

NOTICE OF DETERMINATION

**DISCLOSURE OF BBC FOOTAGE TO CORE PARTICIPANTS AND INSTRUCTION OF A USE OF FORCE
EXPERT**

1. This determination deals with two proposals which have been made by the Inquiry. They are (1) the disclosure by the Inquiry of unredacted BBC footage to Core Participants (CPs) and (2) the instruction by the Inquiry of Jonathan Collier, a use of force (UoF) expert.

BBC footage

2. The Inquiry has obtained video footage from the BBC which was covertly filmed at Brook House IRC. It includes material which was broadcast in the Panorama programme "Under-Cover: Britain's Immigration Secrets" aired on 4 September 2017, as well as unbroadcast material.
3. By a Note dated 3 June 2021, Counsel to the Inquiry (CTI) set out the Inquiry's proposals for the disclosure of unredacted BBC footage to CPs. In the Note, CTI sought representations from CPs on the Inquiry's proposals, in particular, from formerly detained individual CPs, prior to making disclosure. They were that the Inquiry considered it necessary to make disclosure of relevant video footage in unredacted form which means it will include the disclosure of sensitive content to CPs without pixelation, blurring or editing and therefore in a way that may potentially identify formerly detained individuals visually, by name or by circumstances.
4. The Inquiry's concern at this stage was only with the disclosure of relevant unredacted footage to CPs and with disclosure of sections of it to individual witnesses.

5. The Inquiry has received representations from the Home Office, the BBC, G4S and, collectively, Deighton Pierce Glynn (DPG), Bhatt Murphy and Duncan Lewis solicitors (together, the DPG group) on behalf of their NGO and formerly detained individual clients. I am grateful to those CPs for their submissions, which I have carefully considered.
6. The BBC, whose material it is, invites the Inquiry *“to ensure that any decision as regards the disclosure of the footage properly reflects existing anonymity orders and the rights of those featured in it.”*
7. Having indicated it is supportive of the Inquiry’s approach to disclosure of the BBC footage to CPs, G4S submits *“when it comes to publication and/or disclosure outside the Core Participant group, different issues arise and whilst G4S reserves its position generally until such time as it is advised of exactly what material in this regard may be subject to disclosure and/or wider publication, it does seem to us that if the footage is not pixilated for such purposes, those individuals identified should be given the opportunity to make their own representations.”*
8. Subject to the process for its security review¹ of the footage the Inquiry proposes to disclose, the Home Office *“has no observations on the ultimate form of disclosure of the BBC footage to Core Participants...”*
9. The DPG group submits:
 - (1) Their *“starting point, consistent with that of CTI, is that unredacted/unpixellated footage should be disclosed.”*

¹ Under this process the Home Office will be given opportunity to identify information that it considers gives rise to current security concerns before that material is disclosed to CPs. If the Home Office raises concerns about sensitivities in respect of any relevant information, and seeks redaction of that information, then a formal Restriction Order application will be necessary.

- (2) Their view that *“it would clearly be preferable for our clients, prior to disclosure to all CPs, to consider what it shows and make any observations from an informed perspective.”*
- (3) They consider that this *“would also allow an informed assessment to be made on whether any Restriction Order applications were required, in line with the Inquiry’s Protocol. A similar approach, albeit for different reasons, is being adopted in respect of the Home Office security review.”*
- (4) They propose that *“the footage relevant to their clients should be disclosed to them in unredacted/unpixellated form as soon as practicable. Given the sensitivities involved, and in order to limit the number of people who see the unredacted/unpixellated footage as a first stage, we would be content for that disclosure to be made to legal representatives only. That would avoid cross-disclosure of the unredacted/unpixellated footage to all detained persons and NGO CPs at this stage. We will then consider the unredacted/unpixellated footage within 7 days of receipt and provide any observations to the Inquiry. If we consider it is necessary for our clients to see the footage at this stage in order to provide a response we will indicate that to the Inquiry.”*
- (5) They also seek an explanation whether further footage beyond the initial 3 hours 40 minutes mentioned in CTI’s Note will be disclosed at a later point, given that the Inquiry has received over 90 hours’ worth.

My determination

10. I emphasise that this determination is limited to the issue of disclosure of unredacted BBC footage to CPs, and of sections of it to individual witnesses. It does not deal with issues related to the use of the footage in the Inquiry’s public hearing and any consequent publication, which I will consider in due course.
11. It is clear from the representations the Inquiry has received that there is no objection to disclosure of the unredacted footage to CPs, in principle. However, the DPG group submits that they can only provide informed observations on material affecting their clients if they are able first to have sight of it. Their proposal therefore is that disclosure of the

unredacted/unpixelated footage should be limited to the DPG group legal representatives first for them to consider it and provide any observations to the Inquiry within 7 days of its receipt.

12. On balance I am persuaded that it is proportionate in these particular circumstances to allow the DPG group legal representatives initial disclosure of the unredacted footage the Inquiry proposes to disclose. As with the Home Office security review, the footage will be provided for the limited purpose of identifying particular sensitivities rather than for wider consideration. Initial disclosure to the DPG group legal representatives will however have to follow the Home Office security review, which I expect to be undertaken as soon as possible.
13. Having made this determination, and in that regard, I emphasise the guiding principle must be that expressed by the DGP group in their letter when they say that the unredacted/unpixelated footage should be disclosed as it *“provides significantly better evidence, such footage will best assist the Chair in fulfilling the TOR, and it will increase the prospects that our clients will understand, as fully as possible, what occurred at Brook House, why such abuse took place and was allowed to continue and who was responsible.”*
14. For the sake of completeness, I deal with G4S’s representations which appear to suggest different considerations should arise in the case of disclosure and/or wider publication of unpixelated footage outside the CP group, so that identified individuals should be given the opportunity to make their own representations. If G4S’s representations are intended to apply to witnesses, disclosure of sections of relevant unredacted footage to individual witnesses is necessary, proportionate and is in pursuance of a legitimate aim (in furtherance of fulfilling the terms of reference of a statutory public inquiry). In my view, G4S’s representations on the issue of disclosure to individual witnesses (and I make no observations about the application of their representations to the issue of wider publication) are not only unworkable and impractical, but they are liable to frustrate the Inquiry’s work and progress and are thereby disproportionate. I therefore decline to adopt them.

15. Finally, the Inquiry is providing the firms in the DPG group with this initial disclosure solely for the purpose of their review, which is limited to making any observations about footage or material that they consider gives rise to sensitivity concerns. I emphasise that the review process has no effect on the Inquiry's existing, published procedures for handling disclosure of relevant material. Whether information is relevant to the Inquiry's terms of reference is determined by the Inquiry; and it will be for the Inquiry to determine whether information that the DPG group (or any firm within the group) considers sensitive is relevant to the matters being considered by the Inquiry. In so doing, the Inquiry will take a broad assessment of relevance. If the Inquiry considers that the information about which the DPG group has concerns or seeks a redaction is relevant, then it will be necessary for the DPG group to apply for a Restriction Order within the Inquiry's Protocol for Applications for Restriction Orders. STI and his team will engage with the DPG group to discuss any concerns they have following their review of the material. The collective submission from the three firms on this issue has been particularly helpful as it has avoided the need to address potentially disparate views of formerly detained CPs. It would help the Inquiry if the DPG group is able to provide any observations to the Inquiry (within 7 days of reviewing the footage) collectively.

Use of Force expert

16. In the Inquiry's update to CPs of 28 May 2021, the Solicitor to the Inquiry (STI) wrote, among other things:

"The Chair has now indicated that she is minded to instruct an additional expert to assist her in respect of the 'Use of Force' at Brook House.

It is anticipated that the expert will be able to assist the Inquiry by considering the training of staff members in Control and Restraint / Use of Force techniques during the relevant period. Their opinion is also likely to be sought on individual instances of Use of Force for which we have video footage or other evidence. The expert may be asked to assess these instances against Prison Service Order 1600 and Rule 41 of the Detention Centre Rules 2001 and published guidance and to provide their expert opinion, firstly, on whether Use of Force was necessary at all, and, if so, whether it was done reasonably and within the guidelines. Finally, they will be asked to comment where appropriate on the recording and follow-up of Use of Force incidents.

The Inquiry has already held preliminary discussions with Mr Jonathan Collier. Mr Collier has been a Prison Service Use of Force Instructor for over twenty-five years. His experience includes instructing, managing and designing the syllabus currently being used within HMPPS and other approved agencies including the immigration detention estate. Mr Collier has been the national lead for restraints in the Juvenile settings and assisted with policy and procedural development across both sectors.

The Inquiry will shortly be providing core participants with a copy of Mr Collier's Curriculum Vitae and will invite any comments at that stage."

17. No objections have been received to this course from any CPs, apart from those represented by the DPG group who object to my intention to instruct a UoF expert. No objection is made that Mr Collier does not possess the requisite expertise, and no explicit submission is made that he could not provide the Inquiry with independent opinion evidence.
18. The objection is made on the basis that they *"do not consider that those are properly matters of expert opinion evidence at all. Whether force was necessary, reasonable and proportionate are matters for the tribunal of fact, i.e. the Chair ... as part of the overall question of whether the use of force caused or contributed to treatment which is incompatible with Article 3 ECHR, as unhuman or degrading."*
19. They argue that *"Asking an expert to provide opinion on those same matters would risk usurping and/or undermining the Chair's role. It may also serve to distract the Inquiry from the overall crucial task of assessing the compatibility of the treatment of detainees with Article 3 ECHR."*
20. They add *"... Mr Collier should be included as an important witness of fact and asked to provide a witness statement, following a Rule 9 request from the Inquiry, addressing the relevant training and policies in place during the relevant period."*

21. I have taken full account of the whole of the representations made including the reliance on two authorities, one in the Supreme Court, as supporting the argument. The DPG group argue that in *Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597, the Supreme Court observed (at §43) that when assessing the admissibility of expert opinion evidence, the judge will consider “*whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area*”. They say if the tribunal of fact can form their own sound conclusions without expert opinion evidence, then the expert opinion evidence will be unnecessary (§45).

22. They argue that these principles have been recognised in the context of UoF against those detained under immigration powers. They cite *Wamala v SSHD* [2014] EWHC 1503 (QB), in which Mitting J observed that a trial judge could properly determine and reach a fully informed decision on whether excessive force had been used without expert evidence. That was a question of fact for the trial judge. There was no requirement for an expert (see §§9-11).

My determination

23. The citation of authority on the issue of the admissibility of expert opinion evidence in adversarial civil litigation, while potentially helpful, is not binding on me or determinative of my approach to the instruction of an expert.

24. Section 17 of the Inquiries Act 2005 reads:
 - (1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
 - (2) In particular, the chairman may take evidence on oath, and for that purpose may administer oaths.

- (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).
25. Those provisions are so designed to permit me to decide the procedure and conduct of the Inquiry, subject only to fairness (and the avoidance of unnecessary cost). Thus, as Chair, I enjoy a very broad discretion. The citation at §43 *Kennedy v Cordia (Services) LLP* is in fact a citation taken from the well-known judgment in the South Australian case of *R v Bonython* (1984) 38 SASR 45 which gave relevant guidance on the admissibility of expert opinion evidence. The full citation is:

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.”

26. It is therefore necessary to ensure that the expert is only instructed if he has expertise in a recognised discipline and if opinion evidence in that field is likely to assist the tribunal of fact.

27. I am satisfied that Mr Collier has the requisite expertise in a recognised discipline, and the DPG group do not suggest otherwise. As to the area of contention, Mr Collier's expert assistance in his field on those areas outlined in STI's update to CPs of 28 May 2021 is likely to assist me as the tribunal of fact. I need expert assistance not only as regards training, policies and guidance on all aspects of the techniques of control and restraint in the detention environment, but also including whether it was necessary and, if so, reasonable to use force in the circumstances depicted in the evidence, or whether force used was excessive.

28. The terms of reference of this Inquiry include reaching conclusions with regard to the treatment of detainees where there is credible evidence of mistreatment contrary to Article 3 ECHR, namely torture, inhuman or degrading treatment, or punishment. In this regard, the terms of reference require investigation of (1) the treatment of complainants, including identifying whether there has been mistreatment and identifying responsibility for any mistreatment; (2) whether methods, policies, practices and management arrangements (both of the Home Office and its contractors) caused or contributed to any identified mistreatment; and (3) whether any changes to these methods, policies, practices and management arrangements would help to prevent a recurrence of any identified mistreatment.

29. This means the Inquiry has to determine whether mistreatment amounting to a breach of Article 3 occurred (see §29 of the Notice of Determination as regards Scope dated 6 January 2021). Whether mistreatment amounting to a breach of Article 3 occurred is uniquely a question for me as the tribunal of fact and is not for Mr Collier. Where incidents of UoF are concerned, however, I will likely be assisted by Mr Collier, who is an expert in the field, in arriving at the findings that are mine to make under the terms of reference.

30. The DPG group have also cited in their representations the first instance judgment of Mitting J in *Wamala v SSHD* which was a decision in a civil claim for damages by a detained person who was forced off a plane. In that case, the need for the evidence of an expert in restraint only arose, theoretically, if the use of force was lawful. If it was lawful, then it was

for the second defendant (who used the force) to prove that the force used was no more than was reasonably necessary to achieve the lawful purpose.

31. A High Court Master had decided that a judge would not be materially assisted by expert evidence on the issue which would arise for decision if the use of force was in principle lawful. In his judgment, the court would be able to come to a fully informed decision on that question without the need to consider expert evidence. Mitting J was hearing the case on appeal from that decision.

32. What Mitting J said about it at §§10-11 was:

“What is and is not excessive when force is being lawfully applied is to be determined by the general law and not by the detail of a Prison Service manual incorporated into a contract with an escorting agency. Whether or not the standards of the general law were complied with in this case is a question of fact for the trial judge.

Although I acknowledge that it is tangentially relevant to examine the standards which the Home Office impose via the Prison Service Use of Force manual on the escorting agency, it does not begin to address the fundamental question: was force, if force could lawfully be used, excessively applied on the facts of the case? As far as that is concerned, it is simply for the judge to determine.”

33. As I have indicated above, the Inquiry has to determine whether mistreatment amounting to a breach of Article 3 occurred. That is a materially different issue to that which obtained in *Wamala*. The DPG group’s argument that *Wamala* recognises the principles set out in *Kennedy* in the context of UoF against those detained under immigration powers not only overstates the impact of the case, but also, and more significantly, overlooks the issues of contention underlying Mitting J’s judgment.

34. Moreover, the evidence provided by Mr Collier will be considered and tested by the Inquiry (through questioning by CTI) and under the Rule 10 process. It is a matter for me whether I accept, or reject, his evidence, as it is with any other witness. Whether or not the UoF fell

within the relevant training, policies and guidance and whether the UoF was necessary and, if so, reasonable in any particular instance remains for me to consider as part of my overall task of determining whether mistreatment amounted to a breach of Article 3.

35. For all these reasons, I require assistance from a UoF expert in forming my own conclusions and I intend to instruct Mr Collier as outlined in STI's update to CPs of 28 May 2021.

Kate Eves

Chair to the Brook House Inquiry

30 June 2021