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Case No: CO/5076/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

(1) LW
(2) SAMANTHA FAULDER
(3) KT
(4) MC **Claimants**

- and –

(1) SODEXO LIMITED
(2) SECRETARY OF STATE FOR JUSTICE **Defendants**

- -
- -

Jason Pobjoy, Isabel Buchanan and Sophie Walker
(instructed by **Steel & Shamash**) for the **Claimants**
David Manknell (instructed by the **Government Legal Department**)
for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing dates: **4 and 5 July 2018**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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The Honourable Mr Justice Julian Knowles:

Introduction

1. This case arises out of the illegal strip searching in prison of the four Claimants. Strip searches involve the removal of clothing. At the hearing I made orders under CPR r 39.2 protecting the identity of three of the Claimants because of that sensitive subject matter. I will therefore refer to them by their initials. The Second Claimant, Samantha Faulder, did not request anonymity.

2. Following the grant of permission by Lang J on 28 January 2018 the Claimants seek judicial review in respect of five unlawful strip searches carried out at HMP Peterborough on 27 July 2017 and 8 September 2017. HMP Peterborough is a private prison for male, female and transgender prisoners run by the First Defendant, Sodexo Limited ('Sodexo').

3. The First Claimant, LW, is a transgender prisoner who was born female but is in the process of transitioning to male and goes by the male pronoun. The other three Claimants are female. All four Claimants were detained in the women's section of HMP Peterborough at the time of the strip searches that give rise to these claims.

4. Sodexo has admitted that all of the searches constituted a breach of the relevant prison instruction, PSI 07/2016, 'Searching the Person' ('PSI 07/2016') and Article 8 of the European Convention on Human Rights ('ECHR'/'the Convention'). Sodexo has also admitted that there has been a breach by it of its positive obligations under Article 8 of the ECHR, and that there was a systemic failure by it to implement PSI 07/2016. It denies any breach of Article 3 of the Convention, either as to the positive or negative obligations that it imposes.

5. The dispute between Ms Faulder, MC and KT and Sodexo has now been resolved by way of a consent order dated 20 April 2018 in which Sodexo has admitted these breaches, with damages to be assessed in the County Court. So far as LW is concerned, the consent order is dispositive of his claim for judicial review against Sodexo save for any claim by him in respect of damages for the violation of his Article 8 rights; whether Sodexo violated his Article 3 rights; and whether Sodexo violated s 149 of the Equality Act 2010. These claims are to be determined in the County Court.

6. All of the Claimants maintain their claims against the Secretary of State for declaratory relief, which is what I am concerned with. Their case can be summarised as follows. They allege that the Secretary of State failed to provide adequate and effective safeguards at HMP Peterborough at the relevant time to protect them against violations of Articles 3 and 8 of the ECHR. Their argument has the following steps:

    a. The Secretary of State has contracted out one of the Government's core public functions, and in doing so, has authorised a private contractor (ie, Sodexo) to conduct strip searches on female prisoners at HMP Peterborough. It is common ground that strip searches can engage Articles 3 and 8 of the ECHR.

    b. In order to safeguard against breaches of Articles 3 and 8, the Secretary of State has issued PSI 07/2016. However, this instruction alone is insufficient to protect

against violations of Articles 3 and 8. The Claimants say that this is clear from the facts of this case, where Sodexo has admitted in terms in its Summary Grounds at [26] that there was 'a systemic failure to implement PSI 07/2016 at HMP Peterborough and inevitably a breach of its positive obligations under Article 8 in that there was a serious risk that a full search conducted by its staff would not follow the correct procedure'.

c. The Secretary of State was required to put in place appropriate supervision and monitoring to ensure that PSI 07/2016 was effectively implemented. Absent such monitoring and supervision, the rights guaranteed under Articles 3 and 8 were theoretical and illusory. The Secretary of State states in his Detailed Grounds that the issue before me is whether the framework that has been adopted provides 'adequate and effective safeguards against breaches of Articles 3 and 8 in all the circumstances' ([26]), and that, in answering that question, I must consider both '[t]he legal and policy framework that is in place to prevent such breaches' and '[t]he practical steps that are taken to prevent such breaches' (Detailed Grounds' [27). The way in which the Secretary of State puts the issues is not significantly disputed by the Claimants.

d. The framework of supervision and monitoring at HMP Peterborough was neither adequate nor effective. The Claimants submit that the evidence demonstrates that so far as that prison is concerned at the relevant time, the system of oversight failed. They say that there were manifest and systemic failings in the way that strip searching was supervised and monitored; that issues which ought to have been identified were not; and even where issues were identified (eg, by external bodies), they were not acted upon.

7. The Claimants are at pains to point out that their case is not a broad attack on the system of contracting prisons out to private corporations, or an attack on the system of oversight that the Secretary of State has put in place to monitor compliance by those corporations. They say that this is a targeted claim, specifically challenging the failure by the Secretary of State to provide adequate and effective safeguards at HMP Peterborough at the relevant time to protect them against violations of Articles 3 and 8. The Claimants do not seek damages against the Secretary of State, but they seek a declaration that the Secretary of State had a duty to protect them against violations of their human rights while they are in the custody of the state and under its control. They say that that duty could not simply be outsourced to a private contractor, and that at the time the strip searches were conducted on 27 July 2017 and 8 September 2017, that duty was not satisfied.

The legal framework

8. Before turning to the factual background in more detail, it is convenient first to set out the legal framework governing contracted out prisons, and the instructions which govern the searching of prisoners in the prison estate.

Contracted out prisons

9. Until the 1990s prisons in the United Kingdom were operated exclusively by the state. During the 1980s the Government began considering whether it was appropriate, both

ideologically and practically, to expand its privatisation program to include prisons. This culminated in the Criminal Justice Act 1991, which introduced contracted out prisons, in other words, prisons run for profit by private operators like Sodexo. Section 84 of the Criminal Justice Act 1991 ('CJA 1991') provides that the Secretary of State may enter into a contract with another person for the provision or running of any prison. Where such a contract is in force then the prison must be run in accordance with ss 85 and 86 of that Act, the Prison Act 1952 (as modified by s 87 of the CJA 1991) ('the 1952 Act') and the Prison Rules (made under s 47 of the 1952 Act) ('the 1952 Rules'). The current prison rules are the Prison Rules 1999 ('the 1999 Rules').

10. Section 84 of the CJA 1991 provides:

> "84. *Contracting out prisons etc.*
>
> (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 prison or part of a prison.
>
> (2) While a contract under this section for the running of a prison or part of a prison is in force—
>
> (a) the prison or part shall be run subject to and in accordance with sections 85 and 86 below, the 1952 Act (as modified by section 87 below) and prison rules;
>
> …"

11. Section 85 provides:

> "85. *Officers of contracted out prisons*
>
> (1) Instead of a governor, every contracted out prison shall have -
>
> (a) a director, who shall be a prisoner custody officer appointed by the contractor and specially approved for the purposes of this section by the Secretary of State; and
>
> (b) a Controller, who shall be a Crown servant appointed by the Secretary of State; and every officer of such a prison who performs custodial duties shall (subject to section 86B) be a prisoner custody officer who is authorised to perform such duties or a prison officer who is temporarily attached to the prison.
>
> (2) The director shall have such functions as are conferred on him by the 1952 Act (as modified by section 87 below) or as may be conferred on him by prison rules.
>
> [...]

> (4) The Controller shall have such functions as may be conferred on him by prison rules and shall be under a duty—
>
> (a) to keep under review, and report to the Secretary of State on, the running of the prison by or on behalf of the director; and
>
> (b) to investigate, and report to the Secretary of State on, any allegations made against prisoner custody officers performing custodial duties at the prison or prison officers who are temporarily attached to the prison.
>
> (5) The contractor and any sub-contractor of his shall each be under a duty to do all that he reasonably can (whether by giving directions to the officers of the prison or otherwise) to facilitate the exercise by the Controller of all such functions as are mentioned in or conferred by subsection (4) above."

12. Section 86 gives custody officers at contracted out prisons specific powers to search prisoners in accordance with the Prison Rules:

> "86. *Powers and duties of prisoner custody officers employed at contracted out prisons*
>
> (1) A prisoner custody officer performing custodial duties at a contracted out prison shall have the following powers, namely—
>
> (a) to search in accordance with prison rules any prisoner who is confined in the prison; and (b) to search in accordance with prison rules any other person who is in or is seeking to enter the prison, and any article in the possession of such a person. …"

13. In addition to having a statutory role of oversight via the Controller (under s 85(1)(b) and s 85(4)), under the 1952 Act the Secretary of State retains the general duties in s 4 of that Act which provides:

> "4. *General duties of the Secretary of State*
>
> (1) The Secretary of State shall have the general superintendence of prisons and shall make the contracts and do the other acts necessary for the maintenance of prisons and the maintenance of prisoners.
>
> (2) Officers of the Secretary of State duly authorised in that behalf, shall visit all prisons and examine the state of buildings, the conduct of officers, the treatment and conduct of prisoners and all other matters concerning the management of prisons and shall ensure that the provisions of this Act and of any rules made under this Act are duly complied with.
>
> (3) The Secretary of State and his officers may exercise all

> powers and jurisdiction exercisable at common law, by Act of Parliament, or by charter by visiting justices of a prison."

14. In addition to the statutory framework, the Secretary of State is responsible for a large number of published policies on prisons, which generally fall into one of two categories: Prison Service Instructions ('PSIs') and Prison Service Orders ('PSOs'). Contractors operating private prisons have contractual obligations to comply with the Prison Rules, mandatory PSOs and all PSIs relating to such mandatory PSOs. PSOs were issued until 31 July 2009.

Searches

15. The power to search prisoners is set out in Rule 41 of the 1999 Rules:

> "(1) Every prisoner shall be searched when taken into custody by an officer, on his reception into a prison and subsequently as the governor thinks necessary or as the Secretary of State may direct.
>
> (2) A prisoner shall be searched in as seemly a manner as is consistent with discovering anything concealed.
>
> (3) No prisoner shall be stripped and searched in the sight of another prisoner, or in the sight of a person of the opposite sex."

16. Prior to 2007, female prisoners were liable to be subjected to routine, non-targeted strip-searching. In March 2007 a report by Baroness Corston into the treatment of vulnerable women prisoners in the justice system, including strip-searching, was published by the Home Office (*A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System* ('the Corston Report')). At [3.18] the Corston Report concluded:

> "… There is one particular aspect of entrenched prison routine that I consider wholly unacceptable for women and which must be radically changed immediately in its present form. This is the regular, repetitive, unnecessary use of strip-searching. Strip-searching is humiliating, degrading and undignified for a woman and a dreadful invasion of privacy. For women who have suffered past abuse, particularly sexual abuse, it is an appalling introduction to prison life and an unwelcome reminder of previous victimisation. It is unpleasant for staff and works against building good relationships with women, especially new receptions. I well understand that drugs and other contraband must be kept out of prison and that there may be a case for routine strip-searching on first reception into prison. But even this procedure is dubious for women given that drugs can be secreted internally, rendering strip-searching ineffective in any event, as routine internal searching is already seen as unacceptable. A group of women in one prison, including some who suffered domestic abuse and some who had not, described strip-searching as making them feel embarrassed, invaded, degraded,

> uncomfortable, vulnerable, humiliated, ashamed, violated and dirty."

17. Consequently, the Corston Report recommended that ([3.35]):

> "… [s]trip-searching in women's prisons should be reduced to the absolute minimum compatible with security; and the Prison Service should pilot ion scan machines in women's prisons as a replacement for strip-searching women for drugs."

18. As a result a Prison Service Instruction, PSI 38/2008, was issued setting out a revised policy on strip-searching. This was replaced in turn by PSI 48/2010, by PSI 67/2011, and most recently PSI 07/2016, which is what I am concerned with in this case.

19. The background to PSI 67/2011 was set out by the Divisional Court in *R (LD, RH and BK) v Secretary of State for Justice* [2014] EWHC 3517 (Admin), [7]-[10]:

> "7. The power conferred by Rule 41 is of course necessary because, without it, any search, and particularly a strip-search, would constitute an assault. But the Rule does not, save as provided in subparagraphs (2) and (3), deal with the circumstances in which strip-searches should be permitted or how they should be carried out so as to avoid any breach of human rights and, incidentally, to ensure that they conform to the requirement in subparagraph (2) that the search is in as seemly a manner as is consistent with discovering anything concealed.
>
> 8. Subparagraph (3) covers an aspect which the European Court of Human Rights dealt with and found to be degrading, where a strip-search was carried out in the presence of an officer of the opposite sex. That was said by the court to constitute a breach of Article 3 because it was degrading. But it has been recognised, and the defendant has accepted, that a search constitutes an interference with the private rights and so falls within the scope of Article 8 of the European Convention on Human Rights.
>
> 9. It was recognised that the impact of strip-searches was far greater on women than men. A very high proportion of women sentenced to imprisonment had suffered, whether as a child or an adult, sexual, physical or mental abuse. Generally, women felt more keenly the humiliation of being strip-searched than men. The Prison Service accordingly asked Baroness Corston to investigate and report on the matter. She produced in 2007 a lengthy and detailed report. It is to be noted that she described the effect of strip-searches on women as '… humiliating, degrading and undignified, a dreadful invasion of privacy'.
>
> 10. As a result, and having accepted her conclusions, the Prison Service have issued instructions, the latest of which is PSI

> 67/2011. This policy is intended to ensure that if strip-searches are carried out in accordance with it, there will be no breach of human rights in particular of Article 8. …"

20. In *R(BK and RH) v Secretary of State for Justice* [2015] EWCA Civ 1259, an appeal from the decision in *R (LD, RH and BK) v Secretary of State for Justice*, supra, the Court of Appeal said at [25]:

> "The policy reasons for the need for searching – including full body searching – of prisoners and others whilst in prison are obvious: both for the purposes of maintaining discipline and order and for the purposes of protection and safety of staff and prisoners (including, sometimes, the individual prisoner being searched). Nevertheless, and for no less obvious reasons, there are real sensitivities and concerns relating to full body searches: not least in the context of women prisoners and especially when, as has been recognised, a significant proportion of women prisoners may previously have experienced abuse (sexual, physical or psychological) or other emotional disturbance giving rise to particular concerns as to vulnerability."

21. PSI 07/2016 was issued on 28 July 2016 and was effective from 26 October 2016. It deals with the procedures for searching of prisoners, staff and visitors. For each type of search there are, in general, different procedures for men and women. I am concerned only with the procedure for searching female prisoners and the modifications to that procedure for transgender prisoners.

22. Paragraph 2.3 provides that the following types of searches of the person may be applied:

    a. *Level A rub-down search*: the mandatory provisions governing the way in which such a search is to be carried are set out in detail in the table in section B1 of Annex B at [8].

    b. *Level B rub-down search*: again, the process is set out in a table in Part B1 of Annex B at [10].

    c. *Full search*: this is dealt with in section B2 of Annex B at [11]-[19], [20] – [22] and [24]. It involves the removal of clothing and is what is colloquially referred to as a 'strip search', and that is the term which I shall use in this judgment. However, *per* [11], at no time must a person be completely naked during a full search.

    d. *Searching of other bodily areas*: this is dealt with in section B3. It involves the inspection of, but not intrusion into, intimate areas of the body.

23. A core requirement of PSI 07/2016 is that all prisons must have a Local Searching Strategy in place (see [1.6], [2.6], [2.14]-[2.15] and Annex K). Annex K provides that the Local Searching Strategy must 'be made available to staff, visitors and prisoners who must be made aware of how it applies to them'. It provides that searching

strategies must define 'the search technique or techniques to be used to maximise the chance of finding the object and the technical aids, if any, needed to conduct the search' ([4(iii]); '[p]rocedures for non-routine (ie intelligence-led) searches; including planning procedures for large-scale searches, such as lock down searches' ([4(vi)]); '[t]he training needed for each technique, the staff or groups of staff to be trained in each technique and the targets for training any staff who need any ongoing training and testing' ([4(viii)]); and '[a] clear strategy must be in place for self-audits of searching and this must be communicated to staff' [4(ix)].

24. Paragraph [2.12] of PSI 07/2016 states:

> "Arrangements must be in place for keeping records of searches and finds. On completion of a search, staff must sign for all examinations they have carried out in accordance with local security strategies. As a minimum, records must be kept of all non-routine full-searches of prisoners, in circumstances where they are conducted on the basis of intelligence or suspicion (this does not include random full-searches where conducted as part of Local Searching Strategies). Records must be kept in these circumstances irrespective of whether or not an item is found during the search. Records must detail why, when and where the full search was conducted, who conducted the search and any other relevant information. A Mercury Information Report (IR) must also be completed and submitted to the security department where contraband is found as part of a search."

25. At [2.17]:

> "All prisoners may be subject to Level-A or Level-B rub-down searches or full searches where appropriate, in accordance with local security strategies and procedures at Annex B. Searches may be conducted routinely or in response to intelligence, suspicion or specific incidents."

26. At [2.23]:

> "Staff should be aware that searches, especially full searches, can be embarrassing and difficult experiences for prisoners. Staff must, in particular, bear in mind the impact searches may have on prisoners who may be at risk – see PSI 65/2011 – Safer Custody."

27. PSI 07/2016 emphasises that women prisoners must not be full-searched routinely. As I have explained, this was a practice which the Corston Report said had to cease. Paragraph 2.54 provides:

> "Women prisoners must not be full-searched as a matter of routine but only on intelligence or reasonable suspicion that an item is being concealed on the person which may be revealed by the search. Full searches must be conducted in accordance with the correct procedures, at Annex B, paragraph 24. The procedure

> for searching women prisoners is different to that used to search male prisoners and women visitors and staff (as set out at Annex B), and consists of two levels. Level 1 involves the removal of the woman's clothing apart from her underwear; Level 2 involves the removal of all of the woman's clothing including her underwear (NB. the woman must never be fully naked during the search) – Annex B, paragraph 24 Level 2 of the search must only be applied if there is intelligence or suspicion that the woman has concealed an item in her underwear or if illicit items have been discovered about the woman's person during Level 1 of the search."

28. Annex B2 deals with full searches at [11] *et seq*. Under the heading 'General', it states:

> "11. At no time must a person be completely naked during a full search.
>
> 12. Full searches must only be carried out by two officers of the same sex as the person being searched and away from the view of any other person.
> …
>
> 15. Hand-held metal detectors may be used during a full search for men and must be used as part of a full search for women."

29. Under the heading 'Full Searching of Women Prisoners', Annex B2 states:

> "20. The procedures for full searching women prisoners outlined at paragraph 24 must be applied.
>
> 21. The full search procedures for women consists of two levels. Level 1 involves the removal of the woman's clothing apart from her underwear; Level 2 involves the removal of all of the woman's clothing including her underwear. Level 2 of the search may only be applied if there is intelligence or suspicion that the woman has concealed an item in her underwear or if illicit items have been discovered about the woman's person during Level 1 of the search. The woman must never be fully naked during the search.
>
> 22. Staff must carry out a rub-down search and hand-held metal detector scan when searching women entering or leaving prisons and before all full-searches are applied."

30. Paragraph 24 sets out the procedure to be followed on carrying out a full search of a female prisoner. It states:

> "24. The procedure for searching women prisoners is different to that used to search men and women visitors and staff (see Full Searching of Women Prisoners) and consists of two levels. Level

> 1 involves the removal of the woman's clothing apart from her underwear; Level 2 involves the removal of all of the woman's clothing including her underwear. Level 2 of the search may only be applied if there is intelligence or suspicion that the woman has concealed an item in her underwear or if illicit items have been discovered about the woman's person during Level 1 of the search."

31. In summary, the procedure set out in the Table in [24] of Annex B2 is as follows:

    a. Two officers must be involved. Officer 1 is the officer in charge of the search. Officer 2's principal role is to receive the prisoner's clothing and other items and to search them.

    b. Prior to carrying out the search, the officer in charge of the search 'should explain the need for the search and each step, taking into account any cultural or religious sensitivity'.

    c. A Level 1 search requires a prisoner to remove her clothes other than her underwear, but in such a way that the top half and bottom half of the woman's body are uncovered in sequence (not at the same time). It requires the provision of a dressing-grown.

    d. Following a Level 1 search, a Level 2 search may be initiated, but only if there is 'suspicion or intelligence that the woman has concealed any item in her underwear or any illicit articles have been discovered concealed, during Level 1'.

    e. In a Level 2 search, a prisoner is required to remove all of her clothes, including underwear, and is subjected to a full body search. Again, the top half of her body is uncovered (by removing her bra) and searched first, and then covered up again before the lower half of her body is uncovered (by removing her underwear) and searched. This requires the provision of a dressing-gown. A woman may be asked to stand with her legs apart while the lower half of her body is observed, but must never be asked to squat.

    f. Both officers involved must sign a record to state why a Level 2 search was initiated.

32. There are specific arrangements in place for the searching of transgender prisoners (see [2.62] of PSI 07/2016 and Annex H). There is also a separate Prison Service Instruction dealing with the particular circumstances of transgender prisoners, PSI 17/2016 ('*The Care and Management of Transgender Offenders*'). The searching of transgender prisoners is addressed at [6.9]-[6.15] of that PSI. Paragraph 6.9 provides that searching of transgender prisoners must comply with the policy and guidance contained in Annex H of PSI 07/2016.

33. The relevant parts of Annex H are:

    a. At [1]:

> "Searching is arguably one of the most emotive, controversial and difficult aspects of dealing with and managing transsexual people in a prison environment. As such, it is important that a strong overall emphasis is placed on securing the cooperation of these prisoners for the purposes of searching, whilst ensuring that there are effective security measures in place which are adhered to as closely as is possible under the circumstances. Procedures must be sensitive both to the needs of prisoners and staff and they must remain proportionate and lawful".

b. Prisoners in receipt of a Gender Recognition Certificate ('GRC') have the legal right to be treated as their acquired gender in every respect (at [3]).

c. Transgender prisoners at all stages of the gender confirmation process 'must be encouraged to enter into a voluntary written agreement in respect of their searching arrangements on arrival to an establishment' ([5]). The compact should be drawn up by local management and must 'clearly set out the arrangements for searching the prisoner, including specifying the gender of searching staff' (at [6]). The PSI makes clear that '[a] consultative approach should be adopted when determining individual searching arrangements', and must take into account 'such factors as legal considerations, possession of a GRC, sex characteristics of the prisoners, views of the prisoner and staff and the likelihood of the prisoner cooperating with a voluntary compact' ([7]). The details of the compact 'may need to change as circumstances change' ([7]).

d. If a prisoner holds a GRC, they should be searched by a member of staff of the gender of the prisoner's acquired gender ([9]-[11]). If the prisoner does not hold a GRC, they would normally be expected to be full searched by staff of the same sex. However, 'this should be carried out with proper regard to the sensitivity and vulnerability of the prisoner concerned and every reasonable effort made to secure their co-operation and to minimise embarrassment' ([12). The PSI stresses that '[c]areful consideration must be given to arrangements for searching transsexual prisoners who do not hold a GRC and are at other intermediate stages of the treatment process. In determining arrangements to be set down in the compact it will be necessary to consult with healthcare professionals, those involved in the prisoner's care and the prisoner concerned' ([15]).

e. A summary of the searching procedures for transgender prisoners is set out under H7.

Scope of the positive obligation on the Secretary of State in respect of monitoring and supervision

34. Although the parties placed different emphases on the relevant legal principles, they were largely agreed as to what those principles are.

35. Section 6(1) of the Human Rights Act 1998 ('the HRA') provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Sections 7 and 8 respectively make provision regarding proceedings for breach of s 6(1) and judicial remedies, including damages. The relevant Convention rights in this case are Articles 3 and 8.

36. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

37. Article 8 provides:

> "(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 interest 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."

38. It is well established that a strip search is capable of amounting to degrading treatment within the meaning of Article 3: see *Wainwright v United Kingdom* (2007) 44 EHRR 440, [41]-[42]. In assessing whether the conduct has reached the requisite minimum level of severity it is necessary to take into account 'all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim' ([41]). In *Wainwright* the Strasbourg Court held at [42]:

> "… where the manner in which a search is carried out has debasing elements which significantly aggravate the inevitable humiliation of the procedure, Article 3 has been engaged: for example, where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands … and where a search was conducted before four guards who derided and verbally abused the prisoner … Similarly, where the search has no established connection with the preservation of prison security and prevention of crime or disorder, issues may arise (see, for example, *Iwańczuk [v. Poland*, no. 25196/94, §59, 15 November 2011], §§58-59, where the search of the applicant, a model remand prisoner, was conducted on him when he wished to exercise his right to vote, and *Van der Ven v. The Netherlands*, no. 5091/99, §§61-62, ECHR 2003-II, where the strip-searching was systematic and long term without convincing security needs".

39. Both the Divisional Court and the Court of Appeal have confirmed that strip searches are capable of breaching Article 3 and Article 8. In *R (LD, RH and BK) v Secretary of State for Justice*, supra, the Divisional Court said at [32]:

> "Of course we accept that strip-searches can result in degrading treatment, which can breach Article 3. No doubt, if carried out in a thoroughly abusive fashion contrary to the instruction [*viz*, PSI

> 67/2011] or if, for example, in the presence of an officer of another sex then, indeed, it would be a breach of Article 3. But there is nothing in this instruction which, in our judgment, could lead to a real risk that that breach might occur, provided that searches are carried out in conformity with it."

40. In *R (BK and RH) v Secretary of State for Justice*, supra, the Court of Appeal held (at [51(vi)]):

> "[T]here can be no doubt that strip-searching is capable in itself of engaging Article 3 (and Article 8). Certainly the application of strip searches, particularly to those who are not prisoners or reasonably suspected of having committed a criminal offence, requires rigorous adherence to prescribed procedures and the need to protect human dignity. Correspondingly, a search carried out in an appropriate manner and for a legitimate purpose may be compatible with Article 3 and Article 8: see *Wainwright v United Kingdom* [2009] 44 EHRR 40, at paragraphs 41 – 43".

41. Thus, there is a negative obligation on those to whom the Convention applies in this context to refrain from carrying out searches in a manner which infringes Articles 3 or 8. However, there is also a positive obligation inherent in Articles 3 and 8 on those persons to ensure so far as reasonably practicable that individuals are protected from cruel, inhuman and degrading treatment (Article 3) and from a disproportionate interference with their private life (Article 8). In other words, those to whom Articles 3 and 8 apply must take positive steps that are reasonably practicable to avoid either of these outcomes.

42. By way of illustration, in *Z v United Kingdom* (2002) 34 EHRR 3, the European Court of Human Rights ('ECtHR') held at [73]:

> "… [t]he obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge".

43. In *R (T) v Secretary of State for the Home Department* [2015] AC 49 Lord Reed said at [125]:

> "The European court has said repeatedly that, although the purpose of article 8 is essentially to protect the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to

> this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals … The court developed the concept of the positive obligation precisely to express the principle that the state cannot fulfil its duty under article 1 of the Convention to 'secure' the rights guarantee by simply remaining passive."

44. In *Edwards v United Kingdom* (2002) 35 EHRR 19, [56], the ECtHR said that 'persons in custody are in a vulnerable position and … the authorities are under a duty to protect them'. In *Wenner v Germany* (2017) 64 EHRR 19, [55], the ECtHR held that Article 3:

> "… imposes on the state a positive obligation to ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention …".

45. The width of the state's positive obligations was discussed by the ECtHR in *Premininy v Russia* (2016) 62 EHRR 18, [83], where the Court said:

> "… the Court firstly reiterates that Article 3 enshrines one of the most fundamental values of democratic societies and, in accordance with this notion, prohibits in absolute terms torture and inhuman or degrading treatment or punishment (see, among other authorities, *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V). It imposes an obligation on the Contracting States not only to refrain from provoking ill-treatment, but also to take the necessary preventive measures to preserve the physical and psychological integrity and well-being of persons deprived of their liberty (see *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX, and *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III). At the same time the Court has consistently interpreted that obligation in such a manner as not to impose an impossible or disproportionate burden on the authorities (see *Pantea v. Romania*, no. 33343/96, § 189, ECHR 2003-VI (extracts)). The Court has also stated that the scope of the State's positive obligation under Article 3 must be compatible with the other rights and freedoms under the Convention (see *Keenan*, cited above, §§ 89-91)."

46. In order to fulfil this obligation, there must, at a minimum, be an appropriate legislative and administrative framework which makes for the effective prevention of the risk of breaches of Articles 3 and 8: see eg *R (FI) v Secretary of State for the Home Department* [2014] EWCA Civ 1272, [36]. In addition. there must be appropriate preventative operational measures with suitable supervisory control and monitoring. In other words, it is not sufficient for the state simply to point to black letter provisions as fulfilling its positive obligation. There must be mechanisms to ensure that such

provisions are effectively implemented. The Claimants were right to submit that reliance on the *mere* existence of a legislative and administrative framework, without consideration of whether that framework is effectively implemented, would render the rights guaranteed under the Convention theoretical and illusory. Thus, in *YL v Birmingham City Council* [2008] AC 95, [57], Lady Hale said:

> "Above all, the state has positive obligations under many articles of the Convention to take steps to prevent violations of an individual's human rights. These include taking general steps, such as enacting laws to punish and deter such violations: as in *X and Y v The Netherlands* (1985) 8 EHRR 235, where Dutch law did not afford an effective remedy to a mentally disabled girl who had been raped by a relative of the directress of the care home where she lived. They also include making effective use of the steps which the law provides: as in *Z v United Kingdom* (2001) 34 EHRR 97, in which a local social services authority did not use its powers to protect children whom they knew to be at risk of serious abuse and neglect."

47. To similar effect, in *S v Sweden* (2014) 58 EHRR 36, [80] the ECtHR said:

> "…[r]egarding the protection of the physical and psychological integrity of an individual from other persons, the Court has previously held that the authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate framework affording protection against acts of violence perpetrated by private individuals."

48. In *Mubilanzila Mayeka and Kanika Mitunga v Belgium* (2008) 46 EHRR 23, [54] the Court held that the question before it was:

> "… whether or not the impugned regulations and practices, and in particular the manner in which they were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's positive obligations under Article 3 of the Convention."

49. There are a number of other cases cited by the parties in their Skeleton Arguments to the same effect, however it is not necessary to set them out. The Claimants put the matter as follows in their Skeleton Argument at [43]:

> "The positive obligations inherent in Article 3 and 8 are not intended to impose an impossible or disproportionate burden on authorities. In the context of Article 3, it is not necessary for the Secretary of State to minimise the risk of a breach of Article 3 'to the greatest extent possible': *cf R (FI) v SSHD* [2014] EWCA Civ 1272, §42. The applicable test is whether the authorities had 'taken all steps which could have been reasonably expected of

> them' to prevent a violation of Article 3: see *Prememininy v Russia* (2016) 62 EHRR 18, §84. This depends on 'all of the circumstances of the case under examination' (*id*). State responsibility will be engaged 'by a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm to the applicant' (*id*)."

50. The Claimants' approach is not controversial in this case. Their acceptance that the test is not 'to the greatest extent possible' is consistent with what the Court of Appeal said in *R(BK and RH) v Secretary of State for Justice*, supra, [52]. In his Detailed Grounds, the Secretary of State states that the issue before me is whether the overall framework that has been adopted provides 'adequate and effective safeguards against breaches of Articles 3 and 8 in all the circumstances' (Detailed Grounds of Defence, [26]). It is then submitted at [27] that in answering that question, that I should consider both '[t]he legal and policy framework that is in place to prevent such breaches', and '[t]he practical steps that are taken to prevent such breaches'. The Secretary of State's Skeleton Argument, [39], is to the same effect.

The factual background

51. I now turn to the facts of these claims. But before I do so, I must resolve a preliminary point on the proper approach to be taken.

52. The Secretary of State has pointed out that there are some significant differences between the factual accounts put forward by the Claimants as to what occurred during the impugned strip searches and those put forward by Sodexo's witnesses. So, for example, LW claims that during the search on 27 July 2017 when he tried to explain the protocol for the searching of transgender prisoners to the officers, one of them replied, 'I don't give a fuck.' This is denied by Sodexo, as are other allegations about how the officers behaved, including that they repeatedly referred to LW as 'she' when they knew that he goes by the male pronoun. Sodexo has denied LW's Article 3 claim. The parties are agreed that in the absence of participation by Sodexo in this claim I should not attempt to decide between these different factual accounts. I agree that that approach is correct.

53. However, the Secretary of State also argues that I should simply proceed by way of factual background on what has been recorded in the consent order. That is in relatively brief terms and merely recites, for example, that the searches in question were unlawful and violated Article 8, but without saying why. On the other hand, the Claimants submit that I can and should proceed on the basis of facts that have been admitted by Sodexo in its Summary Grounds of Resistance, and elsewhere (such as in its pre-action correspondence).

54. It seems to me that the Claimants' approach is the correct one. I bear well in mind that judicial review proceedings are generally not well-suited to resolve disputed issues of fact: see eg *R (A) v Croydon London Borough Council* [2009] 1 WLR 2557, [33]. However, where the evidence or other material before me discloses statements against interest by Sodexo in relation to its admitted failures – in other words, admissions of fault - then I can see no reason why I should not take these admissions into account so far as relevant to the claims. These matters are all within the knowledge of Sodexo,

and the Secretary of State is not in a position to dispute them. What impact they have upon the claims against the Secretary of State is obviously another matter and that is what I have to decide. However, the admissions themselves – eg, that the unlawful searches took place in part because Sodexo had not adequately trained its staff – is not something that I can or should leave out of account.

55. I am also able to draw appropriate inferences from the documentary evidence which is before me, for example, whether the illegality which occurred was serious. The Secretary of State suggests in his Skeleton Argument at [16] that I cannot do this, but I consider it to be a legitimate part of my fact-finding function. The drawing of inferences from written evidence is often necessary in judicial review proceedings. I also consider, contrary to the Secretary of State's assertion, that it is open to me to find whether there is any evidence before me that appropriate training was provided in relation to PSI 07/2016.

56. With that preliminary issue resolved, I can now turn to the factual background in more detail.

57. These claims involve five unlawful strip searches carried out at HMP Peterborough on 27 July 2017 (when there were four separate searches involving each of the four Claimants) and on 8 September 2017 (when there was a further search involving LW alone).

58. As I have set out, Sodexo has admitted that all of these searches constituted a breach of PSI 07/2016 and hence breached its negative obligation under Article 8 of the ECHR and thus that the searches were not 'in accordance with law'. It has also admitted there has been a breach of the positive obligations it owed under Article 8, and a systemic failure to implement PSI 07/2016. It has denied the Claimants' Article 3 claims. Specifically, Sodexo has admitted that:

    a. No reasons were provided to each of the Claimants for their search, beyond stating that they were based on intelligence; cf *R (LD, RH and BK) v Secretary of State for Justice* [2014] EWHC 3517, [25], [29], where the provision of such generalised information was held not to be sufficient.

    b. A Level 1 search was not conducted in advance of a Level 2 search. This was a breach of the mandatory obligation in [2.54] of PSI 07/2016, which provides that:

> '*Level 2 of the search must only be applied if there is intelligence or suspicion that the woman has concealed an item in her underwear or if illicit items have been discovered about the women's person during Level 1 of the search'* (original emphasis) (see also [21] of Annex B).

That this instruction is mandatory is made clear on the second title page of PSI 07/2016, which states that '*All Mandatory Actions throughout this instruction are in italics and must be strictly adhered to*' (original emphasis). Sodexo admitted that the Level 2 searches were carried out 'without explicit consideration of whether a Level 1 search was adequate in the circumstances. The officers also proceeded straight to a Level 2 search without first carrying out a 'rub-down and

hand-held metal detector scan', which was a breach of Annex B, [22].

c. A record was not made on the cell search report of a Level 2 search having been carried out. This was a breach of the mandatory obligation to keep a record of searches in PSI 07/2016 at [2.12].

59. Sodexo has admitted that the unlawfulness of the searches was caused by its failure adequately to train its officers in the conduct of strip searches. By reason of the deficient training of its staff in the correct procedures when conducting a full search, Sodexo has accepted that there has been a systemic failure to implement PSI 07/2016 at HMP Peterborough (Summary Grounds of Resistance, [26]).

60. After these proceedings had been instituted, Sodexo undertook a review of the procedures at HMP Peterborough for the strip searching of female prisoners in accordance with PSI 07/2016, and a number of new safeguarding measures were introduced. These are set out in the witness statement of Mark Bennett, Deputy Director at HMP Peterborough. He has stated that (at [7]):

> "… [t]he efficacy of the steps outlined above is demonstrated by the significant reduction in the number of full searches which have been completed at the Prison since the steps were introduced."

The parties' submissions

The Claimants' submissions in outline

61. On behalf of the Claimants, Mr Pobjoy's primary argument is that at the relevant time the Secretary of State failed to provide adequate and effective safeguards at HMP Peterborough to protect the Claimants against a violation of Articles 3 and 8 of the ECHR in the context of strip searching. As a result, he submits that there has been a violation of the Secretary of State's freestanding positive obligations under Articles 3 and/or 8 in respect of the four Claimants.

62. The Claimants say that the Secretary of State has contracted out one of the State's core public functions, the operation of a prison, to a private corporation. In doing so, he has authorised employees of that private corporation to conduct strip searches of female prisoners which can engage Articles 3 and 8 of the ECHR. In these circumstances, it was incumbent on the Secretary of State to ensure not only that a suitable framework of rules, arrangements and procedures was in place (ie, in this case, PSI 07/2016), but also to put in place appropriate supervision and monitoring to ensure that those rules, arrangements and procedures were effectively implemented. This is necessary in order to provide practical and effective protection of the rights guaranteed by Articles 3 and 8 of the ECHR. In arguing that the Secretary of State failed in his duty to provide adequate or effective supervision or monitoring to ensure compliance with PSI 07/2016, the Claimants rely on the following points in particular.

63. Sodexo has admitted that there was a systemic failure to implement PSI 07/2016 at HMP Peterborough, and a breach of the positive obligations under Article 8. It has admitted that there was 'a serious risk that a full search conducted by its staff would not

follow the correct procedure' **(**Summary Grounds of Resistance, [26]). It was in this context that each of the Claimants were strip searched.

64. The Claimants say that this, together with the other matters set out in their Skeleton Argument, make clear that this claim does not involve some isolated incident or aberration. As to this they distinguish, for example, *R (FI) v Secretary of State for the Home Department*, supra, [57], which involved the use of restraint techniques on board aircraft following the death of a person being removed which was described as 'an isolated incident' and where, overall, the Court said there was 'little evidence of systemic problems in the control and restraint techniques actually applied in the course of removals.' The Claimants says that is not the case here and that there is just such evidence in relation to strip searching at HMP Peterborough at the relevant time.

65. The Claimants argue that the Secretary of State was aware, or ought to have been aware, of the problems at HMP Peterborough, that the procedures set out in PSI 07/2016 were not being followed, and that there was therefore a real risk of violations of Articles 3 and 8.

The Secretary of State's submissions in outline

66. On behalf of the Secretary of State, Mr Manknell submits as follows. He says that the Claimants' case fails to distinguish between the role of Sodexo, the public authority which has the statutory obligation to run HMP Peterborough, and which is directly responsible for preventing any breach of Article 3 or Article 8 in that prison, and the Secretary of State's very different obligation for ensuring that there is an adequate system of monitoring and supervision in place. He says that it is obvious that any individual prison (whether run by the Prison Service, by Sodexo or by anyone else) will err from time to time, and that some of those failings may be serious, even to the extent of breaching prisoners' human rights. However, says Mr Manknell, that alone cannot mean that the Secretary of State has failed in his separate and additional Article 3 or 8 positive obligations in respect of the operation of the system of monitoring and supervision.

67. Mr Manknell submits that it is important to emphasise Sodexo's role. Although Sodexo is a limited company, in its capacity as the operator of HMP Peterborough it is exercising a public function in accordance with statutory powers, and is a public authority for all relevant purposes, including s 6 of the Human Rights Act 1998. It is amenable to judicial review in relation to its prison operations. Should Sodexo fail in its obligations (positive or negative) under the ECHR in respect of the running of HMP Peterborough (or any of its public law obligations) then the full range of public law remedies is available. It can be compelled to stop any unlawful actions, be required to take necessary steps and (as here) be required to pay damages for any breach of the ECHR. As a public authority for the purposes of s 6, it is an emanation of the State for the purposes of the ECHR just as much as any other public authority.

68. The Secretary of State says that his obligations are different. He is not responsible for the running of the prison at HMP Peterborough; under s 84 of the CJA 1991 the statutory responsibility for the running of the prison is that of Sodexo. Rather, the Secretary of State has a series of underlying responsibilities that requires him to establish a suitable framework for the superintendence of all prisons (whether operated

by the Prison Service or a limited company), by virtue of s 4 of the 1952 Act in particular, to have suitable policies in place (the PSIs and PSOs) and to have monitoring and supervisory responsibilities that will, overall, enable there to be an effective system which requires prisons to operate lawfully, and where they fail to do so, mechanisms for this to be corrected.

69. The Secretary of State submits that the issue before me is as defined in *R(FI) v Secretary of State for the Home Department*, supra, and in *R(BK and RH) v Secretary of State for Justice*, supra, namely: Did the framework provided by the state provide adequate and effective safeguards against breaches of Article 3 and 8 at HMP Peterborough in all the circumstances ? As I have said, the Claimants do not take issue with this formulation of the question that I have to decide.

70. Mr Manknell submits that applying this test to the circumstances of this case, in deciding whether the framework provided by the state provided adequate and effective safeguards against breaches of Article 3 and 8, I should consider: (a) the legal and policy framework that is in place to prevent such breaches; (b) the practical steps that were taken to prevent such breaches; and (c) the steps taken by the Secretary of State in light of the admitted failings by Sodexo. The Claimants' Skeleton Argument accepts (at [45]) that this is the correct approach.

71. The Secretary of State argues that the Claimants' submissions on how they say some of the individual parts of the framework failed to operate falls short of showing that the system is unlawful.

72. In relation to the legal and policy framework, the Secretary of State points to the legislative provisions governing contracted out prisons; the legally enforceable obligations which Sodexo has under its contract with the Secretary of State pursuant to s 84 of the CJA 1991, including the obligation to comply with PSIs and PSOs; the role of the Controller who, by s 85 of the CJA 1991, is a Crown servant appointed by the Secretary of State who has the duty to keep under review, and report to the Secretary of State on, the running of the prison (s 85(4)(a)). Patrick Morris, the Controller of HMP Peterborough, explains in his witness statement that, as the lead accountable manager, he monitors, records and reports areas of non-compliance. Where there are contractual failings by Sodexo, he says his role is to ensure they are remedied and/or penalised when necessary, escalating unsatisfactory performance as necessary.

73. The Secretary of State also relies on the Independent Monitoring Board ('IMB') appointed under s 6 of the 1952 Act. The Board's duties are contained in the 1999 Rules, and these including satisfying themselves as to the state of the prison premises, the administration of the prison and the treatment of prisoners. The Board has the power to report matters of concern to the Director and/or to the Secretary of State. The IMB for HMP Peterborough published in 2017 was, says the Secretary of State, generally positive and concluded that, 'In general both the women's and men's prisons treat residents humanely and decently'.

74. The Secretary of State also points to the tri-annual prison inspection by HMCIP. He accepts that the Chief Inspector's 2014 report did identify issues in relation to full (ie strip) searches, but argues that appropriate remedial actions were taken, including the introduction of PSI 07/2016 and PSI 17/2016 (The Care and Management of

Transgender Offenders) and the imposition of an action plan by him aimed at ensuring that women prisoners should only be strip-searched when there is sufficient, up-to-date intelligence suggesting it is necessary, and where no alternative is available. Those recommendations were accepted by the prison, and it confirmed that a strategy for searching would be implemented to ensure women prisoners would only be strip-searched when there is sufficient, up-to-date intelligence suggesting it was necessary.

75. The Secretary of State also relies on the role of HM Prison and Probation Service ('HMPPS'), formerly the National Offender Management Service ('NOMS'). Compliance with national policies is subject to internal audit by HMPPS's Audit and Assurance Team, which carries out an audit programme to audit all private and public establishments in a three-year cycle. As part of this audit programme, HMP Peterborough was subject to a security audit in June 2016 during which searching standards were audited. The audit report observed that the key findings rated searching as moderate. None of the remedial action related to strip searches, and the Secretary of State said that it was reasonable for him to take reassurance from this.

76. The Secretary of State also details in his Skeleton Argument at [89] onwards remedial steps taken since 2017, ie, actions that have taken place following the searches which have given rise to this claim. I do not consider that these can avail the Secretary of State if the framework in place prior to that date did not provide the sort of adequate and effective safeguards demanded by Articles 3 and 8. If that is the case, then steps taken afterwards will just have been shutting the stable door after the horse has bolted.

77. In summary, it is the Secretary of State's position that he maintains a policy instruction which has been held to comply with Articles 3 and 8 and an appropriate monitoring regime. The fact that Sodexo failed in certain respects in July and September 2017 does not show that the overall system was in breach of the requirements of the ECHR. He says that the Claimants have (appropriately) challenged Sodexo over these failures, and as the responsible public authority, and the body charged with running the prison, Sodexo has admitted those and agreed to the appropriate remedy requested by the Claimants. Accordingly, the Secretary of State denies that he was in breach of any positive obligations placed upon him and that the claim should be dismissed.

Discussion

The issue

78. As I have explained, the question that I have to decide is whether the framework provided by the state and operated by the Secretary of State with regards to strip searching provided adequate and effective safeguards against breaches of Articles 3 and 8 at HMP Peterborough in all the circumstances: *R(FI) v Secretary of State for the Home Department*, supra, [41]-[42] and *R(BK and RH) v Secretary of State for Justice*, supra, [53]. In the latter case, Davis LJ said at [53]:

> "52. In her initial skeleton argument Ms Mountfield [counsel for the Appellants] had suggested that, in the context of the potential application of Article 3 to vulnerable women prisoners in connection with strip-searching, the State had been under a duty to make arrangements designed to "minimise to the maximum

> extent possible" the risk of harm amounting to a breach of Article 3. The authority relied on – *Makaratzis v Greece* (2005) 41 EHRR 49 – lent only limited support, at best, to so generalised a proposition. In any event such a proposition cannot be sustained in the light of the specific conclusion on the point by the Court of Appeal in *R (FI) v Secretary of State for the Home Department* [2014] HRLR 30, [2014] EWCA Civ 1272: see in particular at paragraphs 41 and 42 of the judgment of Richards LJ (with whom Christopher Clarke LJ and the Chancellor agreed).
>
> 53. Ms Mountfield accepted that to be so in her argument before us. She also rightly accepted the distinction properly to be drawn between the compliance with Article 3 of an individual act or operation on the one hand and the compliance with Article 3 of the relevant legal or administrative framework on the other hand. With regard to the latter, as decided in *R (FI)* , the obligation of the state is to provide a framework with adequate and effective safeguards against arbitrariness and abuse of force: no less but no more."

Article 3

79. I begin with the Claimants' Article 3 claims. To recap, as against the Secretary of State, the Claimants all allege a breach of the positive obligation imposed upon him by Article 3. That is what I am concerned with. In addition, LW claims that his search on 27 July 2017 violated the negative obligation imposed by Article 3 on Sodexo because of the manner in which it was carried out. Sodexo denies liability and there are, as I have said, a number of hotly disputed issues of fact involved. That claim has been transferred to the County Court for determination.

80. The position is therefore that, as of now, there is no proven breach of the negative Article 3 obligation by Sodexo. Given that, it seems to me that the decision in *R(BK and RH) v Secretary of State for Justice*, supra, is fatal to the Claimants' case that the Secretary of State did not have in place adequate and effective safeguards to protect against a violation of Article 3. In that case the appellants BK and RH were women serving custodial sentences. In February 2013, whilst at HMP Send, they were separately subjected to strip searches in their cells. It was conceded that the searches were unlawful. Each of the appellants pursued claims that PSI 67/2011 (the predecessor to PSI 07/2016), by reference to which the searches were purportedly carried out infringed, in certain respects relevant to women prisoners who may be subjected to full-body searches, Article 3 and Article 8 of the Convention.

81. The Court of Appeal rejected the challenge, holding in relation to Article 3 at [58] that, read as a whole, PSI 67/2011 provided a framework which was amply compliant with Article 3 and did so in a way designed to give effect to the recommendations in the Corston Report. The Court noted at [67]-[68] the absence of any evidence of systemic failings.

82. Against that background, and in the absence of any clear evidence of systemic breaches of Article 3 by Sodexo in this case, I reject the Claimants' case under Article 3 against the Secretary of State. Because the Court of Appeal has held that PSI 67/2011

provided sufficient compliance with Article 3, in my judgment the same conclusion follows in respect of the replacement policy PSI 07/2016.

Article 8

83. I turn to the Claimants' case under Article 8. In my judgment the position here is not so straightforward. True it is that in ***R(BK and RH) v Secretary of State for Justice***, supra, the Court of Appeal also rejected the Appellants' challenge to PSI 67/2011 under Article 8 (at [68]-[76]), as well as under Article 3. However, it did so in significant part because of the absence of any evidence that there had been any systemic failings. It said that the illegality that had occurred had merely been an 'aberration'. This is clear from [67] – [68] and [74] of Davis LJ's judgment, which I have already referred to but should now quote:

> "67. … Overall, no systemic arbitrariness has been shown on the basis of the limited materials which Ms Mountfield was able to advance. No pattern can be identified as having emerged. Moreover, it must not be overlooked that the PSI must, by its own terms, be read in conjunction with the local instruction which each prison is also required to set as being appropriate for that particular prison. I can overall, see no sufficient basis for departing from the conclusion of the Divisional Court that what happened here was an aberration. There thus is, in my view, no sufficient evidence of systemic or significant failings indicative of a policy which does not comply with Article 3 or which does not operate fairly in the generality of cases involving targeted strip-searching of female prisoners …
>
> 68. For corresponding reasons, the argument under Article 8 – which, of course, necessarily brings into play issues of proportionality – also, in my view, fails.
>
> …
>
> 74. Ultimately, and rejecting Ms Mountfield's submissions, I am of the view that these provisions of the PSI are such as to satisfy all realistic requirements of clarity, justification and proportionality."

84. The present case is distinguishable because of Sodexo's admitted systemic breaches of relation to PSI 07/2016 and Article 8. In my judgment this constitutes the sort of systemic and significant failings which were absent in ***R(BK and RH) v Secretary of State for Justice***, supra. Also, there was no question in that case of the absence of the adequate training of staff, which is an important aspect of the case before me.

85. The starting point is to identify why the breaches of Article 8 in this case took place. Sodexo has made the following admissions in its Summary Grounds of Resistance:

> "2. The First Defendant concedes the following:

a. That the relevant searches of the Claimants were not carried out in accordance with PSI 07/2016 and therefore breached the Article 8(1) rights of the Claimants as they were not 'in accordance with law';

b. There has been a breach of the positive obligations owed by it under Article 8 ECHR;

c. There has been a systemic failure to implement PSI 07/2016;

d. Appropriate declarations can be made and any damage claims transferred to the County Court.

3. …

b. … Although it is accepted that the First Defendant's officers did not follow the correct procedure on 27 July and 8 September 2017, the searches on 27 July were conducted as part of a large intelligence-based operation …

d. At all material times the First Defendant's officers believed, albeit wrongly, that they were following a lawful procedure rationally connected to intelligence received.

e. Whilst there was justification for a search of each prisoner, Level 2 searches were conducted without explicit consideration of whether a Level 1 search was adequate in the circumstances. The searches therefore amounted to a breach of domestic law and a breach of the Claimants' Article 8 ECHR rights because the searches were not "in accordance with the law".

f. It is accepted that the unlawfulness of the searches was caused by the First Defendant's failure to adequately train its officers in the conduct of searches …

…

Breach of PSI 07/2016 and Article 8 ECHR

25. Although the searches of the Claimants were based on intelligence and authorised, the First Defendant concedes in respect of the search of each Claimant on 27 July 2017 and [LW] on 8 September 2017 that PSI 07/2016 – "*Searching the Person"* was breached and the requirement for the searches to be 'in accordance with the law' for the purpose of Article 8 ECHR was also thereby breached:

a. Reasons were not provided to each Claimant for the search, beyond stating that it was based on intelligence;

> b. A Level 1 search not being conducted in advance of a Level 2 search, in breach of paragraph 21 of the PSI 07/2016;
>
> c. A record not being made on the cell search report of a Level 2 search having been carried out, in breach of paragraph 2.12 of PSI 07/2016.
>
> *Systemic failures to implement PSI 07/2016 and breach of positive obligations under Article 8 ECHR*
>
> 26. By deficiently training its staff in the correct procedures when conducting a full search, the First Defendant concedes that there has been a systemic failure to implement PSI 07/2016 at HMP Peterborough and inevitably a breach of its positive obligations under Article 8 in that there was a serious risk that a full search conducted by its staff would not follow the correct procedure."

86. In this case, therefore, systemic breaches of Article 8 took place because Sodexo had not adequately trained its staff in relation to strip searches and the requirements imposed by PSI 07/2016.

87. That the failings in this case are properly described as systemic does not depend merely on Sodexo's acceptance of that term in the consent order, important though that admission is. That is also my own qualitative assessment of the sort of failures which occurred in this case. In my judgment, the matters which Sodexo admitted demonstrate the sort of 'systemic arbitrariness' and 'systemic or significant failings' that the Court of Appeal alluded to in *R(BK and RH) v Secretary of State for Justice*, supra, [64], [67]. I agree with the Claimants' submission that, in relation to HMP Peterborough, these failings demonstrate that the administrative and legal framework that is relied upon by the Secretary of State was ineffective to ensure that Sodexo had systems in place so that its staff were adequately trained in the particularly difficult and sensitive area of strip-searching.

88. As I have said, the failings in this case happened because of the lack of proper training. PSI 07/2016 requires all prisons to have a Local Searching Strategy (see [1.6], [2.6], [2.14]-[2.15] and Annex K). It is therefore significant that the Local Searching Strategy in place at HMP Peterborough did not comply with PSI 07/2016 because it did not contain items which it was required to contain, including, in particular (and obviously relevant to this case), '[t]he training needed for each technique, the staff or groups of staff to be trained in each technique and the targets for training of any staff who need any ongoing training and testing' (PSI 07/2016, Annex K, [4(viii)].

89. There is no evidence of any training on PSI 07/2016, which came into force on 26 October 2016. The training that is said to have been conducted was conducted in May-July 2016, which was when the previous PSI was in force. There is no evidence of any training on the specific searching requirements for transgender prisoners. Sodexo has admitted that it had 'deficiently train[ed] its staff in the correct procedures when conducting a full search' (Summary Grounds, [26]).

90. Second, the failings here were not by a single officer. The search records that have been disclosed show there were at least 12 individual officers involved in the 27 July 2017 strip searches. Intelligence officers were also involved in tasking the searching officers (see Sodexo's pre-action correspondence dated 6 October 2017), meaning that this unlawful activity by Sodexo involved, directly or indirectly, a significant number of its employees, who cannot have recognised that what they were doing - or directing be done - was unlawful. In his Skeleton Argument at [15(i)] the Secretary of State argues that 'there is no admission by Sodexo that none of the 12 individuals referred to by the Claimants acted lawfully, or that all of them were unaware of the relevant requirements.' That argument wholly misses the point. The officers were collectively responsible for all of the searches, and all of the searches were unlawful. Furthermore, the second search of LW was carried out on 8 September 2017, which was more than one week after the pre-action protocol letter had been sent in relation to the earlier searches, and even then the illegality that had already occurred was not recognised.

91. That so many officers could have been involved collectively in directing or undertaking searches which were manifestly unlawful to my mind demonstrates serious training failures. Any person in any profession can on occasion make a mistake. The capacity for mistakes is part of the human condition. But where a significant number of people working together are responsible for a number of mistakes then the conclusion readily follows that something serious and preventable must have occurred, especially in the sensitive area in which I am concerned where much work has been done in recent years precisely to avoid the sort of unlawfulness which occurred. I will say more about this aspect of the case later.

92. Next, I consider how serious were the breaches of policy which took place. I regard them as having been serious. In all five cases the officers proceeded straight to a Level 2 search without first carrying out a Level 1 search, or a rub-down and hand-held metal detector scan. A Level 1 search involves the removal of the woman's clothing apart from her underwear; Level 2 involves the removal of all of the woman's clothing including her underwear. This violated the mandatory obligations in PSI 07/2016, [21], [22] and [24], which provide that a Level 2 search may only be applied if there is intelligence or suspicion that the woman has concealed an item in her underwear or if illicit items have been discovered about the woman's person during Level 1 of the search, and that staff must carry out a rub-down search and hand-held metal detector scan before all full-searches are applied. Those conditions did not apply in this case. The purpose of this policy is to ensure that the infringement of human dignity that is inherent in a Level 2 search only occurs where absolutely necessary. The need for that restraint is amply demonstrated here, where one of the Claimants was menstruating, and the Level 2 search in her case involving the removal of her underwear and also the removal and disposal of her sanitary towel. Leaving aside the factual disputes as to precisely what happened during that process, the mere fact of that happening must plainly have been humiliating and embarrassing for the woman concerned.

93. Further, in none of the cases before me were adequate reasons given for the searches. In *R (LD, RH and BK) v Secretary of State for Justice*, supra, the Divisional Court held that reasons had to be given for a search, and that general language such as saying merely that a search was 'targeted' was insufficient. The Court said that a formulation such as, 'we have information which tells us that you have been doing whatever it may be, or that you may have drugs in your possession' had to be given by way of

explanation in every case.

94. There was also a failure to keep proper records. These are an explicit requirement: see PSI 07/2016, [2.12]-[2.13]. As Patrick Morris, the Controller of HMP Peterborough, admitted in his witness statement at [47], no central record of strip-searching was kept by HMP Peterborough, despite this being an express requirement of the PSI:

> "47. In September 2017 the HMCIP [Her Majesty's Chief Inspector of Prisons] made an unannounced visit which specifically found that full searching of women was being used by the Sodexo staff extensively and that there were numerous examples of where it had been 'unnecessary'. The team also found that although the local searching policy stated that the searches were intelligence-led, in practice a strip search could be authorised by any senior officer. There was also no central record of strip searching carried out across the prison to enable managers to satisfy themselves of the proportionality."

95. The Claimants say that not only were all five searches unlawful, but the entire operation that took place on 27 July 2017 was unlawful. I am not sure whether there is a necessary difference in labelling the operation overall as having been unlawful, as opposed to the way in which it was executed in respect of the individual Claimants. But what is clear is that Sodexo has admitted in its pre-action response dated 6 October 2017 that the officers attended the Claimants' cells specifically in order to conduct Level 2 searches and a search of each Claimant's cell. In other words, what occurred can rightly be regarded as having come close to being the sort of 'routine' strip-searching which the Corston Report deprecated and which concerned the Court of Appeal in *R(BK and RH) v Secretary of State for the Home Department*, supra, [59] – [60]:

> "59. As [counsel for the Secretary of State] pointed out, paragraphs 3.18 to 3.21 of the Corston Report had been focusing on and criticising *routine* strip searching of female prisoners (other than on first reception into prison): the more so when experience indicated that results, in terms actually of finding illicit items, were nebulous. The Corston Report was not directed at excluding strip-searches altogether, however.
>
> 60. The PSI gives effect to that. Routine searching of female prisoners is abrogated. Further, if there is to be full body searching in any particular case it has to be for a reason: it cannot be arbitrary. Thus it is stated at the outset of the PSI that one aim is to ensure that searching contributes to a "safe and decent" environment by being "proportionate to the risk assessed". It is made clear, and is later repeated, that women prisoners must not be strip-searched routinely but only on intelligence or reasonable suspicion. Further, there are the most detailed requirements as to how any such body search is to be conducted. These are designed to minimise, as far as possible, the distress and embarrassment

> caused: in what is, on any view, likely to be a distressing and embarrassing situation."

96. The Secretary of State denies that these were routine searches because he says that Sodexo maintains they were based on intelligence. That claim is certainly made in Sodexo's Summary Grounds. But whatever the intelligence was, and Sodexo has not said, it has not claimed that it was intelligence of the particular specificity and quality required by [24] of Annex B2, namely, intelligence that the prisoner concerned had concealed an item in her underwear. The searches were routine in the sense that it appears to me that the officers defaulted to the most intrusive form of search without any specific consideration having been given to whether such a sensitive step was warranted on the information available.

97. In my view this point is important. It exacerbates the seriousness of the systemic failures and what I have concluded was the Secretary of State's failure to implement effective systems for the monitoring and supervision of Sodexo's operation of HMP Peterborough. The Corston Report had identified a particular problem in strip-searching female prisoners and recommended steps to reduce it (but not entirely to eradicate it). A failure to take adequate and effective steps to safeguard against a known and avoidable problem is, in general, likely to be more readily established than a failure to take steps to guard against something which was not readily foreseen. It seems to me, therefore, that there was a particular obligation on the Secretary of State to ensure (eg, by monitoring the quality of training) that, as part of his overarching monitoring and supervisory function, he took adequate and effective steps to make reasonably sure that the known mistakes of the past (ie routine strip searching) were not being repeated.

98. I have also concluded that there were further systemic deficiencies. The four prison search forms from 27 July 2017 contained in the bundle expressly sanctioned a breach of PSI 07/2016. That is because the search form template was entitled 'Cell Search Report – Routine Plus'. 'Routine' cell searches are a cell search plus a scan of male prisoners with a metal detector (see [2.31]). 'Routine Plus' searches combine a cell search with a full search of the male prisoner (Ibid). However, PSI 07/2016 does not permit 'Routine Plus' searches of female prisoners. This is clear from [2.31], which expressly only refers to male prisoners, and from [2.54] which states:

> "Women prisoners must not be full-searched as a matter of routine but only on intelligence or reasonable suspicion that an item is being concealed on the person which may be revealed by the search."

99. Despite this injunction, the forms which the officers used (and which, together with the intelligence officers' guidance presumably shaped their actions) stated under the heading 'Features of this Search':

> "Must be full searched (including hair, mouth, ears, top half, bottom half & footwear) as per searching procedures."

100. In summary, therefore, there were numerous serious, systemic and widespread failures at HMP Peterborough over the relevant period which led to a number of strip searches being carried unlawfully, for a variety of different reasons.

101. I turn to the question of what aspects of the framework governing the superintendence of contracted out prisons the Secretary of State can point to as having amounted to adequate and effective steps to prevent such illegality happening. I begin with considering how that framework addressed the question of training, the defective nature of which was the root cause of the illegality in this case. The evidence is contained in the statement of David Rogers, a senior contract manager at Her Majesty's Prison and Probation Service, at [18] – [22], and in the statement of Patrick Morris, the Controller of HMP Peterborough at [42] – [46]. The position is that it is for the contractor (in this case, Sodexo) to provide training and the Secretary of State does not provide training or assess the quality of the training or the effectiveness of its delivery except to the extent that *ex post facto* compliance testing might uncover problems, such as the prison staff not following the relevant PSI. Mr Morris said at [44] that 'we [ie, the Secretary of State] do not provide or give training to staff on searching … because there is an absolute obligation on the contractor in the contract to train staff to a suitable level.' Then, at [45] he said:

> "We do not routinely monitor/assess the training itself, we monitor all of the essential performance of staff via the Compliance Checking Tool as set out above. If staff are being inadequately trained, this will be apparent from the performance of the prison in the relevant respect. This will be picked up by the Compliance Tool, which will in its turn lead to necessary training being provided."

102. The Compliance Checking Tool is the principal means by which the Controller and his staff report on Sodexo's performance on a monthly basis. It specifies a large number of tests in areas that have been identified as having a risk requiring monitoring and auditing by the Controller. The test in relation to searching is test number 2.01 on the Tool. The Test Objective is:

> "To test that the type and frequency of searches are carried out in accordance with the Local Security Strategy and PSI 67/2011"

103. Despite the fact that the version of the Compliance Checking Tool produced by Mr Morris is dated May 2018, this test is erroneous because PSI 67/2011 has been superseded by PSI 07/2016. However, Mr Morris said at [18] of his statement that compliance testing is being carried out against the correct PSI. The test description is as follows:

> "The test is performed to ensure the quality of searches conducted is compliant with instruction set out in PSI 67/2011.
>
> Types of test would include Level A rub-down search; Level B rub-down search; Full search; Searching of other body areas; Searches using technical aids."

104. The Tool goes on to provide that the minimum sample size to be tested is two, and that the minimum frequency of recording the test on the tool is monthly. Mr Morris said at [46] that if he became aware that training was deficient then there are a number of steps

that he could take. He said that he would only become aware of a problem if there were a complaint from a member of staff or if compliance testing (via the Checking Tool) disclosed a problem.

105. In my judgment this methodology was not adequate and effective to prevent systemic breaches of Article 8. It was not compliant with the Secretary of State's positive obligation under Article 8 for him to have left the question of training entirely to Sodexo in the way that he did, and for him to rely upon *ex post facto* identification of infringements of PSI 07/2016 via the Compliance Checking Tool (and the other means described in the evidence, such as auditing by HMPPS and oversight by independent bodies such as HM Chief Inspector of Prisons) as the method of rectification. My main reason for so concluding is because that methodology was only capable of identifying problems with training once the infringements of PSI 07/2016, and hence breaches of Article 8, had taken place. But his obligation was to have an adequate and effective system in place *to prevent infringements in the first place*. Thus, in the context with which I am concerned, compliance with the positive obligation imposed by Article 8 required the Secretary of State to put in place adequate and effective measures to ensure so far as reasonably practicable that Sodexo's staff were being adequately trained so as to guard against the risk of an infringement of Article 8.

106. It is important to emphasise that the context I am dealing with is the strip-searching of female and transgender prisoners. As I have explained, a significant proportion of this population have previously experienced sexual, physical or psychological abuse, giving rise to particular concerns about their vulnerability. It is a subject on which much work has been done following the Corston Report, including the issuing of a number of PSIs. As the Court noted at *R(BK and RH) v Secretary of State for Justice*, supra, [51(vi)], rigorous adherence with procedures is required in relation to strip-searches otherwise the search will be unlawful under domestic law and Article 8. It is an area where the prisoner's rights under Article 8 are directly engaged. There was hence a particular need for care by Sodexo to ensure that staff were adequately trained in this field and, on the part of the Secretary of State, a heightened need to ensure that the overall framework for which he was responsible operated so as to ensure that Sodexo was training its staff properly in the requirements of PSI 07/2016. The Secretary of State is to be held to a heightened standard of adequacy or reasonableness in relation to the steps he took in relation to that framework because of the acute sensitivity of this whole area of prison management.

107. To underline this point one can, I think, draw a distinction between strip-searches on the one hand, and other aspects of prison life such as family visits, food quality or bathing facilities, on the other. The latter are certainly *capable* in sufficiently severe circumstances of giving rise to issues under Article 8 and/or Article 3. However, a failure to supply a meal or a bath, or to allow a visit, of itself, would be unlikely to give rise to a human rights infringement. Such failures are of a different character and, in general, are less acutely sensitive than an unlawful strip-search of female prisoners. Requiring a woman to remove in the presence of strangers first her blouse and bra, and then her skirt and knickers, thus exposing her breasts and genitalia, represents a greater affront to human dignity then a wrongful failure to supply a meal, etc, and if done without strict compliance with procedures, is very likely to be unlawful. I have already referred to one aspect of the facts of one of the searches to underline this point about human dignity. The positive obligation on the Secretary of State imposed by the

Convention in respect of things such as meals and baths could, in my view, be satisfied by a system of monitoring via the Compliance Checking Tool so that failures in meal service could be detected and rectified. But the positive obligation in relation to strip-search required a more rigorous framework to be in place including, as I have said, measures so that the Secretary of State could monitor how Sodexo was to deliver its training on strip-searching and satisfy himself that it was doing so effectively.

108. I turn to the question of the effectiveness of the framework. In his Skeleton Argument at [7], the Secretary of State submits that individual prisons and individual decisions may from time to time breach prisoners' human rights. He argues that that alone cannot mean that he has failed in his separate duty under Article 8 to provide for adequate and effective monitoring and supervision. I agree. An isolated error or aberration by an officer in the conduct of a search will not generally of itself be capable of establishing a breach of the positive obligation imposed upon the Secretary of State by Article 8 even when it itself results in a violation of Article 8. Mistakes can happen even against the background of such a framework, as the decision in *R(BK and RH) v Secretary of State for Justice*, supra, demonstrates. The Convention does not require a counsel of perfection to fulfil the positive obligations it imposes and nothing in this judgment is intended to suggest otherwise.

109. However, it seems to me that a primary question is to ask *why* the illegality in question took place. Was it because of an isolated aberration or mistake, or was it because of a more fundamental failure ? If the former, then there is less likely to have been a breach of the Secretary of State's positive obligation. If the latter, then the opposite conclusion follows and it is more likely that there has been a breach of that obligation. It seems to me that it is largely a matter of common sense that if there has been systemic illegality arising from a number of different breaches of procedure, and that that occurred as a result of a fundamental failure adequately to train, then it is more likely that there has been a breach by the Secretary of State of his obligation to have in place *adequate and effective* measures to prevent such occurrences.

110. The fact is that this case does not involve an isolated failure (or failures). There were systemic failures to follow the relevant procedures in a number of different ways by a number of officers over different days because of Sodexo's failure to train them adequately. It is impossible to characterise what happened in this case as being in the former category. Even leaving aside Sodexo's own characterisation of its failure to implement PSI 07/2016 as 'systemic', as I have said, given the nature and scale of the multiple failures in this case that is a conclusion which I myself have reached.

111. The measures put in place by the Secretary of State to ensure that Sodexo had procedures in place to train its staff properly so that there were not systemic or widespread mistakes – which is an aspect of his duty to monitor and supervise - therefore failed. Those measures cannot therefore be described as having been effective; if they had been effective then staff would have been properly trained and the breaches would not have occurred in a way properly described as systemic. Hence in my judgment there was a breach of the positive obligation imposed upon the Secretary of State by Article 8.

112. Further, it is clear from the evidence that the Secretary of State's own chosen methodology for monitoring compliance, namely the Compliance Checking Tool, failed

to pick up that for some years prior to 2017 there had been a problem with strip-searching and that PSI 07/2016 (and its predecessor) had not been complied with on a significant scale. The evidence of the Controller Mr Morris at [47] – [51] of his statement is revealing:

> "47. In September 2017 the HMCIP made an unannounced visit which specifically found that full searching of women was being used by the Sodexo staff extensively and that there were numerous examples of where it had been 'unnecessary'. The team also found that although the local searching policy stated that the searches were intelligence-led, in practice a strip search could be authorised by any senior officer. There was also no central record of strip-searching carried out across the prison to enable managers to satisfy themselves of the proportionality (*sic*).
>
> 48. The HMCIP made a recommendation to the Director that strip-searching should only be used when current intelligence indicates the need for it.
>
> 49. In/around December 2017 I was made aware that the Claimants had brought judicial review proceedings against the Contractor and the Secretary of State alleging that full searches that they had undergone from staff were not compliant with search policy.
>
> 50. I was surprised and concerned at the HM[C]IP findings of excessive full searching of women and about lack of proper justification for the searching oversight by the contractor. I was not aware of any issues arising in this area since the 2014 HMIP. No full testing had been flagged for remedial action by the ACA [the part of HMPPS responsible for external audits] when they audited in July 2016 or had been notified to the Controller's team by Sodexo. No women prisoners have ever raised an issue with me directly or, to my knowledge, my Controller team. It was not until the Contractor investigated its local searching procedures, that I became aware that its local searching strategies were not compliant with the procedures set out in our policy.
>
> 51.1 have been through all the formal Authority monthly meeting minutes and the quarterly meeting minutes since 2014 - until present and there is no specific mention of concerns about female full searching apart from the Authority meeting in January 2018.
>
> 52. I have conducted a check of the Searching of the Person compliance testing on the Tool since 2016 and there is no compliance testing concerns have been identified in respect of female full searching."

113. In his Skeleton Argument at [28] the Secretary of State accepts that:

> "… the SSJ has a series of underlying responsibilities that requires him to establish a suitable framework for the superintendence of all prisons …. to have suitable policies in place (the PSIs and PSOs) and to have monitoring and supervisory responsibilities that will, overall, enable there to be an effective system which requires prisons to operate lawfully, and where they fail to do so, mechanisms for this to be corrected."

114. In my judgment the Secretary of State's monitoring and supervisory responsibility required him to have in place a framework with adequate and effective safeguards against systemic breaches of Article 8 and that included having adequate and effective systems in place to ensure that Sodexo was training its staff on the requirements of PSI 07/2016. It would have been reasonably possible for the Secretary of State to have had such a system in place. He could, for example, have required Sodexo as part of its tender application for HMP Peterborough to have provided details of the training to be provided on searching in general, and strip searches of women in particular. He could have required them to specify the methods by which the training was going to be delivered of delivery and how the competency of those undergoing the training was going to be assessed. Once the tender had been awarded he could have continued proactively and on an ongoing basis to monitor the quality of the training.

Conclusion

115. For all of these reasons I am driven to conclude that despite all of the measures put in place by the Secretary of State as described in his Skeleton Argument and in the evidence, they were not adequate and effective to prevent breaches of Article 8 at HMP Peterborough in relation to the strip searches of the Claimants over the relevant time period because they were not adequate or effective in ensuring that Sodexo had proper and suitable systems in place for training its staff on strip-searching.

116. These claims are allowed. I invite counsel to draw up a suitable form of declaratory order.