The Brook House Inquiry: Continuing Pressure for Reform of the Article 3 Systems Duty
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The Brook House Inquiry into the inhuman and degrading treatment of detainees uncovered by the BBC's *Panorama* in 2017 held hearings from November 2021 until 6th April 2022 and its report was published on 19 September 2023.

1. In May 2017 I was instructed by Toufique Hossain and Alex Schymyck, then at Duncan Lewis solicitors, to bring a claim for judicial review of a man detained at Brook House. The client was unable to give us a full picture, but from what we were able to glean, it seemed he was being subjected to inhuman and degrading treatment in that he was mentally ill, had other vulnerabilities, and was experiencing an intense level of suffering resulting in almost daily self-harm and suicide attempts. He brought a claim for judicial review challenging the lawfulness of his detention inter alia on the ground of a prohibition on inhuman and degrading treatment in article 3 ECHR relying on what was already a body of case law on inhuman and degrading treatment in immigration detention which included: (***R (BA) v SSHD*** [2011] EWHC 2748 (Admin); ***R (S) v Secretary of State for the Home Department*** [2011] EWHC 2120 (Admin).*;* ***R (HA) v SSHD*** ([2012] EWHC 979***, R (D) v SSHD*** [2012] EWHC 2501 (Admin) and *R* ***(MD) v SSHD*** ([2014] EWHC 2249). There have subsequently been two further article 3 cases on immigration detention: ***R (VC) v SSHD*** [2018] 1 WLR 478 (appeal to Supreme Court conceded on basis of article 3 breach) and ***R(ARF) v SSHD*** [2017] EWHC 10 (QB). We were, thankfully able to get an urgent hearing of an application for an interim order for release of the Claimant and, although that was resisted by the Secretary of State, Cranston J directed his release. The remainder of the case was then due to determine the lawfulness of his detention, including any article 3 breach.

2. The five earlier High Court cases on article 3 breaches in immigration detention had already by this point in time led the government in 2016 to ask Stephen Shaw to make recommendations to address the findings of the High Court. In Stephen Shaw's 2016 review (following a visit on 22 May 2015)[1], he asked Jeremy Johnson QC (as he was) to review these cases. Mr Johnson's report (at Appendix 4) was summarised at page 108 of Stephen Shaw's report, including the following points:
    - The nature and pattern of the findings "**tend to suggest that these cases may be symptomatic of underlying systemic failings** (as opposed to being wholly attributable to individual failings on the part of the clinicians or public servants who were involved in the particular cases)".
    - None of the findings was attributed to a failing in the legislative framework or policy. Nor was there any finding of a deliberate intention to cause harm.
    - The findings focus upon a lack of healthcare assessment and treatment: "The nature and pattern of findings are such that they are more likely to be a **reflection of a systemic problem** (i.e. insufficient medical – particularly psychiatric – provision) rather than individual failings."
    - Explicitly in two cases, and implicitly in others, there are findings relating to a failure in communication between the immigration removal centre and the Home Office: "An important example concerns the compilation and use of rule 35 reports …"
    - In each of the cases the detention of the vulnerable and mentally ill claimant was unlawful as chapter 55 of the policy had not been properly applied. This related to a number of detention reviews over long periods of time:

3. This report in 2016 reflected what NGOs like Medical Justice, and indeed those who had been bringing litigation on behalf of detainees had long known and pointed out to those in authority: that

[1] Shaw Review (publishing.service.gov.uk)

there were fundamental problems in the systems that are designed to protect vulnerable people in detention from harm.

4. A history of the litigation on rules 34 and 35 of the Detention Centre Rules 2001 exhibits the chronic failure of these protective systems. Rules 33-35 together with the Statutory *Adults at Risk* policy (and previous policies) provide the principal safeguards against the mistreatment of vulnerable detainees by immigration detention. Rule 34 of the DCR 2001 provides:

> (1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre

Rule 35 provides:

> (1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> (2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
>
> (5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.

A summary of some of the litigation around the detention of vulnerable people displays the continuing failure over more than 15 years in the build up to the Inquiry.

Year	**Case**	**Issues and findings**
2006	*HK (Turkey) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin) (Also called *D and K v SSHD*)	SSHD breached rules 34 and 35 of the DCR 2001by denying detainees (who alleged that they were torture victims) medical treatment within 24 hours of their admission to Oakington Detention Centre. SSHD's conduct was "*not a rare and regrettable lapse in the circumstances of these two cases. Rather it reflected the cross-the-board failure to give effect to the requirements of Rule 34 (and applicable Standards): the [Home Secretary] regarding compliance as neither "necessary nor appropriate". I repeat what I have said earlier: that is not acceptable."* [95] The SSHD displayed a "*disinclination to abide by the statutory Rules*" [97].
2007	*R. (on the application of MH (Iraq)) v Secretary of State for the Home Department* [2007] EWHC 2134 (Admin)	SSHD failed to apply policy that persons suffering from mental illness are normally considered suitable for detention in only very exceptional circumstances. SSHD's decision did "*not indicate that any consideration was given to the implications of the diagnosis… . It simply says that there was at that time no risk of suicide. That is, in the light of the policy, insufficient*" (at [48] per Beatson J).

2008	*R. (on the application of B) v Secretary of State for the Home Department* [2008] EWHC 364 (Admin)	SSHD failed to undertake a physical and mental examination of a torture victim within 24 hours of her admission to Yarl's Wood IRC and failed to assess the Claimant's allegation that she had been tortured abroad. The HO "*failed to apply its own policy to the claimant without any reasonable justification or excuse and acted unlawfully by such failure*." [33]. Further, as to policy on reporting torture, *"…the real policy was not articulated and was not accessible to those [detainees] who would be affected by it… If a policy impacts upon detention it must, under Article 5 of the ECHR be accessible… The policy was not accessible and cannot therefore be relied on*." [34]
2009	*R. (on the application of Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin) (later went to Court of Appeal)	SSHD failed to assess the Claimant's mental health and therefore failed engage with his own policy not to detain mentally ill persons unless there were "very exceptional circumstances". The evidence of the Home Office's official as to the assessment of the Claimant's mental health "*gives the appearance of an* ex post facto *rationalisation and is unsupported by the contemporary records"* (at [65] per Cranston J).
2010	*OM (Algeria) v Secretary of State for the Home Department* [2010] EWHC 65 (Admin)	SSHD failed to apply policy that persons suffering from mental illness are normally considered suitable for detention in only very exceptional circumstances. The Claimant suffered from a mental illness for the purposes of the policy and a presumption against detention applied. The Court found it "*striking*" that "*hardly any*" of the detention reviews completed by the Home Office made "*any reference at all to the claimant's mental condition as a factor in deciding whether detention is to be maintained*" (at [37]). SSHD had "*failed to establish that the claimant's detention was other than arbitrary*" (at [45]).
2010	*R. (on the application of MC (Algeria)) v Secretary of State for the Home Department* [2010] EWCA Civ 347	SSHD failed to consider policy that mentally ill persons should only be detained in very exceptional circumstances in detaining the Claimant. The SSHD's attempt to argue that the Claimant suffered from a personality disorder rather than a mental illness was "an ex post facto attempt to justify [its] inexcusable delay… in obtaining a psychiatric assessment of the Claimant" [43]. This was a "very troubling case" The [Home Secretary] could, and should, have acted with greater diligence" during the Claimant's detention ([68] and [70]).
2010	*R. (on the application of O) v Secretary of State for the Home Department* [2010] EWHC 709 (Admin)	Order made for the release of a failed asylum seeker, with conditions attached, as the grounds relied on to justify his continued detention pending his removal were not supported by evidence.
2010	*R. (on the application of Nukajam) v Secretary of State for the Home Department* [2010] EWHC 20 (Admin)	Detention of family prior to removal was unlawful and in breach of the European Convention on Human Rights 1950 art.5, as the original basis for the detention was flawed due to the failure of the United Kingdom Border Agency to act in accordance with the policy of the Secretary of State on the administration of anti-malarial drugs prior to removal.

2011	*R. (on the application of Raki) v Secretary of State for the Home Department* [2011] EWHC 2421 (Admin)	No prospect of an emergency travel document within a reasonable period of time, four years and seven months detention self-evidently unreasonable, and unlawful.
2011	*R. (on the application of Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23	Detention pending deportation unlawful by reason of failure to carry out reviews as required by published policy.
2011	*R. (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245; [2011] UKSC 12	Operation of secret blanket policy of detaining all FNPs at expiry of sentence unlawful.
2011	*R. (on the application of S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin)	Detention pending deportation of detainee who suffered from mental illness had been unlawful and in breach of art.3 and art.5 since (i) the UKBA had failed to notify him of the deportation order; (ii) SSHD had failed to follow her own policies on the detention of those with mental health issues; (iii) the circumstances of his detention amounted to inhuman or degrading treatment.
2011	*R. (on the application of T) v Secretary of State for the Home Department* [2011] EWHC 370 (Admin)	Detention pending removal as an overstayer had been unlawful where SSHD failed to have regard to policy that those suffering from serious medical conditions, were suitable for detention only in very exceptional circumstances.
2011	*R. (on the application of Qader) v Secretary of State for the Home Department* [2011] EWHC 1956 (Admin)	Detention unlawful for the period during which it was based on a policy other than the published policy.
2012	*R. (on the application of AM (Angola)) v Secretary of State for the Home Department* [2012] EWCA Civ 521	SSHD breached her published policy by detaining an asylum seeker despite there being independent evidence that the detainee had been subjected to torture in Angola. SSHD liable for false imprisonment.
2012	*R. (on the application of Anam) v Secretary of State for the Home Department (No.2)* [2012] EWHC 1770 (Admin)	C's immigration detention, which had previously been declared to be unlawful on the ground that the secretary of state had failed to consider the implications of departmental policy concerning the detention of those who were mentally ill, had remained unlawful: those responsible for his detention had failed to take account of a medical report which dealt with the effect that detention was having on his mental health.
2012	*R. (on the application of D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin)	SSHD's failure to treat a detainee's mental health condition adequately whilst in immigration removal centres breached PSED under Equality Act 2010 s.149, its duty under the UKBA Enforcement Guidance and Instructions Chapter 55.10, and the detainee's rights under art.3 and art.8 ECHR.
2012	*R. (on the application of He) v Secretary of State for the Home Department* [2012] EWHC 3628 (Admin)	Unlawful detention for a period of 13 days when his detention review was missed because of delays transferring his file.
2012	*R. (on the application of EH) v Secretary of State for the Home*	Unlawful failure to consider whether an asylum seeker's detention should have continued under the terms of her mental health policy,

	Department [2012] EWHC 2569 (Admin)	given evidence that the asylum seeker had been suffering from a serious mental illness.
2013	*R. (on the application of EO) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin)	The Secretary of State breached her own policy in respect to the detention of victims of torture to the extent that the decision to detain the Claimants was unlawful.
2013	*Nyang v G4S Care & Justice Services Ltd* [2013] EWHC 3946 (QB)	Care of a detainee in an IRC had been negligent in that a doctor and mental health nurse had failed to carry out an adequate mental health assessment and a supervising officer had failed to initiate a further assessment process, though not causative of the injuries sustained by the detainee when he broke his spine after deliberately running into a wall.
2014	*R. (on the application of Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634	"Quick processing criteria" in the Detained Fast-Track Processes Guidance pending their appeals against refusal of their asylum claims did not meet the clarity and transparency requirements in *Lumba*.
2014	*R. (on the application of MD) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin)	Detention of man suffering from a mental illness unlawful both at common law and under art.5 and 3. SSHD failed properly to apply her own policy in relation to those suffering from mental illness by not taking steps to inform herself of the nature of the condition and whether it could be satisfactorily managed in detention.
2014	*R. (on the application of Alemi) v Secretary of State for the Home Department* [2014] EWHC 3858 (Admin)	Afghan national's detention pending deportation became unlawful after SSHD received a psychiatrist's report that he was suffering from a mental illness and should be placed in a secure unit.
2014	*R. (on the application of DK) v Secretary of State for the Home Department* [2014] EWHC 3257 (Admin)	"There had been a breach of r.34, as he had been seen by a nurse not a GP, which rendered his detention unlawful. His detention was unlawful from 24 hours after his admission until 5-6 weeks later when a r.34 examination was carried out."
2014	*Mustafa Abdi (formerly known as MA (Somalia)) v Secretary of State for the Home Department* [2014] EWHC 2641 (Admin)	Detention unlawful for the final nine months prior to release (in a four-year, nine month detention).
2015	*Abraha v Secretary of State for the Home Department* [2015] EWHC 1980 (Admin)	SSHD had failed to comply with its duty of candour and co-operation with the court. Detention unlawful where no realistic prospect of deportation.
2015	*R. (on the application of S) v Secretary of State for the Home Department* [2015] EWHC 2063 (Admin)	C unlawfully detained for two months under the Detained Fast-Track procedure despite independent evidence under the DCR 2001 r.35 that she had been a victim of torture."
2015	*Da Silva v Secretary of State for the Home Department* [2015] EWHC 1157 (Admin)	Man falsely imprisoned though only nominal damages because, if he had not been detained in immigration detention his mental illness would have required his detention in a psychiatric hospital.
2015	*R. (on the application of AG (Somalia)) v Secretary of State for the Home Department* [2015] EWHC 1309 (Admin)	SSHD acted with conspicuous unfairness when failing to disclose relevant information relating to an asylum seeker's family members, who had been regarded as credible witnesses for the purposes of their own asylum claims. That breach of public law duty bore upon, and was relevant to, the decision to detain the asylum seeker pending

		deportation, and had caused him to be detained longer than he should have been.
2015	*Xue v Secretary of State for the Home Department* [2015] EWHC 825 (Admin)	C unlawfully detained pending deportation as her continued detention, in the light of significant health problems which reduced the risk of her absconding or committing further offences, had not been reasonable in all the circumstances.
2016	*B v Home Office* [2016] EWHC 1080 (QB)	During 2008 and 2009 a mother and three children were unlawfully detained pending their removal from the UK with their father, who was subject to a deportation order. SSHD had not applied policy that detention could only be used for children when necessary and every alternative had been considered.
2016	*R. (on the application of O) v Secretary of State for the Home Department* [2016] 1 WLR 1717; [2016] UKSC 19	Supreme Court considered a Home Office policy relating to the detention of the mentally ill pending deportation. Failed asylum seeker's detention pending deportation had been procedurally flawed, (albeit a lawful application of the secretary of state's policy would not have secured her release from detention any earlier than the date of her actual release on bail).
2016	*R. (on the application of Ibrahim) v Secretary of State for the Home Department* [2016] EWHC 158 (Admin)	Detention became unlawful when it was accepted that the application for an ETD could not be expedited.
2016	*Onos v Secretary of State for the Home Department* [2016] EWHC 59 (Admin)	Detention pending removal had been unlawful because the secretary of state had failed to follow her own published policy governing detention without good reason for departing from it.
2017	*R. (on the application of Medical Justice) v Secretary of State for the Home Department* [2017] 4 WLR 198; [2017] EWHC 2461 (Admin)	The definition of torture in the Adults at Risk in Immigration Detention Statutory Guidance issued by the secretary of state was unlawful. The exhaustive list of indicators of when a person might be particularly vulnerable to harm in detention conflicted with the legislative purpose behind the guidance and lacked any rational or evidence base.
2017	*R. (on the application of TN (Vietnam)) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin)	Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 were ultra vires.
2017	*R. (on the application of TM (Kenya)) v Secretary of State for the Home Department* [2017] EWHC 2267 (Admin)	Extension of removal from association, under r.40 DCR 2001 was unlawful because not authorised by an officer of appropriate seniority or independence from the management of the centre. Also a breach of the detainee's rights under ECHR art.8(1).
2018	*R. (on the application of Aboro) v Secretary of State for the Home Department* [2018] EWHC 1436 (Admin)	SSHD failed to address the policy in UKBA Enforcement Instructions and Guidance r.55.10 that those suffering serious mental illness which could not be managed satisfactorily in detention could only be detained in very exceptional circumstances. Detention unlawful, tough only nominal damages.
2018	*R. (on the application of Hussein) v Secretary of State for the Home Department* [2018] EWHC 213 (Admin)	The lock-in regime breached ECHR art.9 and constituted indirect discrimination under the Equality Act 2010 s.19, which was not justified.

2018	*R. (on the application of VC) v Secretary of State for the Home Department* [2018] 1 W.L.R. 4781; [2018] EWCA Civ 57	Appellant's detention was unlawful between the secretary of state's receipt of the first Rule 35 report on 30 June 2014 and 27 April 2015, SSHD had not demonstrated that she had complied with her duty to make reasonable adjustments for mentally ill detainees in respect of their ability to make representations on decisions regarding their continued detention and segregation. SSHD discriminated against the appellant by failing to make reasonable adjustments to the decision-making process in breach of s.20 and s.29 of the 2010 Act. Further appeal to SC settled on basis of admission of article 3 breach.
2018	*R. (on the application of KG) v Secretary of State for the Home Department* [2018] EWHC 3665 (Admin)	£19,500 awarded for 30 days false imprisonment. If he had been provided with a medical examination in accordance with the Detention Centre Rules 2001 r.34 within 24 hours of his admission, the claimant's allegation that he had been tortured in Sri Lanka would have been known earlier and his vulnerable mental state would not have been exacerbated by his unlawful detention.
2019	*R. (on the application of IS (Bangladesh)) v Secretary of State for the Home Department* [2019] EWHC 2700 (Admin)	Unlawful detention: SSHD too slow to respond to evidence of adverse impact of detention on mental health. Failure to complete r.35(2) report. Judge found there is a considerable body of evidence that the rule 35 process is not working properly.
2019	*R. (on the application of ASK) v Secretary of State for the Home Department; R. (on the application of MDA) v Secretary of State for the Home Department* [2019] EWCA Civ 1239	SSHD conceded that in the light of the decision in *VC* it was a breach of the duty to make adjustments not to give mentally ill detainees assistance in understanding the reasons for, or making representations in respect of, decisions to detain them, VC followed.
2019	*R. (on the application of Hemmati) v Secretary of State for the Home Department* [2021] AC 143; [2019] UKSC 56	SSHD's policy in Chapter 55 of the EIG does not satisfy the requirements of Regulation 604/2013 art.28(2) and art.2(n). Damages awarded because the decision to detain them had been outside the scope of the exercise of discretion conferred by the Immigration Act 1971 Sch.2.
2020	*R. (on the application of ZA (Pakistan)) v Secretary of State for the Home Department* [2020] EWCA Civ 146	SSHD failed to comply with DCR 2001 r.34 by rendered his continued detention unlawful, but nominal, rather than compensatory, damages.
2020	*Mohammed v Secretary of State for the Home Department* [2020] EWHC 1337 (Admin)	The court ordered a claimant's release. Evidence that the claimant suffered from significant mental health disorders reinforced his case, continued detention being contrary to the secretary of state's own policy guidance.
2021	*AA (Sudan) v Secretary of State for the Home Department* [2021] EWHC 1869 (Admin)	It was arguable that it had been unlawful for the secretary of state to have had in place an unpublished policy which went directly against the terms of her published policy and which directly impeded her in her duty to consider whether asylum seekers had been trafficked en route to the UK.
2021	*AO v Home Office* [2021] EWHC 1043 (QB)	Detention unlawful as overlong. SSHD had also erred by acting in breach of her Adults At Risk policy and the EIG concerning the position of a detainee's children, inter alia by failing properly to take into account a recommendation from the Case Progression Panel that the detainee should be released.

5. Despite this history of litigation and despite the recommendations of Stephen Shaw in 2016 in 2017, *Panorama* uncovered significant continuing abuse and neglect. Included within the film was footage related to the abuse of the client whom we had been representing. In September 2017 we therefore had a consultation with Stephanie Harrison KC as to the implications of this further disclosure.

6. Stephanie Harrison KC immediately alighted on the principle that article 3 ECHR does not only protect against substantive violations of the article 3 right not to be subjected to mistreatment, but that according to the case law, where such mistreatment does occur, it must be investigated, the full facts must be brought to light and lessons must be learned so that it never happens again.

Article 3- a Quick Summary

7. Torture, inhuman and degrading treatment have long been prohibited by the common law and since 2000, article 3 to Schedule 1 to the Human Rights Act 1998 has provided that:
   "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

8. Articles 2 and 3 and 4 ECHR impose three distinct types of duty upon the Defendant : (i) the substantive negative duty to refrain from and to prevent taking life or inflicting torture or inhuman or degrading treatment or enslaving a person (operational duty); (ii) the positive duty to put in place a suitable framework of laws, policies and systems including training, monitoring and oversight to ensure operational decisions and actions safeguard people in immigration detention from treatment in breach of Articles 2/3/4 ECHR (systems duty) and (iii) where a breach has occurred, a duty to investigate.

9. The Brook House litigation engages each of these components.

(i) The Substantive Negative Duty not to Mistreat

10. The following summary principles are taken mainly from ***R (HA) Nigeria v SSHD*** [2012] EWHC 979 Admin at [173-178] and ***R (MD) v SSHD*** [2014] EWHC 2249 at [58-62] which in turn cite from Strasbourg case law including ***Kudla v Poland*** [2001] 35 EHRR 11:
    a. Article 3 prohibits in absolute terms torture, inhuman or degrading treatment or punishment.
    b. Ill-treatment must attain a minimum level of severity. Unnecessary use of force in principle amounts to a breach of article 3 (***Gedrimas v Lithuania*** [2017] EHRR 14 at [62], [66]).
    c. Treatment may be <u>inhuman</u> inter alia where premeditated, applied for hours at a stretch and caused either bodily injury or intense physical or mental suffering.
    d. Treatment may be <u>degrading</u> inter alia because it was to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them. Discrimination based on race may of itself, or form part of degrading treatment s in breach of article 3 (*East African Asians v UK* 1983 EHRR 76 at [207]].
    e. Article 3 imposes a positive duty on the state to ensure that a person is detained and detained in conditions which are compatible with his human dignity and that the manner and method of execution of those measures used do not subject him to distress or hardship of an intensity exceeding the unavoidable levels of suffering inherent in legitimate detention
    f. Article 3 imposes a (positive) duty to protect vulnerable detainees (***R (HA) Nigeria v SSHD*** [2012] EWHC 979 Admin at [175]). This includes a positive duty to effectively monitor mentally ill detainees; obtain suitable expert advice as to how that person should be dealt with; and to take active decisions to prevent harm occurring by releasing the person from detention (***R (S) v SSHD*** [2011] EWHC 2120 (Admin)). A comprehensive therapeutic strategy aimed at preventing aggravation rather than treating them on a symptomatic basis

may be required (***O v Secretary of State for the Home Department*** [2016] 1 W.L.R. 1717 and ***Barilo v Ukraine*** Application number 9607/06 at [68]).

g. Where a naturally occurring illness, risks being exacerbated by treatment for which the state can be held responsible, that may engage article 3 (***HA*** *supra* at [176])

h. Where a person with mental health problems is in custody there may be a combination of factors both acts and omissions such as inadequate medical records, lack of resource to specialist psychiatric input, the imposition of seven days segregation and the imposition of 28 days imprisonment for an assault on officers which combine to breach article 3 *Keenan v United Kingdom [2001] 33 EHRR 38* A particular duty is owed to vulnerable detainees (***Slimani v France*** [2006] 43 EHRR 49) were repeatedly flouted.

(ii) Investigative Duty

11. The investigative duties are parasitic upon that primary duty and in order to arise there must be an arguable breach of the substantive duty: ***R (Gentle) v Prime Minister*** **[2008] 1 AC 1356** at §6 and ***R (Amin) v Home Secretary*** [2004] 1 AC 653, 668 at §31.

12. In ***R (Wright) v SSHD*** [2001] EWHC Admin 520 (approved in ***R (Amin) v Home Secretary*** [2004] 1 AC 653, 668 at §20 per Lord Bingham) Jackson J set out the state's obligation in the following terms (§43)

> *"1. Articles 2 and 3 enshrine fundamental human rights. When it is arguable that there has been a breach of either article, the state has an obligation to procure an effective official investigation.*
>
> *2. The obligation to procure an effective official investigation arises by necessary implication in articles 2 and 3. Such investigation is required, in order to maximise future compliance with those articles.*
>
> *3. There is no universal set of rules for the form which an effective official investigation must take. The form which the investigation takes will depend on the facts of the case and the procedures available in the particular state."*

13. An analogous duty is created by Article 3 ECHR: ***AM v Secretary of State for the Home Department*** [2009] UKHRR 973, at §4 and the same basic principles apply such that in ***D v Commissioner of the Metropolis*** [2018] 2 WLR 895, at §145; ***R (Green) v Police Complaints Authority*** [2004] 1 WLR 725 at §58*:* ***R (Mousa) v Secretary of State for the Home Department*** [2012] HRLR 210 at §12-13.

14. In Article 3 cases it is the victims themselves to whom the lessons learned duty is owed.

15. The investigative duty encompasses examination of the compliance of both the systems in place to secure compliance with the substantive negative duty and the operational decisions taken within those systems: see ***D v Commissioner of Police of the Metropolis*** [2018] 2 WLR 895 at §§27-28 and through to §58 and at §86 the Supreme Court held that the article 3 investigative duty may be breached not only on the basis of structural or systemic breaches but also on the basis of operational failures. Lord Neuberger held this wider approach applied to both articles 2 and 3. In ***(AM)*** at §57 Sedley LJ put the wider purpose of an article 3 investigation as **"**to inform the public and the government about what may have gone wrong in relation to an important civic and international obligation and about what can be done to stop it happening again."

R (MA and BB) v SSHD

16. The detainee known to the Brook House Inquiry as D1527 who had been subjected to the article 3 mistreatment therefore asked that there be an investigation. The Home Office refused to hold a

public inquiry, arguing that other investigations could collectively discharge the investigative duty. D1527 brought a claim for judicial review.

17. There had indeed there had been several investigations of the wider failings before the Stephen Shaw's follow up review had in the meantime in 2018 identified continued systemic failings despite what he noted was fifteen years of scandals and reports and recommendations and despite his earlier report and recommendations some of which have been implemented. Further parliamentary reports from the Joint Human Rights Committee (JCHR) and the Home Affairs Select Committee had also continued to document the same systemic failures in particular with regard to the failure to ensure that detention of those with a serious mental illness are protected from the very harmful effects of detention or are promptly released from detention.

18. However, ultimately the Home Office was forced to hold a public inquiry with powers to compel witnesses and with funding for representatives following the judgment of May J in *R (MA and BB) v SSHD* [2019] EWHC 1523 (Admin) who held that the investigative duty under article 3 required it. An inquiry was instituted under the Inquiries Act 2005.

(iii) The Article 3 Systems Duty

19. It is now well established, including in evidence to the Inquiry, that immigration detention can have a negative impact upon a detainee's mental health and that impact increases the longer that person is in detention, particularly where, as with immigration detention, there is no fixed time limit on the duration of detention. The causes of mental deterioration resulting from detention itself include not just the length of detention, but also pre-existing trauma such as torture or other forms of ill-treatment.

20. This well-known fact brings into focus the article 3 "Systems Duty". How does this work in legal terms?

21. Section 1 and Schedule 1 of the HRA 1998 incorporates the ECHR. By Article 1 ECHR, contracting states must '*secure*' to everyone within their jurisdiction the rights and freedoms in the Convention. This is given effect in domestic law *inter alia* through sections 6-8 of the HRA 1998. Sections 6-8 of the HRA 1998 provide as follows:

> ***6.-Acts of public authorities***
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right*
> *(2) ….*
> ***7. Proceedings***
> *(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –*
> *(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
> *(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.*
> *…*
> ***8.-Judicial remedies***
> *(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*
> *(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*
> *(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-*
> *(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
(4) In determining-
(a) whether to award damages, or
(b) the amount of an award,
the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.
...
(6) In this section-
"court" includes a tribunal;
"damages" means damages for an unlawful act of a public authority; and
"unlawful" means unlawful under section 6(1)."

22. Among the positive or procedural obligations that have been identified under Article 3 are the systems duty (with a '*higher*' and a '*lower*' level) and the '*operational*' duty[2] as well as an investigative duty.

23. A similar principle is inherent in Article 2[3]. In *Öneryildiz v Turkey* (2005) 41 EHRR 20 (Grand Chamber) at §§89-90 it was held that there is a compulsory requirement for all concerned to take practical measures to ensure effective protection of those who might be endangered. Such a "framework" duty, also referred to as a '*systems*' duty, was afforded domestic recognition in *Smith v Ministry of Defence* [2013] 3 WLR 69 *per* Lord Hope at §68 and Lord Mance at §105.

24. When, in the early part of the century the Labour Government hugely expanded the numbers of immigrants detained, it made clear it expected to see rigorous and robust enforcement of the safeguards in policy and practice, as well as the highest standards of governance, oversight, management and vigilance in ensuring compliance. Thus for example in the House of Lords on behalf of the Government Lord Filkin in 2002 said

> "… evidence [of torture] may emerge only after the detention has been authorised. That may be one of the circumstances referred to by the noble Lord, Lord Hylton. If that happens, the evidence will be considered to see whether it is appropriate for the detention to continue. We reinforced that in the Detention Centre Rules 2001. Rule 35(3) specifically provides for the medical practitioner at the removal centre to report on the case of any detained person who he is concerned may have been the victim of torture. There are systems in place to ensure that such information is passed to those responsible for deciding whether to maintain detention and to those responsible for considering the individual's asylum application."[4]

25. The evidence heard in the Inquiry, and the findings of the Inquiry point to exactly the opposite at all levels within both the Home Office and G4S.

26. The key safeguards are to be found in Rules 34 and 35 of the Detention Centre Rules 2001 and the *Adults At Risk* policy. Their combined effect should provide a procedure for the mental and physical examination of a detainee within 24 hours of their entry to an IRC and to secure the prompt reporting

[2] See *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52 *per* Lord Hope at § 68 and Re Jordan [2019] H.R.L.R. 8

[3] See *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] 2 W.L.R. 879 at § 7 *per* Lord Bingham: '*As the summary in para 2 of the Middleton case [2004] 2 AC 182 makes clear, article 2 not only prohibits the unjustified taking of life by the state and its agents, but also requires a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life'.*

[4] See *R (HK (Turkey) v SSHD* (2006) EWHC 980 (Admin) (also called *D and K*) at §34

of key indicators of vulnerability: principally a risk of injury to health through continued detention, suicidal ideation and a history of torture. The purpose of these safeguards is to secure prompt release of those whose vulnerability means they should not be detained.

Medical Evidence

27. The Inquiry heard from a wide range of witnesses including from four nurses and two doctors who worked in the detention centre. Links to the evidence are included below.
28. The purpose of immigration detention is notionally to enforce removals (although the evidence is that most people who are detained are later released without being removed from the UK). For anyone wanting to understand the force and degradation involved in the process of removing an apparently mentally ill person with what the Home Office found to be a lawful use of force, the full process is shown in video of Day 14 starting at 5:00:40
29. On Day 29, 11 March 2022 the Inquiry heard from Dr Oozeerally who still runs the medical services in Brook House. As the Inquiry report explains (vol 1, p. 156) "under questioning by Counsel to the Inquiry, Dr Oozeerally accepted that it would never be in the interests of a patient to have force used against them, except in the very limited circumstances of acting to save their life, if it was in imminent danger). Yet in one case examined by the Inquiry Dr Oozeerally had written a note stating he was happy for force to be used on a man who had undergone triple bypass surgery. Dr Oozeerally (and his partner Dr Chaudhary) admitted to never once (in nine years of work) having complied with his statutory duty under rule 35(2) of the Detention Centre Rules to report to the Manager on a detainee whom he suspected of having suicidal intentions. In fact, Dr Oozeerally did not even know who the Manager to whom he was legally obliged to report was. The Chair concluded "Dr Oozeerally was unapologetic about his failure to fulfil his obligations under Rule 35, and he was intransigent in his view that Part C forms were an effective method of securing a Home Office review of detention, He did not demonstrate insight into his actions and omissions. Upon publication of this Report, a copy will be provided to the General Medical Council."
30. Three nurses gave candid evidence of how the system designed to protect vulnerable detainees was neither properly implemented nor even understood in Brook House IRC. In particular, see the evidence of Sandra Calver on Day 21 (1 March 2022). Two other nurses gave similar evidence (Karen Churcher and Chrissie Williams on Day 28). The other nurse giving evidence on 14 March was Jo Buss who has now been struck off the register. She had previously admitted all the charges against her concerning her involvement in an incident in which a detainee known as D1527 was abused by detention centre officers in her presence (as shown on Panorama) and in which she appeared to agree not to write up the abuse as a "use of force" incident. Buss made an attempt in evidence to retract her admissions.
31. The Inquiry has also heard from Theresa Schleicher of Medical Justice and Dr Bingham who appeared on 14 March 2022 giving a well-informed assessment of what they described as the failure of the Home Office and its subcontractors to abide by their legal obligations under rules 33-35 of the Detention Centre Rules 2001. The inquiry also heard extensive evidence from Professor Bosworth; Dr Hard; Dr Collier and others.

The Chair's Findings

32. The Chair of the Brook House Inquiry was tasked with examining allegations of inhuman and degrading treatment within a snapshot period of five months during 2017. The Chair explicitly rejected the analysis as presented by the Home Office and G4S at the inquiry that the findings of extensive violence, inhuman and degrading treatment was the consequence of the actions of a small number of people ("bad apples") as opposed to a symptom of systemic failure. The following are the key findings.:
    a. The Chair found that there were 19 incidents- at least one a week- amounting to inhuman or degrading treatment. These incidents included considerable violence, humiliation and degradation of detainees. The scale of likely abuse is only apparent when one considers that these findings were made as a result of examining the experience of 13 different detainees. In the five month period in question around 3,000

people were detained there. Most of those detained were never reached by the Inquiry: they had been removed, returned to their home countries, or moved on.

b. The Chair found that "the entire safeguarding system in a number of areas to be dysfunctional" (Report para 40, page 9). The law and practice around removal from association was "routinely misunderstood, misinterpreted and misapplied by both G4S and the Home Office" and she found that "this confusion and potential misunderstanding persists under Serco" (para 38, page 9 and Vol II, page 347 para 36). Misuses of segregation were a matter of serious concern (para 38, p.9). There were 241 cases of isolation (removal from association under rule 40) in the five month period under examination (Vol II page 346, para 34). The Chair found that in at least 237 of those cases, the use of isolation was not properly authorised. She found that the confusion appears to be continuing under Serco.
c. There was a misuse of force against 11 of the 13 detainees whose cases were examined in detail and pain was deliberately and unnecessarily inflicted on four of them during the inappropriate use of force (page 4, para 15.2). Force was misused against naked people (para 43, p.10): 3 of the 13 detainees were forcibly removed from their cells while naked or near naked (page 4, para 15.2). Force was misused against mentally ill detainees (see Vol. II, page 155). Monitoring and oversight was inadequate and led to dangerous situations (Vol II. Page 158). Misuse of force included the choking incident on D1527 that featured in Panorama. Shocking footage extending to 28 minutes was seen by the inquiry. The use of restraint techniques such as handcuffing behind the back that were found in the Mubenga Inquest to be dangerous (2010) continue to be used.
d. The Chair found "serious failings in the application of rule 34 and 35" (para 32, page 8) which amounted to a wholesale failure in processes designed to protect vulnerable detainees like suicidal people and torture victims from being detained, or from mistreatment while in detention, particularly in relation to suicidal people. She found healthcare did not understand their obligations towards detained individuals and failed to appreciate their key safeguarding role (para 50, p.11). Vol II page 343, para 29 "This safeguard was not operating effectively at the outset of detention in 2017 and evidence indicated that this remained the case at the time of the Inquiry's hearings". Para 33 "The inquiry has not received any evidence of fundamental changes since 2017".
e. The Chair found "explicit racism" (Vol II, page 227. Para 41) and "found considerable evidence of racist beliefs and abuse by staff at Brook House" ((para 89, page 243) She found that "Brook House appears to have been a breeding ground for racist views in the relevant period and was perceived as an acceptable environment in which to express them". See also para 55, p.12. The Chair was "Particularly concerned by the lack of reflection by some of those who remain working in Brook House, a number of whom are now in more senior roles. It inevitably casts doubt on how far the cultural changes described by Serco can be said to have been embedded. There is more to do". The Chair found a culture of dehumanisation, of "us and them" (Vol II page 229).
f. There are relentless accounts of racist; homophobic and other degrading language. (para 15.8- homophobic). In many cases such language was intensified during times when detainees were self-harming or attempting suicide.
g. Lengthy lock-ins detrimental to mental and physical well-being were driven by financial incentives connected to lower staffing levels (para 30 page 7).
h. The prime responsibility lay with the Home Office and its contractor G4S, yet there was alarming reliance on monitoring by volunteers at the Independent Monitoring Board. The Home Office accepted it did not sufficiently resource staff to monitor its contract (para 21 page 5). Her findings closely mirrored those of previous investigations: the problems have persisted for many years and continue.

33. The Chair made one principal recommendation of significance which is that there should be a maximum period of immigration detention of 28 days to bring the UK within comparable norms for civilised countries.
34. The findings of the inquiry reflect little credit on Detention Centre Officers, detention centre medics, detention centre managers, the private contractors, various bodies charged with oversight, the Home Office or on our Ministers. All of these people were paid public money to perform roles in which they were responsible for the welfare of a vulnerable group of people. With the exception of Detention Centre Officer Callum Tulley, none of these individuals or organisations exposed what was going on. Even when faced with video evidence of inhuman and degrading treatment, the Home Office did not want the inquiry to happen. It fought tooth and nail to resist the judicial review by which it was ultimately compelled to hold the inquiry.
35. There remains the task of ensuring that lessons are learned and this never happens again. Wholesale reforms are required. As yet there is, regrettably, little sign of that being done voluntarily. Most of those singled out for criticism remain in post. G4S and the Home Office are yet to even apologise to the detainees for the abuse the detainees suffered.
36. The task of reforming this system lies now primarily in political intervention. Lawyers have spent twenty years exposing the failures of this system to the light of day. It needs to be reformed. The chair has (recommendation 7) recommended a 28-day time limit on detention. That would probably have a significant impact in reducing the harm caused by immigration detention. I would interpret that as intended to be an outer limit: so a much shorter period being the norm. That is to say that detention would be used only in advance of a removal, rather than during lengthy processes of trying to arrange removal. Rules 33-35 have never worked properly and clearly need to be improved as well. The Chair has recommended a review of the operation of rule 35 (recommendation 9) and regular audits of compliance.
37. The Inquiry is in a sense continuing: it is now in a monitoring period and there is a requirement for the relevant organisations identified to publish details of the steps that they will take in response to each recommendation within six months of publication of the report (by 19 March 2024) and implementation of and compliance with the recommendations will be regularly monitored and reported on by the Home Affairs Select Committee and the Joint Committee on Human Rights[5].
38. Outside of that political process, Article 3 continues to exert a legal on the state to have in place a clear and effective legal framework and procedure to prevent a further breach *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681 and *VC* at [113-114, 118]. Accordingly, a further period of failure will no doubt result in further findings of breaches of the article 3 duties by the Courts.
39. Of course, we must hope that is avoided and I think it is important not to be cynical. After all, in the end, the Home Office did (was forced to) comply with its legal obligation to ensure that its own failings were brought to light and examined. In the end, it had to allow an opportunity to put its own failings right. That is the rule of law in action in a democratic country. We can be proud of that and it should give us cause for optimism that what the Chair called the "hidden places" of our society do not always remain like dungeons.

Alex Goodman KC
Landmark Chambers
6 December 2023

[5] See Chair's report on Brook House Inquiry Volume II, final page (page 374).