MA and BB during the investigation. The PPO's usual mode of investigation would not ordinarily encompass these elements.

Background

The Claimants

MA

8. MA is an Egyptian national who arrived in the UK in January 2014, as an unaccompanied child seeking asylum. His asylum claim was dismissed by a determination of the First-Tier Tribunal dated 8 October 2015.

9. On 5 October 2015 MA committed an offence of sexual assault when he pushed a young woman into the toilet in a café and kissed her. On 8 June 2016 MA was given a suspended sentence of 16 weeks suspended for twelve months. He was subsequently arrested in respect of further charges (which were later dropped). He was held on remand first in HMP Highdown and from 13 December 2016 in HMP Belmarsh. While on remand it was noted that he had a history of self-harm and of mental illness. In November 2016 he had taken an overdose and been hospitalised. On 30 January 2017 his thoughts about self-harm and suicide were noted and he was put under observation. He was prescribed antidepressants. On 3 February 2017 he was retained for observation in the Healthcare wing for a week. On 4-5 February 2017 MA self-harmed by cutting his wrists; he was found to be in possession of a noose.

10. After the further charges were dropped on 9 March 2017 MA remained in HMP Belmarsh at the direction of the SSHD in exercise of his powers under the Immigration Act 1971. On 5 April 2017 MA was transferred to Brook House where he remained until his release pursuant to the order of Cranston J on 15 June 2017.

BB

11. BB is from Somaliland. He came to the UK in 1994 aged 10 with his mother and siblings; the family were granted refugee status. His other family members now have British citizenship.

12. BB committed a series of offences including robbery and burglary, ultimately receiving a 3-year prison sentence. On 30 July 2015 his refugee status was revoked and a deportation order made. His appeal was dismissed on 29 June 2016. His solicitors made further representations on 7 June 2017 but these were refused as a fresh claim on 17 August 2017. An application for judicial review failed on 15 February 2018 but further representations remain outstanding.

13. At the end of BB's sentence in March 2015 he was held in immigration detention for a period of 2 years and 8 months until his release on 30 November 2017. Whilst in detention he was recorded as having mental health difficulties and was on medication. BB was at Brook House from October 2016 until 13 May 2017 when he was moved to The Verne IRC. BB was eventually released on immigration bail on 30 November 2017.

Brook House

14. Brook House is a purpose-built Immigration Removal Centre with a prison design, operated by G4S for the Home Office. It has four main wings, together with a discrete unit on the ground floor of one of the wings housing a "Care and Separation Unit" ("CSU") for detainees removed from association or who are temporarily confined.

15. Healthcare services are provided by NHS England and G4S Medical Services Limited. There is intended to be 24-hour cover for primary care as well as acute and emergency provision, including mental health cover provided by the Sussex NHS Partnership Trust, but the services are subject to chronic recruitment difficulties.

16. Support for detainees is also available through various charities including the Gatwick Detainees Welfare Group ("GDWG"), the Samaritans and the Red Cross.

17. The Home Office Immigration Enforcement Department has an office located in Brook House, with full time staff on-site. An explanation of the role of these staff was given by the Home Office to the Home Affairs Select Committee on 31 October 2017 as follows:

> "*The Home Office Immigration Enforcement on site in the IRCs carry out a dual role of (1) acting as the interface between detainees and their Home Office caseworkers and (2) monitoring service delivery to ensure that the standards, specifications and statutory requirements in the contacts with the Home Office are being met*"

The Independent Monitoring Board (IMB)

18. An IMB (known as a Visiting Committee in the context of immigration detention) is appointed by the SSHD under s.152 of the Immigration and Asylum Act 1999 for each detention centre. IMB members are volunteers. The functions of an IMB are set out in the Detention Centre Rules 2001 and include meetings at the detention centre 8-12 times per year, with visits by at least one member of the IMB each week.

19. IMB members have access to every part of the centre and to all of the centre's records. Amongst other things, they are required to satisfy themselves as to the state of the premises, the administration of the detention centre and the treatment of detainees and are obliged to inform the SSHD immediately of any abuse which comes to their knowledge.

20. There is a jointly agreed Memorandum of Understanding between IMBs and Home Office Immigration Enforcement set out in DSO 04/2014 (reissued in 2017) which includes the following statement of the role of an IMB:

> "*to ensure those held in the care of Immigration Enforcement are treated with humanity and respect and that it operates a safe and secure environment for detainees, staff and visitors alike" (para 3 of the MoU).*"

Her Majesty's Chief Inspector of Prisons (HMIP)

21. HMIP carried out an unannounced inspection of Brook House between 31 October and 11 November 2016, the report being published on 10 March 2017. The findings were largely positive: Brook House was reported as "reasonably good" and making "excellent progress".

22. The detention officer whose secret recordings were later shown on the *Panorama* programme was present at Brook House during the HMIP visit. In the programme, he draws a clear distinction between the HMIP's conclusions and his impression of the living and working environment at Brook House.

Alleged breaches of Article 3

(i) BBC Panorama Programme

23. Prior to the hearing, and for the purposes of preparing this judgment I have watched the *Panorama* programme in full, more than once. The following examples, included in a subsequent report by Verita for G4S (at Appendix H of the Lampard report, see further below), provide a flavour of what appears from the *Panorama* footage (the names of staff and detainees are anonymised in the report):

(i) Detention Custody Manager (DCM1) showing disrespectful and callous behaviour towards a detainee on spice whose eyes are rolling round *("Does your face taste nice" "Lay still you div"*). Not taking situation seriously/as medical issue: *"Scrotum"*.

(ii) Detention Custody Officer (DCO A): doing observations /suicide watch on Detainee A [this is MA]. DCO A claims he bent back fingers of Detainee A and banged his head up and down *"It was funny" "You're an attention seeker, you prick"*. DCO A confesses what he has done to other staff and no one challenges or bats an eyelid. In same section DCO B is asked what is the best way to deal with them - answers *"turn away, Hopefully they're swinging"*.

(iii) DCO C -– a Control and Restraint trainer, prior to a forcible removal (from which, in the event, officers are stood down) says others should use racist language *"N*****"*. Discussion of a removal *"Fuck him up round the corner" "Can't fuck about" "I'll scrub the CCTV" "He had his fucking chance"*

(iv) DCO D and DCO E- forcible removal of detainee with heart problems. DCO D says *"If he dies he dies"* DCO E: *"All you have to worry about, all you have to know is to roll his fucking head or hit him with a shield"*. Detainee wails and swears at officers. When returned from airport an unidentified DCO is heard to say, *"it's a fucking joke" "It's fucking wrong"*. Reporter enters cell of same detainee to find blood everywhere – detainee has cut arms, wrists and taken pills.

(v) DCM 1 says of a food refusing detainee that he isn't eating as protest *"he's a penis"*. Tells reporter not to record food refusal.

(vi) DCO F shouts at a detainee with mental health issues through the door *"clean this fucking window or I'll beat the fucking shit out of you" "If this keeps*

going I'm going to smash the fucking shit out of him" "you'll be in trouble boy". The detainee in question is so ill that he is taken to hospital and sectioned.

(vii) Another detainee with mental health issues throws milk at officers who respond *"for fuck's sake" "your fucking attitude depends on how it is going to be for you" "piss us off and you won't have a shower"*.

(viii) DCM 1; Nurse X; DCO E; DCO G: Film of emergency on E wing. Detainee A[MA] has tried to kill himself making a ligature with his own t-shirt and tried to swallow batteries. Detainee A says, *"I'll die". "I don't care what I do"* DCM 1 comments *"If he wants to suck batteries plug him up like a Duracell bunny"* Nurse X says, *"he's an arse basically"*. Reporter then does observations during which Detainee A tries to strangle self with own hands. DCO E comes to cell, holds Detainee A's head and says, *"I'm going to put you to fucking sleep. Don't move you fucking piece of shit"*. DCO E pushes his fingers into Detainee A's neck saying, *"Are you going to stop being an idiot yes or no"*. DCO G *"are you going to be man or a mouse"*. Reporter says *"easy DCO E"*. Later DCO E filmed saying *"that wasn't really C[ontrol] and R[estraint]"*. Nurse X doesn't mention restraint in her notes. In staff room DCO E says, *"if I killed a man, I wouldn't be bothered"*.

(ix) Later incident of Detainee A [MA] on the netting- a DCO when asked what should be done about Detainee A laughing says *"what DCO E did"*.

(ii) MA's allegations

24. MA's case is that events revealed by the *Panorama* programme were merely the tip of the iceberg so far as he is concerned. He alleges that the following matters individually and cumulatively amounted to inhuman and/or degrading treatment and/or punishment and/or torture, in breach of Article 3:

(1) MA maintains that he should never have been detained as he met the definition of an "Adult at Risk" (AAR) within the meaning of the Statutory Guidance issued under s 59 of the Immigration Act 2016 and the SSHD's policy in Chapter 55B of the Enforcement Instructions and Guidance ("the Policy").

(2) He says that there was a wholesale failure to abide by the key safeguards for mentally ill detainees and those identified as potential torture victims laid down in rules 34 and 35 of the Detention Centre Rules 2001 (the Rules) and in the AAR Statutory Guidance, and Policy by those taking administrative decisions to maintain his detention and by the medical practitioners who should have been caring for him.

(3) MA was known at the outset of immigration detention to be vulnerable, suffering from a serious mental illness and a suicide risk. There was no assessment within 24 hours as required by rule 34 and no rule 35 report in consequence.

(4) No rule 35 report was completed during the first six weeks of immigration detention and his detention was not considered in the context of his vulnerability under the Guidance and Policy at all. When a report was completed, on 13 April

2017, despite identifying him as a potential torture victim, the doctor was unsure whether detention was having a deleterious impact despite the recognition underpinning the AAR policy and rule 35 that victims of torture are at risk of harm in detention.

(5) There was both a systemic and operational failure to identify, protect and monitor MA as a vulnerable detainee in breach of the positive duties arising from Article 3 (see *R (HA) Nigeria v SSHD* [2012] EWHC 979 Admin at (70(f)).

(6) MA was detained without ensuring his mental health was properly assessed and considered. Such measures as were in place were not used effectively to diagnose and properly treat and manage his condition (see *R (MD) v SSHD* [2014] EWHC 2249 (Admin) at [142]). It is said that the failure to recognise MA's vulnerability and treat him accordingly amounted to a breach of both the negative and positive requirements of Article 3.

(7) MA was subjected to deliberate physical assaults and ill-treatment by officers while detained, at the very least on 9 April 2017 (by the officer's own admission and subsequent finding of the PSU, see further below); on 24 April and on 25 April 2017 when the assault was filmed as well as on 4 May 2017 when it was not captured on film. MA feared for his life and safety. The deliberate assaults and abuse caused both bodily and psychiatric injury; and were intended to and did degrade and debase him, arousing in him feelings of fear, anguish, and humiliation.

(8) MA was subject to specific threats to his life by DCO Paschali who whilst holding him down whispered in his ear *"Don't move you fucking piece of shit. I'm going to put you to fucking sleep"* (as shown in the *Panorama* programme). MA's suicidal ideation was the occasion for the physical and mental abuse. Paschali is recorded after this incident as saying *"we don't cringe at breaking bones. If I killed a man I wouldn't be bothered, I'd carry on"*.

(9) Other DCOs exhibited a total disregard for the risk of suicide and self- harm *("If he dies, he dies"; "hopefully he's swinging")*.

(10) According to the evidence of a psychiatrist, Dr Basu, the assaults and other abusive treatment were followed in each case by exacerbations in MA's suicidality, self-harm and mental health problems.

(11) In breach of rule 41 of the Detention Centre Rules 2001 force used was excessive, and in further breach of those Rules no record of the use of force was made on at least one occasion. In breach of the duty under Rule 45(2), staff did not report on the assaults to management, and indeed actively conspired in covering up the assaults and other abusive treatment. One nurse, rather than report abuse of which she was aware (as required by rule 45(2) of the Rules) is shown on *Panorama* conspiring with those who assaulted, humiliated and degraded him not to report the assaults and to cover them up.

(12) Medical staff lacked training and fell below the standards of competence and ethics to be expected in their treatment of MA. For example, a nurse recorded in the medical notes (wrongly and improperly) informing MA after at least two

assaults that his detention was being maintained for his own safety because of his self-harming and suicidal behaviour**.**

(13) Other staff failed to put in train any of the processes reasonably to be expected following assaults and mistreatment by officers and failed to give effect to the safeguarding procedures in place.

(14) MA was repeatedly put into isolation and removed from association without appropriate justification, and without appropriate notifications being given to MA within 2 hours (or at all) under rule 40(6) of the Rules, nor to the Secretary of State nor to a member of the visiting committee, in further breach of rule 40 of the Rules. It is said that removal from association and temporary confinement was used by officers as a means of deliberately debasing, humiliating or punishing MA in breach of rules 42 and 43 of the Rules and without any regard for the adverse impact on his mental health (see *Keenan v the United Kingdom* (2001) 33 EHRR 38).

(15) MA self-harmed through food refusal for extended and extraordinary periods of time. It is said that Guidelines which were required to be followed on the management of food-refusal were ignored and that records of food refusal were inaccurate.

(16) MA says that he was subjected to excessive and unlawful use of lock-down procedures in conditions of detention that were degrading and/or incompatible with human dignity and which subjected him to discriminatory treatment in breach of Article 9 and 14 ECHR and the Equality Act 2010.

(17) MA contends that he was was subjected to racism from officers (a G4S officer is recorded on the *Panorama* footage referring to a detainee as "nigger"), involving denigration of his Islamic faith and denial of a right to visit the mosque. He was subjected to dehumanising insults and treatment (for example swearing; and insults such as *"you fucking piece of shit"; "are you a man or a mouse"*; references to him acting like a baby and sucking on a dummy; not allowing him a shower, or opening the shower door and interrupting him when showering).

(iii) BB's allegations

25. BB alleges that he was subjected to regular (daily) abuse by officers, including being called a "prick" and being told to "get back to [his] own country". He says that untrue information suggesting that he had a conviction for sexual assault was leaked by officers to other detainees, putting him at risk of assault by them. He took spice, which was widely and freely available in Brook House, to escape his feelings.

26. On 13 May 2017 he was told that he was going to be moved to another centre. He did not want to go. The resulting incident is recorded in the *Panorama* programme. BB is shown putting a ligature around his neck and threatening to kill himself. Officers rush into his room. BB says that excessive force was used on him, unrecorded by the footage, when he was on the ground. His neck was grabbed, he could not breathe, his fingers were twisted, his face and chest were pressed for the floor by an officer sitting on him.

27. BB's case is that these events individually and cumulatively amounted to inhuman/degrading treatment and/or punishment/torture. He was later interviewed by the PSU during their investigation. It dismissed his claims as unfounded (see further below).

Subsequent investigations

28. A number of investigations were instigated and conducted immediately following the airing of the *Panorama* programme:

    a. On 21 November 2017, the Home Office requested Stephen Shaw CBE to extend the scope of his review, already underway, of conditions in immigration detention specifically to include the complaints of ill-treatment at Brook House detailed in the *Panorama* programme. Stephen Shaw indicated that while the allegations were relevant to his overall review he did not consider it within the scope of his review "*to investigate the circumstances of the specific incidents and allegations at Brook House*"**.** The report of that inquiry, entitled *Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons* (Cm 9661) was published in July 2018.

    b. On 22 November 2017, the Secretary of State appointed the Home Office Professional Standards Unit ("PSU") to investigate the incidents identified in the *Panorama* programme. The terms of reference did not require the PSU to address all of the matters now raised by MA and set out above; MA's representatives criticised the extent and manner of the PSU investigation at the time. In the event the PSU upheld most of the matters respecting MA which it did investigate. It dismissed all of BB's complaints.

    c. An investigation was conducted into the incidents broadcast in the *Panorama* programme by Sussex Police. On 7 November 2018, the Crown Prosecution Service wrote to MA indicating that no criminal charges were to be brought.

    d. In November 2017, G4S commissioned the company Verita to conduct what was described as an 'Independent Investigation' into the allegations of ill-treatment at Brook House. That led to the Lampard Investigation which published a report, in redacted form, in November 2018. Certain relevant findings are set out below.

29. MA has started civil proceedings. These are currently stayed by agreement between the parties. BB has not started civil proceedings.

The PSU's findings

30. The PSU report dated 22 February 2018 concluded that MA was "degraded", reflecting the language of Article 3 ECHR. Further, the PSU made a number of findings as to treatment of MA while detained which could amount to "inhuman treatment".

31. The PSU drew the following specific conclusions (references are to paragraphs of the report, emphasis added):

(1) "**It is more likely than not that DCO Sanders did hurt [MA] as he stated**" (para 7.20**)**. DCO Sanders had been secretly filmed boasting (on two occasions) to colleagues of abusing MA while MA was segregated under constant suicide and self-harm watch. DCO Sanders was the officer designated to supervise MA. He *"obviously went out to make sure no one was watching"* (his words – para 7.7) and then as the Claimant banged his head on a table, DCO Sanders used his hand to bang MA's head down on the table *"on the bounce"* (his words – para 7.7) and then held it there. Further, when MA sought to self-harm by pushing his own fingers into his neck, DCO Sanders deliberately took hold of his fingers and bent them back. DCO Sander's view stated on camera *"It was funny…You know you're hurting yourself cos you are attention seeking you little prick… I don't have any sympathy for any of them"* (his words again – para 7.7). The PSU concluded that these comments "**were derogatory and were likely to have degraded the claimant**" (para 7.21).

(2) Two officers failed in their statutory obligation under rule 45(2) of the Detention Centre Rules 2001 to inform the manager and the Secretary of State promptly of any abuse or impropriety coming to their knowledge (namely the assault on MA) (para 7.39).

(3) The actions of DCO Yan Paschali in holding MA's head between his knees while apparently "*digging his fingers in*" to MA's neck and whispering in his ear *"Don't move you fucking piece of shit. I'm going to put you to fucking sleep"* while MA made gasping noises as if he was struggling for breath did not involve a proportionate use of force; was not in accordance with any approved control and restraint technique; and "**there did not appear to be any justification for the level and type of force used against** [MA]" (paras 7.42 and 7.36). DSO Paschali had not been truthful in his account of what occurred (para 7.46). At para 7.47 the report concludes:

> "Mr Paschali threatened 'to put [MA] to sleep' while he used non-approved restraint techniques on [MA] and appeared to dig his fingers into [MA]'s neck while MA struggled to breathe, while he was held by two other officers. This was not in accordance with any Home Office policy or procedure. Therefore, on balance, **the allegation that DCO Paschali assaulted and threatened [MA] was substantiated**."

(4) At para 7.48 the report notes that other officers present also failed to comply with their obligations to report this conduct to their managers. Furthermore, "[t]**here was collusion by G4S staff not to record the events** in accordance with policy and procedure and therefore the allegation is substantiated" (para 7.65).

(5) "Officers comments made following the use of force appeared on balance, to **be derogatory towards [MA] and the allegation is substantiated**" (para 7.75).

The Verita investigation for G4S ("the Lampard Report")

32. As an internal inquiry conducted for G4S, it is accepted by all parties that the Lampard Report cannot be regarded as satisfying the requirements of an effective Article 3 investigation. In its published form the Lampard Report anonymised officers and detainees. Nevertheless, the issues which its authors identified (at Appendix 1 of the

report) are instructive: virtually all engage institutional/cultural/systemic questions, for instance:

- *A culture of menace towards some detainees and a conspiracy of silence and/or misrepresentation concerning incidents of violence or neglect.*
- *A number of employees [unnamed] have raised concerns and been assured issues would be resolved which have not been resolved. Officers labelled "snitches" or "grasses" can be singled out at the IRC, leaving some staff afraid to speak out about concerns to management."*
- *Unprofessional and/or insulting attitudes and poor behaviour demonstrated by a number of staff. This includes towards detainees with pre-existing mental health difficulties who are not treated appropriately at times by some staff at the IRC. This directly undermines the Home Office's policy that detainees with mental health issues can be "satisfactorily managed within the IRC.*
- *Poor attitudes demonstrated by one nurse, one detainee custody manager and one G4S restraint trainer and supervisor towards detainees. These attitudes were known to senior managers at G4S but have continued as has their supervision of detainees, some of whom are vulnerable.*
- *A poor attitude by at least two different detainee custody managers, towards food refusal by detainees. At least one incident of food refusal was covered up and deliberately not reported.*
- *There have been occasions where a number of detainee custody officers have mistreated detainees in their care, including deliberately hurting them. At least one incident of harm or mistreatment has been covered up because the events were deliberately not reported.*
- *A larger number of officers and other G4S employees have turned a blind eye to or helped to cover up those actions. This includes some managers and medical staff.*

(emphasis added)

33. Issues relating to staff and management culture and systems identified by the authors of the Lampard Report were not confined to those arising within G4S. The report also raised concerns about the attitude of the IMB in exercising its supervisory function, for instance (at para 14.18):

> "*…We were struck during the IMB meeting by a sense of collegiality between the IMB and G4S and a tendency on the part of IMB members to over-empathise with the G4S management team and the Home Office, rather than to hold them vigorously to account and press them on their plans for action to address concerns and make improvements at Brook House*."

34. Concerns were likewise expressed in relation to the role and function of Home Office staff at Brook House:

> "*The former director [of Brook House] told us that Home Office managers he dealt with during his time running Brook House up to September 2017 had been primarily concerned with how G4S supported the immigration removal process*." (para 14.39)

> "*The Home Office service delivery manager…also acknowledged that the Home Office had been more focused on those aspects of the contact with G4S that supported the delivery of immigration objectives..* " (para 14.41)
>
> "*Home Office managers also acknowledged that the Home Office monitoring of the performance of the contract at Brook House tended to be based on consideration of the individual elements of contract performance and compliance and that they had not taken an approach that examined and questioned the wider concerns of the care and welfare of detainees, their quality of life and experience of being detained in Brook House*" (para 14.42)
>
> "*The Home Office compliance manager told us that the overall welfare of detainees and the quality of life of detainees was not a matter he was required to report on to his managers*" (para 14.44)
>
> "*The Home Office on-site team enter the centre regularly and have regular contact with detainees, staff and managers. We believe they should take greater responsibility than they appear to have done in the past for monitoring the overall experience of detainees at Brook House and whether G4S is providing detainees with enough to occupy[y] their time and are adequately ensuring the overall welfare of detainees*." (para 14.46)

35. Immediately after the *Panorama* programme aired, G4S responded by suspending 10 staff, just under 10% of the total number of custodial staff then working at Brook House. Following on from the Lampard Report, 14 members of staff (including those that had been suspended) either resigned or were dismissed.

Home Affairs Select Committee inquiry

36. On 21 March 2019, the House of Commons Home Affairs Committee ("HASC") published its report, *Immigration Detention* (HC 913), following an inquiry which had been prompted by the *Panorama* programme. The HASC heard evidence from a number of current and former employees of G4S, the GDWG, HM Inspectorate of Prisons, Stephen Shaw, and anonymously from several immigration detainees. The report emphasised that serious systemic failures, and problems of organisational culture, leadership and management, appeared to have contributed to the ill-treatment of detainees at Brook House (references are to paragraphs of the report):

(1) The Committee identified *"serious problems with almost every element"* of the immigration detention process and indicated that *"substantial reforms*" were needed (para 20).

(2) Some of the failings identified by the Committee, particularly in the area of the treatment of Adults at Risk, were policy failings, as opposed to merely operational failings or failings of implementation (para 118).

(3) Evidence before the committee called into question the ability of oversight mechanisms in immigration detention centres to detect and prevent abuse. For example, the Committee noted that "*The most recent HMIP report (2017) [on Yarl's Wood] found that "there had been significant improvements at the centre" and that "there was little violence". However, the Committee also heard from a former Yarl's Wood detainee who described staff openly mocking her, and putting their fingers in her eyes after she collapsed*" (para 249).

(4) Staff and detainees at Brook House did not make use of the available whistleblowing channels because they *"simply do not trust the process, and have voiced concerns about confidentiality and potential repercussions to their safety"* (para 255). The Committee concluded that the Home Office should take immediate steps to remedy this state of affairs (para 256).

(5) Issues of poor organisational culture, which can contribute to poor outcomes for detainee welfare, may affect Home Office staff in addition to the previously recognised issues of G4S staff culture (para 260).

37. The HASC report concluded that the Home Office had *"utterly failed"* in its responsibility to oversee and monitor the safe and humane detention of individuals in the United Kingdom.

Article 3 investigatory duty – the law

38. ECHR Article 3 imposes a negative duty on the state to prevent individuals from being subjected to inhumane or degrading treatment. There is a corresponding positive obligation to investigate when the substantive prohibition has arguably been breached. The SSHD has always accepted that the Claimants' allegations arising from their treatment whilst detained at Brook House prima facie engages an obligation to investigate under Article 3.

39. The relevant principles applicable to the discharge of an Article 3 investigatory duty are not in dispute. In *AM v Secretary of State for the Home Department* [2009] UKHRR 973 the Court of Appeal approved the following requirements of any Article 3 investigation as submitted by counsel in that case (at [32]):

- The investigation should be capable of leading to the identification and punishment of those responsible

- It may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those involved in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

- It must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances;

- It must be thorough, in that the authorities must make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incidents and

- It must permit effective access for the complainant to the investigatory procedure.

40. A succinct description of the scope and purpose of an effective enquiry following an arguable breach of Article 2 (right to life) was given by Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [31]:

> "The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others"

41. This statement of the purpose of an Article 2 inquiry, with appropriate adaptations, has been held also to apply to the investigatory duty arising upon an arguable breach of Article 3 rights. – see *AM* per Sedley LJ at [4] and Elias LJ at [86]

42. Synthesising the principles to be derived from the above authorities, an effective Article 3 inquiry must:

(1) Be conducted by a person/body that is both institutionally and practically independent from the person(s) involved in events.

(2) ensure, so far as possible, that the full facts are brought to light, so as to uncover and expose culpable and discreditable conduct to public view and allay any unjustified suspicions of wrongdoing,

(3) permit effective access to the investigatory procedure for complainants,

(4) discover and rectify processes which have caused or contributed to Article 3 breaches (if established), in order that

(5) lessons may be learned, the better to minimise the risk of recurrence.

43. The "learning lessons" element of an Article 2/3 investigation is critical, as the purpose of the investigation is to buttress the substantive prohibition for the future. The best way to ensure future compliance is to learn lessons from the past. Depending upon the precise nature of the breaches this may involve looking into *"questions of system, management and institutional culture"* (*AM*, per Sedley LJ at [60].

44. The rationale for an independent inquiry engaging sufficient public scrutiny was summarised in this way by the ECtHR in in *Al-Skeini v UK* (2011) 53 EHRR 18 at [167]:

> "For an investigation … to be effective, it is necessary for the persons responsible for and carrying out the investigation to be

> independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities … may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

45. All parties were agreed that the requirements of an effective investigation, including the level of public scrutiny and the extent of victim involvement that will be necessary, will depend upon the facts of any particular case. As I have indicated above, there is no dispute about the applicable principles, the issues in this case turn on whether the particular facts of this case demand that wider powers be made available to the PPO now for the purposes of her bespoke investigation into these Claimants' allegations.

Scope and powers of the PPO Special Investigation

46. The PPO Special Investigation was announced on 21 September 2018. There is no dispute over the adequacy of the final Terms of Reference ("ToR"), which have taken into account representations from the Claimants and the EHRC.

47. The final ToR set for the PPO's investigation are as follows:

"Introduction

The Prisons and Probation Ombudsman (PPO) is commissioned to investigate the decisions, actions and circumstances surrounding the mistreatment of detainees broadcast in the BBC Panorama programme 'Undercover: Britain's Immigration Secrets' on 4 September 2017.

In particular it is to reach conclusions with regard to the treatment of detainees where there is credible evidence of mistreatment contrary to Article 3 ECHR and make recommendations. The investigation has been instigated in order to ensure that the investigative requirements of Article 3 ECHR are satisfied.

Definitions

For the purposes of these Terms of Reference:

"Mistreatment" is used to refer to treatment that is contrary to Article 3 ECHR, namely to torture or to inhuman or degrading treatment or punishment.

"Complainants" is used to refer to any individual who was detained at Brook House Immigration Removal Centre during the period 1 April 2017 to 31 August 2017 where

there is credible evidence of Mistreatment. There is no requirement for an individual to have made a specific complaint to the PPO.

Terms of Reference

1. To make findings as to the treatment of Complainants, including identifying whether there has been Mistreatment and identifying responsibility for any Mistreatment.

2. To examine whether existing methods, policies, practices and management arrangements (both of the Home Office and its contractors) caused or contributed to any identified Mistreatment.

3. To establish whether any changes to these methods, policies, practices and management arrangements would help to prevent a recurrence of any identified Mistreatment.

4. To establish whether any clinical issues caused or contributed to any identified Mistreatment.

5. To establish whether any changes to clinical care would help to prevent a recurrence of any identified Mistreatment.

6. To review the adequacy of the complaints and monitoring mechanisms provided by Home Office Immigration Enforcement and external bodies (including, but not limited to, the centre's independent monitoring board and statutory role of Her Majesty's Inspectorate of Prisons) in respect of any identified Mistreatment.

Required output of the Investigation

The PPO should prepare and publish a comprehensive written report covering areas 1-6 above, making clear recommendations to the Home Office and anybody that she considers appropriate, given their roles, duties and powers.

Timescale

The investigation should be undertaken with sufficient pace to enable resulting recommendations to be implemented as quickly and effectively as possible. It is expected, on the basis of current information, that the investigation will make its best endeavours to complete work and produce its report within 6 months.

Resources

Funding for the Investigation will be provided by the Home Office. Appropriate investigators will be appointed by the PPO to support her work and will be funded by the Home Office.

The Home Office will consider requests for funding by Complainants and will ensure that funding is provided where to do so is necessary to ensure that the investigation complies with the requirements of Article 3 ECHR."

48. The witness statements before me included the Third and Fourth statements of Frances Hardy, deputy Director at the Home Office, dealing with the scope of a PPO Special Investigation and comparing it (in terms of time and expense) with public inquiries set up under the Inquiries Act 2005. I also had a witness statement from Deborah Coles, Executive Director of the charity INQUEST, dealing with her experience of PPO investigations, in particular the limitations to which such investigations are generally subject.

49. It was common ground that the PPO would not ordinarily have powers to compel witness evidence. It is not currently clear whether any, and if so which, of her hearings will be held in public. No assurances have been provided to MA or BB that they will be provided with funding for representation; on the contrary the provision of travel expenses and the services of an interpreter are all that has been offered to-date.

Arguments on this application for judicial review

50. The Claimants' position, supported by the EHRC, is that an effective investigation discharging the Article 3 investigatory duty, cannot be achieved unless the PPO has broad powers from the outset, specifically (i) to compel attendance of witnesses and production of documents (ii) to hold public hearings and (iii) to authorise and fund proper representation of MA and BB enabling them to take an effective part in the process, seeing and commenting on evidence and either asking questions of witnesses themselves (via their representatives) or alternatively submitting lines of enquiry to the PPO for her to follow up with the witnesses.

51. The SSHD submits that the PPO's ordinary methods, tailored as they will be to the demands of this case, will sufficiently discharge the Article 3 duty when taken together with all the investigations that have already taken place since the *Panorama* programme aired. To the extent that the PPO may in future decide that her powers are insufficient as her investigation proceeds, then her powers can be enlarged as necessary at that time (characterised at the hearing as a "wait and see" approach).

52. Ms Giovannetti QC, for the SSHD, argued that to embark upon a full-blown inquiry under the Inquiries Act 2005 would be unduly time-consuming, when what is required is a speedily concluded investigation. It would also be disproportionately costly: a comparison of the time and cost of various public inquiries, compared to that of private investigations was to be found in the witness statement of Ms Hardy. Ms Giovanetti readily acknowledged, however, that my task at this hearing was not to determine whether there were good reasons not to hold a statutory inquiry, but rather whether the PPO Special Investigation will adequately discharge the SSHD's investigatory obligation under Article 3.

53. The Claimants and the EHRC focused their submissions on what they argued were the three minimum requirements of an effective investigation, identified above. I propose to take each in turn, before dealing lastly with the "wait and see" approach currently advocated by the SSHD.

(1) Power to compel witness attendance

54. There are a number of examples of cases where courts have determined that the Article 2 investigatory duty requires a power to compel attendance of witnesses. *Edwards v United Kingdom* (2002) 35 EHRR 487 concerned a private inquiry into the death of a prisoner at the hands of his cellmate. The ECtHR held that the inquiry had not discharged the Article 2 investigatory duty, amongst other reasons because

> "[it] had no power to compel witnesses and as a result two prison officers declined to attend. One of the prison officers had walked past the cell shortly before the death was discovered and the

> Inquiry considered that his evidence would have had potential significance" (para 78).

The ECtHR held that:

> "the lack of compulsion of witnesses who are either eye-witnesses or have material evidence related to the circumstances of a death must be regarded as diminishing the effectiveness of the Inquiry as an investigate mechanism." (para 79).

55. The power to compel the attendance of witnesses was also considered to be necessary in *R (Ali Zaki Mousa) v SSD (no 2)* [2013] EWHC 2941 ("*AZM2*"), a case concerning investigations into deaths in Iraq for which British soldiers were allegedly responsible. The Divisional Court held that compulsion was necessary where there was a real risk that witnesses accused of misconduct, or the colleagues of those accused, would otherwise be reluctant to give evidence. Sir John Thomas, then PQBD, observed at [15]:

> "It is always possible that … the military personnel involved will give evidence as to what happened in a meaningful way (as the Secretary of State hopes). However, there is a real risk that they will not; in our view the overwhelming probability is that soldiers will be reluctant to give evidence at all and certainly to give evidence that involves any significant criticism of a colleague. Thus a form of inquiry where such persons can be compelled to attend will be the only effective and fair way of determining what happened. In such circumstances it is clear that if, for example, allegations are put orally to a witness and unsatisfactory answers are given, then the Inspector will be entitled to draw adverse inferences when determining what happened. It is presently impossible to see how, taking into account the gravity of the allegations in the majority of these cases, an inquiry can be fair and effective if it does not have powers of compulsion over military personnel and be able to draw adverse inferences if such a witness gives an account that is not … credible."

56. *Re Finucane's Application for Judicial Review* [2019] UKSC 7, concerned a challenge to the efficacy of an Article 2 enquiry into the death of Patrick Finucane, a solicitor murdered by loyalist terrorists in Northern Ireland in 1989. In that case the lack of opportunity to compel the cooperation of witnesses was identified by the Supreme Court as a key shortcoming of the inquiry conducted by Sir Desmond de Silva (per Lord Kerr at [134] and [140]). The inability to compel the cooperation of witnesses deprived Sir Desmond of the means properly to identify those involved in Mr Finucane's death.

57. Ms Giovanetti argued that an Article 2 investigation raises different considerations to those arising in an Article 3 case: in Article 2 cases the deceased will clearly be unable to give any account of what happened; it is accordingly vital that others present should attend and give evidence of what they saw and/or did which may have lead to the death. The same is not true of an Article 3 investigation, where complainants will be able to attend and given an account of what happened to them, identifying who was responsible.

58. Ms Giovanetti argued that it was insufficient to show a risk that the PPO's investigation might not be Article 3 compliant without a power to compel witnesses. She maintained that before the court could intervene and require that power it would have to be wholly satisfied that there were critical witnesses who would not attend voluntarily and without whose presence the inquiry could not discharge its Article 3 function. In response Mr Armstrong, for BB, referred me to *AZM2* where at [15] the court spoke in terms of a "real risk" that military personnel potentially responsible for deaths in Iraq would not attend. That was sufficient to require a form of inquiry where such persons could be compelled to attend, he submitted.

59. Ms Giovanetti pointed out that *AZM2* was an Article 2 case, where personnel were required to give evidence about a death, in circumstances where the deceased could not. There was no Article 3 case, she submitted, where the court had concluded that compulsion was necessary. I cannot accept this submission as the Divisional Court in *AZM2* clearly contemplated that the Article 2 inquiry template would be employed subsequently for the Article 3 cases also, albeit that the reasoning on this point is set out only briefly later in the judgment (at [45]).

60. I accept that not every effective Article 2/3 investigation will necessitate a power to compel the attendance of witnesses. Whilst most Article 2 investigations are likely to require it, for the reasons already given, few Article 3 cases may do so.

61. I have borne in mind also that an Article 3 investigation can only be *"parasitic on alleged substantive breaches of the Article"* (per Longmore LJ in *AM* at [91]) and that its efficacy must therefore be assessed by reference to such breaches alone. Other complainants may exist and/or there may be wider considerations calling for an inquiry into activities at Brook House but those are outside the remit of this court on this application (a point also emphasised by Elias LJ in *AM* at [110]).

62. I am nevertheless satisfied that in this case an effective inquiry into the allegations of abuse of MA and BB at Brook House should have a power to compel the attendance of witnesses. These are the particular aspects that have driven me to this conclusion:

(1) The egregious nature of the breaches, the multiplicity and regularity of the abusive events and the openness of the activity within the units. These were not isolated incidents of abuse against MA and (allegedly) BB by one person, done in secret behind a closed door; they were repeated events, in front of others, where the perpetrators were managers and trainers, as well as ordinary officers. A nurse was involved on at least one occasion. The abuse was openly conducted in full view of other staff and detainees. Use of force was not recorded as it should have been. There was no contemporaneous complaint made by staff or by detainees. Neither the IMB, Home Office staff based at Brook House nor the HMIP on its visits noticed anything amiss.

(2) In these circumstances the questions to be asked about the alleged abuse will not be confined to whether particular staff abused these detainees as shown on the *Panorama* programme and as further alleged by MA and BB, but why and how they came to do it so openly, and so regularly, without complaint or criticism from other staff or detainees and without other supervising staff and/or monitoring bodies picking up on it? The answers to these questions must start with the people who perpetrated and/or witnessed the activity.

(3) There is very good reason to believe that perpetrators and other former G4S staff will not voluntarily attend to give evidence to the PPO. Whilst the SSHD has confirmed that all current Home Office and G4S staff will make every effort to respond to any request for evidence the PPO makes, many of those who were at Brook House in 2017 are no longer employed by G4S. They were dismissed or resigned following the Lampard Report (see above). One senior member of staff declined on legal advice to attend the PSU investigation. Another refused to speak to the Lampard enquiry. Those who feel themselves likely to be exposed as perpetrators of abuse are highly unlikely to attend voluntarily; others who witnessed events may refuse from a sense of misplaced loyalty or because they feel exposed to the possibility of criticism for their failure to act. Reports have commented on some staff exerting a "malign and undue influence" (Lampard Report, see above) and on the reluctance to engage with whistleblowing arrangements (as observed by Stephen Shaw in his Review). Ms Giovanetti submitted that it need not matter if some witnesses declined to attend, pointing out that criminal courts frequently reach conclusions about the actions of people who have been absent from trial or from whom they have not heard evidence. That is no doubt correct, so far as it goes, but a criminal trial is not looking to identify lessons to be learned, an Article 3 inquiry is.

(4) Finally, immigration detainees are a uniquely vulnerable group of people. They are not convicted persons serving a sentence, they are not being detained as punishment. Unlike most prisoners, they do not know for how long they are going to be confined. Detention under these conditions is diminishing and depersonalising enough, but it is unacceptably degrading and dehumanising where there is repeated and apparently casual abuse on the part of staff employed by the state to supervise and look after such detainees. It is right, in those circumstances, to afford the abused detainee an opportunity to see and confront their abuser on equal terms, as a means of restoring dignity and respect to the person from whom it has been so wholly stripped away. This exposure and confrontation is an important psychological restorative. In other cases this restorative function may be secured through criminal proceedings but in the case of abuse at Brook House in 2017 a criminal investigation has resulted in no charges being brought.

63. In my view the power to compel witnesses in these circumstances is necessary to satisfy each of elements (2), (4) and (5) of an effective investigation identified at paragraph [42] above. First, to establish the full facts: whilst the PSU and Lampard investigations interviewed (some of) the alleged perpetrators, their evidence was not shown to the Claimants for comment, and the Claimants had no opportunity to see or confront their (alleged) abusers. Even if the material garnered to-date from alleged perpetrators and others about events of mistreatment of MA and BB at Brook House could be said to have uncovered full facts (which must be doubtful, for reasons already given), the full extent of the culpable and discreditable behaviour has not been exposed to public view. The allegations made by MA and BB go much wider than events shown in the *Panorama* programme. The full extent of Article 3 abuse said to have been experienced by both Claimants needs to be investigated.

64. Next, the evidence of former G4S staff (as well as current staff, whom it is understood will attend voluntarily) is necessary to identify management and systemic issues so as to arrive at a better understanding of how the particular repeated and apparently open mistreatment of these Claimants came to happen (to the extent that it did, which will be a matter for the PPO to determine). Taken against the background of at least 3 previous PPO special investigations where recommendations were made and apparently implemented, the abusive treatment of MA and (allegedly also) BB at Brook House (described in argument by Ms Harrison as "recalcitrant") suggests that the root causes have never been identified and addressed. Mr Shaw himself seemed to have reached this view in his evidence given to the HASC on 11 September 2018:

> "*As I say, I am tired of this in a way. I think it is now 15 years ago that I did the first review for the Government of abusiveness that had not been identified by the formal oversight mechanisms, had not been seen by management and had been revealed by an undercover reporter. The means by what was revealed at Brook House – leaving aside the appalling nature of it – came to public view was exactly the same as at Yarl's Wood two or three years ago and exactly the same as at Yarl's Wood and Oakington in the early 2000s. Therefore, we have not solved the problem*."

(2) Public hearings

65. A sufficient element of public scrutiny is a minimum requirement for an effective, and therefore Article 3-compliant, investigation: *R (L) v Justice Secretary* [2009] 1 AC588 per Lord Brown at [107]; see also *Al-Skeini* quoted above. As the ECtHR observed in *Anguelova v Bulgaria* (2004) 38 EHRR 31 at para140 "*The degree of public scrutiny required may well vary from case to case*". What is required is "*a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts"*.

66. Whether or not "*public scrutiny*" requires hearings to be held in public depends on the facts of an individual case. In some cases publication of the final report may be sufficient to secure compliance with Article 3. In *L* Lord Brown observed that, generally speaking, an investigation into a near-suicide in custody would not need to be held in public, but he went on to give two examples where that was not so: (i) where witnesses prove uncooperative; and (ii) where *"egregious failures become manifest"* (at [108]).

67. In *R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), the Divisional Court concluded that, in order to meet the requirements of Article 2, the inquiries into deaths of Iraqis for which British soldiers were allegedly responsible were, so far as possible, to be accessible to the public, when they examined *"State responsibility for the death, including the instruction, training and supervision given to soldiers undertaking such tasks"* (at [187]). The Divisional Court held that the inquiries should be open to anyone who wished to watch.

68. The PPO has stated that the methodology which she intends to adopt for her Special Investigation in this case will be similar to her current methodology. To-date, this

appears to involve holding private one-to-one meetings together with open "seminars" for NGOs and other interested organisations. In her Third witness statement Ms Hardy observes that *"the Home Office is supportive of the PPO holding..elements of its investigations in public.."*, whilst pointing out that "*[t]he PPO has made it clear..that an investigation which is wholly carried out in public is not suited to her organisation's methodology…"*

69. I would have significant concerns about the prospect of key witnesses in this case being asked questions by the PPO privately:

(i) As indicated above, the abuse by staff – even if it is confined to that which is shown on *Panorama* – was particularly worrying, warranting the description of "egregious failures" (per Lord Brown in *L*). It seemed routine and widespread yet went apparently unremarked by Home Office staff and IMB observers present on the unit and by the HMIP on an unannounced visit. There is a serious issue as to whether private hearings could secure sufficient accountability, allay suspicions of state tolerance of mistreatment of the weak, and ultimately maintain public confidence in the rule of law.

(ii) Public denunciation of those who did wrong, together with public exoneration of those who did not, may also serve to buttress the on-site whistleblowing and complaints processes. The Lampard Report, the Shaw Review and the HASC report all drew attention to a lack of trust and confidence in those systems.

(iii) A detention centre, with its population of vulnerable persons, is a place where erosion of the rule of law may be thought to be both particularly likely and (because of that) particularly dangerous. As Mr Armstrong QC, for BB, pointed out in his written submissions, detainees are frequently subject to hostile political and media rhetoric; the public at large do not in general care about welfare in detention. In those circumstances it may be thought to be of especial importance that detainees' rights should be publicly vindicated and the rule of law thus publicly upheld.

70. For these reasons I agree with Mr Squires QC's submissions for the EHRC that significant public scrutiny of the PPO's Special Investigation will be required. Having said this, I am firmly of the view that it is not for me in these proceedings to prescribe which of the PPO's hearings should be in public; I am clear, however, that the power to do so, with sufficient funds provided for the purpose, must be afforded to her. The precise format of the PPO's proposed enquiry in this case is not yet clear. I note, in this respect, the contents of a letter sent to the court by the PPO on the eve of the hearing. In it, she refers to the appointment to her investigation of Professor David Feldman QC (Emeritus Professor of English Law at Cambridge University) whose input she is specifically seeking *"on how to ensure that the investigation meets every requirement of Article 3"*. It will be for the PPO to determine (with the advice of Professor Feldman) what the Article 3 investigative duty requires in terms of public hearings.

(3) Victim involvement and representation

71. One of the purposes of an Article 2/3 investigatory duty is to safeguard victims' interests. In *Edwards*, the ECtHR found that the interests of the parents of the young prisoner who had died in custody had not been sufficiently protected, because they had not been allowed adequate participation in the enquiry:

> "The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the Inquiry Panel. They had to wait until the publication of the final version of the Inquiry Report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject-matter of the Inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests." (at para 84)

72. In *AZM2* the Divisional Court indicated that families should be able to attend and to suggest questions and lines of enquiry to the inspector conducting the investigation, although this would not necessarily extend to a right to ask questions themselves (at [37]-[38]). The court made it plain that proper funding would be required to secure effective involvement by the victim/family in the inquiry process, and that this required

> "legal assistance…so that the families can raise issues with the Inspector and can properly give their own evidence" (at [42]).

73. The court in *AZM2* placed importance upon the necessity for probing questions to be asked to test the accuracy, credibility and reliability of witness evidence:

> "Given the type of inquiry we envisage, with a highly experienced lawyer or retired judge conducting the examination of witnesses, we do not consider that it is necessary we should stipulate that any of those interested have a right to ask their own questions, as distinct from suggesting to the Inspector the questions to be asked" (at [38])

74. In the present case an assessment will need to be made of witness' reliability and credibility in relation to the allegations of abuse made by MA and BB. It is important to remember that they make wider allegations of misconduct than appear from the *Panorama* programme. Moreover in BB's case the PSU dismissed all his allegations, which the PPO will now need to re-evaluate. Detailed questioning, informed by the complainants' comments on the evidence, will be necessary. That cannot be done by MA and BB acting alone, even with the assistance of an interpreter; it requires expert representation. Moreover the representatives need to be able to see, take instructions about and thereafter comment on evidence given by witnesses who are said either to have perpetrated or witnessed the abuse on their client. At a minimum they need to be able to suggest lines of questioning for relevant witnesses.

75. There is a further consideration in Article 3 cases such as this one. I have referred above to the importance which, in my view, Article 3 by implication attaches to a psychological restoration for the abused individual. When dignity and humanity has been stripped one purpose of an effective investigation must be to restore what has been taken away through identifying and confronting those responsible, so far as it is possible. How is that to be done in any meaningful way here unless MA and BB, non-lawyers where English is not their first language, are enabled through representation to meet their (alleged) abusers on equal terms? An interpreter is essential, as the Secretary

of State has already recognised, likewise assistance with transport to the hearings. But that alone is not enough if MA and BB are properly to identify and confront the abuse which they say was meted out to them; for that, they need representation, which must be funded.

The proposed "wait and see" approach

76. As I understand it the SSHD's primary position is that his investigatory duty under Article 3 has been discharged by a combination of all existing investigations and enquiries; nevertheless and without prejudice to that position, he has now agreed to a Special Investigation conducted by the PPO. Thus even if, which he still does not accept, the various proceedings and investigations to-date have been insufficient to discharge the duty, any deficiency will be made up by the PPO's current inquiry.

77. Ms Giovanetti did not accept, therefore, that the PPO needed any further powers in order for her Special Investigation to discharge the Article 3 duty, at this stage. She submitted that it was premature for the court to find that the PPO would be incapable of conducting an effective Article 3 investigation before the Special Investigation had started to gather evidence. She pointed out that it would be possible later on to convert the PPO's investigation into an Inquiry under s.15 of the 2005 Act, if required. A full inquiry under s.1 of the Act would be unnecessarily time-consuming and overly expensive.

78. I was referred in this respect to the discussion at paras 2.76-2.79 of *Public Inquiries*, 2011, by Jason Beer QC, in particular at 2.85 where it where it is suggested that the full extent of the Inquiry Rules 2006 do not apply to inquiries converted under s.15 of the 2005 Act. When I enquired at the hearing I was told that the PPO's investigation is now underway, albeit still in the early stages, accordingly it could be converted under s.15 so as to obtain a power to compel witnesses; there would be no need to convene a fresh inquiry under s.1 of the 2005 Act engaging the full requirements of all the Rules.

79. The Claimants and EHRC submitted that, it being clear now that further powers will be required, then there is no sense in waiting. The power to compel should be available to the PPO now, they said, there should be no "wait and see". Mr Armstrong made the further point that there is a certain inertia built into any process which, once underway, will militate against a change of direction. The PPO herself has already said that her processes are not designed to accommodate the demands of a full public inquiry, which suggests that there may be even less inclination to call later for a change in her powers, if that change is not one that her procedures can easily adapt to meet.

Conclusion

80. In this case I am satisfied that there is a real risk amounting an overwhelming probability that former G4S staff will not attend voluntarily to give evidence and that the PPO's investigation will, as a result and for the reasons discussed above, fail to ensure an effective Article 3 investigation. In my view the PPO must have a power to compel witness attendance.

81. It will be for the PPO to determine which hearings should be held in public so as to secure full accountability and to ensure that MA and BB's interests are fully protected, but she should have both the power and the funding to do so as and when she requires.

I have set out above my concerns in this respect. Likewise, in relation to representation: for the reasons I have given, in my view MA and BB must be afforded properly-funded representation at least to enable them to review and comment on witness evidence and to direct lines of enquiry for the PPO and her team to follow up.

82. The ToR for the PPO's Special Investigation having been agreed, I am told that her investigation has now started. In view of my conclusions above, and the ability to convert under s.15 of the 2005 Act now, I can see no justification for waiting to augment the powers available to her. It will be a matter for the PPO the extent to which she makes use of these powers or permits the Claimants' representatives to assist her by asking questions of witnesses themselves.

83. I will hear the parties as to the form of order required to give effect to this decision, if it cannot be agreed.