

Brook House Inquiry Seminar

# Article 3 Systems Duty



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# The Brook House Inquiry

## Background to Art. 3 Breaches

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

Prior to 2017:

*R (BA) v SSHD* [2011] EWHC 2748 (Admin);

*R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin);

*R (HA) v SSHD* ([2012] EWHC 979;

*R (D) v SSHD* [2012] EWHC 2501 (Admin);

*R (MD) v SSHD* ([2014] EWHC 2249).

There have subsequently been two further article 3 cases on immigration detention:

*R (VC) v SSHD* [2018] 1 WLR 478 (appeal to Supreme Court conceded on basis of article 3 breach) and *R (ARF) v SSHD* [2017] EWHC 10 (QB).



# Background to Art 3 Breaches: Shaw Review

In Stephen Shaw's 2016 review (following a visit on 22 May 2015), he asked Jeremy Johnson QC (as he was) to review these cases. Mr Johnson's report (at Appendix 4) was summarised at page 108 of Stephen Shaw's report, including the following points:

- The nature and pattern of the findings "tend to suggest that these cases may be symptomatic of underlying systemic failings (as opposed to being wholly attributable to individual failings on the part of the clinicians or public servants who were involved in the particular cases)".
- None of the findings was attributed to a failing in the legislative framework or policy. Nor was there any finding of a deliberate intention to cause harm.
- The findings focus upon a lack of healthcare assessment and treatment: "The nature and pattern of findings are such that they are more likely to be a reflection of a systemic problem (i.e. insufficient medical – particularly psychiatric – provision) rather than individual failings."
- Explicitly in two cases, and implicitly in others, there are findings relating to a failure in communication between the immigration removal centre and the Home Office: "An important example concerns the compilation and use of rule 35 reports ..."
- In each of the cases the detention of the vulnerable and mentally ill claimant was unlawful as chapter 55 of the policy had not been properly applied. This related to a number of detention reviews over long periods of time:



## Article 3 - Summary

Article 3 to Schedule 1 to the Human Rights Act 1998 provides that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

Encompasses:

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



## (i) Duty not to Mistreat

Duty includes:

- a. Where a naturally occurring illness, risks being exacerbated by treatment for which the state can be held responsible, that may engage article 3 (*R (HA) v SSHD* ([2012] EWHC 979 at [176])
- b. Where a person with mental health problems is in custody there may be a combination of factors both acts and omissions such as inadequate medical records, lack of resource to specialist psychiatric input, the imposition of seven days segregation and the imposition of 28 days imprisonment for an assault on officers which combine to breach article 3 *Keenan v United Kingdom* [2001] 33 EHRR 38 A particular duty is owed to vulnerable detainees (*Slimani v France* [2006] 43 EHRR 49) were repeatedly flouted.



## (ii) Investigative Duty

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



### (iii) Systems Duty

- *Öneryildiz v Turkey* (2005) 41 EHRR 20 (Grand Chamber) at §§89-90 it was held that there is a compulsory requirement for all concerned to take practical measures to ensure effective protection of those who might be endangered.

- Such a “framework” duty, also referred to as a ‘*systems*’ duty, was afforded domestic recognition in *Smith v Ministry of Defence* [2013] 3 WLR 69 *per* Lord Hope at §68 and Lord Mance at §105.

- Lord Filkin in 2002 said

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





## Chair's Findings- Briefly

- 19 incidents- at least one a week- amounting to inhuman or degrading treatment.
- “the entire safeguarding system in a number of areas to be dysfunctional” (Report para 40, page 9).
- There was a misuse of force against 11 of the 13 detainees whose cases were examined in detail and pain was deliberately and unnecessarily inflicted on four of them. Monitoring and oversight was inadequate and led to dangerous situations (Vol II. Page 158).
- “serious failings in the application of rule 34 and 35” (para 32, page 8) which amounted to a wholesale failure in processes designed to protect vulnerable detainees like suicidal people and torture victims from being detained,
- racist; homophobic and other degrading language. (para 15.8- homophobic). In many cases such language was intensified during times when detainees were self-harming or attempting suicide

The prime responsibility lay with the Home Office and its contractor G4S, yet there was alarming reliance on monitoring by volunteers at the Independent Monitoring Board. The Home Office accepted it did not sufficiently resource staff to monitor its contract (para 21 page 5).



# Chair's Recommendations

- 33 Recommendations.
- Recommendation 7: a 28-day time limit on detention
- Recommendation 9 The operation of Rule 35 be reviewed and compliance be regularly audited.



## Systems Duty and Compliance with Article 3





- The Political Sphere: The Chair has required the relevant organisations identified to publish details of the steps that they will take in response to each recommendation within six months of publication of the report (by 19 March 2024) and implementation of and compliance with the recommendations will be regularly monitored and reported on by the Home Affairs Select Committee and the Joint Committee on Human Rights.
- Article 3 continues to exert a legal on the state to have in place a clear and effective legal framework and procedure to prevent a further breach: *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681 and *VC* at [113-114, 118]. Accordingly, a further period of failure will no doubt result in further findings of breaches of the article 3 duties by the Courts.



# Thank you

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