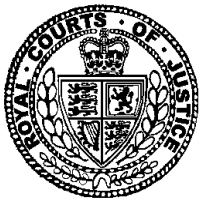


Neutral Citation Number: [2020] EWHC 2291 (Admin)

Case Nos: CO/5146/2017, CO/5004/2017 and CO/678/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2020

Before :

MR JUSTICE CAVANAGH

- -

THE QUEEN, ON THE APPLICATION OF

(1) NEMAT SOLTANY **Claimants**
(2) ABDUL NASIR EBADI
(3) ABIDULLAH ORIAKHAIL

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

-and-

G4S

Interested Party

- -
- -

Stephanie Harrison QC, Raza Halim, and David Sellwood (instructed by **Duncan Lewis**) for the **Claimants**
Thomas Roe QC and Hafsah Masood (instructed by **Government Legal Department**) for the **Defendant**
Scott Matthewson (instructed by **BLM**) for the **Interested Party**

Hearing dates: 23-25 June, and 1 July 2020.

- -

Approved Judgment

Mr Justice Cavanagh:

Introduction

1. In this claim for judicial review, the Claimants contend that the conditions in which they were held at Brook House Immigration Removal Centre ("Brook House"), near Gatwick Airport, were unlawful, on a number of cumulative and alternative grounds. At the material times, in 2017 and 2018, Brook House was being run by G4S, pursuant to a contract between G4S and the Defendant. This contract was awarded following a procurement exercise in 2007-8.

2. The focus of the Claimants' challenge is upon the following aspects of the regime at Brook House:

   (1) A lock-in or lock-down regime was operated at Brook House, known officially as the "night state", pursuant to which detainees were locked in their rooms overnight from 9pm to 8am. This was a longer and more restrictive lock-in period than was operated at some other IRCs, and the Claimants say that this was unnecessary and unduly harsh;

   (2) For at least some of their periods of detention, two of the Claimants, Mr Soltany and Mr Ebadi, were placed in three-person rooms, even though the rooms had originally been designed to have two occupants;

   (3) The cubicle in which the rooms' toilets were located did not have a door, and, in some cases, did not have a curtain to screen it from the rest of the room. The Claimants say that this meant that detainees felt embarrassed to go to the toilet, because they could be seen and heard by their room-mates, and because noises could be heard when they or others used the toilet. They also said that the rest of the room was permeated by unpleasant smells emanating from the toilet;

   (4) Moreover, for those detainees who observed the Muslim faith, it was a requirement that they performed prayers in their room during the night state period. The Claimants say that this meant in some cases that they had to face the toilet when they prayed and, in every case, it meant that they were in very close proximity to the toilet when they prayed;

   (5) The toilets did not have a seat or lid, and the Claimants say that the detainees were not provided with adequate cleaning materials, as a result of which the toilets were generally dirty, and at times filthy and unsanitary;

   (6) the Claimants say that the unpleasant conditions in the rooms were exacerbated by a lack of adequate ventilation, which meant that the rooms were stuffy and smelly; and

   (7) The Claimants also complain about being locked in their rooms for shorter periods, twice each day, whilst headcounts were taken.

3. As I will explain, there are a number of disagreements between the parties about the conditions in which the Claimants were held at Brook House. The Defendant does not accept that the Claimants' descriptions are accurate in all respects. So, for example,

the Defendant says that, by the time the Claimants were detained at Brook House, steps had been taken to ensure that curtains were available to screen the toilets in rooms, that most rooms had a curtain to screen off the toilet, and, if a curtain was missing, the room's occupants could ask for a replacement. There is also a dispute about the extent to which cleaning materials were available for detainees' use, and about how far the ventilation was adequate. The parties also disagree about the amount of time that was spent locked in rooms during the day, whilst the headcounts were being taken.

4. The Defendant says that there were good reasons for the length of the night state and that there were good reasons why detainees at Brook House were locked in their rooms during night state, rather than being confined to their corridor or unit, as was the case in some other Immigration Removal Centres ("IRCs"). The Defendant says that the reason why the toilet space had a curtain rather than a door was to avoid the risk that door fittings would be used as ligature points for suicide attempts. The Defendant further says that the toilet did not have a lid or seat because to provide them would have created a safety and security risk.

5. There is also a dispute between the parties about the extent to which the proximity of the toilet would interfere with religious observance. The Claimants and the Defendant have provided the Court with expert evidence in this regard. There is a difference, in particular, as to whether unpleasant and/or unsanitary conditions could invalidate a believer's prayers.

6. The Claimants also renew their application for leave to apply for judicial review on the basis that the Defendant should have published the criteria which were applied when allocating an immigration detainee to a detention centre, and should have given them an opportunity to make representations before the allocation decision was taken (or, failing that, the opportunity to make representations as to why they should be moved to another centre after they placed in a detention centre). Brook House was built to the standard of a Category B prison, and the Claimants say, though the Defendant disputes, that the conditions were akin to those of a Category B prison. Brook House was designed to be suitable to take detainees who had completed a prison sentence or who required a stricter regime, for example because they were regarded as an escape risk. However, it accommodated almost all types of detainees. None of the Claimants was an ex-prisoner or a particular threat, and they say that this should have been taken into account by the Defendant, when making its allocation decisions, and that they should have been given the opportunity to make representations as to why they should have been allocated to an IRC with a softer regime.

7. Permission to apply for judicial review on the "allocation" ground was refused by Martin Spencer J on the papers on 15 April 2019. On the same occasion, Martin Spencer J gave permission to apply for judicial review on the other grounds that were advanced before me, and refused permission on two further grounds, relating to the Public Sector Equality Duty ("PSED"), set out in the Equality Act 2010 ("EA 10"), section 149, and to an alleged failure to operate a safe regime at Brook House. The Claimants have not renewed their application for permission to apply for judicial review in relation to the s149 or "safe regime" grounds.

8. The Claimants have been represented by Ms Stephanie Harrison QC, Mr Raza Halim and Mr David Sellwood, the Defendant by Mr Thomas Roe QC and Ms Hafsah Masood, and the Interested Party by Mr Scott Matthewson. I am grateful to all counsel for their submissions, both oral and written.

The Claimants

9. The First Claimant, Mr Soltany, who is from Afghanistan, arrived in the UK on 16 May 2016 and immediately claimed asylum. His claim was refused, and on 7 April 2017 he became appeal rights exhausted. He was detained while reporting on 22 August 2017, and on 1 September 2017 he was transferred from Morton Hall IRC to Brook House, after being served with removal directions. At the time, it was expected that he would be flown to Afghanistan a few days later, on 4 September 2017. In fact, he remained in Brook House until he was transferred to Tinsley House IRC on 28 October 2017, after an incident in which he was assaulted by other detainees. During this period, there were two unsuccessful attempts to remove Mr Soltany to Afghanistan, on 4 and 23 September 2017. On these occasions, Mr Soltany resisted his removal. The Defendant says that he was disruptive, and Mr Soltany claims that he was treated unlawfully by those who were trying to remove him.

10. Mr Soltany was released from detention on 30 October 2017. On 1 November 2017, Mr Soltany was assessed by Dr Lisa Wootton, a Consultant Forensic Psychiatrist instructed by his solicitors. Dr Wootton diagnosed Mr Soltany as suffering from Post-Traumatic Stress Disorder and depression.

11. Mr Soltany was granted refugee status by the Defendant on 2 January 2020.

12. Mr Soltany was, therefore, detained at Brook House for about two months, from 1 September 2017 to 28 October 2017. During this period, Mr Soltany stayed in a number of different rooms. Some of them were two-man rooms, but he was placed in a three-man room during 5-6 September 2017, 24-27 September 2017, and 11-25 October 2017.

13. The Second Claimant, Mr Ebadi, is also from Afghanistan. He claimed asylum in 2014. His asylum claim was refused, and his appeal rights were exhausted on 22 January 2016. Mr Ebadi was detained when reporting on 16 May 2017, and was taken to Brook House. An attempt was made to remove Mr Ebadi on 27 July 2017 but he resisted. The Defendant says that he was disruptive, and Mr Ebadi complains about the way that he was treated during the attempt at removal. Mr Ebadi remained at Brook House until he was released from detention on 16 November 2017. Whilst he was at Brook House, Mr Ebadi was examined by a psychiatrist instructed by his solicitors, Dr Utpaul Bose. In a report dated 8 November 2017, Dr Bose diagnosed Mr Ebadi as having PTSD.

14. Mr Ebadi was subsequently granted an in-country right of appeal, and his asylum appeal was allowed by the First-Tier Tribunal on 4 February 2020.

15. Accordingly, Mr Ebadi was at Brook House for about six months in 2017. During this period, he was in a three-man room between 18 May 2017 and 29 August 2017,

and from 23 September to 4 October 2017. The rest of the time, he was in two-man rooms.

16. The Third Claimant, Mr Oriakhail, is also a national of Afghanistan. He entered the UK unlawfully as a child on 3 March 2011 and claimed asylum. His application was rejected but, as an unaccompanied child, he was granted discretionary leave to remain until 16 July 2015. On 14 July 2015, Mr Oriakhail applied for leave to remain. His application was refused and his appeal to the First-Tier Tribunal was refused. His appeal rights were exhausted on 5 May 2016. Mr Oriakhail was arrested on 15 September 2018, following a traffic stop, and arrived at Brook House on 16 September 2018. Mr Oriakhail was released from detention on 27 November 2018. During this period, he was examined by Dr Soumitra Burman-Roy, a psychiatrist instructed by his solicitors, and was diagnosed with PTSD and depression, with symptoms including self-harm and suicidal ideation. On 20 November 2018, Mr Oriakhail was accepted by the Defendant to be an Adult at Risk, Level 3. However, he remained in detention because removal was expected to take place on 24 November 2018. This was deferred after Mr Oriakhail lodged a claim for judicial review challenging both the decision to remove him, and the decision that to refuse to treat further submissions as a fresh claim. Mr Oriakhail was released on immigration bail on 27 November 2018.

17. Mr Oriakhail's claim for judicial review relating to his fresh claim was settled by agreement with the Defendant. On 17 September 2019, he was granted humanitarian protection and 5 years' leave to remain.

18. It will be seen, therefore, that Mr Oriakhail was in detention for about two months, and he was at Brook House roughly a year after the other two Claimants. Mr Orikhail was, throughout his stay, in two-man rooms, apart from a few days when he was in a room on his own.

The issues

19. The questions which I have to decide in these proceedings can be summarised as follows:

The night state and the conditions in rooms

(1) Did the Defendant act unlawfully, and in breach of general public law principles and/or in breach of Articles 5 and/or 8 of the European Convention on Human Rights ("ECHR"), by locking the Claimants into their rooms during the night state, because there was no adequate and clear statutory provision which permitted it, either at all, or in the restrictive manner in which the night state was operated at Brook House?;

(2) Did the Defendant unlawfully fetter her discretion by effectively delegating to G4S the decision as regards how long the night state at Brook House should be?;

(3) Even if there was adequate and clear statutory provision, and the Defendant had not fettered her discretion, was the operation of the night state nonetheless unlawful because:

(a) The Brook House night state regime and conditions were not consistent with, and did not meet, or further the object or purpose of, the statutory scheme, and in particular the requirements, under the Detention Centre Rules 2001 (SI 2001/238, the "DCR"), rules 3 and 39, namely that the regime should be relaxed with as much freedom of movement and association as possible, should respect detainees' dignity, and should have no more restriction than was required for safe custody and well-ordered community life;

(b) The night state regime at Brook House, and the conditions relating to the toilets, were inconsistent with the Defendant's common law powers and obligations; and/or

(c) The Brook House night state regime and conditions (particularly in relation to the toilets) were inconsistent with the respect for privacy and human dignity which are required by Articles 5 and 8 of the ECHR?;

Allocation

(4) Did the Defendant act contrary to common law and/or Article 5, ECHR, by failing to publish clear and precise criteria for allocation to detention centres and/or by failing to give reasons for allocation to a particular centre, or to grant detainees an opportunity to make representations about which detention centre they should be allocated to? This is the ground in respect of which the Claimants were refused permission on the papers by Martin Spencer J and so they have renewed their applications for permission before me;

Religious discrimination

(5) Did the combined effect of the night state, which meant that observant Muslims had to perform some of their daily prayers in their rooms, and the condition of the rooms and especially the proximity of the toilet, amount to an unlawful, discriminatory, and/or disproportionate interference with Muslim detainees' rights under Article 9, ECHR, either read alone or with Article 14, ECHR, and or to a breach of section 19 of the EA 10? This ground is only relied upon by the Second and Third Claimants.

20. During the oral submissions on behalf of the Claimants, it was not entirely clear to me whether the Claimants were contending that (1) any form of night state which involved locking detainees in their rooms with an in-room toilet which was not separated by a door was unlawful; or that (2) a shorter period of night state would have been lawful, but the duration of the night state at Brook House rendered it unlawful. It was clear that the Claimants were not contending that locking detainees in their units, or in their corridor, overnight would have been unlawful. The challenge was to a night state which involved locking detainees into their rooms with in-room toilets. At times during the submissions, Ms Harrison QC, on behalf of the Claimants, appeared to be accepting that a shorter night state, from 11 pm to 7 or 8

am, would have been lawful even if detainees were locked in their rooms with in-room toilets. In her reply, Ms Harrison QC confirmed that the main thrust of her submissions to be that the over-long duration of the night state at Brook House was what rendered it unlawful, taking into account the conditions. However, as the Claimants' pleaded case is to the effect that any form of night state which involved locking detainees in their rooms is contrary to law, I will address Issues (1) to (3) on the basis that there is a challenge to any duration of night state in which detainees are locked in their rooms with in-room toilets. But I will also consider the issues on the basis that the Claimants' primary submission is an alternative submission, namely that, even if a lock-in to rooms with in-room toilets can be lawful, a lock-in from 9 pm to 8 am was so long that it is not lawful. So far as Issue (5) was concerned, Ms Harrison QC made clear that she accepted that there would have been no breach of Articles 9 or 14, or of the EA 10, if there had been a night state, but it had been only 7 or 8 hours long.

21. In this judgment, I will first refer to the procedural history of these proceedings. I will then make some preliminary observations and will set out the relevant statutory and regulatory framework. I will next set out the relevant facts, before dealing in turn with the questions set out above.

Procedural history

22. The First and Second Claimants, Mr Soltany and Mr Ebadi, were two of five representative Claimants who brought claims for judicial review in relation to the conditions at Brook House in November 2017. Two of the other representative cases, that of Messrs Hussain and Rahman, were selected as test cases and Mr Soltany and Mr Ebadi's cases were stayed whilst an expedited rolled-up hearing of the two test cases was heard by Holman J in February 2018. The Claimants in the test cases were represented by Ms Harrison QC and Mr Halim, and the Defendant by Mr Roe QC and Ms Masood. Liberty intervened by way of written submissions, which are relied upon by the Claimants in these proceedings.

23. Some, at least, of the grounds that are relied upon by the Claimants in the present case were relied upon by the Claimants in the **Hussain and Rahman** cases. In addition, the Claimants in **Hussain and Rahman** relied upon further grounds that are not relied upon in the present case. One such ground was a contention that the Defendant had breached her obligations under the Public Sector Equality Duty ("PSED"), set out in EA 10, s149, by failing to pay due regard to the need to eliminate discrimination when exercising her functions in relation to the regime at Brook House. In advance of the hearing before Holman J, the Defendant accepted that she had failed to comply with the PSED. The other ground that arose in **Hussain and Rahman** which does not arise in the present case is whether the Defendant acted unlawfully by permitting smoking at Brook House.

24. In the **Hussain and Rahman** case, Holman J declined to grant permission to apply for judicial review in relation to some of the issues that had been relied upon by the Claimants in that case because there was insufficient time to deal with all of the issues within the two-day listing, especially as there were very substantial disputes of evidence, and because, by the time of the hearing, Mr Hussain and Mr Rahman had been released. However, Holman J made clear that this was essentially a case management decision and, in refusing permission, he was not making any

determination on the merits as to the arguability of the grounds: **R (Hussain and Rahman) v SSHD** [2018] EWHC 213 (Admin), paragraph 8.

25. There was no consideration by Holman J in **Hussain and Rahman** of Issues (1) to (4) in the present case, but Holman J did address Issue (5), religious discrimination.

26. Holman J granted permission to the Claimants in **Hussain and Rahman** to apply for judicial review in relation to their challenges based on religious discrimination, under Article 9 of the ECHR, under Article 14 when read with Article 9, and under EA 10, s19. These challenges were the same as the religious discrimination complaints made by the Second and Third Claimants in the present case.

27. In relation to the religious discrimination challenges, Holman J held that the night state or lock-in regime at Brook House, in conjunction with the presence of internal unclosed lavatories and shared rooms, (i) constituted indirect discrimination contrary to Article 9, when read with Article 14, which is unlawful unless justified, and (ii) unless justified, constitutes unlawful indirect discrimination contrary to EA 10, section 19 (judgment, paragraph 95).

28. Holman J held that the facts and circumstances of the claim were within the scope or ambit of Article 9, and that there was interference with Article 9 rights. He therefore accepted that both Article 9 and Article 14 were engaged. However, he did not "attach any adjective to qualify or quantify the degree of interference, or to place it on a spectrum." (paragraph 33).

29. At paragraph 35 of his judgment, Holman J said that

> "35. There is indirect discrimination in these circumstances on the ground of religion. Muslims are required to pray at the stated hours, and the lock-in has the differential and discriminatory consequence that they have to pray in conditions (viz in the shared rooms with the lavatories) in which adherents of other faiths, or of none, do not have to do. However great the impact of the lock-in, the lavatories and room sharing may be on other detainees, it has a greater and discriminatory impact upon practising Muslims because of the requirements of their religion. As the European Court of Human Rights said in **Thlimmenos v Greece** (2001) 31 EHRR 15 at paragraph 44:
>
> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.""

30. As for the claim under the EA 10, Holman J said that "the combination of the practice of the lock-in, the required hours of prayer, the unclosed lavatories, and room sharing, clearly results in indirect discrimination contrary to section 19 of the Equality Act 2010, unless it can be justified" (judgment, paragraph 36).

31. In coming to these conclusions, Holman J made clear that he was not ruling that the Defendant had discriminated unlawfully against the Claimants on religious grounds. Rather, the effect of his ruling was that the treatment would be unlawful religious discrimination, contrary to Articles 9 and 14 and EA 10, s19, unless it could be justified by the Defendant as being a proportionate means of achieving a legitimate aim. Noting that the Defendant had not, at that stage, carried out an equality impact assessment ("EIA") or complied with her obligations under the PSED, Holman J said that no such justification had ***as yet*** been shown by the Defendant (paragraph 66).

32. It is clear from the judgment of Holman J that, in so saying, he was not making a finding that the treatment complained of was not capable of being justified. Rather, he was, in effect, postponing consideration of the justification issue, until after the Defendant had carried out an EIA.

33. The current proceedings are, in in a sense, and to an extent, Stage Two of the litigation which began with the **Hussain and Rahman** proceedings. Whether or not, as a matter of procedural formality, these proceedings are the second stage of the **Hussain and Rahman** proceedings, the practical reality is that I am being asked to address the issues, relating to religious discrimination, which Holman J did not deal with both because there was insufficient time and because the Defendant had not yet conducted an EIA. In my judgment, two consequences follow.

34. First, it would be too late, in these proceedings, for the Defendant to dispute that Articles 9 and 14 of the ECHR were engaged, or that the treatment complained amounted to prima facie discrimination of Muslim detainees, for the purposes of Article 14 and EA 10, s19. Holman J has ruled on these issues, and the Defendant did not appeal. In fact, the Defendant does not dispute these matters. The Defendant did not seek to argue before me that Articles 9 and 14 are not engaged, or that there was no prima facie indirect discrimination for Article 14 and EA 10 purposes. The religious discrimination aspect of the case, under Article 14 and the EA 10, was dealt with before me by the Claimants and the Defendant on the basis that the only remaining issue is justification.

35. On the other hand, this Court is not bound, as a result of the judgment in **Hussain and Rahman,** to find that that the treatment was unlawful under Articles 9 or 14, or the EA 10. That is still an open issue, and it was not determined by Holman J's judgment in **Hussain and Rahman**. As I will explain, after the hearing in **Hussain and Rahman,** the Defendant conducted an EIA in December 2018, known as the Policy Equality Statement ("PES").

36. It follows from all of this that the only issues that arise in relation to religious discrimination in these proceeds are concerned with justification. There is also an issue as to whether there has been an unlawful interference with Article 9 rights.

37. The Third Claimant, Mr Oriakhail, was not one of the representative Claimants whose cases were stayed at the time of the **Hussain and Rahman** proceedings. His detention took place in 2018, after the Hussain and Rahman judgment was handed down. He contends that the conditions at Brook House at the time of his detention were unlawful in the same way, and for the same reasons, as the conditions were unlawful for Mr Soltany and Mr Ebadi the previous year.

Preliminary observations

38. There are several important points that need to be made at the outset.

39. First, the contractor which was in charge of Brook House at the relevant time, G4S, has been added to these proceedings as an Interested Party. G4S has been represented before me by Mr Scott Matthewson of counsel. G4S has made its position clear in relation to these proceedings: the company neither contests the claim nor supports it, and therefore made no submissions of law to me, though G4S filed evidence in the **Hussain and Rahman** proceedings which is before me in these proceedings.

40. Second, these proceedings are concerned with a challenge to the conditions at Brook House at certain periods in 2017 and 2018, when the Claimants were detained there. None of the Claimants is still at Brook House and none is at any risk of being returned there. It is important to make clear, therefore, that this challenge is not to the current conditions at Brook House. It is common ground that there have been a number of changes at Brook House since the periods covered by these proceedings. In particular, G4S's contract for the operation of Brook House has come to an end and, since 21 May 2020, the IRC has been run by Serco. A new night state will be implemented in October 2020, with a duration of nine hours per night. The curtains which (when they were present) divided the toilet space from the rest the bedrooms have been replaced by doors which have been specially designed so that they do not provide potential ligature points.

41. The Claimants rely upon these changes, saying that they show that there was no need to have a 9pm to 8am night state period in the relevant period for these proceedings and that it would have been possible, all along, to install a door to provide a screen between the toilet and the main part of the room. However, it is also important to bear in mind that the conclusions that I reach in this judgment do not relate to the current conditions at Brook House.

42. This is reflected in the relief sought by the Claimants. In essence, they seek a number of declarations about the treatment of the Claimants and the unlawfulness of the conditions at Brook House when they were detained there. The Claimants also seek damages for breach of Articles 5 and 8, ECHR, and, in the case of the Second and Third Claimants, for breach of Article 9, ECHR and section 19 of EA 10. This is on the basis that, if the Claimants succeed, the assessment of damages will be referred to the County Court.

43. The Replacement/Amended Grounds for Judicial Review, filed on behalf of the Claimants, also seek two mandatory orders, (1) a mandatory order that the Defendant urgently reviews the practice of the lock-in regime at Brook House, and (2) a mandatory order that the Defendant provides access to sanitary facilities that are separated from the rest of a detainee's room in a manner compliant with human dignity and Article 8, ECHR. In oral argument, Ms Harrison QC, leading counsel for the Claimants, accepted that, since the Claimants have already been released, (1) no longer arises. She did not formally withdraw the application for mandatory order (2) but she did not press strongly for it. In my judgment, whatever my conclusion on the merits of the challenges, it would not be appropriate to grant such an open-ended and non-specific mandatory order of this nature. It would essentially be ordering the

Defendant to do what the law requires her to do anyway, and would not have any substantive content.

44. Third, on 4 September 2017, BBC Panorama broadcast a programme about the mistreatment of detainees at Brook House by certain members of staff who were working there. The programme was based on secret filming carried out by a whistleblower, a Detention Custody Officer ("DCO") based at Brook House from 2015 to 2017, Mr Callum Tulley. The allegations of mistreatment that were dealt with in the Panorama programme are summarised in the judgment of May J in **MA and BB v Secretary of State for the Home Department** [2019] EWHC 1523 (Admin). It is not necessary to summarise them in this judgment, but the allegations were concerned primarily with the actions of certain DCOs and supervisors.

45. As a result of the Panorama programme, a Public Inquiry has been set up to investigate mistreatment of detainees at Brook House from 1 April to 31 August 2017 (this includes the period during which Mr Tulley was carrying out his undercover filming, which was between 24 April and 6 July 2017).

46. Ms Kate Eves was appointed as Chair to the Inquiry by the Defendant in November 2019. The Inquiry is still in its investigatory/evidence gathering stage and has not held any public hearings, and so I anticipate that it will be some time before a Report is published.

47. I have looked at the Terms of Reference for the Public Inquiry. It is clear from the Terms of Reference, and from the judgment of May J in **MA and BB**, that the function, and the focus, of the Inquiry is very different from the function and focus of these proceedings. The purpose of the Public Inquiry is to investigate into and report on the decisions, actions, and circumstances surrounding the physical and verbal mistreatment of detainees, including bullying and violence, that was broadcast in the Panorama Programme, and, in particular, the mistreatment of two individual complainants, known as MA and BB. The Public Inquiry will focus on the alleged acts of mistreatment, but will also consider whether methods, policies, practices and management arrangements (both of the Home Office and its contractors) caused or contributed to any identified mistreatment. In contrast, the proceedings before me are not concerned with any alleged acts of physical or verbal mistreatment, such as bullying or violence against the Claimants (or against MA and BB). It may be that the Public Inquiry will look into the general conditions at Brook House, but this is not the focus of the Inquiry.

48. It follows that I am dealing with different issues from those that arose in the Panorama Programme, and from those that will be dealt with in the Public Inquiry. It was not suggested to me by anyone that I should watch the Panorama programme, and I have not done so.

49. Mr Tulley, who is now a BBC journalist, has provided a witness statement in these proceedings, in support of the Claimants.

50. Fourth, as I have said, there are a number of disputes of fact between the parties as regards the exact nature of the conditions at Brook House during the relevant period, and some other matters. This is unfortunate, as judicial review proceedings are not designed to enable the judge to resolve disputed issues of fact. I have had to do the

best that I can to make appropriate findings of fact in light of the evidence before me. I will return to this later in this judgment.

51. The final preliminary observation concerns terminology. The bedrooms used by detainees at Brook House are variously described as "rooms" and as "cells". It is easy to see why the bedrooms are called cells. It is common ground that Brook House was based on the model of a Category B Prison and the bedrooms have cell doors attached to them, and bars on the windows (which cannot be opened). I have seen a number of Reports on conditions at Brook House written by HM Chief Inspector of Prisons ("HMCIP"), which say that the centre's environment is similar to that of a prison, and which refer to the bedrooms as "cells". Nevertheless, I have decided, in this judgment, to refer to the bedrooms as "rooms". This is not intended as a value judgment: I do so simply because it is important to bear in mind that the detainees are in administrative detention, not in prison, and the word "cell" has connotations of prison. The Claimants' Statements of Facts and Grounds referred to their sleeping accommodation as "rooms". Similarly, different people refer to the practice of locking detainees in their rooms (or, in some IRCs, in their units) from a particular time at night as "night state", whilst others call it "lock-down" or "lock-in". I will refer to it mainly as the night state, but, once again, this does not denote any form of value judgment. Throughout the period in question, the practice of locking detainees into their rooms was officially referred to as "night state", as it is the period when the detention centre goes into night operation, rather than day operation, when visits and activities take place. There is no doubt that, during night state, detainees were locked in their rooms, and night state might equally readily have been referred to as "lock-in".

The statutory and regulatory framework

The power to impose administrative detention upon the Claimants at IRCs

52. Paragraph 16(2) of Schedule 2 to the Immigration Act 1971 provides that if there are reasonable grounds for suspecting that a person is someone in respect of whom removal directions may be given, that person may be detained under the authority of an immigration officer pending a decision whether or not to give such directions, and his/her removal in pursuance of such directions. This was the power pursuant to which each of the Claimants was detained.

53. Paragraph 18(1) of Schedule 2 to the 1971 Act provides that a person detained under paragraph 16(2) may be detained "in such places as the Secretary of State may direct".

54. By paragraph 3(1) of the Immigration (Places of Detention) Direction 2014 (No 2), the Secretary of State directed that such persons may be detained at one of eleven named IRCs, including Brook House, and at other locations such as pre-departure accommodation and a short-term holding facility. Two of the IRCs, Brook House and Tinsley House, are in the vicinity of Gatwick Airport. Two others, Colnbrook and Harmondsworth, are near Heathrow Airport. One IRC, Yarl's Wood in Bedfordshire, is for women and families. Since 2014, two of the eleven IRCs, Campsfield House and The Verne, have closed.

The duty to make rules in relation to the regulation and management of IRCs, and the power to contract out management of IRCs

55. Section 153 of the Immigration and Asylum Act 1999 ("the 1999 Act") provides that:

> "(1) The Secretary of State must make rules for the regulation and management of removal centres.
>
> (2) Removal centre rules may, amongst other things, make provision with respect to the safety, care, activities, discipline and control of detained persons."

56. The power to contract out management of IRCs is set out in section 149 of the 1999 Act, which provides, in relevant part:

> "(1) The Secretary of State may enter into a contract with another person for the provision or running (or the provision and running) by him, or (if the contract so provides) for the running by sub-contractors of his, of any removal centre or part of a removal centre.
>
> (2) Where a removal centre contract for the running of a removal centre or part of a removal centre is in force –
>
> (a) The removal centre or part is to be run subject to and in accordance with provision of or made under this part…."

57. The effect of section 149(2)(a) is that the rules made under section 153 for the regulation and management of removal centres apply to contracted out IRCs.

58. Section 148 of the 1999 Act provides, in relevant part, that:

> "(1) A manager must be appointed for every removal centre;
>
> (2) In the case of a contracted out removal centre, the person appointed as manager must be a detainee custody officer whose appointment is approved by the Secretary of State;
>
> (3) The manager of a removal centre is to have such functions as are conferred on him by removal centre rules."

59. Where the running of a removal centre is contracted out, the Defendant must appoint a contract manager (section 149(4)). The contract manager, who is a Crown servant, has such function as may be conferred on him/her under the removal centre rules (section 149(6)), and must keep under review, and report to the Defendant on, the running of a removal centre for which s/he is appointed (section 149(7)).

The Detention Centre Rules

60. In accordance, inter alia, with the obligation imposed by section 153 of the 1999 Act, the Defendant made the Detention Centre Rules 2001 (SI 2001/238) ("the DCR"). The DCR were laid before Parliament before they were made.

61. The purpose of detention centres is set out at Rule 3 of the DCR as follows:

> "3.—(1) The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and the right to individual expression.
>
> (2) Due recognition will be given at detention centres to the need for awareness of the particular anxieties to which detained persons may be subject and the sensitivity that this will require, especially when handling issues of cultural diversity."

62. As will be seen, the Claimants rely, in particular, upon the statement in Rule 3(1) to the effect that the purpose is to provide a relaxed regime with as much freedom of movement and association as possible.

63. Rule 39 of the DCR provides that:

> **General security and safety**
>
> 39.—(1) Security shall be maintained, but with no more restriction than is required for safe custody and well ordered community life.
>
> (2) A detained person shall not behave in any way which might endanger the health or personal safety of others.
>
> (3) A detained person shall not behave in any way which is inconsistent with his responsibilities under the compact.
>
> (4) A detained person shall not be employed in any disciplinary capacity."

64. Again, the Claimants rely upon the statement in Rule 39(1) to the effect that security shall be maintained with no more restriction than is required for safe custody and well ordered community life.

65. The DCR set out specific rules relating to detention centres, such as that there will be separate accommodation for male and female detainees (Rule 10); detainees are to be provided with wholesome, nutritious, well-prepared and served food (Rule 13); detainees shall not have access to alcohol (Rule 14); all detainees shall be provided with an opportunity to participate in activities to meet, so far as possible, their recreational and intellectual needs and the relief of boredom (Rule 17); detainees will have at least one hour per day in the open air (Rule 18); there will be a system of privileges (Rule 19); detainees will be given support to practise their religion (Rules 20-25); each detention centre shall have a medical practitioner (Rule 33); and

refractory or violent detained persons may be confined temporarily in special accommodation, but this may not be done as a punishment (Rule 42).

66. Rule 15(1) provides that the Defendant shall satisfy herself that in every detention centre sufficient accommodation is provided for all detained persons. Rule 15(2)(a) provides that no room shall be used as sleeping accommodation for a detained person unless the Defendant has certified that its size, lighting, heating, ventilation and fittings are adequate for health. Rule 15(4) provides that a certificate given under this rule in respect of any room shall specify the maximum number of detained persons who may be accommodated in the room.

Detention Service Orders

67. In addition to the DCR, the Defendant has, from time to time, issued Detention Service Orders ("DSOs") and Operating Standards, which set out rules and principles about the way in which IRCs should be run and managed.

68. At the time of the Claimants' detention, there was nothing in the DCR, DSOs, or Operating Standards which laid down requirements or minimum standards in relation to the night state at IRCs. The Defendant's PES that was conducted in December 2018 (after the **Hussain and Rahman** proceedings) stated that "There is no central Home Office guidance or policy related to when detainees may be limited to their bedroom accommodation, for what purposes or for what period.", and that "There is no specific reference within the Detention Centre Rules to night state."

69. In December 2018, after each of the Claimants had been released from detention, the Defendant issued DSO 04/2018, entitled "Management and security of night state". The nature and purpose of the night state was set out at paragraphs 3 and 4 of DSO 04/18:

> "3. The night state is defined as the period when detainees are limited to their rooms or their residential units during the night. The use of the night state creates a clearly defined day/night routine and offers detainees the opportunity to rest in a quiet and private space in contrast with the constructive activities available during the day time. This DSO outlines the general principles of how the night state should be operated across the estate to ensure a consistent approach is taken.
>
> 4. During the night state, the normal expectation is that detainee movement will be restricted to residential rooms, units or areas (depending on the physical constraints of the individual centre, such as access to sanitation facilities)."

70. Paragraphs 9-11 of DSO 04/2018 state:

> 9. Each centre supplier must have in place local Night Operating Procedures that clearly define and justify the timings for night state. The Night Operating Procedures must be agreed between the supplier centre manager and the Home Office Compliance Team Service delivery manager, or residential

> STHF contract monitoring senior manager, and be set out in the centre's Local Security Strategy or Security Standard Operating Procedures. A summary of how the centre operates during the night and the availability of services and the expectations of detainee behaviour during night state must be included in the centre's induction literature and explained to all detainees during the supplier induction process.
>
> 10.The following must be considered when agreeing the local Night Operating Procedures;
>
> • The management and security of night state must balance the need to maintain safety and security with the dignity and welfare of detainees.
>
> • The duration of the night state. Depending on the layout of each centre, this must be the minimum time necessary to ensure the safety and security of detainees during the night and deliver a normal daily cycle in the centre. The duration of night state at each centre must also reflect the local assessments conducted as per paragraphs 11-13.
>
> • The earliest start and end times of night state.
>
> 11.The restrictions of night state could have a potential impact on a number of the protected characteristics set out in the Equality Act 2010. An equalities assessment must be completed by the supplier centre manager when developing or revising the centre's local Night Operating Procedures, and its findings must be approved by the local Home Office Compliance Team delivery manager, or residential STHF contract monitoring senior manager, when implemented or reviewed. This must include a consideration of any impact of the night state procedures on any protected characteristics, such as a detainee's right to practice their religion whilst in detention. Any impact identified locally must be documented in the assessment, as well as any mitigating factors or reasonable adjustments adopted."

The Human Rights Act 1998 and the relevant provisions of the ECHR

71. Section 6(1) of the Human Rights Act provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." Section 8(1) provides that "In relation to any act…. of a public authority which the court finds is… unlawful [under section 6(1)], it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

72. The relevant Articles of the ECHR, for present purposes, are Articles 5, 8, 9 and 14.

73. Article 5 provides, in relevant part:

"Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

….

(f)the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

….

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

74. Article 8 provides:

"Right to respect for private and family life

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

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

75. Article 9 provides:

"Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and

> are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

76. Article 14 provides:

> " **Prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Indirect discrimination on religious grounds, contrary to the EA 10

77. Section 29(6) of the EA 10 provides that:

> "(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

78. A "public function" for this purpose is a function that is of a public nature for the purpose of the Human Rights Act 1998: section 31(4). This plainly covers the public function of detaining persons pending possible removal. Challenges for breach of section 29(6) may be brought by way of claims for judicial review: section 113(3).

79. "Discrimination" can involve direct or indirect discrimination. The discrimination challenge in the present case is wholly concerned with indirect discrimination. Indirect discrimination is defined, for the purposes of the EA 10, in section 19, as follows:

> "19. **Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are— …. religion and belief…."

The facts

Introductory

80. I have been provided with witness statements from the Claimants and from Mr Toufique Hossain, a partner in the Claimants' solicitors. Two of Mr Hossain's witness statements were filed in the **Hussein and Rahman** proceedings. Mr Hossain's statements deal mainly with two matters. First, they set out extracts from the documentary evidence which are regarded as important to the Claimants' case, and comment upon them. Second, they refer to statements made by others of his firm's clients, who were also detainees at Brook House, about the conditions there. These other clients are not named, but their initials are given. Mr Roe QC submits that I should pay little, if any, attention to hearsay evidence of unidentified persons about the conditions at Brook House. I do not agree. The evidence of other detainees was collected by the Claimants' solicitors with a view to those detainees being additional claimants. At a Case Management Conference in the **Hussein and Rahman** proceedings, Holgate J indicated that it was not necessary to issue proceedings in these other cases. I do not attach a great deal of weight to the information provided to Mr Hossain by these other potential Claimants, as it is hearsay and is not supported by statements of truth from the detainees, but I think that the material is helpful, to an extent, in assisting in building up a picture of conditions at Brook House at the relevant time.

81. I have also been provided, as I have said, with a witness statement from Mr Callum Tulley and with the statements of Mr Hussain and Rahman. On behalf of the Defendant, I have been provided with four witness statements from Ms Frances Hardy, Deputy Director and Head of Corporate Operations and Oversight at the Home Office, since November 2017. Prior to that, she was Head of Operational Practice since November 2014. I have also been provided with two witness statements which were provided by Mr Lee Hanford, an employee of G4S who, at the material time, was Director of Gatwick IRCs. These were provided for the **Hussein and Rahman** proceedings.

82. In addition, I have been provided with witness statements relating to Muslim religious observance and the impact on this observance of the conditions during night state at Brook House. These statements are:

    (1) An expert report from Professor M.A.S Abdel Haleem OBE, Professor of Islamic Studies, School of Oriental and African Studies, University of London, and a recognised Muslim Scholar, dated 15 December 2017, prepared for the **Hussein and Rahman** proceedings;

(2) A witness statement dated 19 January 2018, from Mr Zeeshan Qayum, an Imam who was Head of Religious Affairs for the Gatwick IRCs at the relevant time, part of the Chaplaincy Team at Brook House, and an employee of G4S; and

(3) An expert report from Mr Ibrahim Mehtar, an Imam and recognised Muslim Scholar, who is a Chaplaincy HQ Adviser for HM Prison Service, with regional responsibility for the prisons in London, South East and South Central areas. Prior to that, between 2005 and 2015, Mr Mehtar was an Imam and Muslim Chaplain for HM Prison Service.

83. As well as the witness statements, I have been provided with a very great deal of documentation concerning the conditions at Brook House. This includes four reports by HMCIP on the conditions at Brook House, published between 2010 and 2016, and the Service Improvement Plans which were issued by the Defendant in response, in which the Defendant indicated whether or not she accepted the various criticisms, and would implement recommendations for change made by HMCIP. There is also the Report of an Independent Investigation into Concerns about Brook House IRC dated November 2018, which was prepared by Kate Lampard CBE at the request of the divisional chief executive of G4S Care and Justice and the G4S Main Board ("the Lampard Report"). This was an investigation into the issues raised in the Panorama Programme. The Investigation team was given unrestricted access to Brook House over five months starting in November 2017. I have also seen annual reports from the Independent Monitoring Board ("IMB") into the conditions at Brook House.

84. I have also been provided with a Report by Stephen Shaw CBE, the former Prisons and Probations Ombudsman, on Immigration Detention, dated July 2018, and with various Parliamentary materials, including extracts from a report by the Joint Committee on Human Rights of the House of Commons and the House of Lords on Immigration Detention dated 7 February 2019.

85. As I have said, there are disputes between the Claimants and the Defendants in relation to a number of factual matters concerning the conditions at Brook House at the relevant times. To a large extent these disputes concerned matters of degree: for example, it was not disputed that some toilets did not have curtains to screen them, but there was a dispute about how common this problem was; again, there was a dispute about the extent to which cleaning materials were available for detainees to clean rooms and toilets.

86. There has been no application to cross-examine those who have provided witness statements. No-one has suggested that I am bound by the views expressed by others who have investigated or commented upon the conditions at Brook House, however expert and eminent they may be.

87. Faced with a number of disputes of fact, in these circumstances, I think that the correct approach is that summarised by the authors of Auburn, Moffett and Sharland, Judicial Review, Principles and Procedures, 1st Ed, 2013, at paragraph 27-98:

> "…. [the Court] will generally proceed on the basis of the facts as stated in the defendant's written evidence. This is because, as the claimant bears the burden of proof, if there is no reason to doubt the defendant's version of the facts, the claimant will

> have failed to discharge the burden on him or her. As the defendant's witnesses will not have been cross-examined, there will be little basis for the court to reject their evidence. However, in certain cases there may be something about the defendant's evidence (eg where it is internally contradictory, inherently implausible, or inconsistent with other incontrovertible evidence) which will lead the court not to accept it."

88. This approach was endorsed recently by the Court of Appeal (Holroyde and Nicola Davies LJJ) in **R (Muhammed Safeer) and others v Secretary of State for the Home Department** [2018] EWCA Civ 2518, at paragraphs 16-19, and it is the approach that I have adopted in finding the facts, as set out below. Where there is clear and incontrovertible evidence in support of contentions made on behalf of the Claimants, I have accepted it. Where there is an outright dispute between the parties, I have accepted the Defendant's evidence, unless it is internally contradictory, implausible, or inconsistent with other incontrovertible evidence.

89. The findings of fact relate to the conditions at Brook House in 2017-2018.

Brook House

90. Brook House was opened as a new facility in March 2009. It is one of two IRCs, the other being Tinsley House, which are located near to Gatwick Airport, in order to facilitate removals from there.

91. Brook House is one of the most secure removal centres within the Home Office estate, and has a stricter regime than some other IRCs. It provides the highest level of security in the IRC estate. As I have said, it was built to the specifications of a Category B prison. The bedrooms have cell-type doors and the windows have bars on them and cannot be opened. Some detainees have described Brook House as being "akin to a prison". However, the Defendant disputes this, saying that Brook House is not "akin to a prison" and that the regime is more relaxed than it would be in a Category B prison. In my view, there are elements of truth in both positions. In terms of building design, Brook House is akin to a Category B prison. However, the regime that was operated at Brook House was not the same as that which is applied to Category B prisoners. It is a considerably more relaxed regime. At the same time, the regime is somewhat more restrictive than that which is operated in some other IRCs.

92. Brook House was not alone, amongst IRCs, in resembling a prison in terms of design and configuration. Colnbrook, too, was built to Category B prison standards. Harmondsworth was built to Category C prison standards. Like Brook House, Colnbrook and Harmondsworth hold some of the most difficult detainees. Morton Hall is a former women's prison. The Verne used to be a prison. Campsfield House was a young offenders' institution before it became an IRC. Dungavel House used to be an open prison. Tinsley House, on the other hand, was converted from airline crew accommodation.

93. Brook House accommodates some of the most difficult detainees. Because of its secure accommodation, Brook House is considered by the Defendant to be suitable to

hold detainees who are awaiting deportation having completed a prison sentence for criminal offences committed in the UK (Time-Served Foreign National Offenders, or "TSFNOs"). It is also regarded as suitable to hold detainees who are, or are expected to be, difficult or disruptive. However, Brook House is also used to accommodate "ordinary" detainees who are neither time-served prisoners nor expected to be difficult or disruptive. The Claimants fell into this latter category.

94. The Lampard Report stated that the proportion of TSFNOs in the detainee population at Brook House represented 36% of the detainee population in 2017, and in the first five months of 2018 they represented between 40% and 50%. The Lampard Report pointed out that detainees at Brook House arrive with differing experiences of the immigration and asylum system and are detained for differing reasons. The come from all parts of the world and some have little or no command of English. They have widely differing life experiences, expectations and concerns. Some of them have been victims of violence, torture and other traumatic events. Many detainees at Brook House have mental health issues. Most detainees at Brook House have reached the end of their attempts to remain in the UK. They face enforced removal and are highly resistant to it. Many are desperate.

95. The Lampard Report said that the head of security for the Gatwick IRCs told the Investigation that TSFNOs held in the more attractive and less restrictive environment of Tinsley House did not present the same degree of problematic behaviour as those at Brook House, and that it was likely that the environment at Brook House affected the behaviour of detainees. The Lampard Report expressed the view that Brook House was not a suitable environment to hold detainees for more than a few weeks.

96. The capacity of Brook House when it was opened was 448 detainees. All detainees are male. The detainees were usually accommodated in two-bed rooms, though sometimes a detainee would be in a room on his own for a while. There are 223 2-bed rooms and 2 medical single rooms. However, in 2017, 60 rooms were converted to 3-bed rooms (by the addition of a top bunk bed to one of the beds), and this increased the capacity to 508. In 2018, the 3-bed rooms were reconverted to 2-bed rooms and the capacity reverted to 448. During the relevant period, Brook House was not always fully-occupied.

97. The residential areas of Brook House consist of an open space surrounded by wings containing rooms on both sides. Detainees live on the wings. Some of these can accommodate more than 100 detainees.

98. At the time with which I am concerned (which was, of course, long before the Coronavirus Pandemic), there was a constant turnover of detainees at Brook House, with detainees arriving and departing at all times of the day and the night. A substantial number of detainees stayed for a short time, pending removal or release, but some detainees, like the Claimants, stayed for months. Mr Ebadi stayed at Brook House for about six months.

99. G4S ran Brook House from its opening in 2009 until May 2020, pursuant to a contract with the Defendant, which was won by open competition, following a detailed procurement exercise in 2007-8. In 2019, the Defendant ran a procurement exercise for the contract to run Brook House and the other IRC at Gatwick Airport, Tinsley House, from 2020-2028. G4S did not bid for this contract, which was won by Serco.

The procurement process for the running of Brook House, and consideration of bidders' proposals for night state

100. As I have said, the contract to run Brook House was awarded to G4S (though, confusingly, the successful bidder was then called GSL, and G4S put in a separate bid; GSL was subsequently taken over by G4S). The contract was awarded in January 2008.

101. On 13 September 2019, the Claimants' solicitors served a Part 18 request for further information upon the Defendant. Inter alia, this asked for an explanation of how bidders' proposed night state hours were considered during the 2007-8 procurement process, and sought disclosure of any contemporaneous documentation showing how night state hours had been evaluated. The Defendant's reply dated 7 October 2019 said that the night state hours were not considered in isolation and scored distinctly, but, rather, were taken into account as part of the overall consideration of the competing bids. On 8 November 2019, the Defendant said that it believed that no documents relevant to this issue were in retention.

102. This turned out to be incorrect. On 23 June 2020, one working day before the hearing began, the Defendant disclosed documents from 2007 which showed that bidders' proposals for night state hours had indeed been considered and scored distinctly. The documents showed also that the Home Office officials who were charged with assessing and evaluating the bids were seriously concerned about the duration of the night state that was proposed by GSL (which became G4S). The Defendant did not provide a satisfactory explanation for the misleading answer that had been given in October 2019, or as to why it had taken until immediately before the hearing to disclose these documents, which were plainly relevant to the case. It is particularly unfortunate, and unhelpful, that the Defendant did not provide a witness statement to explain the error. This should have been provided. The Claimants are entitled to feel aggrieved about the failure to provide proper and timely disclosure in this regard, even though the normal rules of disclosure do not apply to judicial review proceedings.

103. When the new documents were disclosed to the Claimants, they were substantially redacted. I put back the beginning of the hearing of this matter by half a day to enable counsel to discuss ways of removing the redactions, or some of them, and the Defendant eventually agreed to a Confidentiality Ring, which enabled the Claimants' representatives to see the full documents. However, even then, the picture was not entirely complete. In particular, the "Final Assessment" of the Brook House bids by the three officials carrying out the evaluation of the quality aspects of the bids shows that another contractor scored more highly on quality. I think that Ms Harrison QC is right to invite me to draw the inference from the documents that I have seen that the reason why, nonetheless, GSL (which came second on quality) won the contract was because its bid was more financially competitive, ie cheaper. The documents show that the evaluation was split as to 50% on quality and 50% on "commercial", ie cost. Indeed, the GSL bid was regarded as something of a bargain. The Commercial Evaluation of the bids stated that "The Brook House tender has delivered significant (35%) cost savings compared to the original budget and is below the current average cost per bed when compared like for like on 2009 projections."

104. A document entitled "Evaluation of Proposals Brook House IRC" sets out the scores at the first assessment stage for the various bids. Each of the three assessors allocated a score to each "quality" aspect of the bid. Each aspect was weighted from 1 to 4, according to its importance. The score for "Lock down time proposal" was given a weighting of 3, which is the weighting for elements which have a "high impact on operation if not delivered." Having said that, the evaluation for the "Lock down time proposal" was only one of more than 100 different aspects of the bid which were evaluated on quality grounds, many of which were given a weighting of 3 or 4 ("Absolutely key deliverable to a successful operation"). In other words, the contractor's proposal in relation to lock down or night state did not loom large in the evaluation process.

105. GSL's bid scored 21 out of 45 on the lock down time proposal.

106. In an "Assessment" document, which assessed the operational or "quality", rather than commercial, aspects of the bids, the three assessors were critical of GSL's proposal in relation to the night state. This document set out comments that had been made by the assessors at the initial assessment stage, and then at the final assessment stage, after bidders had been given feedback and an opportunity to revise their offerings. Their comments included:

Initial assessment

> "GSL proposed to lock up detainees between 2100-0800 hrs but we have concerns about the impact this would have on the availability of some services including visits."
>
> "We are seriously concerned at the GSL proposal to reduce DCO levels at 2100 hrs through to 0800 hrs, which has clearly been done in order to accommodate the lock down hours which are at the same time."
>
> "We cannot ignore the fact that [another bidder] share the very tight staffing levels during the night-time period, a fact shared with four other bidders which border on the unsafe. The assessors are satisfied that only one bidder has proposed sufficient staffing levels for the night-time period. An ethos of cutting corners and meeting basic standards is evident from much of what we read and we are especially disappointed at the extended lock down hours proposed by these four bidders [including GSL]. This appears to be a desperate attempt to reduce costs at the expense of welfare."
>
> "GSL have proposed a lock down period which we consider to be excessive and not in keeping with the ethos of the rest of the estate: 2100 hrs – 0800 hrs. the proposals give no justification for such a lengthy period of non-association. Against this background it is difficult to believe that there will be no impact on visiting hours, activities and staffing levels."

> "To summarise, certain aspects of this bid require no improvement or clarification, however we remain very concerned about certain areas. With opportunities to clarify, GSL could improve the overall quality of this bid but the lockdown proposal is rather harsh."

Final assessment

> "The assessors are satisfied that [another bidder] offers the best all round response. However the long lockdown period, which is shared with other bidders and tight staffing levels remain a concern."

107. Ms Harrison QC, understandably, made much of these comments, saying that they showed that the experienced assessors within the Defendant thought that G4S's night state proposal was "rather harsh" and that the proposal appeared to be a desperate attempt to reduce costs at the expense of welfare.

108. The initial assessment also said that GSL's proposal for activities was extremely poor.

The Services Agreement between the Defendant and G4S for the running of Brook House ("the Contract")

109. There are three parts of the Contract which are relevant for present purposes.

110. First, clause 13 granted the right to the Defendant to insist upon a change to the way that the IRC was operated. Clause 13.1.1 provided, in relevant part:

> "13.1.1 The [Defendant] may delete, suspend, amend or alter the extent of any obligation to be met by the Service Provider under the Contract, or add to the obligations of the Service Provider under the Contract, by giving written notice to the Service Provider of the required change…."

111. Second, G4S was required to operate Brook House in accordance with the law, and, if there was any conflict between the Contract and the DCR, the DCR were to take precedence. Clauses 19 and 20 provided:

> "19. **CONDUCT OF THE SERVICES**
>
> 19.1 The Service Provider shall be responsible for the operation, management and maintenance of the Removal Centre in accordance with the terms and specifications of the Contract, and in accordance with and by virtue of the [Defendant's] powers under the 1999 Act and any other applicable legislation.
>
> 20. **OPERATION**
>
> 20.1 The Service Provider shall at all times operate and manage the Removal Centre in accordance with all relevant provisions of Legislation including but not limited to the 1999 Act, the

> Human Rights Act 1998 and the DC Rules. The Service Provider shall be responsible for maintaining awareness of all relevant legislation.
>
> 20.2 Without prejudice to Clause 20.1 the Service Provider shall operate and manage the Removal Centre in accordance with Schedule D (*Operational Specification*). For the avoidance of doubt, if there is any conflict between the terms of Schedule D (*Operational Specification*) and Schedule E (*Contingency and Emergency Procedures*) and the DC Rules, the terms of the DC Rules will prevail."

112. Finally, paragraph 1.1.7 of Schedule D said that:

> "[G4S] will operate a "lock-down" period between the hours of 2100 hrs and 0800 hrs. During this period Detainees will be locked in their rooms. Detainees will be invited to collect hot water and conclude activities from 20.45 hrs. Visits will conclude at 2100 hrs and the staff profile will deliver sufficient resource to return detainees to their accommodation safely at the end of their visit period."

113. It is clear from the bid evaluation documents that the proposal for a night state lasting from 9pm to 8am originated from G4S, not the Defendant. It is also clear from the format of Schedule D that bidders had been invited by the Defendant to propose a "lock-down" time during which detainees will remain in their rooms.

Night state

114. As stated above, night state refers to the period, of 11 hours, from 9pm to 8am, during which detainees were locked in their rooms at Brook House. This was in accordance with the Contract between G4S and the Defendant. DSO 04/2018, paragraph 3, set out above, says that the purpose of night state is that it "creates a clearly defined day/night routine and offers detainees the opportunity to rest in a quiet and private space in contrast to the constructive activities available during the day." It also gives contractors the opportunity to reduce the numbers of staff on duty during the night hours.

Muslim religious observance during the night state

115. Observant Muslims are required to pray five times a day. The prayer timings mean that some of these prayers will be during the night state. The Second and Third Claimant contend that the requirement to pray in sight of, or in close proximity to, the toilet during the night state amounts to indirect religious discrimination. I will deal with the main findings of fact relevant to this part of the claims separately when I come to deal with the challenges under Articles 9 and 14, and EA 10, section 19.

Free association and activities

116. During the day, outside night state, detainees at Brook House were free to make use of communal facilities and activities and to visit other residential units at the IRC.

They could receive visitors from 2pm to 9pm. Detainees had access to a multi-faith room, a gym, outdoor sports area, a smoking yard, the internet (on a controlled basis), a library and (for some of the relevant period) a cultural kitchen. There were also pool tables and table tennis tables, an arts and crafts room, and a cinema room. Educational classes were offered. There was a shop. Paid activities were available in roles such as orderlies, kitchen and servery workers, barbers, and wing cleaners. The Lampard Report said that the provision of activities and entertainment for detainees at Brook House was limited by lack of space, and was also under-resourced, poorly-managed, and also compromised by long-standing staffing problems. However, the HMCIP Report published in March 2017 said that "The centre continued to provide a reasonably good range of purposeful activities which met the needs of most detainees… Recreational amenities were good."

Night state at other IRCs

117. All IRCs have a night state. There was no uniformity as regards the duration or nature of the night state at the IRCs within the Defendant's estate. Ms Hardy said that this was largely down to differences in the physical attributes of centres and staffing levels.

118. At Tinsley House in 2017-18, the night state hours were the same as for Brook House, from 9pm to 8am, but detainees were restricted to their corridors, rather than their rooms. This was because the rooms did not have their own toilets.

119. At Harmondsworth, the night state lock-in was from 9pm to 8am. Detainees in rooms with their own toilets in the new part of the IRC were locked in their rooms, and detainees in the older part, which did not have their own toilets, were locked in their corridors. Detainees at Colnbrook were also locked in their rooms from 9pm to 8am.

120. At the Verne (which has now closed) detainees were locked in their rooms, which had toilets, from 8pm to 8 am. This was a longer night state than operated at Brook House.

121. At Campsfield House (which has also now closed), lock-in of detainees took place at 11pm. Detainees were locked in their units, rather than in their rooms, as their rooms did not have their own toilets. They could move around their units during night state.

122. The only IRC which has in-room toilets but which locks residents within their units, rather than in their rooms, is Yarl's Wood. This IRC is used for women and families and so is different in nature from Brook House.

123. As for the form of the night state, the Defendant's evidence, which I accept, was that this largely depended on the physical configuration of the building. Where, as with Brook House, there were toilets in rooms, detainees would be locked in their rooms during night state. Where there were no toilets in rooms, detainees were locked in their landing or corridor or residential unit (as otherwise they would have no access to toilets overnight). During night state, detainees in the latter category could move around and associate with other detainees on their landing or unit.

124. Even in the IRCs which manage the night state within residential units, detainees do not have access to the activities and facilities that are available to them during the day.

Recommendations in relation to the night state

125. In a Report in July 2010, following a visit to Brook House in March 2010, HMCIP said that "The centre should reduce the length of time detainees are confined to their rooms each day, institute later lock up and increase the time detainees are allowed in communal areas." In further Reports by HMCIP in October 2013, and March 2017, there was, once again, a recommendation that detainees should not be locked into their cells and should be allowed free movement until later in the evening. In the 2013 Report, HMCIP said that it was unclear why detainees needed to be locked in their rooms at all.

126. In July 2018, Mr Stephen Shaw CBE published a report on the Welfare of Vulnerable Detainees in Immigration Detention in July 2018, in which he was critical of the practice of lock-in during night state, and said that the experience of Campsfield IRC, where detainees were not locked into their rooms until 11pm, showed that it was possible to manage a diverse population within relatively open conditions.

127. The Defendant has considered these recommendations on each occasion when they were made, and has rejected them. In the Service Improvement Plan which followed the 2010 inspection Report, the Defendant said, "Under this contract [with G4S], detainees have access outside their rooms 13 hours a day and are confined to their wings during this period only at meal times. This is considered adequate time to engage with other detainees and access facilities within the centre." It has not been suggested that the Defendant was bound to accept the recommendations, and, plainly, she was not. Needless to say, I, too, am not bound by the views expressed by HMCIP or Mr Shaw.

128. The Lampard Report did not refer to night state, and did not ascribe any of the problems at Brook House to the length of night state. The Lampard Report did not make any recommendation to change the duration of night state.

129. On 7 February 2019, The Joint Committee on Human Rights of the House of Commons and House of Lords published a report on "Immigration Detention". At paragraph 84 of the Report, the members of the Joint Committee said that they were particularly concerned by reports of [inter alia] "Prison-like conditions in several IRCs and the extended time periods individuals spent locked in their rooms. HMIP told us that Colnbrook, Brook House, Morton hall and parts of Harmondsworth IRC look and feel like prisons and not enough has been done to adapt them for an immigration detainee population."

Changes in 2020

130. In the new Brook House contract, the Defendant specified that the night state should be no more than 9 hours long, and this will be implemented in October 2020.

Headcounts

131. In addition to the night state, detainees at Brook House were locked into their rooms each day on two occasions, whilst the roll was taken. These were at 12 noon to 12.30 and at 5pm to 5.30 pm. This was to ensure that all detainees were accounted for and to perform a visual check that they were safe and well. In principle, the lock-ins for

headcount purposes should have taken no more than 30 minutes each, but in practice they often took longer. If the roll count did not tally, detainees would remain in their rooms until any issues were resolved and roll counts were redone. This would happen several times a week. Occasionally, the delay would last more than an hour.

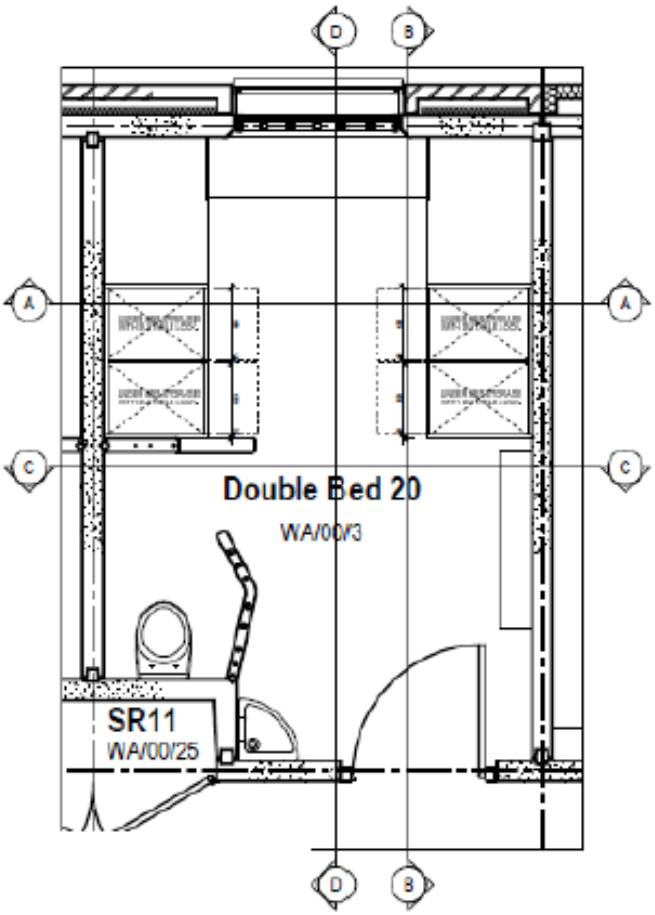
132. Though the Claimants complain about being locked in during headcounts, it is fair to say that this did not loom large during oral argument and it is not the main focus of their complaints.

The conditions in detainees' rooms at the relevant time

(1) General description of rooms

133. The rooms at Brook House are relatively large. They are approximately 12.2 metres squared. They have a window, though this cannot be opened. There are bars outside the window.

134. I have seen an architect's drawing of the room layout and I have seen photographs of a room. The architect's drawing is set out below.



135. Each room at Brook House had a washbasin and a toilet and two beds. It also had a chair, a television set mounted on the wall, a desk, and shelving. There was also a kettle, mirror and picture-board.

136. The rooms are rectangular, with a window at one end and the door on the facing wall. The beds are located along the side walls of the room, lying parallel to the side walls. There is a desk under the window, with a chair or chairs. The toilet area, which I describe in more detail below, is against one of the side walls, in a cubicle located between the foot of one of the beds and the inner wall which contains the door. The washbasin is in the corner of the room, where the wall with the door in it meets the outer wall of the toilet area.

137. Detainees could watch the television during night state. Detainees could make themselves hot drinks during night state, but there was no facility for preparation of hot food. Also, when they arrived at Brook House, detainees were provided with a mobile phone. They could use a sim card to make calls to and from their phone during night state, but the phone could not be linked to the internet. In addition, each room had the facility for a detainee to make contact with a detention custody officer, if required.

(2) Numbers of detainees in each room

138. For most of its history, Brook House has had two detainees to a room. However, in 2016 work was done to add a third bed to 60 rooms (by turning an existing bed into two bunks). A feasibility study was conducted in August 2015 by Mott McDonald, consulting engineers. This study concluded that the proposed modifications did not require any alteration to the lighting and sanitary/drainage facilities. The study also concluded that, though it would need re-balancing, the ventilation requirements could be met by the existing equipment.

139. The 60 additional beds were installed in about March 2017 and both Mr Soltany and Mr Ebadi spent time in 3-bed rooms. The practice of having three detainees in a room was strongly criticised by Stephen Shaw CBE, the former Prisons Ombudsman, in his report about Immigration Detention, and on 24 July 2018, the Defendant announced that the practice of having three detainees in rooms designed for two would cease. This has now happened.

140. Mr Oriakhail was never placed in a 3-bed room.

(3) In-room toilets and their screening

141. There was a toilet in a cubicle in the corner of each room. This was made of anti-vandal resin and so was not white. It did not have a seat or a lid. Mr Hanford, who gave evidence for G4S, said that no secure institution in the UK has toilets with seats. The reason is that they could be detached and used as a weapon or to cause damage to the room. I have not been shown a photograph of a toilet, but I infer that it was functional and somewhat unattractive in appearance.

142. Notwithstanding the criticisms of the in-room toilets which is at the heart of this case, it should not be overlooked that there were benefits in having in-room toilets. In particular, whether or not the room doors were locked, it was convenient for detainees to be able to use a toilet in their room overnight, rather than having to go out in their nightclothes into the unit to use a communal toilet. In that respect, the in-room toilets enhanced privacy for detainees. There were also safety and security advantages in enabling the room doors to be locked overnight, and so in minimising the safety and

security problems that might arise if detainees were able to wander the units at night, and could have access to other detainees' bedrooms. Some might regard the availability of in-room toilets as being an advantage, not a disadvantage.

143. The toilet area was separated from the rest of the room by floor to ceiling walls, apart from a gap formed by an aperture which enabled the detainees to enter and exit the toilet area or cubicle. The washbasin was in the room itself, against the outer wall of the toilet area.

Sight lines, if there was no screen

144. As I have said, the two bed spaces in the rooms at Brook House were each parallel to the side wall of the room. At one end of the room was the desk and window. At the other end, next to one of the bed spaces was the toilet area. A full-height wall or solid concrete partition jutted out at right angles from the side wall to separate the toilet space from the bed space on the same side of the room. This concrete partition extended beyond the side of the bed, so that neither the toilet nor the toilet space could be seen from that bed.

145. The aperture into the toilet space could, however, be seen by someone if he was sitting on at least part of the bed on the other side of the room. So far as I can tell from the plan and the photographs, a detainee sitting on the bed would not be able to see a person who was actually sitting on the toilet. This was because there was another full sized curved concrete wall or partition which ran from the inner wall of the room along the side of the toilet.

146. It would, however, be possible for someone to see a person sitting on the toilet (if there was no screen) if that person chose to stand at a particular place on the floor in the middle of the room and look into the toilet space. I am satisfied, however, that the configuration of the rooms was such that (leaving aside religious observance, which I will deal with separately) it was not unavoidable that a detainee would have to watch his roommate use the toilet during the night state. The detainee could avoid doing so by sitting on the bed nearest to the toilet, where the view would be blocked by the partition wall. Also, a detainee would not have to see someone on the toilet (even without a screen), if he sat at the far end of the other bed, or at the desk by the window, or stood at the washbasin, or at other places on the floor.

147. It follows that, in my judgment, it is clear that the configuration of the room did not, even in the absence of a screen, require a detainee to look at a fellow detainee whilst he was using the toilet. Detainees would, though, be aware that the toilet was very close by.

Sound and odours

148. However, the proximity of the toilet to the rest of the room means that, especially if there was no screen, the sounds of toilet usage would potentially be heard, and any resultant odours would waft into the room. There was, therefore, plenty of scope for personal embarrassment in using the toilet in the absence of a screen.

Were the toilets screened?

149. It is the evidence of the Defendant, which I have no reason to doubt, that, at the relevant period, the intention was that each toilet would be provided with a screen, of lightweight curtain material, in order to provide greater privacy when the toilet was being used. The reason why, at the material time, the Defendant did not provide a door or a more solid partition, was because of a fear that to do so would provide ligature points which might be used by detainees to harm themselves or to commit suicide.

150. There is compelling evidence, however, that the screens were not always present in the rooms. In the HMCIP's Report following his unannounced visit in October/November 2016, the HMCIP said that "The toilets were divided from the living area by a partial concrete partition but were screened by a small curtain at best, and nothing in many cases." However, Ms Hardy said, and I accept, that in the Spring of 2017, and in response to the HMCIP's Report, curtains were ordered and installed in all rooms. This was before Mr Soltany or Mr Ebadi arrived at Brook House, although is possible that the roll-out of curtains was still underway when they arrived.

151. Accordingly, prior to the Claimants' arrival at Brook House, efforts had been made by the Defendant and G4S to ensure that each toilet would be screened from the rest of the room by a curtain.

152. Nonetheless, both Mr Soltany and Mr Ebadi said in their evidence that there was no screen to block the aperture to the toilet. Mr Soltany said that he never saw a screen in any room throughout his time at Brook House. He said that there was no screen in either the two-bed room or the three-bed room in which he stayed. Mr Ebadi's evidence does not make clear whether there was no screen in his rooms throughout his time at Brook House, or only in some of the rooms that he occupied. However, in his witness statement of 7 November 2017, Mr Ebadi set out the position in relation to two of the rooms that he stayed in. He said, in relation to one, that "There was a toilet in the room which did not have any screens or doors", and, in relation to the other, "The toilet situation is still the same – there is no door or screens and it is still very dirty and smelly."

153. The Defendant does not have any evidence to contradict the First and Second Claimants' evidence in this regard, and I accept it.

154. The witness evidence of Mr Hossain, solicitor to the Claimants, referred also to the evidence of the Claimants in **Hussain and Rahman**. Mr Hussain said that there was no screen or curtain around the toilet. Mr Rahman, in contrast, referred to a "makeshift curtain" covering the entrance to the toilets. Mr Hossain's statement also exhibited a table consisting of instructions that he had received from other clients at Brook House, who were identified only by initials. In eleven cases, these clients said that there was no curtain or screen, whilst in four cases they said that there were curtains.

155. Callum Tulley, who worked at Brook House between 26 January 2015 and 7 July 2017 before leaving after carrying out undercover filming for BBC Panorama, said in his witness statement that "I can confirm that whether or not the curtains were available, there were serious problems with the Velcro fixing for these curtains which meant that they would not screen the toilets adequately or at all…. There were many rooms on the wings that simply did not have curtains screening the toilets… It is not

possible for me to put a precise figure on the amount of times I came across this problem because it was so common with many cells without screened toilets."

156. In my judgment, on the balance of probabilities, curtains had been installed in most, if not all, rooms in Spring 2017, but, by the time Mr Soltany and Mr Ebadi arrived, curtains were missing in a substantial number of rooms. I do not know why this would be the case, but presumably detainees, or previous detainees, had removed them, or they had fallen away from their Velcro fastenings. It is impossible to form a view about the number of rooms in which the screen was missing, but it is clear that this was a common problem.

157. It is also clear that, in theory, detainees could go to a member of staff and ask for a replacement curtain, but, perhaps because they did not know they were available, or perhaps out of embarrassment, this was not always done. There is no record or either Mr Soltany or Mr Ebadi complaining about the lack of a screen. Sometimes, detainees made home-made screens from sheets or towels. However, as I have said, even in the absence of a screen, there was a degree of privacy as a result of the configuration of the toilets.

158. By 2018, when Mr Oriakhail was detained at Brook House, curtains had been installed in all rooms. Mr Oriakhail's evidence was that there was a curtain over the aperture in his room, though he complained that it was transparent. In his Report dated July 2018, Stephen Shaw said that the toilets were separated by a curtain.

The thickness of the screen

159. In his evidence, Mr Oriakhail called the screen a "thin curtain" and said that it was "transparent", and that he felt on show when using the toilet. In my judgment, based on the totality of the evidence before me, this was an exaggeration. The curtains that were supplied to rooms were not transparent. This would have made no sense. They were intended to screen off the toilet from the room. The curtains that I have seen in photographs were dark and fully blocked the view into the toilet area. The curtains had a small gap at the bottom, but were virtually full-height. It may be that, in some cases, the curtain was of some opaque material. In any event, I am satisfied on the preponderance of the evidence that the material from which the screen was constructed was sufficient to block the view into the toilet area.

The efficacy of the screening by a curtain

160. The curtain was attached to the wall with Velcro and stretched almost, but not quite, to the top and bottom of the aperture. The curtains sometimes came away from their Velcro fastenings.

161. As I have just said, the curtain, when it was in place, blocked the view into the toilet area and so should have meant that detainees were not at risk of seeing each other, or of being seen, when using the toilet. This would also have helped with (but not entirely eradicate) the problems with noise and embarrassing odours. The curtain did not provide as much privacy as a door would have done, but it nonetheless provided considerable privacy.

Changes since 2018

162. Since the period with which I am concerned, the Defendant has removed the curtain and has fitted a swing-door to the aperture between the toilets and the rooms. This is a special door that was designed to avoid creating a ligature risk. This door does not extend all the way to the ceiling or all the way down to the floor. Whilst this may give a user greater confidence than a sheet-like screen, there is still scope for noise and smells to leak out. However, the risk of a door such as this having been removed by a previous occupant of the room is much lower than the risk of a curtain being removed.

163. I accept Mr Roe QC's submission that the fact that this change has now been introduced does not mean that the arrangement that previously existed was unlawful. The arrangement in place at the relevant time must be assessed on its own merits.

The reactions of detainees to the in-room toilets

164. I am satisfied that detainees often found the conditions relating to the in-room toilets to be unpleasant and even degrading. Mr Soltany said, in his evidence, "It is horrible because there is no privacy and it is shameful to have to use the toilet in front of your roommate." Mr Ebadi said that "I feel really embarrassed to go to the toilet if someone else is in my room", and that to go to the toilet when another person is there, without a door or cover, "is simply degrading, like a punishment." Mr Oriakhail said "… we can hear each other defecating and urinating because the toilet is in the room. It's disgusting. There is no privacy at all." Mr Hussain said that "it was really humiliating and embarrassing to have to use the toilet whilst my roommates are in the same room…" Similar comments were made by a number of unidentified residents whose statements were collected by Mr Hossain, the Claimants' solicitor.

165. The July 2010 Report on Brook House by HMCIP said, "We received a considerable number of complaints about [the lack of communal toilets] from detainees who found it degrading to have to share a toilet in their room with someone else present…." In his July 2018 Report, Mr Shaw said that "Rooms were essentially cells, with prison doors and – most notably -in-room toilets separated only by a curtain. This is not decent."

166. None of the Claimants made a formal complaint regarding the in-room toilets, or about the lack or insufficiency of curtains in their rooms.

(4) Ventilation

167. Rule 15(2)(a) of the DCR provides that no room shall be used as sleeping accommodation for a detained person unless the Defendant has certified that its size, lighting, heating, ventilation and fittings are adequate for health. The rooms in Brook House were certified as having ventilation that was adequate for health in August 2016 and in May 2019. Also, as I have said, the feasibility study by the consulting engineers in 2015, concerning the conversion of some rooms to three-bed rooms, determined that the ventilation requirements could be met by the existing equipment.

168. DSO 04/2003, entitled "Accommodation: Lighting, Heating and Ventilation" was in force at the time of the Claimants' detention. This provided that for rooms with no natural ventilation, "the minimum fresh air rate must be eight litres/second/person, where no smoking is permitted." Where smoking is permitted, "the fresh air rate

shall be increased in accordance with CIBSE Guidance and the Building Regulations Part F1 recommendations." The rooms at Brook House complied with these minimum standards, and continued to do so when some were converted to three-bed rooms. In December 2018, the Defendant published DSO 06/2018, which increased the minimum fresh air rate to 10 litres/second/person.

169. I accept, therefore, that at all material times the ventilation in Brook House rooms was adequate and safe for health purposes.

170. Nonetheless, complaints about poor ventilation in the rooms at Brook House have been a common theme since the IRC opened. The July 2010 Report on Brook House by HMCIP stated, "The most common complaint about residential areas was the poor ventilation…" The later HMCIP report, in March 2017, following an unannounced visit in 2016, stated that "The lack of ventilation was the most common complaint, and many cells were too stuffy overnight."

171. The windows at Brook House were not capable of being opened for security reasons, in order to protect the public and detainees. The self-regulating building management system managed temperature and ventilation throughout Brook House and did not permit detainees to have control over fresh air access in their rooms. In his witness statement, Mr Tulley said that there was a fan installed in each room.

172. During the detention of Mr Soltany and Mr Ebadi, detainees were permitted to smoke in their rooms. Smoking was banned at all IRCs from April 2018.

173. Mr Tulley said, and I accept, that detainees would often complain about the smell in their rooms and the lack of fresh air after they had been locked in them for long periods of time. Mr Tulley said that the rooms would smell particularly bad after the morning unlock and it was extremely unpleasant. This was not due entirely to the toilets. Mr Tulley said that this was due to either ventilation issues, poor hygiene, unscreened toilets, prolonged time in the rooms, or a combination of some or all of these factors.

174. Mr Ebadi said in his evidence that "The toilet made the room smell horrible and there was no window for ventilation. It felt as though there was no oxygen even to breathe." Mr Oriakhail said "The room feels very stuffy because we cannot get any fresh air. Because of the toilet within the room, it does smell very bad sometimes."

175. The relative stuffiness in the rooms must inevitably have exacerbated the odour problems resulting from the in-room toilets, though the stuffiness and smell was not solely the result of the toilet being in the room.

(5) Cleanliness

176. Detainees were responsible for cleaning their own rooms. Each room was issued with a toilet brush. Cleaning materials were available for them to use. Detainees could request cleaning products from an officer or obtain them from the residential wing products. The available products included a toilet and sink cleaner. Each wing office also has a stock of cleaning cloths, scouring pads, paper towels and disposable gloves.

177. Leaving other considerations aside, the fact that detainees cleaned their own rooms meant that the state of cleanliness was dependent on their own and their roommates' motivation, and also on the extent to which predecessors in their room had kept the room clean.

178. An EIA prepared by G4S in relation to the night state said that good room hygiene was encouraged by Imams during Friday prayers.

179. All rooms were subjected to regular checks to ensure that the fixtures and fittings were safe, secure, clean and properly maintained. All contracted out IRCs were contractually obliged to conduct health and safety inspections on a monthly and annual basis. On a regular basis, G4S or its contractors would carry out a deep clean of the rooms, including the toilets. Deep cleaning of all rooms at Brook House was completed in April 2018.

180. Complaints were made about the standards of cleanliness in the rooms in general and, in the toilets, in particular. Mr Ebadi said that "I try to clean my room as much as possible before prayers. However, the toilet is still very dirty and the room smells." Mr Rahman said that "The rooms I have been in are not cleaned by any staff members. They expect us to clean the rooms and the toilets ourselves. They do not provide us with any cleaning products so we have to ask for them."

181. In the HMCIP Report in March 2017, following an unannounced inspection in October-November 2016, HMCIP said that "many cells had ingrained dirt, especially in toilets, and those on C wing were in the worst condition." The HMCIP recommended a deep clean. The Service Improvement Plan published in response by the Defendant in March 2017 said that work was underway to clean all detainee rooms and toilet areas as part of a continuous programme of cleaning.

182. The Lampard Report in November 2018 said that the standard of cleaning at Brook House "has been a problem for some time" and was unacceptable. The Investigation was told that detainees found it difficult to clean their rooms properly because they did not have adequate cleaning products and cloths. However, some cleaning products were kept on the wings. On the other hand, HMCIP's 2019 Report described the standard of cleanliness at Brook House as "very high", but also said that there was widespread staining of toilets and basins, despite different products being tried. The IMB Report for Reporting Year 2018 said that "a positive change has been a sustained improvement in the cleanliness of the centre throughout the year". In its Report for Reporting Year 2016, the IMB said that "There is an issue with the WC bowls which always look unclean. We are told this is mineral staining which can only be improved with products which cannot be made available to detainees…."

183. Drawing these strands together, the evidence shows that many toilet areas were dirty, and some had ingrained dirt. Even when they were not dirty, the toilet bowls looked unattractive. There were practical obstacles to ensuring that rooms and toilets attained the highest standards of cleanliness. Primary responsibility for cleaning rooms rested with the detainees, but the extent to which this was done was patchy, as it depended on personal motivation, and many detainees did not expect to be in their room for very long. Cleaning materials were available for the detainees to use to clean their rooms, including the toilets. This is what Ms Hardy says, and it is borne out by Mr Ebadi's and Mr Rahman's evidence. Mr Tulley said that staff could offer

cleaning products if they were available. He was not aware that cleaning products were available to clean the toilets but his main responsibilities were in the activities department and he would necessarily have been unaware. For security reasons, the strongest and therefore most effective cleaning products were not made available to the detainees.

184. Muslim detainees were advised by their Imams at Friday Prayers to keep their rooms clean.

185. The Claimants contend that the Defendant failed to provide adequate cleaning materials, but I find on the evidence that this is not so, at least in general. Cleaning materials were available for use by detainees to clean their rooms. On some occasions, supplies may have been temporarily unavailable. From time to time, rooms and toilets were given a deep clean.

Issue One: Did the Defendant act unlawfully, and in breach of general public law principles and/or in breach of Articles 5 and/or 8 of the European Convention on Human Rights, by locking the Claimants into their rooms during the night state, because there was no adequate and clear statutory provision which permitted it, either at all, or in the restrictive manner in which the night state was operated at Brook House?

186. The Claimants contend that there was no adequate and clear statutory provision which authorised night state, or alternatively which authorised the form of night state in operation at Brook House, and that this was in breach of domestic public law principles, and Articles 5 and/or 8 of the ECHR. The Defendant disputes that Article 5 or Article 8 of the ECHR are engaged, in this respect, because the challenge is not to the fact of detention, but to the conditions of detention. The Defendant submits that Article 5 and Article 8 are only engaged by the conditions of detention where the conditions are particularly repressive, and that was not the case here.

187. I will first identify the relevant domestic public law principles and the requirements, under ECHR Articles 5 and 8, to the effect that the requirement that the deprivation of liberty is justified by adequate and clear statutory language. I will then go on to consider whether the night state at Brook House was unlawful because it did not have adequate or clear statutory provision. There are separate questions as to whether Articles 5 and 8 have any application at all to a challenge to the duration and conditions of night state in a detention centre. It is convenient to deal with these questions when I come on to deal with whether the duration and conditions themselves are in breach of Article 5 or 8. For the purposes of addressing the complaint about lack of adequate and clear statutory provisions, I will assume, without deciding, that Articles 5 and 8 are engaged.

The general public law requirement for adequate and clear statutory provision

188. Ms Harrison QC says that the starting point is that the power administratively to detain is a draconian power that must be strictly and restrictively construed: **B(Algeria) v SSHD** [2018] UKSC 5; [2018] AC 418, at paragraph 29. This is because, in enacting legislation, Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear.

189. Ms Harrison QC submits that domestic public law requires that there be adequate and clear statutory provision for the infringement of personal freedoms. She relies on **New London College Ltd v SSHD** [2013] UKSC 51; [2013] 1 WLR 2358, in which the Lord Sumption (with whom Lords Clark, Reed and Hope agreed) said, at paragraph 29:

> "Without specific statutory authority, [the Defendant] cannot adopt measures which are coercive; or which infringe the legal rights of others (including their rights under the Convention for the Protection of Human Rights and Fundamental Freedoms); or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law."

190. I accept that there are circumstances in which infringements to personal freedoms may be rendered unlawful, as a matter of domestic law, because they are not underpinned or justified by adequate and clear statutory justification. But it does not follow that every action which has an impact upon personal freedom must have a specific statutory justification. The passage from the **New London College** case makes clear that Lord Sumption was referring to a need for specific statutory authorisation in circumstances in which the treatment would otherwise be unlawful on public law grounds. Lord Sumption was not setting out a general common law principle to the effect that any step taken in relation to a person who is detained, which limits their freedom of movement or action, must be authorised by statute. That would be wholly unworkable, because it would not be possible to anticipate every circumstance in which such an infringement might take place, and, even if it were possible, the resulting legislative provisions would be unworkably dense and lengthy. Almost every single aspect of the regime at a detention centre would have to be set out in legislation. The **New London College** case was not a case about detention. It follows, in my judgment, that there is no general common law principle that every aspect of the regime that is imposed on those who are in immigration detention must be laid down in statute. If the treatment could be characterised as coercive, or would otherwise be unlawful, for example because it is irrational, then it would require statutory authorisation.

The requirements under the ECHR, Articles 5 and 8

191. The leading authority is **Lumba v Secretary of State for the Home Department** [2011] UKSC 12; [2012] 1 AC 245. In that case, the Claimants challenged the application of a blanket policy of the Secretary of State to the effect that all foreign national prisoners would be detained following the completion of their sentences of imprisonment, pending the making of deportation orders against them. This policy, which admitted of no exceptions, was unpublished, and, indeed, was inconsistent with published policy. The Supreme Court held (Lord Phillips dissenting) that this was unlawful.

192. In the course of his judgment, Lord Dyson said that Article 8 required that the conditions for deprivation of liberty under domestic and/or international law must be clearly defined. This is necessary so that deprivation of liberty is "in accordance with the law", as required by Article 8.2. At paragraphs 32-39 of his judgment, he said:

"In **Medvedyev v France** (Application No 3394/03) (unreported) 29 March 2010, para 80 the Grand Chamber said:

"where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined."

Gillan and Quinton v United Kingdom (2010) 50 EHRR 1105 concerned the stop and search powers conferred on the police by the Terrorism Act 2000 . For present purposes, the relevant issue was whether the powers were "in accordance with the law" within the meaning of article 8.2 of the ECHR. A Code of Practice was issued by the Secretary of State to guide police officers in the exercise of their powers of stop and search. The ECtHR said, at para 77:

"Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

33. The ECtHR noted at para 83 that the Code of Practice

"governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer's decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the 'hunch' or 'professional intuition' of the officer concerned."

In the opinion of the court, there was a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. At para 87, they concluded that, despite the existence of the Code of Practice, the statutory powers were not "in accordance with the law" because they were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse".

34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.

35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see **In re Findlay**1985 AC 315, 338 e . There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In **R (Anufrijeva) v Secretary of State for the Home Department** [2004] 1 AC 604 , para 26 Lord Steyn said:

"Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice."

36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in **R (Salih) v Secretary of State for the Home Department** [2003] EWHC 2273 at [52] that "it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute". At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made "in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit". This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?

37. There was a real need to publish the detention policies in the present context. As Mr Husain points out, the Cullen policies provided that certain non-serious offenders could be considered for release. The failure to publish these policies meant that individuals who may have been wrongly assessed as having committed a crime that rendered them ineligible for release would remain detained, when in fact, had the policy been published, representations could have been made that they had a case for release.

38. The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before

> us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be *269 compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.
>
> 39. For all these reasons, the policies which were applied to Mr Lumba and Mr Mighty were unlawful. …"

193. Lords Hope and Walker, Baroness Hale, and Lords Collins, Kerr, Brown, and Rodger agreed with this part of Lord Dyson's judgment. At paragraph 206, Baroness Hale made clear that Article 5.1(f), ECHR, also requires that any deprivation of liberty has to be "in accordance with a procedure prescribed by law".

194. In **JN v United Kingdom** (Application No. 27289/12), an Article 5 case about the lawfulness of detention, the European Court of Human Rights ("ECtHR") said:

> 77. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5.1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the "quality of the law". "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness […] Factors relevant to this assessment of the "quality of law" […] will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention […]; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention.'

195. In **Amuur v France** [1996] ECHR 25, a case concerning the confinement of asylum seekers to a hotel, the ECtHR said, at paragraph 50:

> "50. It remains to be determined whether the deprivation of liberty found to be established in the present case was compatible with paragraph 1 of Article 5. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any

> deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.
>
> In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5(1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11 , they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention.
>
> In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty—especially in respect of a foreign asylum seeker—it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies."

196. Finally, in **Al Nashif v Bulgaria** (50963/99) [2002] ECHR 502, an Article 8 case, the ECtHR said, at paragraph 111:

> "119. In addition, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

Has there been a breach of domestic law principles or of ECHR, Articles 5 and/or 8, as the result of the lack of an adequate and clear statutory framework?

197. Ms Harrison QC submits that, from its outset, Brook House has operated and continues to operate a most restrictive regime, based on a category B prison, of prolonged and multiple lock-ins which significantly curtail and restrict the residual liberties and freedoms of administrative detainees. She says that there was and is nothing specific in the statutory scheme, or the DCR, guidance, or other published policy that authorises, regulates or reviews the terms, imposition of and the wide

ranging variations in the 'lock-in' regime that have been operated across the different IRCs. Nor is there anything in the scheme which sanctioned, adequately or at all, the highly restrictive regime implemented at Brook House. She says that this renders the night state arrangements at Brook House unlawful, given the absence of an adequate and clear statutory underpinning.

198. Mr Roe QC, on behalf of the Defendant, submits that that the relevant framework is sufficiently clear, precise and foreseeable in its application as not to offend against the principle of legal certainty.

Discussion

199. Ms Harrison QC is right that there is no statute or statutory instrument which makes provision for night state, or a specified duration of night state, at IRCs. The DCR do not refer to night state. At the material times for these proceedings, there was no DSO which dealt with night state. That has now changed. As stated above, DSO 04/2018 now requires that each centre supplier must have in place local Night Operating Procedures that clearly define and justify the timings for night state, and that the Night Operating Procedures must be agreed between the supplier centre manager and the Home Office Compliance Team Service delivery manager. DSO 04/2018 sets out factors which should be taken into account when deciding upon the duration of the night state, but it does not specify timings or parameters.

200. However, prior to DSO 04/2018, there was no central Home Office guidance or policy relating to when detainees might be locked in their rooms, or for what period.

201. In practice, at the relevant time, the duration of the night state at each IRC was determined by the contract between the Defendant and the contractor. The duration of the night state at Brook House was laid down in the contract between the Defendant and G4S. G4S's (then GSL's) bid, submitted in 2007, to run Brook House, had proposed a duration of 9pm to 8am. The Defendant's contract specification in 2007 did not specify that a particular night state, or maximum night state, should apply. This is in contrast to the position in relation to the new contract to run Brook House, which commenced in May 2020. For that contract, the Defendant specified that the night state should be no more than 9 hours long.

202. There are, however, general statutory provisions about the conditions in which detainees may be held in IRCs. These are in Rules 3 and 39 of the DCR (set out above). The DCR are made pursuant to the Defendant's obligation under section 153(1) of the 1999 Act to make "rules for the regulation and management of removal centres." Rule 3 of the DCR prescribes that that there must be "as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment" and Rule 39(1) provides that "security shall be maintained, but with no more restriction than is required for safe custody and well-ordered community life." Other parts of the DCR, set out at paragraphs 65 and 66, above, are much more prescriptive.

203. In my judgment, the absence, at the relevant time, of specific statutory or Home Office rules or policy relating to the existence, duration, or nature of the night state did not amount to a breach of domestic legal principles or to a breach of ECHR Articles 5 or 8 (assuming that they were engaged).

204. It is convenient to start with the position under the ECHR.

205. In the passage from the ECtHR's judgment in the **Gillan and Quinton** case, referred to in Lord Dyson's judgment in **Lumba,** the ECtHR said that:

> "The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

206. This recognises that the extent to which provision must be made specifically in legislation depends on the subject-matter and the nature of the treatment that is being circumscribed. The themes running through the case-law cited above are, first, that the level of precision which is required must be that which is sufficient to prevent arbitrary treatment, and, second, that those affected must have access to the policy in question, so that they are able to challenge its lawfulness, if they wish to do so. If those affected by it do not even know that a policy is being applied, and/or do not know the terms of the policy, they are powerless to do anything about it.

207. In light of these principles, even assuming that Articles 5 and 8 are engaged, they are not breached by the failure to lay down statutory provisions or Home Office rules or policy about the existence, nature or duration of night state. The subject-matter of this challenge is not a challenge to the rules relating to detention itself (as in **JN**, **Lumba** and **Amuur**). In **JN,** the ECtHR found that UK law relating to immigration detention has been found to comply with the requirements of Article 5(1) of the ECHR, including the principle of legal certainty. The subject-matter of the present challenge relates to aspects of the conditions in which detainees are held, namely being locked in their rooms overnight, whether at all, or for a particular length of time, with an in-room toilet. In my judgment, neither Article 5 nor Article 8 requires that domestic law or departmental policy must be prescriptive either as to whether there should be a night state at all, or its duration. This is a matter of operational arrangements which must respond to particular circumstances, and which does not lend itself to being prescribed in full detail.

208. Detainees at Brook House, at the relevant time, were protected by the provision of an adequate and clear statutory provision for their conditions of detention in the DCR. Many aspects of life in a detention centre are prescribed in detail by rules in the DCR. Three rules in the DCR were of particular relevance to the lock-in of detainees at IRCs in their rooms overnight. As stated above, Rule 3 provided that there should be "as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment" and Rule 39(1) provides that "security shall be maintained, but with no more restriction than is required for safe custody and well-ordered community life." Although these were "soft" rules, rather than "hard-edged" rules, they nonetheless gave a clear steer that restrictions should be as light as possible. Moreover, rule 15 imposed restrictions on the conditions in detainees' rooms, requiring that size, lighting, heating, ventilation and fittings must be adequate for health. It is true that this gave discretion to the Defendant and the contractors about matters such as the night state, but Articles 5 and 8 do not have the effect that arrangements such as these are unlawful unless prescribed by law or set out in policies in every detail.

209. There is no risk of the use of night state being arbitrary, in the sense that stop and search by police officers can be arbitrary. Night state did not leave a discretion to individual DCOs to decide whether there should be a night state for a detainee, or how long a detainee should be locked in overnight.

210. There is no respect in which the arrangements for the night state could be regarded as being a "secret" policy, in the way that the policy of detention for TSFNOs in **Lumba** was secret. Detainees knew that there was a night state, and they knew the duration and conditions of the night state, because they were experiencing them.

211. Importantly, detainees could challenge the night state by way of legal proceedings (such as these). Moreover, the state of detention centres, and the conditions of them, were subject to review by IMBs and HMCIP. IMBs had a right, at any time, to enter and inspect any part of an IRC: 1999 Act, s152(1). The IMBs are required, amongst other things, to "satisfy themselves as to the state of the detention centre premises, the administration of the detention centre and the treatment of detained persons" (DCR, rule 61).

212. For all of these reasons, I consider that, even assuming Articles 5 and 8 ECHR are engaged by the night state, there was no breach of the obligation for legal certainty imposed by those Articles.

213. For the same reasons, I take the view that there was no breach of the domestic law requirements of legal certainty in certain circumstances. There was plainly a need for statutory authorisation for detention itself, but there was no need for a statutory authorisation, or express departmental rules, about the night state arrangements.

214. In any event, in my judgment, the provisions of the DCR provide a sufficiently certain legal underpinning for the night state arrangements at Brook House in 2017-18, to satisfy the domestic law requirements of adequate legal certainty.

215. I should add that the fact that the Defendant introduced a specific policy for night state in late 2018, in DSO 04/2018, does not affect this conclusion. It was undoubtedly a positive and beneficial step for the Defendant to spell out her policy for night state in DSO 04/2018, but this does not mean that the pre-existing position was in breach of the requirements of legal certainty.

Issue Two: Did the Defendant unlawfully fetter her discretion by effectively delegating to G4S the decision as regards how long the night state at Brook House should be?

216. It is clear on the evidence, as I have said, that the proposal that the night state at Brook House should run from 9pm to 8am emanated from G4S (as GSL), as part of the company's bid for the Brook House contract in 2007. The Defendant accepted GSL's bid in the knowledge that the contractor would operate a night state at the detention centre for those hours.

217. Ms Harrison QC's skeleton argument submitted that this means that the Defendant had unlawfully fettered her discretion. She put the point in two ways in her skeleton argument.

218. First, she submitted that the Defendant had fettered her own freedom to exercise her statutory powers by way of contract with another party. She submitted that the Defendant had in effect surrendered and/or abdicated her responsibilities to set the minimum standards and conditions required for a relaxed and humane regime appropriate for administrative detention and to set appropriate constraints on how the balance should be objectively be struck with security.

219. Second, and in the alternative, she submitted that even if the Defendant had, in theory, retained the power to instruct the contractor to change the duration of the night state, in practice the Defendant abdicated responsibility for the night state, and left it to the contractor to decide how long it should last for. This meant that the Defendant had unlawfully and/or unreasonably fettered her discretion.

220. In her oral argument, Ms Harrison QC accepted that the Contract between G4S and the Defendant did not in terms fetter the Defendant's discretion. However, she submitted that in the practice the Defendant fettered her discretion by treating the contract as determinative. Even though, strictly, the Defendant was not bound by the Contract to maintain a night state from 9pm to 8am at Brook House, at the relevant time, the Defendant fettered her discretion in practice by regarding herself as bound by the Contract in this respect.

221. For the Defendant, Mr Roe QC says that it is clear both from statute and from the language of the Contract itself that responsibility for setting the minimum standards and conditions at Brook House, including the night state, was not delegated to G4S. Moreover, there is no evidential basis for drawing the conclusion that the Defendant laboured under the misapprehension that she was bound by the Contract with G4S to abide by the night state timings determined by G4S.

Discussion

222. The starting point is that Ms Harrison QC was right to concede that, by entering into the Contract, the Defendant did not fetter her discretion or surrender her responsibilities for setting the minimum standards and conditions required for a relaxed and humane regime. It is clear from section 153 of the 1999 Act that the Defendant, not the contractor, has statutory responsibility for the management and regulation of detention centres. This responsibility is exercised by the making of the DCR and the DSOs.

223. It was also absolutely clear from the terms of the Contract that the Defendant was not bound by the Contract to defer to G4S's plans or arrangements in relation to the night state. The Defendant retained control. This was made clear by clauses 13, 19 and 20, which are set out, in relevant part, at paragraphs 109-112 above. So, pursuant to clause 13.1.1, the Defendant was entitled to alter the extent of any obligation to be met by the contractor under the Contract, by giving notice in writing. Clause 19.1 provided that the operation of the IRC by the contractor had to be in accordance with and by virtue of the Defendant's powers under the 1999 Act and any other applicable legislation. Clauses 20.1 and 20.2 provided that the contractor was obliged to operate and manage the centre in accordance with all relevant legislation, including the 1999 Act, the Human Rights Act 1998 and the DCR.

224. Against that background, it would be very surprising if the Defendant had made the fundamental mistake of believing that she was fettered by the contractor's indication, in its tender documents for the bid to run Brook House, that it would operate a night state from 9pm to 8am, which was then set out in Schedule D to the Contract. This would be directly contrary to the contract documentation, which reserved a general power for the Defendant to alter specifications, and would also be contrary to law and common sense. If it became clear that legislation, including the Human Rights Act 1998, required there to be a shorter night state, or no night state at all, then it is inconceivable that the Defendant could have believed that, nonetheless, she was bound to continue with the night state from 9 to 8, because of what G4S, or GLS, had said in the tender documents, or because of what was set out in Schedule D to the Contract.

225. There is no evidence from the Defendant to the effect that she considered herself to be fettered by the terms of the agreement with G4S to maintain a night state of 9 to 8, come what may. Contrary to the Claimants' submission, this was not said in Ms Hardy's first witness statement.

226. In my judgment, one cannot work backwards from the fact that the Defendant did not take steps to require G4S to vary the night state in order to come to the conclusion that this must mean that the Defendant thought that she had no power to vary the night state. It is true that the duration of the night state was criticised by HMCIP in several reports. However, the Defendant was not bound to accept that criticism. Moreover, in the Service Improvement Plans, which the Defendant drew up in response to HMCIP's reports, the Defendant did not say that she was powerless to change the length of the night state. Rather, she said that she considered the duration of the night state to be "adequate". So, for example, in the Service Improvement Plan in response to the Report which followed HMCIP's announced visit on 15-19 March 2010, the Defendant said that:

> "Regime timings are determined by the operational contract in place between UKBA and G4S. Under this contract, detainees have access outside their rooms 13 hours a day and are confined to their wings during this period only during mealtimes. This is considered adequate time to engage with other detainees and access facilities within the centre."

227. It is true that this response says that night state timings are determined by the Contract, but that was no more than a statement of fact. It cannot be inferred from this statement that the Defendant mistakenly believed that she was bound to stick with the night state timings laid down by G4S. The last sentence of the above passage makes clear that the Defendant was content with the night state timings and so thought that they were consistent with the balance between a relaxed regime and security that IRCs are required to maintain by the DCR.

228. Accordingly, in my judgment, the evidence does not lend any support to the Claimants' contention that the Defendant had fettered her discretion in relation to the length of the night state.

Issues 3(a) and (b)

3(a): Was the operation of the night state unlawful because the Brook House night state regime and conditions were not consistent with, and did not meet, or further the object or purpose of, the statutory scheme?

3(b) Was the night state regime at Brook House, and the conditions relating to the toilets, inconsistent with the Defendant's common law powers and obligations?

229. It is convenient to deal with these two issues together.

The Claimants' submissions

230. On behalf of the Claimants, Ms Harrison QC submits that the Defendant cannot establish that the regime at Brook House is compatible with the object and purpose of the statutory scheme for administrative detention and/or Rules 3(1) and 39 of the 2001 Rules because:

a. The night state, coupled with the conditions in the rooms, is inconsistent with a regime for administrative detention where individuals are held without charge or trial for the purposes of immigration enforcement and administrative convenience;
b. It is inconsistent with, and contrary to, the express provisions of Rule 3(1) of the Rules for "secure but humane accommodation" in so far as the Rule requires:
   i) "A relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment,
   ii) To encourage and assist detained persons to make the most productive use of their time,
   iii) Whilst respecting in particular their dignity and the right to individual expression."
c. It is also inconsistent with, and contrary to, the requirement of Rule 39(1), that: "Security shall be maintained, but with no more restriction than is required for safe custody and well-ordered community life" (emphasis added).

231. She further submits that the imposition of the night state, coupled with the conditions in the rooms, is an unlawful exercise of the Defendant's powers, bearing in mind, in particular, the heightened intensity of review that she submits is appropriate in a case like this.

232. She relies, in particular, on the following factors:

(1) The Brook House night state regime is significantly more restrictive than other regimes that have been operated over many years at other IRCs;

(2) The Defendant herself accepted that the duration of the lock-in at Brook House can be reduced from 12 hours to 9 hours, because that is what she specified for the new contract for the operation of Brook House with effect from May 2020;

(3) No specific security issues are relied upon by D to justify why Brook House required the night state regime when other IRCs have not and do not impose it;

(4) The HMCIP has consistently stated that the night state regime at Brook House is not justified, and Stephen Shaw has commended the more liberal regime at Campsfield House;

(5) The main justification for the night state that has been advanced by the Defendant, namely to create a clearly defined day/night regime, is not an adequate justification;

(6) Nor is the additional justification, of preventing detainees congregating in landing areas and to promote security. Indeed, the night state poses a risk to detainees;

(7) Again, the justification that the night state saves costs and enables the contractor to operate with a smaller staff during the night hours cannot stand as a justification; and

(8) The conditions associated with the in-room toilets mean that the night state is inconsistent with human dignity and is inhumane.

233. For the Defendant, Mr Roe QC contends that the night state was consistent with the statutory purpose and with rules 3(1) and 39 of the DCR. He submits that Rules 3(1) and 39 bristle with tensions between factors which pull in different directions and indicate the problems which face the decision-maker in seeking to provide a secure and well-ordered, but humane and relaxed regime. Rules such as these are very different from the types of hard-edged statutory requirements that appear elsewhere in the DCR, such as the requirements that there be separate accommodation for male and female detainees (Rule 10) and that each detainee will have at least one hour a day in the open air (Rule 18). Mr Roe QC submits that the general statutory purpose of administrative detention, and Rules 3(1) and 39, require the decision-maker to strike a balance and to make judgments. In other words, the decision-maker has a discretion as to how to comply with the statutory purpose and to reconcile the various requirements of Rules 3(1) and 39, and, he submits, the Court must respect the balance that the Defendant has struck, unless it is **Wednesbury** unreasonable, or the Defendant has otherwise acted unlawfully on standard public law grounds, such as by taking immaterial considerations into account. Mr Roe QC submits that, provided that there is a rational connection between the night state regime and the requirements of Rules 3(1) and 39, the Defendant has acted lawfully. He says that there is such a rational connection.

234. In dealing with this part of the case, I will first identify the relevant statutory purpose. I will then deal with the legal tests that I must apply, and I will, finally, apply the tests to the issues in the case.

What is the relevant statutory purpose?

235. The purpose of administrative detention is set out in paragraph 16(2) of Schedule 2 to the Immigration Act 1971, namely that if there are reasonable grounds for suspecting that a person is someone in respect of whom removal directions may be given, that person may be detained under the authority of an immigration officer pending a decision whether or not to give such directions, and his/her removal in pursuance of such directions.

236. This is the statutory purpose for the Claimants' detention, but the general statutory purpose does not shed any light on the conditions in which a detainee should be confined, save that it is obviously implicit that the conditions must be secure, and, as Ms Harrison QC stresses, detainees are in administrative detention in order to facilitate their removal or deportation and are not being detained as punishment for the commission of criminal offences.

237. In my judgment, the statutory purposes or requirements that matter for the purposes of this part of the Claimants' argument are those that are set out in Rules 3(1) and 39 of the DCR, namely that the Defendant should arrange for the provision of secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, and that security should be maintained, but with no more restriction than is required for safe custody and well ordered community life. This takes account of the fact that detainees are being held pending removal, and that they should not be treated, so far as possible, as if they are in prison.

238. The main question, therefore, is whether the night state regime at Brook House was incompatible with the statutory purposes that are set out in Rules 3(1) and 39.

What is the nature and scope of the Court's review, for a "statutory purpose" challenge, in a case like this?

239. The difference in the parties' submissions on the law is stark.

240. Ms Harrison QC submits that the statutory purpose set out in Rules 3(1) and 39, essentially that the regime should be as relaxed as possible, was "hard-edged", and the question whether the regime was consistent with the statutory purpose was an objective question, to be determined by the Court. She submits that Mr Roe QC's assertion to the contrary, that the issue is subject only to **Wednesbury** review, in which the Defendant enjoys considerable latitude, is wrong as a matter of common law.

241. Mr Roe QC, on the other hand, submits that, while the identification of the relevant statutory purpose of the power is a matter for the Court, the decision as to how to give effect to it, in a case where an exercise of judgment is called for, must necessarily be a matter for the Defendant, subject of course to review for lawfulness on the usual grounds, such as irrationality.

242. The starting point, in my judgment, is that it is for the Court to ascertain the purpose of a statute from its wording, not for the minister or her officials to do so. See **Padfield v Minister of Agriculture, Fisheries & Food** [1968] AC 997 at 1030B-D, **R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Ltd** [2001] 2 AC 349, at 382, and **R (Rights of Women) v Lord Chancellor** [2016] EWCA Civ 91 [2016] 1 WLR 2543 (CA), at paragraph 40.

243. In the present case, the statutory purposes of Rules 3(1) and 39 of the DCR are clear on the face of the Rules. They are spelt out. They do not require any judicial inferences or interpretation.

244. Once the Court has identified the statutory purpose, the Court must go on to see whether the way in which the minister has given effect to the statutory purpose frustrates the statutory purpose and this involves considering whether it is rationally connected with the statutory purpose. This is not the same as a pure rationality challenge. In the **Rights of Women** case, at paragraph 42, the Court of Appeal said:

> 42. Mr Sheldon protests that this shows that the challenge being made to regulation 33 is in truth a rationality challenge, a challenge which the Rights of Women have always disavowed. But that is to confuse the **Wednesbury** jurisdiction (**Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223) with the **Padfield** jurisdiction of the court, when they are separate concepts. Any discretion conferred on a Minister "should be used to promote the policy and objects of the statute": **R (Electoral Commission) v Westminster Magistrates' Court** [2011] 1 AC 496 , para 15, per Lord Phillips of Worth Matravers PSC. As Lord Kerr of Tonaghmore JSC said in **R (GC) v Comr of Police of the Metropolis** [2011] 1 WLR 1230 , para 83:
>
> "a discretion conferred with the intention it should be used to promote the policy and objects of the Act can only be validly exercised in a manner that will advance that policy and those objects. More pertinently, the discretion may not be exercised in a way that would frustrate the legislation's objectives."
>
> Any inquiry as to frustration of purpose must consider whether there is a rational connection between the challenge requirement and the legislation's purpose."

245. In my view, therefore, the questions for me, in relation to statutory purpose, are whether the night state at Brook House at the relevant time operated so as to frustrate the statutory purpose, and, in particular, whether there was a rational connection between the operation of the night state and the purpose of Rules 3 and 39.

246. It follows that the "statutory purpose" test is not exactly the same as the **Wednesbury**-style irrationality test. However, this does not mean that I should substitute my own view for the way in which the Defendant should have provided a humane and relaxed regime at Brook House for the view of the Defendant, and then find that the Defendant has acted unlawfully if our views do not match. I do not agree with Ms Harrison QC that Rules 3(1) and 39 of the DCR are hard-edged. As Mr Roe QC submits, they require a balance to be struck between a number of objectives which are in tension with each other: the regime must be as relaxed and humane as possible, and with as much freedom and association as possible, but it must also be secure, safe, and well ordered. It is for the Defendant to strike the balance, provided only that the choice does not frustrate the statutory purposes and there is a rational connection between the regime that is adopted and the purpose of the Rules. It was the Defendant, not the Court, which was vested by statute with the responsibility for maintaining and regulating the regimes at IRCs.

The other public law challenge: the irrationality challenge

247. The other domestic public law challenge advanced by the Claimants to the night state is an irrationality challenge. In this respect, the parties are agreed that the Court should adopt the standard of scrutiny which is appropriate to the subject matter. The Courts have often stated that where a decision gives rise to an interference with important rights, there will be heightened scrutiny. In such cases, the public body will have to justify its decision and explain why the rights have been interfered with, and the Court will then assess whether it was reasonable for the public body to have concluded that there was a sufficient justification for the interference. The more substantial the interference, the more that will be required by way of justification, before the Court can be satisfied that the decision is a reasonable one: see, eg **R v Ministry of Defence, ex parte Smith** [1996] QB 517 (CA), at 554-555, per Sir Thomas Bingham MR.

248. In my judgment, to an extent a heightened degree of scrutiny is required in respect of the irrationality challenge in the present case, as compared to a "basic" **Wednesbury** challenge, but the subject-matter of this case is not such as to require the highest degree of scrutiny which the Courts can apply to an irrationality challenge. This is not a challenge about the fact of detention itself. This part of the case is not a challenge to discrimination related to characteristics such as sex, race or (as in **Smith**) sexual orientation. Rather, it is a challenge to certain aspects of the conditions of detention.

The statutory purpose challenge: discussion

249. In my judgment, in light of the findings of fact made earlier in this judgment, and for the reasons set out below, the operation of the night state at Brook House at the relevant time did not frustrate the statutory purposes set out in Rules 3(1) and 39 of the DCR, and there was a rational connection between the regime that was adopted and the purposes of those Rules.

250. Both of the Rules required the Defendant to strike a balance between the requirements of safety and security and good order, on the one hand, and the requirement of a relaxed and humane regime and as much freedom and association as possible, on the other. As Mr Roe QC submits, there is a tension between these requirements. A balance has to be drawn somewhere and in my view it cannot be said that the balance that the Defendant drew at Brook House in 2017-2018 frustrated the statutory purposes or was not rationally connected with those purposes. This is not to say that the night state regime at the time was the optimum regime, or that it did not have its problems, but the discretion as to where to set the balance rested with the Defendant, and it is not for the Court to say that it was unlawful unless the balance was so skewed that it frustrated or had no rational connection with the statutory purposes. This was not the case.

251. The rationale for the night state was set out in Ms Hardy's evidence. She said that it was 'to allow detainees an opportunity to rest and sleep while maintaining the safety and security of the centre' She added that the physical layout of Brook House means that:

> "Without the restriction of limiting detainees to their rooms, there would be no requirement for detainees to return to their rooms, allowing any number of detainees to congregate in the

> landing area immediately outside the rooms. To maintain the safety and security of the centre in such circumstances would require the same or similar regime to the one in place during the daytime. The number of detainees associating in the landing areas, coupled with the number of staff required to maintain safety and security, would make it impossible to provide detainees with the peace and quiet necessary for rest and sleep.'

252. I take first the question whether any night state at all is lawful. In my judgment, the answer is plainly "yes". It is plainly legitimate, and rationally connected to the objectives of security, safety and good order, for there to be a differentiation between the day-state and the night state at an IRC. It ensures that the environment is calmed down and quietened down so that detainees can rest and sleep. The population of detainees contains people who are stressed, and in some cases, desperate. Some of them have recently completed prison sentences, sometimes for serious offences. It is a challenging environment. In his witness statement, Mr Oraikhail said that a significant number of detainees used Spice. If there was no night state, and detainees had the free run of the IRC, or the wing, or the corridor, for the whole of the night, there was a risk that some of them would prevent others from getting a good night's sleep, by making a noise or knocking on doors and disturbing those who had gone to bed. There was also a risk that if detainees congregated on the corridors, or in each others' rooms, in the middle of the night, when there were likely to be fewer staff on duty, there might be risks to public order, or dangers to particular detainees.

253. The regime at Brook House had to be such as was suitable for TSFNOs and for "difficult" detainees, as well as for other detainees.

254. In my judgment, by deciding that there should be a night state, the Defendant was striking a lawful balance between the statutory purposes of security, safety and good order and the statutory purposes of providing a relaxed and humane environment and having as much freedom and association as possible.

255. During the rest of the day, outside the night state, detainees were able to make use of the centre's facilities, and for much of the time, they could receive visitors. Apart from at mealtimes, they could leave their wings and move to other parts of the IRC. Activities were made available for them. They were free to associate with whichever of the other detainees they chose to associate with.

256. Even during the night state, detainees could make telephone calls to the outside world. They could watch TV and make hot drinks. They could converse with their roommates. It is true, as Mr Harrison QC pointed out, that detainees did not choose their roommates, and that there were occasions in which detainees could be at risk from their roommates. However, the risk was small, and detainees had the means to call for help from officers if required. The Defendant was entitled to take the view that the risk was less than if detainees were able to roam the wings at night (when several detainees might gang up on another detainee, or an aggressive detainee might bully and dominate others). As detainees were not usually in a room on their own, the risk of self-harm was small, and the rooms were designed to minimise the risk that detainees could use the fittings or furniture to hurt themselves.

257. Even if rooms were unlocked during the night, detainees would not have access to all of the facilities of the IRC, such as the faith room.

258. It follows that the decision to operate a night state did not frustrate the objectives of having as relaxed and humane a regime as the Defendant considered possible, and permitting as much freedom and association as possible.

259. It is also necessary to take account of the in-room toilet and the unpleasant conditions that this could lead to. I have made findings of fact about this earlier in this judgment. In one obvious respect, it is a good thing that detainees have access to a toilet close by overnight. The negative aspects are not so much that the detainee would be seen by his roommate or roommates whilst using the toilet, because I think that with a bit of co-operation this could be avoided. Rather, there was the unavoidable risk of embarrassment at the thought of being heard whilst on the toilet, or even from the knowledge that the roommate(s) would be in no doubt about what the detainees was doing when he went into the toilet cubicle. Also, there were unpleasant smells, made more unpleasant by the stuffy atmosphere in the rooms and the fact that, for sensible security reasons, the windows did not open.

260. The negative aspects of having an in-room toilet were exacerbated, at least to some extent, when there were three detainees in a room.

261. Nonetheless, in my judgment, the fact that there were in-room toilets which were not always in good condition did not mean that the operation of a night state defeated the statutory purposes or was not rationally connected with the statutory purposes. The security, safety and good order benefits of having a night state remained. Indeed, without in-room toilets, a night state as operated at Brook House would not have been feasible. I have no doubt that the in-room toilets were reasonably considered by many detainees, including the Claimants, as greatly adding to the unpleasantness of their period of detention, but the issue for the Court is not whether detainees were being held in optimum conditions. They plainly were not, and improvements have been made since 2017-2018. However, the question presently under consideration is different, namely whether the night state was unlawful because it was incompatible with the statutory purposes, and, in my judgment, the answer to that question is "no".

262. The next stage in the analysis is to ask the question whether the night state at Brook House in 2017-2018 was rendered unlawful by its unnecessarily long duration. It is fair to say, I think, that though she did not formally concede that the night state was not inherently unlawful, the main thrust of Ms Harrison QC's submissions was to the effect that the night state operated at Brook House at the relevant time was too long and that a night state that was two or three hours shorter, from 11 pm to 7 or 8 am, would have been lawful.

263. This serves to emphasise, in my judgment, that the decision as regards exactly how long the night state would be in an IRC was an operational judgment which was for the Defendant to decide upon, having taken into account the views or recommendation of the contractor. If the existence of a night state did not frustrate the statutory purposes and was rationally connected with those statutory purposes, then in my judgment, a night state of 11 hours' duration was not unlawful. It would very likely be the case that a "night state" which lasted almost all of the day and night, say of 23 hours' duration, for example, would be unlawful. But that would be

because it was not really a night state at all. It would be a disguised form of solitary (or almost solitary) confinement. Here, however, the argument is about whether a night state, which starts in the evening and ends in the morning, is two hours too long. In my judgment, it cannot realistically be the case, as a matter of law, that a night state lasting from 11 pm to 8 am, in the same conditions, with an in-room toilet, would be lawful and in accordance with the statutory purposes, but a night state which begins two hours earlier is unlawful and incompatible with the statutory purposes.

264. In reaching this conclusion, I do not lose sight of the fact that the night state as operated at Brook House at the relevant time has been roundly criticised by distinguished experts such as HMCIP and Mr Stephen Shaw. Nor do I overlook that the panel of experienced Home Office officials who evaluated the bids to run Brook House in 2007-8 were very unhappy about the proposed duration of the night state in the GLS (G4S) bid. Again, I have taken account of the fact that the Defendant has had a change of mind, and has now specified that the night state at Brook House should be no longer than 9 hours from May 2020 onwards. All of this suggests that the night state from 9 pm to 8 am was sub-optimal and that a shorter night state from the outset at Brook House would have been better. However, that is not the test I have to apply. None of this means that the night state at Brook House at the relevant time was incompatible with the statutory purposes.

265. I also bear in mind that the individual Claimants say that the practice of locking them in at night exacerbated their mental health difficulties, and that they have provided expert medical reports to support this, but in my judgment this does not render the night state unlawful. It does not follow that the night state is, of itself, damaging to the mental health of most detainees. Unfortunately, administrative detention is inherently stressful and unpleasant. Detainees know that detention is intended to be a precursor to removal and, in almost all cases, they do not want to be removed. Many of them will have suffered very difficult life experiences in the period immediately before their detention. Many of them are vulnerable, and some have pre-existing mental health difficulties. Once again, the potential impact of the night state on the mental health of detainees is a consideration in deciding whether to have a night state, and how long it should be, but it does not follow from the evidence put forward on behalf of the Claimants that the night state at Brook House was incompatible with the statutory purposes. I should add that there was no evidence before me to the effect that a reduction in the night state of two hours would have had any positive impact upon the Claimants' mental health.

266. The Claimants emphasise that other IRCs have had a shorter night state, and, in particular, that Mr Shaw pointed out that Campsfield House had a more liberal regime, including a night state that began at 11 pm, and yet managed to deal with difficult detainees as well as, or better than, at Brook House. These are policy and operational arguments in favour of a shorter night state, but they do not mean that the night state at Brook House was incompatible with the statutory purposes. I note also that some other IRCs had a night state of the same length as Brook House. These included Harmondsworth and Colnbrook, which, like Brook House, housed some of the most difficult detainees. In general, where an IRC did not lock detainees in their rooms during night state, this was because the lack of an in-room toilet made it impractical to do so. This was the position in relation to Campsfield House (the

exception was Yarl's Wood, which dealt with women and families, not male detainees).

267. The Claimants also submit that the use of a relatively long night state at Brook House enabled costs savings to be made, because fewer staff were required on duty during the night state. It is clear, in my judgment, that this was one consideration in favour of the operation of a night state, though not the sole or primary one. This does not mean that the night state conflicted with the statutory purposes. There were other reasons, apart from costs, related to the statutory purposes of security, safety and good order, why there was an 11-hour night state at Brook House. The fact that there were costs advantages too, and that the costs benefits were taken into account when GSL's bid was evaluated, does not convert the night state into something unlawful. The Defendant was not legally obliged to have the same staffing levels at the centre at all times of the day and night, or to ensure that the facilities that were available to detainees at night-time were as extensive as they were during the day.

268. The Claimants also take issue with the lock-ins for the purposes of headcount, but in my judgment these are plainly justified as being compatible with the statutory purposes. There are two rationales for the headcount: security, to check that the detainees have not absconded, and safety, to check that the detainees are safe and well. It plainly makes sense that detainees should return to their rooms for the headcount and remain there. If they moved around, it would not be feasible to do a headcount, and it is more congenial to wait for the headcount to take place in a detainee's own room, than for them to have to congregate in some open space. It follows that headcounts, and the practice of locking detainees in whilst the headcount takes place, promote the statutory purposes, and, in my judgment, are consistent with the objectives of having a relaxed and humane regime. Indeed, in so far as headcounts help the officers to look after the health of the detainees, they promote a humane regime.

The irrationality challenge: discussion

269. For the same reasons as are set out in the preceding section of this judgment in relation to the "statutory purposes" challenge, I reject the Claimants' irrationality challenge. Whilst there is room for disagreement about whether there should be a night state at all, and as to what its duration should be, this falls far short of leading to the conclusion that the Defendant's decision to permit a night state from 9 pm to 8 am at Brook House in 2017-2018 was irrational, even if a heightened standard of scrutiny is applied to the issue. The fact that third parties such as HMCIP and Mr Shaw disagree with the approach that was taken does not mean that the Defendant's decision was irrational (cf **Morita v SSHD** [2019] EWHC 758 (Admin), at paragraph 90).

Issue 3(c) Were The Brook House night state regime and conditions (particularly in relation to the toilets) inconsistent with the respect for privacy and human dignity which is required by Articles 5 and 8 of the European Convention on Human Rights ("ECHR")?;

270. Two questions arise under this head. The first is whether the combined effect of the night state and the disadvantages of the in-room toilets is within the scope of Article 5 and/or 8 at all. Mr Roe QC says that it is not. The second question is whether, if this

comes within the scope of Article 5 or Article 8, there was a breach of the relevant Article.

Article 5(1)

271. Ms Harrison QC submits that conditions of detention may render the detention itself unlawful as arbitrary and in breach of Article 5(1) ECHR if, on a broad evaluation, the conditions are not "appropriate" or "suitable", or if they are "seriously inappropriate" or "unduly harsh", taking into account all relevant factors.

272. Mr Roe QC submits, on the other hand, that the practice at Brook House of restricting detainees to their rooms during the night state (and for short periods during the day for a headcount), does not, in itself, constitute a deprivation of liberty within the meaning of Article 5(1). Rather it is simply an incident of the conditions of lawful detention, and as such, falls outside the scope of Article 5(1).

Discussion on breach of Article 5(1)

(1) Do the conditions at Brook House come within the scope of Article 5(1)?

273. In support of his submission that the night state is one of the incidents of the conditions of lawful detention and so cannot fall within the scope of Article 5(1) at all, Mr Roe QC relies on two authorities from the ECtHR. The first is **Bollan v United Kingdom** (2000) 30 EHRR CD343. Ms Bollan committed suicide by hanging whilst on remand at HMP Corton Vale. She had not previously given any signs of suicidal ideation, but had been disruptive earlier in the day, and so she was left locked in her cell for an extra two hours, whilst she calmed down. During this period, she committed suicide. The ECtHR said, at CD 349, that:

> "The Court does not exclude that measures adopted within a prison may disclose interferences with the right to liberty in exceptional circumstances. Generally, however, disciplinary steps, imposed formally or informally, which have effects on conditions of detention within a prison, cannot be considered as constituting deprivation of liberty. Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention and therefore fall outside the scope of Article 5(1) of the Convention."

274. The second authority is **Munjaz v United Kingdom** (Application no. 2913/96). In this case, the Applicant had been transferred from prison to a medium secure mental hospital unit. Whilst he was there, he had been secluded on a number of occasions for the protection of others, for days at a time. The longest period of seclusion was over two weeks. During these periods of seclusion, he was allowed out for short periods of association daily with staff or other patients. Mr Munjaz claimed that this had been a breach of Article 5(1). The Court drew a distinction between a further deprivation of liberty, which is within the scope of Article 5(1), and a further restriction upon the liberty of a detained person, which is not (judgment, paragraph 67). The Court said that there was no general rule that either solitary confinement or seclusion per se amounts to a further deprivation of liberty. In the **Munjaz** case, the Court found that

none of the periods of seclusion imposed on the Applicant amounted to a further deprivation of liberty, and so Article 5 was inapplicable.

275. In my judgment, applying the guidance of the ECtHR in **Bollan** and **Munjaz,** the night state was a further restriction on the liberty of detained persons, rather than a further deprivation of liberty. If a regime of sustained seclusion is not a further deprivation of liberty, then it is all the clearer that being locked in one's room at night is not a separate and further deprivation of liberty for those who are already locked in the IRC. As Mr Roe QC submitted, the night state was one of the conditions of lawful detention at an IRC (albeit that the particular duration and circumstances of night state differed from centre to centre). Accordingly, Article 5(1) is inapplicable.

276. I do not think that this conclusion is affected by the judgment of the Court of Appeal in **R (Idira) v Secretary of State** [2015] EWCA Civ 1187; [2016] 1 WLR 1694, upon which both counsel relied when dealing with the question whether, if Article 5(1) is applicable, it has been breached. The **Idira** case was concerned with a TSFNO who was kept in prison and was not transferred to an IRC at the end of his period of imprisonment. He sought judicial review on the ground that his detention in prison rather than an IRC constituted arbitrary detention in breach of Article 5(1)(f) of the ECHR. The Court of Appeal's judgment in **Idira** does not address the question whether the issue in that case was concerned with a further deprivation of liberty or a further restriction on the liberty of detained persons. In my view, there is an obvious reason for this. This is because the challenge was to the deprivation of the Claimant's liberty in a prison, not to a particular aspect of the regime in prison which was alleged to amount to a further restriction on the liberty of those who were detained in prison. It was, in other words, a challenge to the place of detention, not a challenge to the conditions at the place of detention.

(2) If I am wrong on question (1), and Article 5(1) is engaged, did the night state at Brook House in 2017-2018 amount to a breach of Article 5(1)?

277. If I am right that Article 5(1) is not engaged, then this question does not arise. However, in case I am wrong, I will go on to consider whether, if Article 5(1) is applicable, it has been breached.

278. The key authority that was relied on by both counsel is **Idira**. Ms Harrison QC says that **Idira** shows that determination of the question as to whether Article 5 is breached by the conditions of detention involves a broad evaluative exercise of the conditions of detention. The place and conditions of detention can, in themselves, engage Article 5, especially, where, as here, the individuals are subject to administrative detention as part of the immigration regime. Mr Roe QC also relied on **Idira,** submitting that **Idira** shows that Article 5 is only engaged by the conditions of detention if there is serious inappropriateness or a fundamental shortcoming, and that does not cover the night state or the condition of the toilets.

279. At paragraphs 48-52 of the Court of Appeal's judgment in **Idira,** applying the guidance of the ECtHR in **Saadi v United Kingdom** (2008) 47 EHRR 17, Lord Dyson MR set out four key principles. These are that:

(1) When deciding whether there has been a breach of Article 5(1)(f), the Court must carry out a broad evaluation of the appropriateness of the conditions of the

detention in the circumstances of the case. What is appropriate for those who have committed criminal offences is likely to be different from what is appropriate for those (like the Claimants in the present case) who have not;

(2) All that is required is that the conditions are appropriate, not that they are the *most* appropriate for the detained person. Lord Dyson MR said that this is an important qualification;

(3) It should not be overlooked that the purpose of Article 5 is to protect the individual from arbitrariness. Detention in an inappropriate place and in inappropriate conditions is arbitrary, but this applies only where there is "serious inappropriateness". Where the inappropriateness is less than serious, it is difficult to describe it as "arbitrary". As the Supreme Court said in **R (Kaiyam) v Secretary of State for Justice** [2015] AC 1344, at paragraph 25, the natural meaning of this word connotes some quite fundamental shortcoming, and, Lord Dyson MR said, that is the meaning of "arbitrary" in this context. This means that there is a high threshold before the place and conditions of immigration detention can be regarded as "arbitrary": they must be unduly harsh (though this does not mean that it must equate with Article 3 ill-treatment); and

(4) The Court should always bear in mind any practical problems on which the state relies to justify its decision.

280. At paragraph 62 of his judgment, Lord Dyson MR (with whom Sir Brian Leveson P and McCombe LJ agreed) held that immigration detention in a prison rather than an IRC is not generally contrary to Article 5.1. The Court of Appeal dismissed Mr Idira's appeal, holding that that there was no prima facie breach of Article 5 where immigration detention took place in a prison (see judgment, paragraph 36).

281. It follows from the **Idira** judgment that there will only be a breach of Article 5(1), resulting from the conditions of detention, if the conditions are seriously inappropriate and demonstrate serious shortcomings. This will only be the case if they are unduly harsh.

282. I have set out my findings of fact about the conditions at Brook House above, and I referred in detail to my evaluation of the conditions when I dealt with the Claimants' contention that the night state and in-room toilets were incompatible with the statutory purpose of immigration detention, so it will suffice to say, for present purposes, that, in my judgment, it is clear that the operation of the night state at Brook House, coupled with the conditions relating to the in-room toilets, was not "unduly harsh" in the sense that this phrase was used by the Court of Appeal in **Idira.** These conditions were sub-optimal, and were not the most appropriate conditions that could have been provided for immigration detainees, but this does not mean that they were unduly harsh. If the holding of detainees in prison conditions was not, prima facie, unduly harsh for the purposes of Article 5(1), then the holding of detainees in a more relaxed regime at Brook House was not unduly harsh, even though they were locked in their rooms for 11 hours overnight.

Article 8

283. The Claimants submit that the combination of prolonged confinement of detainees in cells in multiple occupation with open and inadequately screened toilets, which were filthy and lacking in adequate ventilation, constitutes a serious lack of respect for and interference with the Claimants' fundamental right to private life and human dignity protected by Article 8 ECHR.

284. At one stage in his oral argument, Mr Roe QC indicated that he was inclined to accept that Article 8 was engaged, but he disputed that there had been any breach of Article 8. However, on reflection, Mr Roe QC submitted both that Article 8 was not engaged at all, and that, if it was engaged, it was not breached.

285. I will first consider, therefore, whether Article 8 was engaged at all.

Was Article 8 engaged?

286. In the **Munjaz** case, dealing with the seclusion of a patient confined in a mental hospital, the ECtHR held that, whilst Article 5 was inapplicable, Article 8 was engaged. The Court said, at paragraph 80:

> "…. the Court agrees that the compulsory seclusion of the applicant interfered with his physical and psychological integrity and even a minor such interference must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against the individual's will (**Storck**, paragraph 143, cited above). Moreover, the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person's personal autonomy is already restricted, greater scrutiny must be given to measures which remove which little personal autonomy that is left."

287. The Court in **Munjaz** went on to find that there was no infringement of Article 8.

288. At first sight, the **Munjaz** judgment suggests that there is a low threshold for the applicability of Article 8, especially where a person is detained and so his personal autonomy is already restricted. However, Mr Roe QC submits that, properly understood, the case-law demonstrates that the conditions complained of in the present case do not engage Article 8.

289. Mr Roe QC submits that **Munjaz** can be distinguished from the present case because it was concerned with compulsory isolation for long periods, a much more drastic form of treatment compared to that complained of in the present case. He submits that the other cases which have held that Article 8 is engaged by the conditions of detention are similarly concerned with much more serious infringements of personal liberty than arise in the present case.

290. In the **Storck** case, (2006) 43 E.H.R.R 6, the Claimant, who had mental health problems, had been forcibly placed in a clinic for a two-year period. At paragraph 142, the ECtHR said:

> "In so far as the applicant claimed that her liberty had been restricted contrary to Art.8 of the Convention during her involuntary placement in the clinic, the Court recalls that the right to liberty is governed by Art.5 , which is to be regarded as a lex specialis vis-à-vis Art.8 in this respect. The Court finds that the applicant, by complaining about restrictions on her freedom of movement, in substance repeats her complaint under Art.5(1). It therefore considers that no separate issue arises under Art.8 in this respect."

291. Mr Roe QC submits that this shows that, in so far as there is a challenge to the deprivation of liberty, or the conditions of that deprivation, it must be within the scope of Article 5, or not at all. It will not come within the scope of Article 8. I do not think that this is what the Court meant in paragraph 142 of its judgment. Rather, the Court was effectively saying that, as it had dealt with the issue under Article 5, there was no need to look at it also under Article 8. The **Munjaz** case, which came after **Storck**, shows that the conditions of detention can, at least sometimes, engage Article 8, because they may interfere with a person's physical or psychological integrity. Also, in **Bollan,** the EctHR said, at CD349, that in appropriate cases, issues relating to detention may arise under Article 8 of the Convention.

292. The next case that is relied upon by Mr Roe QC is **R (Akbar) v Secretary of State for Justice** [2019] EWHC 3123 (Admin). This was a judicial review claim brought by a foreign national prisoner who complained about a rule that life prisoners could not be transferred to open conditions if they were subject to a deportation order which was appeal-rights exhausted. The Claimant relied upon Article 14 when read with Articles 5 and/or 8. The Divisional Court said, in relation to Article 8:

> 74. It is, of course, possible for conduct to fall within the scope of more than one Convention right. Article 8 , in particular, has a broad reach which may overlap with other rights, including article 5: a prisoner who is lawfully deprived of his liberty retains a right to respect for private and family life. Moreover, such retained rights may be regarded as having enhanced importance by reason of the loss of liberty (see **R (Daly) v Secretary of State for the Home Department** [2001] 2 AC 532 at [5] per Lord Bingham, and **Munjaz v United Kingdom** [2012] MHLR 351 at [80]). Thus, matters such as interference with prisoner correspondence and searching of prisoners may raise issues under article 8 (see **Golder v United Kingdom** (1975) 1 EHRR 523 and **Wainwright v United Kingdom** (2007) 44 EHRR 40).
>
> 75. However, article 8 covers interests that are distinct from those that are protected by other Convention rights. Although its field of coverage is broad, there are limits. It is important to observe those limits in order to prevent its use becoming "overblown" (see **R (Wood) v Commissioner of Police of the Metropolis** [2010] 1 WLR 123 at [22] per Laws LJ). In particular, just because a complaint narrowly fails to fall within the scope of another Convention right does not mean that it will

> meet the criteria for an article 8 claim (see **R (ASK) v Secretary of State for the Home Department** [2019] EWCA Civ 1239 at [74]-[75] per Hickinbottom LJ). Further, the ECtHR has consistently emphasised that the choice of the means by which article 8 rights are secured is essentially a matter for a contracting state's margin of appreciation (see, e.g., **Söderman v Sweden** (2013) ECtHR Application No 5786/08 at [76]). It is therefore frequently the case that article 8 rights are considered adequately protected by the protection of other Convention rights which are engaged in the same circumstances.
>
> 76. There seems to us little doubt that the transfer of the Claimant into open conditions would afford him better opportunities for interaction with others (including his family members) of an extent, nature and quality that is simply not possible in a closed prison. However, the denial of those opportunities is an inevitable consequence of his imprisonment. If his imprisonment is lawful under article 5, then we do not consider that these are values that are capable of falling within the ambit of article 8 . It is clear that any increase in family contact or enhancement of private life as a result of being in open conditions is purely incidental to the assessment of continuing risk – and, if necessary, the reduction of any residual risk – that open conditions are primarily designed to accomplish. In our view, to get within the ambit of article 8, it would be necessary for the Claimant to identify some discrete family life or private life interest that is not necessarily curtailed by his lawful imprisonment, but which is impacted by rule 7(1A) . He has not done so.
>
> 77. Accordingly, in our view, the Claimant's complaint does not fall within the ambit of article 8 so as to engage, by that distinct route, the protection of article 14."

293. Mr Roe QC submits, in reliance on **Akhbar**, that if you are already lawfully detained, you need to establish the infringement of some discrete family life or private life interest in order to come within Art 8. That is highly relevant to the present case, he says, because the lock-in during night state is simply an incident to the ordinary running of the establishment.

294. There is one other case that should be referred to in this regard. This is **Nadir Syed v Secretary of State for Justice** [2019] EWCA Civ 367. This case concerned a prisoner who was transferred to a Managing Challenging Behaviours Strategy Unit, which meant that he was removed from any contact with other prisoners. He was locked in his cell for between 20 ¾ and 21 ½ hours a day for four months. At paragraph 61, the Court of Appeal approved the analysis of Lewis J in the court below to the following effect:

(1) Restrictions and limitations 'ordinarily' consequent on prison life and discipline during lawful detention may not amount to an interference with the detainee's private life or family life;

(2) However, restrictions which go beyond that may amount to an interference with the right to respect for private life and may, therefore, require to be justified in accordance with Article 8(2); and

(3) the nature of the restrictions and their duration in the **Syed** case, together with the context in which they are imposed do amount to an interference with the right to respect for private life and did need to be justified under Article 8(2) of the ECHR.

295. The Court of Appeal said, at paragraph 160, that the Claimant in **Syed** was prevented from associating with others at Feltham Young Offenders' Institution in a way which would have been permitted if he had not been subject to the special regime which was regarded as being necessary in the unusual circumstances of his case, and that this meant that there was clearly an interference with the Claimant's Article 8 rights.

296. In my judgment, in light of these authorities, the fact that detainees are locked in overnight does not amount to a potential interference of Article 8. As Ms Harrison QC said in her oral submissions, the question whether Article 8 is engaged is a question of fact and degree. The authorities set out above draw a distinction between restrictions and limitations which are "ordinarily" consequent on prison life, on the one hand, and restrictions which go further than that, on the other. It is not always easy to work out upon which side of the line a particular restriction falls. However, the cases in which an interference with Article 8 has to be found to have taken place were cases in which a special regime was imposed upon the prisoner or detainee, usually as a disciplinary measure, or as the result of mental health problems, and that regime imposed very severe restrictions on the individual. In my judgment, night state does not come into this category. It is not a special regime that is imposed in difficult and recalcitrant detainees: it is part of the normal rhythm of life at Brook House, and all detention centres have a night state of one sort or another, and so it is a restriction which is ordinarily consequent on life in the detention centre. Even restrictions that are imposed for disciplinary reasons will not ordinarily engage Article 8 (see **Syed**).

297. There is, however, a separate reason why the conditions in which night state operated at Brook House might potentially engage Article 8. This is because of the unsatisfactory sanitary conditions. Ms Harrison QC relies on **Szafranski v Poland** (2017) 64 EHRR 23. In this case the Claimant, a prisoner, claimed that the conditions of detention in many of his cells in Wronki Prison were so bad as to amount to a breach of Articles 3 and 8 of the ECHR. He referred to the fact that the cells were not properly heated in the autumn and winter and had no proper ventilation in the summer, meaning that the prisoners suffered from intense levels of heat. The windows were old and the frames leaked. He further submitted that the toilet facilities were only separated from the cells by a low fibreboard partition, 1.2 metres high, with no doors, which made even a minimum level of privacy impossible for him.

298. The ECtHR held that there was no breach of Article 3, but that there had been a violation of Article 8, resulting from the insufficient separation of the sanitary

facilities from the rest of the cell. At paragraphs 39-41 of the judgment, the Court said:

> "39. The Court notes that between 31 March 2010 and 6 December 2011 the applicant was placed in 10 cells, seven of which had sanitary facilities which were not fully separated off. In those cells he had to use the toilet in the presence of other inmates and was thus deprived of a basic level of privacy in his everyday life. The applicant raised the matter with the prison authorities and requested that at least a curtain be hung in place to separate off the sanitary facilities. The prison authorities replied that domestic law did not set out specific regulations as regards the way in which sanitary facilities were to be fitted and separated off in prison cells. 24
>
> 40. It follows that in the present case the domestic authorities failed to discharge their positive obligation of ensuring a minimum level of privacy for the applicant when he was detained in Wronki Prison.
>
> 41. Taking into consideration the above, the Court concludes that there has been a violation of art.8 of the Convention."

299. Ms Harrison QC submits that, similarly, the deficiencies in the sanitary conditions in rooms at Brook House amounted to a violation of Article 8, especially as detainees were locked into their rooms for 13 hours in each 24-hour period.

300. Once again, the question whether something of this sort can give rise to an interference with Article 8 rights is a matter of fact and degree. In light of the facts as found earlier in this judgment, I do not consider that the conditions at Brook House at the relevant time amounted to an interference with the Claimants' Article 8 rights. Their position was very different from that of Mr Szfranski. In his case, the only privacy was a 1.2 m plasterboard partition around the entirety of the toilet cubicle. This meant that he would inevitably be visible to cell-mates whilst he used the toilet. In the case of detainees at Brook House, their toilet cubicles were hidden by full-height concrete walls, apart from the entrance aperture. The aperture was supposed to be filled with a full-height, or almost full-height curtain. When the curtain was in place, privacy was provided. Even when the curtain was missing, the configuration of the room was such that detainees did not need to be visible whilst they were on the toilet: it was easy for roommates to sit in a place which afforded privacy to the person on the toilet. Moreover, a replacement curtain would be available on request. As I have already said, the arrangements for the in-room toilets at Brook House were sub-optimal, but in my judgment they did not amount to an interference with the Claimants' Article 8 rights (it was not submitted on behalf of the Claimants at the hearing that there was degrading treatment in breach of their Article 3 rights, though this was suggested in the Claim Forms).

301. I should add, finally on this issue, that I have read and taken into account the helpful written submissions of Heather Williams QC and Keina Yoshida that were filed by Liberty in the **Hussain and Rahman** proceedings. These deal with general principles about the application of Articles 5 and 8 (and Article 3) to cases where there are

complaints about the conditions in which immigration detainees are held. At paragraph 40, the submissions state that "The ECtHR case law also clearly establishes that a failure to provide bodily privacy can result in a violation of Article 3 and Article 8." I accept this submission. However, the question whether there has been such a violation in a particular case is a question of fact and degree. Entirely understandably, Liberty's submissions focus on matters of general legal principle, rather than on the application of the general principles to the specific facts of the present case, and there is nothing in Liberty's submissions which persuades me to reach a different conclusion from that set out above on the question whether there was an interference with Article 8 rights in the Claimants' cases.

Issue (4) Did the Defendant act contrary to common law and/or Article 5, ECHR, by failing to publish clear and precise criteria for allocation to detention centres and/or by failing to give reasons for allocation to a particular centre, or to grant detainees an opportunity to make representations about which detention centre they should be allocated to?

302. Martin Spencer J refused permission for this ground on the papers. The Claimants have renewed their applications for permission before me.

303. Ms Harrison QC submits that the Defendant has acted contrary to common law, and has breached Article 5, ECHR, by failing to publish its criteria for allocation of detainees to particular IRCs, by failing to give reasons for their allocation, and by failing to give them an opportunity to make representations about where they should be sent, either before or after the allocation decision is taken. She says that the Claimants have been prejudiced as a result, because Brook House's environment and regime is akin to that of a Category B prison, and they have to share the centre with TSFNOs and with "difficult" detainees. She says that they should have been given the opportunity to make representations as to why they should have been allocated to a detention centre with a more liberal regime.

304. I will first summarise the arrangements for allocating detainees to an IRC, and will then consider the challenge under common law, which was the focus of the Claimants' submissions on this issue, and then with the challenge under Article 5.

The arrangements for allocating detainees to an IRC

305. The Immigration (Places of Detention) Direction 2014 (No 2), made by the Defendant under powers granted by paragraph 18(1) of Schedule 2 to the Immigration Act 1971, requires, at paragraph 4, that detention for more than five consecutive days shall only take place in an IRC (unless removal is scheduled to take place within the next two days after that). There are, obviously, good reasons for this rule, and it is to the advantage of detainees. It means, however, that there is only a short window of time in which allocation decisions must be taken.

306. The process for the placement of detainees is managed by the Detention Escorting and Population Management Unit of the Home Office ("DEPMU"). Before a detainee is allocated to an IRC, DEPMU will carry out a risk assessment to determine the detainee's suitability to be detained in the immigration detention estate, and to determine whether the detainee may have some specific accommodation requirement which would necessitate allocation to a particular IRC.

307. Details of the risk assessment process are set out in DSO 03/2016, which is a published document that is generally available. DSO 03/2016 states that consideration will be given to whether a detainee has a physical or mental disability, or alcohol or drug dependency, which may mean that he is not suitable for particular IRCs. DSO 03/2016 also says that other risk factors should be taken into account, including those relating to transsexual detainees, MAPPA cases (violent and sexual offenders who are subject to Multi-Agency Public Protection Arrangements), and those who pose escape risks or other security risks.

308. In the case of the majority of detainees, the risk factors referred to above will not apply, and so will not limit the IRCs for which the detainee is suitable. In those cases, Ms Hardy said that:

> "decisions about allocation are made on a case by case basis taking into account factors such as individual IRC capacity and occupancy levels, proximity to main airports (for detainees with imminent removal directions) and initial detention location, as well as detainee-specific factors, including any single room requirements or court or other interview requirements."

309. DEPMU does not have a fixed set of criteria which it applies when deciding the IRC to which a detainee should be allocated. The Defendant has an internal document entitled "Immigration Removal Centre Criteria". This was referred to in Ms Hardy's witness statement dated 10 October 2019, but, by an oversight, was not disclosed to the Claimants' representatives until the day before the hearing began, in June 2020. This document is not available to the public. Despite its name, this document does not set out criteria to be applied when deciding which IRC a detainee should be allocated to, and it is not a document that is used by DEPMU staff when making decisions about allocation. Rather, it is used as an induction document for new members of staff. The document sets out an overview of the detention estate, giving a broad description of each IRC and summarising the extent to which each IRC is suitable for detainees with serious health difficulties.

310. There is no process for consultation with detainees about where they will be allocated.

311. The Claimants were all deemed suitable for detention at Brook House. Though the evidence does not deal with this, I infer that, at least in the cases of Mr Soltany and Mr Ebadi, they were placed in Brook House because they were expected to be removed within a couple of days, and Brook House is close to Gatwick Airport.

312. When a detainee enters an IRC for the first time, there is a formal reception process, with screening interviews and healthcare screening. If any risks come to light at this stage, or are raised by the detainee himself or herself, further consideration will be given to whether the detainee is suitable for detention at the IRC.

313. Once they have been placed in an IRC, detainees are entitled to request a transfer. This regularly happens, and transfer request forms are available for use at Brook House, in the welfare office.

314. None of the Claimants made a transfer request whilst he was at Brook House. However, Mr Soltany's solicitors raised the matter in pre-action correspondence, and Mr Soltany was transferred to Tinsley House on 28 October 2017. Mr Ebadi's solicitors also raised concerns in correspondence, shortly before Mr Ebadi was released from detention, on 7 November 2017.

The common law challenge

315. Ms Harrison QC submits, first, that the Defendant has been making use of unpublished criteria for allocation, and has a legal duty to publish "establishment specific criteria" for determining which IRC a detainee should be detained in. She says that this is necessary so that the detainee can understand the decision and make representations about it, and because allocation will have significant implications for the conditions in which the detainee will be held. Ms Harrison QC relies on **Lumba v SSHD** [2011] UKSC 12, [2012] 1 AC 245.

316. Second, Ms Harrison QC submits that there is an obligation to consult, or to afford the opportunity to make representations, to the detainee. In her oral submissions, Ms Harrison emphasised that she was not suggesting that there was a need for an oral hearing. Rather, she said that there should be an opportunity to make representations, if not before, at least after the allocation decision. She submits that the current arrangements are in breach of common law principles of procedural fairness, which were underlined and summarised in **R (Citizens UK) v SSHD** [2018] EWCA Civ 1812, at paragraphs 68-84.

317. In my judgment, it is not reasonably arguable that the arrangements for allocation of detainees to IRCs is unlawful as being contrary to common law. This is essentially for the reasons put forward by Mr Roe QC on behalf of the Defendant.

318. Amongst the principles of procedural fairness that were referred to in **Citizens UK** are the following:

i. The duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed;

ii. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects;

iii. Fairness very often requires a person who may be adversely affected by a decision to be given the opportunity to make representations before a decision is taken, or after with a view to modifying it, or both;

iv. Fairness is an objective question for the court to decide, and does not require fault on the part of the public authority; and

v. When considering questions of fairness, courts will weigh the individual interest at issue, the benefits to be derived from added procedural safeguards, and the costs to the administration of compliance.

319. I agree with Mr Roe QC that, in this context, fairness does not require the Secretary of State to set up a procedure which gives a detainee the opportunity to make representations about where s/he should be detained. There are a number of cumulative reasons for this conclusion.

320. First, I do not accept that the conditions in the various IRCs are so different that fairness requires giving a detainee a say as to which IRC he or she should be placed in. There are certainly differences, and some have more pleasant or comfortable buildings and environments than others, and some have a more liberal regime than others, but the differences are not very great. In all cases, the detainees are locked in and deprived of their liberty. In all cases, there is a night state, even though the duration of the night state may differ, and in some cases detainees can move around the corridor or unit during the night state. Brook House is by no means alone in being built to the same model as a prison (and, indeed, several IRCs are converted former prisons). The allocation of a detainee to a particular IRC will not affect his or her prospects for an early release.

321. As I have found, earlier in this judgment, the conditions of detention at Brook House are lawful, and, in my judgment, the fact that detention in one IRC would be preferable, or somewhat more comfortable, than detention in another, does not give detainees a right to be consulted about where they should be placed.

322. This means, in my view, that the individual interest at issue does not require that there be a consultation process, especially as the delay and administrative cost and inconvenience would be very considerable. Indeed, it would not be practicable to conduct a proper consultation process in the five-day window between original detention and move to an IRC. It would not be in the interests of anyone, least of all detainees, for them to be detained in initial accommodation for longer periods in order to accommodate a consultation process.

323. Second, in my judgment the nature of the considerations that must be taken into account in making the allocation decision does not make it suitable to have a consultation process grafted on to it. There is already a procedure in place to identify detainees who are at special risk, or who pose special risks, and to allocate them accordingly. If something is inadvertently missed, then it can be picked up at the reception process, and a detainee can draw relevant matters to the authorities' attention at the screening interview. If a detainee is, like these Claimants, one of the great majority of detainees for whom there is no particular identified risk, then it must be a matter of administrative discretion for DEPMU to decide where to place the detainee. This will fundamentally be governed by operational matters, such as availability of spaces, and proximity to airports or courts, and initial detention location. There is little, if anything, that a detainee could contribute to this process of consideration. The detainee could, essentially, simply express a preference for the IRC with the most comfortable conditions. But it is hard to see that any detainee would take a different approach, so this would not set him apart from other detainees.

324. Third, Ms Harrison QC has drawn attention to the fact that Brook House has a higher proportion of TSFNOs than most other IRCs. The proportion varied from time to time, but they represented up to 50% of the total detainees at Brook House. However, in my judgment this is not something that gives rise to an obligation to give the opportunity to detainees to make representations. It is plainly reasonable for the

Defendant to have a mixture of TSFNOs and "difficult" detainees and other detainees in the same IRC (provided that there a regime which provides adequate protection to the detainees). Indeed, it can readily be seen that it might not make sense to place all TSFNOs or "difficult" detainees in the same place, and, even if this was done, they might not fill up the IRC. Once it is accepted that it is reasonable to have a mixture of TSNFOs and "difficult" detainees, on the one hand and "ordinary" detainees, on the other, in the same IRC, there is no valid basis for an "ordinary" detainee to make representations to the effect that other "ordinary" detainees, rather than him, should be placed there. It is different if the detainee has particular vulnerabilities, but the risk assessment and screening interview process is in place to deal with that possibility.

325. Fourth, although there is no formal consultation process, detainees are able to request a transfer, if they think that there is a good reason for it.

326. In her skeleton argument, Ms Harrison QC cited a number of cases in which the Courts have held that there is a duty to afford the opportunity to make representations concerning the classification of prisoners, and before decisions are made to transfer prisoners from a Category B or a Category C prison (eg **R v Secretary of State for the Home Department Ex parte Hirst** [2001] EWCA Civ 378; and **R (Ali) v Director of High Security Prisons** [2009] EWHC 1732) or to transfer a patient from a medium to a high security hospital (**R (on the application of L) v West London Mental Health NHS Trust** [2014] EWCA Civ 47; [2014] 1 WLR 3103). However, in my judgment, those cases are dealing with decisions of a very different nature. In the prison cases, classification was likely to affect prospects for release, and would lead to very different prison regimes. Similarly, in the **L** case, the transfer would mean that the Claimant would be subjected to a much more restrictive regime. Nothing similar arises in relation to the allocation of a detainee to a particular IRC.

327. As for the submission that there is a duty to publish the criteria that are used, again I do not think that it is arguable, in all the circumstances, that such a duty arises at common law. In fact, some of the considerations that are taken into account have been published, in DSO 03/2016. These identify the risk factors that are of particular importance. It is clear, in my judgment, that, beyond the specific risk factors referred to in DSO 03/2016, there are no fixed criteria that are used. DEPMU takes into account a wide range of mainly operational considerations. These are really a matter of common sense, which will be obvious even if they are not published. It is self-evident that DEPMU will take account of occupancy levels, proximity to the airport from which removal is scheduled to take place, and initial detention location. There is no "secret" list of special criteria which are withheld from detainees and their advisers. The "Immigration Removal Centre Criteria" document, which was disclosed very late, is not evidence of such special criteria, despite its title.

328. In my judgment, these features mean that this case is very different from the facts of **Lumba,** in which an unpublished policy concerning the detention of TSFNOs was being applied, which contradicted the published policy. The policy in **Lumba** made the difference between liberty and the deprivation of liberty, and was a policy which those affected could not have guessed at. In the present case, the decision as to the allocation of detainees does not make the difference between liberty and deprivation of liberty, and it does not make use of "hidden" criteria beyond the obvious considerations that anyone would expect DEPMU to take into account.

329. This means, also, that detainees are not disadvantaged, in making representations for the purposes of their transfer requests, by not being provided with a list of the criteria that DEPMU applies. Put bluntly, there are no special criteria, and it is a straightforward exercise to work out the factors that DEPMU takes into account.

Article 5

330. Although Article 5 was referred to in Ms Harrison's skeleton argument, the thrust of her submissions on this issue, both oral and in writing, was based on the contention that there was a breach of common law principles of procedural fairness, in relation to allocation.

331. In my judgment, it is not arguable that the decision as to which IRC to allocate a detainee to engages Article 5(1). Plainly the decision whether to detain an individual at all engages Article 5(1), but, for the reasons given in an earlier part of this judgment, the conditions in which a detainee is held will only engage Article 5(1) if they are "unduly harsh". I have already held that the conditions at Brook House (about which the Claimants complain) are not unduly harsh, and it follows that the decision to allocate the Claimants to Brook House did not engage Article 5. Moreover, I note that, in the **Idira** case, the Court of Appeal held that held that immigration detention in a prison rather than an IRC is not generally contrary to Article 5(1). If that is so, it is all the clearer that immigration detention in a detention centre in which the regime is, to some extent, more restrictive than it is in other detention centres is not contrary to Article 5(1).

Conclusion on allocation

332. For these reasons, I do not consider the Claimants' challenge to the allocation process to be reasonably arguable, and I refuse permission to apply for judicial review on this ground.

Issue (5) Did the combined effect of the night state, which meant that observant Muslims had to perform some of their daily prayers in their rooms, and the condition of the rooms and especially the proximity of the toilet, amount to an unlawful, discriminatory, and/or disproportionate interference with Muslim detainees' rights under Article 9, ECHR, either read alone or with Article 14, ECHR, and or to a breach of section 19 of the EA 10?

333. These grounds are relied upon only by the Second and Third Claimants, Mr Ebadi and Mr Oriakhail, who are both Muslims. They complain that they were obliged to perform prayers during the night state in their rooms, close to the toilet, and that this impeded their religious observance as practising Muslims, and interfered with their right to practise their religion. They contend that the Defendant infringed their rights under ECHR, Article 9, discriminated against them in breach of Article 14, when read with Article 9, and indirectly discriminated against them on the ground of their religion in breach of EA 10, section 29(6).

334. The Claimants' case, in relation to Articles 9 and 14, and the Equality Act, is not that it was inevitably unlawful for the Defendant to lock detainees into their rooms at Brook House overnight, even given the proximity of the in-room toilet. The complaint was that the duration of the lock-in was unnecessarily long. Ms Harrison

QC advanced her oral submissions on the basis that, if the night state had lasted 8 hours, from 11pm to 7am, rather than 11 hours, it would have been lawful. If this had been the position, observant Muslims could have conducted all five of their compulsory daily prayers outside their bedrooms in winter, and four out of five of their daily prayers in summer. However, they would still have had to perform one daily prayer in their rooms during the summer period.

335. The Defendant accepts that Article 9 is engaged. Moreover, as I have already explained, in the **Hussain and Rahman** proceedings, Holman J held that there had been prima facie discrimination against the Claimants on the ground of religion for the purposes of Article 14 and the EA 10, and it is common ground that the only remaining issues are whether the discriminatory impact had a reasonable and objective justification, for the purposes of Article 14, and whether it was a proportionate means of achieving a legitimate aim, for the purposes of the EA 10.

336. I will first set out the relevant facts, and the expert evidence, and will then deal in turn with the arguments that there was a breach of Article 9 and that there was unlawful discrimination in breach of Article 14 and/or the EA 10.

The relevant facts

337. I have already made extensive findings of facts about the layout of, and conditions in, detainees' rooms at Brook House, at the relevant time, and about the in-room toilets. I will not repeat these findings here.

338. Observant Muslims pray five times a day. This is the Salat, which is one of the Five Pillars of Islam. Each act of worship lasts a few minutes, and must be performed within a specific time-frame, or time window. These time-frames are determined by the rising and setting of the sun and so they vary over the course of the year. The length of the time-frames varies but they range from one hour to eight hours. Therefore, it is possible to choose when, within the permitted time-frame, the prayers will be performed. These timings mean that the number of prayers that fall within night state will vary across the year. It was common ground that, as a result of the timings of the night state at Brook House in 2017-2018, at least one prayer (Fajr, the dawn prayer) would have to be performed during the night state in the winter months, and up to three prayers would have to be performed during the night state in the summer months (Fajr, Maghrib, the sunset prayer, and Isha, the late night prayer).

339. The undisputed evidence was that facilities were made available for Muslim detainees to pray in their rooms. Each room was provided with a washbasin and personal water jugs were made available to assist with the performance of ablutions, if necessary. Prayer mats and other religious artefacts could also be provided by the chaplaincy if required for prayer or other worship in rooms (or otherwise). Qurans are distributed in many different languages and can be retained by the detainee.

340. The only place where a Muslim detainee could pray in his room would be on the floor in the middle of the room. This means that, inevitably, he would be close to the toilet cubicle. Muslims must pray in the direction of Mecca. In the UK, this means that they must pray facing the South East. As a result, in some rooms, it was necessary for Muslim detainees to pray facing the direction of the toilet cubicle. The G4S EIA (see below) said that this was the case for half of the rooms at Brook House. As I have

already said, in a considerable number of cases, there would not be a curtain or other barrier blocking the aperture of the toilet cubicle. Even if there was a curtain, and even if the configuration of the room was such that the detainee would be praying facing away from the toilet cubicle, he would be aware of its proximity, and if there were odours coming from the toilet, he would be aware of them too.

341. If a detainee was in a three-man room, and all three were observant Muslims, they would have to find room in the limited floor space to pray. Mr Ebadi said that this meant that the prayer mat of one of the detainees would extend into the floor area of the toilet cubicle. This does not mean, however, that it was necessary for any detainees actually to pray inside the toilet cubicle. Even where there were three Muslim detainees in a room, praying at the same time, and even if the prayer mat of one of them intruded into the floor area of the toilet, there is no suggestion that the detainee himself was inside the toilet area whilst he prayed.

342. Mr Ebadi's Amended Grounds said that "As a consequence of D's operation of a system of lock-ins, C was required to offer prayers on at least one occasion inside his room." He said in his supplementary witness statement that when he was the one of three detainees who was praying closest to the toilet, "This would often cause me to become distracted during my prayer and affect my ability to focus and offer my full devotion."

343. Mr Oriakhail said that he felt guilty praying in an unclean place, but that the conditions did not stop him praying completely. That would have been worse and totally unacceptable to his Muslim faith. He said that sometimes his roommate would use the toilet whilst he was praying. If this happened, he would stop praying. It is clear, however, that the time-frames for prayer are broad enough that there would always be time for him to resume his prayers when his roommate had finished.

344. I was provided with a witness statement dated 19 January 2018, from Mr Zeeshan Qayum, an Imam who was part of the Chaplaincy Team at Brook House, and an employee of G4S. This witness statement was provided for the **Hussain and Rahman** proceedings. Mr Qayum said that the chaplaincy was available to provide advice and support if a detainee had any concerns about being able fully to observe his faith at the centre.

345. Neither Mr Ebadi nor Mr Oriakhail complained about the impact of the night state or toilet conditions on their ability to pray whilst they were at Brook House, and neither of them raised the matter with the chaplaincy.

346. Mr Qayum said that there are many prophetic statements that Muslims should fulfil their prayers regardless of their location. He said that it is highly discouraged in Islam that the place of prayer is near a toilet, but in extreme circumstances prayer can be offered at such a place using a prayer mat. He said that there are mosques in the UK which have no choice but to have prayers close to the toilet, and this is permitted so long as the entrance to the toilet is covered and the area is kept clean at all times. He also said that detainee could keep the toilets clean, and they are encouraged to do so by Imams at Brook House at Friday prayers.

347. It is important to add that the only matter complained of, in relation to the treatment of Muslim detainees, was the effect of the night state, taken together with the

proximity and condition of the toilet cubicle, upon observant Muslims whilst they were performing their night prayers. There was no suggestion that there was a culture of disregard or disrespect for Muslim detainees or their religious observance at Brook House. The HMCIP Report on Brook House in 2016 said the following:

> "In our survey, 80% of detainees felt their religious beliefs were respected. A large chaplaincy team delivered an excellent service, catering for a wider range of faiths than usual. The worship spaces were open at all times, and there was a full programme of classes and groups. There was now ample space for Muslim prayers in the visits hall. Chaplains gave significant support to detainees who were not fluent in English.'

348. In its 2018 report, the IMB stated that 'Management continues to demonstrate interest in and respect for the widely diverse cultures and religious in the Centres', and that 'Muslims remain the largest single faith group, with the number fluctuating around 40-50% of the Centre's population.'

The expert evidence

349. As I said, earlier in this judgment, I was provided with two expert reports on religious observance.

350. The first was provided by Professor M.A.S Abdel Haleem OBE, Professor of Islamic Studies, School of Oriental and African Studies, University of London, and a recognised Muslim Scholar, and had been prepared for the **Hussein and Rahman** proceedings. Professor Haleem said that prayer should be offered in a place that permits the believer to concentrate on his or her prayer and that distraction caused by sight, sound, smell or other sensory causes should be avoided and/or minimised as soon as possible. He said that:

> "A practising Muslim may well feel, correctly, that such close proximity to toilets, especially if the are unclean, would invalidate his prayer, so the odour of urine or faeces if present would be particularly offensive. Many Muslims, distracted, must stop and restart their prayer."

351. Professor Haleem said that the condition of the toilet would impede one's ability to concentrate and feel the prayer as prescribed in Islam. He said that unpleasant smells should not be allowed into the place of prayer, because of its distracting effect. He said that noise from television and people talking loudly in a small, crowded room would also distract a Muslim who wanted to concentrate on his prayer. Professor Haleem concluded his report as follows:

> "In my view, the conditions in the cells at Brook House, during lock-in, as described in the literature that has been sent to me, do not properly enable Muslim detainees to pray in the clean, quiet conditions required in Islamic teachings on prayer. The lock-in obstructs them from going to the prayer room and the toilets and the wash-room at the times appointed for prayer."

352. Professor Haleem had not visited Brook House when he prepared his report.

353. The Defendant relies upon an expert report from Mr Ibrahim Mehtar, an Imam and recognised Muslim Scholar, who is a Chaplaincy HQ Adviser for HM Prison Service, with regional responsibility for the prisons in London, South East and South Central areas. Between 2005 and 2015, Mr Mehtar was an Imam and Muslim Chaplain for HM Prison Service.

354. Mr Mehtar visited Brook House on 1 November 2019, sometime after the Claimants had been released. By this point, the curtains had been replaced with a door which partially obscured the entrance aperture. Mr Mehtar expressed the view that the rooms were perfectly adequate for a Muslim to perform their prayers. He said that even if it was possible to view the toilet, this in itself is not a barrier to the completion of prayer. It would only be necessary for a person to face the toilet entrance, even in rooms where the toilet is in the South Eastern direction which is the direction of formal prayer for Muslims in the UK, where there were three detainees praying in the room. If there were two, then it would not be necessary to face the toilet entrance. Even if someone needed to stand facing the toilet, this would not deem the prayer invalid. He also said that the problem could be avoided by the detainees praying at different times within the time-frame for the prayer: it is not necessary to pray in congregation.

355. Mr Mehtar said that strong smell and odour could affect one's concentration in prayer, as could the noise coming from a television. He said that:

> "Devotion and concentration is very important in prayer, but no Muslim scholar would argue that a lapse in concentration would make the prayer null and void. The prayer takes around 10 minutes and should be completed within a time window. It would be fairly easy to wait for an appropriate time when no one is on the toilet or until any strong smells have disappeared before starting one's prayers. So a very strong odour during the prayer would affect the quality of the prayer as it would affect one's concentration, but not the validity of the prayer.
>
> Any action taking place, external to the prayer would not affect the validity of the prayer. On this there is no dispute amongst the Muslim scholars. To ensure that one could maximise concentration and devotion in their prayer, it would be reasonable to expect them to position themselves away from the door or offer the prayers at a slightly different time, but still within the acceptable timeframe."

356. In addition, Mr Mehtar said:

> "Islam is a very pragmatic religion which will adapt depending on the circumstance. Every Muslim knows the importance of the 5 daily prayers but also appreciates that they won't always be offered in the most ideal situation possible."

The PES

357. Following the judgment of Holman J in **Hussain and Rahman**, the Defendant carried out and published an Equality Impact Assessment into night state at Brook House in December 2018. This was called the Policy Equality Statement, or PES. The PES set out the rationale and justification for night state, and considered the impact of night state on a range of protected characteristics, including religious belief and observance.

358. The PES said that there was no central Home Office guidance or policy related to when detainees may be limited to their bedroom accommodation, for what purpose or for what period of time.

The justification for night state

359. The PES said that, in contrast with other IRCs, the residential areas at Brook House consist of an open space area surrounded by bedrooms on most sides. Some of these areas can house more than 100 detainees. It is therefore operationally impracticable to maintain a position whereby detainees are restricted only to their wings (but not their bedrooms) during the night without mirroring during night state the full daytime security regime and staffing requirements. The PES said that the use of night state is fundamental to allow detainees a calm and quiet opportunity to rest and sleep whilst maintaining the safety and security of the centre. Without night state, any number of detainees might congregate in the landing areas, located immediately outside the bedrooms. To maintain safety and security in such circumstances would require imposing the same or similar regime to the one in place during day time. This regime would make it impossible to provide detainees with the peace and quiet necessary for rest and sleep.

Impact on religion and belief

360. The PES noted that the DCR state that the practice of religion in detention centres shall take account of the diverse cultural and religious background of detained persons. The PES also noted that, in his review of detainee vulnerability, in 2015, Stephen Shaw did not find any evidence to suggest that IRCs did not take seriously their need to allow detainees to observe their religions and said that he was very satisfied with management of religious affairs within the detention estate.

361. The PES recognised that detainees from religions with structured prayer times may be impacted by the night state more than detainees with of no religious persuasion or members of other religious groups, as the latter can reserve their prayer times to the general association periods. The PES also recognised that facilities were made available for Muslim detainees, including access to Jumu'ah Prayer every Friday in the visits hall, access to prayer mats and Qurans, which the chaplaincy team provides and which detainees can keep for their prayers, access to members of the chaplaincy team, and the issue of personal water jugs to perform ablutions.

362. Having taken advice from the Brook House manager of religious affairs, whom I take to be Mr Qayum, the PES accepted that every day one or more of the prescribed prayers must be performed during night state. The manager of religious affairs was asked to consider what adjustments were in place to mitigate this impact, and reference was made to an impact assessment carried out by G4S, which also drew upon Mr Qayum's expertise. The advice was that the five daily prayers can all be

recited within the confines of a detainee's room, and the current timings for night state should be no barrier to a follower of Islam completing his prayers, as the facilities requires, such as water jug, hats, beads and a prayer mat are given to each individual detainee. If two or more Muslim detainees shared a room, they could complete their prayers simultaneously or consecutively, within the time window. Mr Qayum confirmed that conducting daily prayers near a toilet is highly discouraged in Islam and should only occur in extreme circumstances. Prayer outside or in the vicinity of a bathroom can be an issue for practising Muslims as this space can be considered to be unclean or impure and prayer is not permitted in a bathroom.

363. The PES described the lay-out of rooms and said that it was unquestionable that detainees are not asked to conduct their prayers in a bathroom setting. The PES said that privacy issues could be managed because detainees could perform their ablutions before night state began. Muslim detainees can pray simultaneously or consecutively within the window of each of the daily prayers. The section of the PES dealing with religion concluded as follows:

> "The operational and security requirements necessary to ensure the safe detention of individuals at Brook House "night state" can disproportionally impact religions with more prescriptive rituals such as the Muslim faith. The broad spectrum of prayer times and how they can vary throughout the year, together with the operational need to maintain a safe and quiet centre throughout the night for detainees of all religions, make it unreasonable to expect Muslim detainees to leave their rooms to fulfil their praying duties. The measures detailed above ensure that Muslim detainees are provided with reasonable adjustments to fulfil their religious obligations from within the rooms of Brook House."

The G4S EIA

364. The most recent version of the G4S EIA was dated 6 November 2019. The G4S EIA made the following additional points. First, on induction all detainees have an opportunity to meet with an Imam or a member of the chaplaincy team who will discuss with them how they can continue to fulfil their religious duties during their stay at Brook House. An on-call member of the chaplaincy team is available during night state if necessary. If Muslim detainees are disturbed during their prayers by their roommates, staff at Brook House will look sympathetically at moving affected detainees to an alternate room, and will normally look to place detainees of the same faith together to minimise the risk of this.

Article 9

365. Article 9(1) provides that everyone has the right to manifest his religion or belief, in worship, teaching, practice and observance. Article 9(2) provides that freedom to manifest one's religion or beliefs "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

366. Holman J did not make a ruling in relation to the alleged breach of Article 9 in **Hussain and Rahman,** though he did say that a combination of the required hours of prayer, the lock in, room sharing, and unclosed lavatories with the rooms does result in an interference with, or a limitation upon, the rights of a Muslim protected by Article 9 (judgment, paragraph 28). The evidence which has been placed before me, however, was much more extensive than the evidence that was placed before Holman J. As a result, I am not bound by the conclusion of Holman J in this regard.

367. The Article 9 challenge can be analysed in terms of a positive duty on the Defendant to take reasonable and appropriate measures to secure the Claimants' rights under Article 9(1) or in terms of whether an interference with Article 9(1) rights by the Defendant can be justified in accordance with Article 9(2). As Mr Roe QC submits, in either case, the principles are broadly similar: **Jakóbsi v Poland** (App 18429/06) [2012] 55 EHRR 8, at paragraph 47.

368. It is clear that the right to practise one's religion, under Article 9(1), is not breached in every case in which the circumstances in which an individual can practise his or her religion are sub-optimal. In **Kovalkovs v Latvia** (App 35021/05), 31 January 2012, at paragraph 67, the ECtHR said, when finding that there was no breach of Article 9:

> "The interference with the applicant's right is not such as to completely prevent him from manifesting his religion. The Court considers having to pray, read religious literature and to meditate in the presence of others is an inconvenience, which is almost inescapable in prisons (see, mutatis mutandis, **Estrikh v. Latvia**, no. 73819/01, § 166, 18 January 2007, and **Golder v. the United Kingdom**, 21 February 1975, § 45, Series A no. 18), yet which does not go against the very essence of the freedom to manifest one's religion."

369. In my judgment, notwithstanding the impact that the night state and conditions at Brook House had upon the prayers of observant Muslims, the Defendant took reasonable and appropriate measures to secure Muslim detainees' rights. The interferences resulting from having to pray during night state in a shared room, and in close proximity to the toilets, did not completely prevent Muslim detainees from manifesting their religion, or go against the very essence of their freedom to do so.

370. The starting-point is that the Defendant went to great lengths to respect Muslim detainees' religious beliefs and to provide a supportive and respectful environment for them at Brook House. The Imams and chaplaincy provided an excellent service. Space was made available for communal prayers, and Qurans and the other materials that Muslim detainees might require for religious purposes were made available. Muslim detainees were assisted in performing their prayers in their rooms by being provided with prayer mats and jugs to perform their ablutions in-room, if they required them. G4S looked to place Muslim detainees in rooms together to minimise the risk that roommates might be disruptive to detainees whilst they prayed, and were prepared to move detainees to a different room if a problem arose in that regard. As I have found, curtains were available to block the aperture at the entrance to the toilet, and cleaning materials were made available to detainees to clean the toilet areas. Imams, at Friday Prayers, encouraged detainees to clean their toilet areas. The risk of having to pray very close indeed to the toilet area arose only where there were three

Muslim detainees in a room, but this problem could be averted by the residents of a room agreeing to stagger the times when they prayed within a particular prayer time-window. Similarly, if a roommate chose to use the toilet whilst a Muslim detainee was praying, or if there were particularly strong odours emanating from the toilet, the Muslim detainee could pause in his prayers until the roommate had finished and/or the worst of the odours had dissipated.

371. None of this means that the situation was ideal. The expert evidence, and that of Mr Qayum, made clear that it is highly discouraged in Islam that the place of prayer is near a toilet, and that it is important that, whilst praying, believers should avoid being distracted by matters such as strong and unpleasant odours and loud noises. However, I did not understand the expert evidence, even that from Professor Haleem, to mean that the proximity of a toilet completely invalidated and rendered nugatory the prayers of a believer. If it is unavoidable, it is permissible to pray near to a toilet, and this was unavoidable for those who were detained at Brook House. It was not a matter for their personal choice, for which they could be criticised. As I understood Professor Haleem's evidence, whilst he said that particularly offensive toilet odours could invalidate a prayer, what he meant was that in such circumstances the believer should pause and wait for the worst of the smells to dissipate, before resuming his prayers. This is consistent with the evidence from Mr Ebadi and Mr Oriakhail themselves. Neither said that they were prevented from completing their prayers. Mr Oriakhail said that the conditions did not stop him from praying completely.

372. The circumstances in which Professor Haleem said that prayers should be performed were "clean, quiet conditions." However, in my view, this was a counsel of perfection. In practice, in many places, it is not possible to guarantee such conditions for practising Muslims, and believers manage to perform their prayers in less ideal conditions. I note that Professor Haleem said that a loud television could distract believers during their prayers, but there was no suggestion that the presence of TVs in the rooms was an interference with Muslim detainees' Article 9 rights. Even if there had been no night state, this would not have meant that the prayer hall would have been open during the night hours, or that all of the Muslim detainees at Brook House could have gathered to pray together.

373. I do not think that there was any real, significant, difference, apart from in emphasis, between the two expert witnesses.

374. In my judgment, two other points are highly relevant to the question whether the Defendant had failed to take reasonable and appropriate measures to secure the Claimants' rights under Article 9(1). The first is that neither Mr Ebadi nor Mr Oriakhail complained whilst he was in Brook House. The second is that it was clear from Ms Harrison QC's submissions that the Claimants accepted that there would have been no breach of Article 9(1) if the night state had been only eight hours long, even though this would still have meant that, in the summer, one of the prescribed prayers, the Fajr, would have had to be performed in the detainee's room during the night state. In my view, if it is acceptable under Article 9(1) for one prayer to be performed in the detainee's room during the night state, notwithstanding the conditions, then it is hard to see why it would be a breach of Article 9(1) for it to be necessary for two or three prayers to be performed in the same conditions.

375. Even if I am wrong, and there was an interference with the Defendant's rights under Article 9(1), any such interference is justified under Article 9(2). For the reasons given earlier in this judgment, the limitations imposed by and consequent upon the night state were lawful. In my judgment, they were necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

376. There were good reasons for the existence of night state. It was important, for the safety, security, comfort and well-being of detainees, that there was a quiet night-time period. The Defendant was entitled to take the view that, where the infrastructure existed, in the form of in-room toilets, it was preferable to lock detainees in their rooms during night state. Otherwise, detainees might congregate on the corridors and disturb those nearby. Some of these detainees would have been difficult and possibly even dangerous. If detainees were able to move around, then there would be two equally unsatisfactory options for the Defendant. Either the same regime would have to be operated, in terms of staff, as during the day, which would have been noisy and expensive, or a small night staff would have been on duty, with attendant dangers for safety and security.

377. As for the length of the night state, this was within the scope of the Defendant's lawful discretion, in my view. Once it is accepted, as the Claimants accept, that a night state which required one of the daily prayers to be performed in the detainees' room was lawful for Article 9 purposes, then in my judgment it is difficult to see why a night state which required one prayer for part of the year and two to three prayers in other parts of the year was impermissible for the purposes of Article 9(1).

Article 14

378. There was no dispute between the parties as regards the applicable legal principles.

379. For Article 14 to apply, it is not necessary that there was a breach of one of the other Articles. It is enough if the facts of the case fall within the ambit of another substantive provision of the Convention or its Protocols: see **Eweida v United Kingdom** (20130 57 EHRR 8, at paragraph 85. The Defendant accepts that this case falls within the ambit of Article 9.

380. The Defendant does not dispute the finding of Holman J that, for the purposes of Article 14, the night state at Brook House had a greater and discriminatory impact upon practising Muslims because of the requirements of their religion. It is common ground that the only issue is whether this prima facie discriminatory treatment is objectively and reasonably justified, in the sense that it pursues a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised: **Eweida**, at paragraphs 87 and 88.

381. It is also common ground that a failure to treat differently persons whose situations are significantly different can be in breach of Article 14 ECHR, in the absence of objective and reasonable justification: **Thlimmenos v Greece** (2000) 31 EHRR 411 at paragraph 44. The **Thlimmenos** principle imposes a positive obligation on the state, in an appropriate case, to make provision to cater for significant difference.

382. Article 9 ranks high in the hierarchy of human rights: **Eweida** at 79-80.

383. It is not the underlying measure that must be justified, but the discriminatory effect on Muslims: **AL (Serbia) v Secretary of State for the Home Department** [2008] UKHL 42; [2008] 1 WLR 1434 , at paragraph 38.

384. The test for justification is that set out by the Supreme Court in **R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening)** [2015] 1 WLR 3820 , at paragraph 33. This is:

> "(i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"

385. As for the standard of scrutiny and the degree of latitude to be afforded to the decision maker: in at least some cases, especially where the decision relates to matters of public expenditure, it is clear that the test is whether the decision or policy under challenge was "manifestly without reasonable foundation" ("MWRF"): see **R (Adiatu) v HM Treasury** [2020] EWHC 1554 (Admin) (DC), at paragraphs 59-63. However, in the same case, the Divisional Court (of which I was a member) said that in many cases the difference between the MWRF standard and the traditional test for proportionality, which gives appropriate weight and respect to the judgment of the executive, is a fine one or even academic.

386. No submissions were made to me about the standard of scrutiny to be applied in the present case and so I will not embark on a consideration as to whether the MWRF test applies in the present case. I will assume, without deciding, that it does not and a lesser test for proportionality applies. Guidance has been given by the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700, at paragraph 30, in which Lord Reed said that the principle of proportionality does not entitle the courts simply to substitute their own assessment for that of the decision maker. On the other hand, Lord Reed noted that the practice of allowing the decision-maker a margin of appreciation did not apply where the matter was before a domestic Court, rather than the Strasbourg Court. Lord Reed went on:

> "That concept [margin of appreciation] does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend on the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court."

387. It is clear, therefore, that appropriate respect should be given to the decision-maker. In my judgment, it is relevant in matters such as this, that the decision is a specialist one, involving operational considerations.

388. In my judgment, there was no breach of Article 14, when read with Article 9.

389. The night state pursues a legitimate aim. That aim is to maintain a safe and quiet centre through the night for detainees of all religions.

390. There is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. For the reasons given at paragraph 376, above, the night state is effective to achieve the aim for which it was designed. That aim would not be achievable if Muslim detainees were exempted from night state, and the Claimants' skeleton argument makes clear that this is not being contended for. Rather, the Claimants contend that, in so far as night state pursues a legitimate aim, that aim could have achieved by a shorter night state for all detainees, which would have meant that, at most, only one daily prayer would have to be performed during the night state.

391. In my judgment, the duration of the night state at the relevant time at Brook House did not mean that there was no reasonable relationship of proportionality between the means employed and the aim sought to be realised. The duration of the night state at a particular IRC was an operational matter, decided upon by making use of specialist expertise, which had to take into account matters such as the configuration of the buildings and the profile of the detainees. In my view, the decision to accept a bid from GSL which provided for a night state from 9 pm to 8 am was a reasonable one and was within the measure of discretion afforded to the decision-maker.

392. Whilst the situation was not ideal, this was not a case in which the treatment complained of meant that observant Muslim detainees were completely prevented from practising their religion. As I have explained, at paragraphs 368-373, above, Muslim detainees had a reasonable opportunity to observe their religious practices, including their daily prayer obligations, notwithstanding the existence of the night state. It is accepted by the Claimants that a night state can be lawful, for Article 14 purposes, even if it means that, sometimes, one of the daily prayers is performed in the detainee's room.

393. Muslim detainees were not singled out to be treated differently from other detainees.

394. An integral part of the conditions which led to the Claimant's concerns about night state was that there was an in-room toilet. This had disadvantages, relating to odour and the scope for embarrassment, but on the other hand, there are benefits in having an in-room toilet which detainees can use throughout the night, without needing to use toilets elsewhere in the building. The fact that the rooms had in-room toilets was not, therefore, of itself something that made the treatment in general, or the treatment of Muslim detainees in particular, unreasonable or unlawful.

395. It is worth noting, also, that none of those who reported on the conditions at Brook House, HMCIP, Stephen Shaw and the IMB, said that the lock in at Brook House excessively interfered with the religious observance of Muslim detainees.

396. It is true that, since the period with which this case is concerned, the Defendant has taken the decision to limit the night state at Brook House to no more than 9 hours, but this does not mean that a longer night state was necessarily unreasonable or unlawful, for the purposes of Article 14. A less intrusive measure could have been used, in the

sense that any shorter night state would, inevitably, be less intrusive than the one that was adopted, but this does not mean, in my judgment, that the night state as actually operated in 2017-18 was disproportionate and in breach of Article 14. It was within the scope of the discretion that is afforded to the state. Even if the night state was eight hours long, Muslim detainees would still have had to perform their prayers in their rooms once a day in the summer months.

397. Ms Harrison QC points out that cost alone cannot justify discrimination, and submits that the reason longer night state hours at Brook House was cost, because the night state hours were an integral part of the GSL bid in 2007 which was lowest in price. However, there was no evidence that the reason why GSL proposed a night state of 11 hours was solely in order to save costs. As I have said, night states of similar duration were in place at other IRCs. The main reason why there was a night state was not connected with cost.

398. For these reasons, in my judgment, and taking account of the findings of fact that I have made, the treatment complained of struck a fair balance between the rights of the individual and the rights of the community.

Indirect religious discrimination contrary to EA 10

399. Both the Claimants and the Defendant, in their submissions, proceeded on the basis that the considerations that were relevant to the Article 14 challenge were equally applicable to the indirect discrimination challenge under the EA 10. In my view, they were correct to do so. In both cases, the central question was whether the prima facie discriminatory treatment complained of was a proportionate means of achieving a legitimate aim. The only relevant difference between Article 14 and the EA 10 is that the **Thlimmenos** principle only applies to claims under Article 14.

400. For the reasons already given in relation to the challenges under Article 9, ECHR, and Article 14 when read with Article 9, in my judgment, the night state and the conditions surrounding the night state at Brook House was not unlawful under the EA 10. The prima facie discriminatory treatment complained of was a proportionate means of achieving a legitimate aim, taking account of the extent of the discriminatory impact and the importance of the aim.

Conclusion

401. For these reasons, the application for leave to apply for judicial review in relation to the allocation issue is refused, and the Claimants' claims for judicial review are dismissed.