

NOTICE OF DETERMINATION
INQUIRY SCOPE

Terms of Reference and provisional list of issues

1. The Brook House Inquiry was announced by the Secretary of State for the Home Department on 5 November 2019. The Inquiry's Terms of References were agreed as follows:

To investigate into and report on the decisions, actions and circumstances surrounding the mistreatment of detainees broadcast in the BBC Panorama programme 'Undercover: Britain's Immigration Secrets' on 4 September 2017.

To reach 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; and then make any such recommendations as may seem appropriate. In particular the inquiry will investigate:

- i. The treatment of complainants, including identifying whether there has been mistreatment and identifying responsibility for any mistreatment.*
- ii. Whether methods, policies, practices and management arrangements (both of the Home Office and its contractors) caused or contributed to any identified mistreatment.*

- iii. *Whether any changes to these methods, policies, practices and management arrangements would help to prevent a recurrence of any identified mistreatment.*
- iv. *Whether any clinical care issues caused or contributed to any identified mistreatment.*
- v. *Whether any changes to clinical care would help to prevent a recurrence of any identified mistreatment.*
- vi. *The adequacy of the complaints and monitoring mechanisms provided by Home Office Immigration Enforcement and external bodies (including, but not limited to, the centre's independent monitoring board and statutory role of Her Majesty's Inspectorate of Prisons) in respect of any identified mistreatment.*

For the purpose of the Inquiry, the term "complainants" is used to refer to any individual who was detained at Brook House Immigration Removal Centre during the period 1 April 2017 to 31 August 2017 where there is credible evidence of mistreatment of that individual.

"Mistreatment" is used to refer to treatment that is contrary to Article 3 ECHR, namely to torture or to inhuman or degrading treatment or punishment. The Inquiry should in particular include investigation in to the mistreatment of complainants known (in the recent Brook House litigation) as MA and BB.

The Inquiry may wish to draw upon the evidence and findings of the previous special investigation in to the events at Brook House, conducted by the PPO, before it was converted to a statutory inquiry.

2. In my opening statement on 21 April 2020, I set out a list of five central questions to be addressed in order to fulfil these terms of reference. This list of issues was informed by

evidence gathered by the PPO's special investigation into Brook House and by other investigations conducted in the aftermath of the *Panorama* program. The list was also informed by the judgment of May J in *MA and BB v Secretary of State for the Home Department* [2019] EWHC 1523 (Admin) and by correspondence received from MA and BB's representatives.

3. The first of the five questions in that list that will need to be addressed is the extent and severity of the mistreatment at Brook House during the material time and to examine who perpetrated it. Secondly, it will need to examine the extent to which policies, practices, staffing and management arrangements at Brook House caused or contributed to any identified mistreatment. In my view, this second question will require an examination of the following:
 - a. Direct management and leadership at Brook House
 - b. Staff and management training, induction and support
 - c. Staffing levels
 - d. Prevalence of racist attitudes /behaviours and measures for addressing such attitudes/behaviours
 - e. Staff and management culture
 - f. The co-location of Time Served Foreign National Offenders (TSFNOs) and asylum seekers
 - g. The assessment of vulnerability (including the process referred to as 'Rule 35' and the Adults at Risk policy)
 - h. The extent and suitability of the specialist mental health provision
 - i. The use of control and restraint techniques, including pain compliance
 - j. The availability of other methods for encouraging good order and discipline and dealing with non-compliance
 - k. The control of drug availability and use
 - l. Response to bullying or intimidation of detainees

- m. The use of segregation
- n. Management of self-harm and food refusal
- o. Language barriers and the use of interpreters
- p. Management of healthcare staff

4. Thirdly, the Inquiry will need to assess the adequacy of the safeguards designed to detect mistreatment. Specifically, this will mean examining the procedures for detainees to make complaints and the response to any such complaints and the recording and monitoring of use of force. It will also involve examining the Home Office monitoring and oversight of Brook House, including the role of the Professional Standards Unit (PSU) and assessing the adequacy of the contractual framework for identifying and responding to mistreatment. This area of the Inquiry's work will also include analysis of the Independent Monitoring Board (IMB)'s monitoring of and HM Inspector of Prisons (HMIP)'s Inspection of Brook House. We will also examine informal mechanisms for raising concerns, including the role of the Chaplaincy, the whistleblowing procedures and protections in place for staff.
5. Fourthly, the Inquiry will need to establish what changes have been made in response to the *Panorama* documentary. And fifth, and finally, we will need to ascertain whether those changes are adequate or need to be improved upon.
6. Following a preliminary hearing on 25 September 2020, I invited written submissions on the Inquiry's scope from Core Participants, to be received by 9 October 2020. Substantive submissions were received by from MA, BB, SR, KK, Gatwick Detainees Welfare Group (GDWG), the Reverend Ward, the Home Office, G4S and Medical Justice. A preliminary hearing was held on 14 December 2020 at which supplementary oral submissions were heard on behalf of MA, BB, the Reverend Ward, GDWG, the Home Office and G4S.

Submissions and ruling on scope

7. I have read and carefully considered each of the submissions I have received. I also listened to each of the supplementary oral submissions presented on 14 December 2020. In her note of 7 December 2020, Counsel to the Inquiry, Ms McGahey QC, summarised the written submissions received on scope as follows:

There are essentially two views:

- (i) The Inquiry should examine wider issues (such as, for example, breaches by the Home Office or its contractors of detention policy in other IRCs, or the correctness of the initial decision to detain an individual) because they form the background to, and may be relevant to an understanding of, the underlying causes for mistreatment at Brook House in the relevant period; or*
 - (ii) The Inquiry's starting point should be the investigation of individual instances of mistreatment in the relevant period, and the Inquiry should then "track back" from those instances to find the underlying causes.*
8. As acknowledged by Ms McGahey QC, and supported by oral submissions made on 14 December 2020, there is general agreement between the Core Participants on the submission by BB and GDWG that *"an effective inquiry needs to remain flexible, and go where the evidence takes it"*¹. I of course agree that this Inquiry must remain open-minded about what may be revealed by the evidence it receives. However, I remain of the view that the *starting point* of that evidence should be establishing what happened to individuals at Brook House in the relevant period. In my view, the evidence provided by former detainees and others of mistreatment at Brook House should be what informs the parameters of what is 'relevant' to the Inquiry. That evidence may lead me to conclude

¹ Para. 24, submissions of 11 September 2020.

that the Inquiry must look significantly beyond the list of issues that I have identified but that cannot be determined ahead of receiving that evidence.

9. In oral submissions made by Ms Harrison QC on behalf of MA, it was propositioned that:

...it is inevitable and intrinsic to [MA's] claim for an article 3 breach that the decision to detain and to continue to detain and the conditions of detention, are part and parcel of the grounds upon which he alleges an article 3 breach in his case. Because the consequences were such that he suffered a significant deterioration in his mental health, he experienced extreme suicidal ideation, and that treatment constitutes treatment falling over the threshold for a breach of article 3.

10. Ms Harrison QC relied on the judgment of May J in *MA and BB v Secretary of State for the Home Department* [2019] EWHC 1523 (Admin) in support of her proposition that this Inquiry was required to investigate not only the deliberate abuse that MA is alleged to have suffered but also the decision to detain him, and to maintain that detention, and the conditions of his detention.
11. It is correct to note that MA, in his submissions to the Court in *MA and BB*, did assert that his Article 3 rights were breached not just through abuse of the sort shown on *Panorama* but in a number of additional ways, including the very fact that he was detained although an Adult at Risk, and that his mental illness was not properly recognised or treated.
12. However, it seems clear to me that, in her judgment, May J was contemplating an inquiry into acts of deliberate abuse such as those shown in the BBC covert filming.
13. The key paragraph in the judgment of May J is paragraph 62. In that paragraph, the judge ruled that an effective inquiry into the allegations of abuse of MA and BB should have the power to require the attendance of witnesses. She identified four factors that had led her

to that conclusion. The first was *“the egregious nature of the breaches, the multiplicity and regularity of abusive events and the openness of the activity within the units.”* She noted that, *“These were not isolated incidents of abuse against MA and (allegedly) BB by one person, done in secret behind a closed door; they were repeated events, in front of others, where the perpetrators were managers and trainers, as well as ordinary officers.”*

14. The remaining three factors listed by the judge all related to deliberate incidents of abuse of this sort. She stated that the questions to be asked about the alleged abuse would not be limited to the issue of whether particular staff committed acts of abuse but how and why they had come to do so openly and without detection. She referred to the likelihood that perpetrators of abuse, or staff who witnessed it, would not attend voluntarily to give evidence. Finally, May J observed that immigration detainees were a uniquely vulnerable group of people; they were not prisoners serving a sentence and, unlike most prisoners, did not know for how long they would be detained. She continued at paragraph 62(4) (in a passage quoted by Ms Harrison QC in her submissions to me):

Detention under these conditions is diminishing and depersonalising enough but it is unacceptably degrading and dehumanising where there is repeated and apparent casual abuse on the part of staff employed by the state to supervise and look after such detainees.

15. I do not read this passage as indicating that the judge envisaged an inquiry into conditions of detention, or decisions to detain, more generally. It seems to me that she was emphasising that deliberate abuse was particularly abhorrent when perpetrated against a group of especially vulnerable individuals.
16. I do not believe, therefore, that the judgment of May J supports the proposition that this Inquiry should investigate matters other than those stemming from acts of deliberate abuse of the sort shown on *Panorama*.

17. Mr Goodman on behalf of Rev Ward referred me to the case of *R (Wright) v Secretary of State for the Home Department* [2001] EWHC 520 (Admin), in support of his submission that an effective investigation is required into alleged breaches of Article 3, in order to maximise future compliance with that article. He also referred me to paragraph 31 of the House of Lords' judgment in *Amin v Secretary of State for the Home Department* [2003] UKHL 51. The relevant and well-known text from that paragraph reads:

The purposes of such an investigation [under Article 2 ECHR] are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

18. Mr Goodman relied on similar observations made by Sedley LJ in *AM v Secretary of State for the Home Department* [2009] EWCA Civ 219, paras. 57-60. At paragraph 60, Sedley LJ stated:

... our domestic jurisprudence, including the binding decision of the House of Lords in Amin, makes it clear that the investigative obligation of the state may – depending on what facts are at issue – go well beyond the ascertainment of individual fault and reach questions of system, management and institutional culture.

19. Mr Goodman also referred to the decision of the Supreme Court in *D v Commissioner of Police for the Metropolis* [2018] 2WLR 895.
20. The propositions in these authorities are not, it seems to me, controversial, but they do not really assist in my task of identifying the alleged breaches of Article 3 that I am required or permitted to investigate, or in the fact-specific determination of the scope of

this investigation. As Sedley LJ noted, the extent of the investigative obligation depends upon the facts at issue. I have already indicated that this Inquiry will examine issues of system, management and culture, and that the Inquiry may well investigate the terms and implementation of national policies and procedures as they affected events at Brook House. But these authorities do not suggest that an inquiry set up to investigate alleged breaches of Article 3 of a specific nature has either the obligation or the power to investigate whether breaches of a different nature have occurred.

21. Mr Odogwu, on behalf of BB and Gatwick Detainees Welfare Group, referred to a number of authorities relating to inquest procedure, and in particular to the well-known “funnel” analogy drawn by counsel for the Coroner in *R (Lewis) v HM Coroner for Mid and North Shropshire* [2009] EWCA Civ 1403, para. 26:

The inquest process can be visualised as a funnel, wide at its opening but narrowing as the evidence passes down it so as to exclude non-causative factors from the eventual verdict.

22. Mr Odogwu submitted that the “*funnelling approach to wider issues [is] required by the legal obligations that are imposed by article 3*”.
23. I am unable to agree with that proposition. It is clear from the authorities that the state’s investigative obligation under Article 3 may be discharged in a number of different ways, including criminal proceedings, inquests, Inquiries Act inquiries or investigations of other sorts. There is no prescribed form of investigation, and no obligation at all to start from a wide basis with a view to narrowing the consideration of issues at a later stage. That may well be a sensible approach, depending on the nature of the investigation and the issues under consideration, but it cannot be said to be a legal requirement. The “funnelling” analogy is apt for inquests because coroners and coronial juries are prohibited by statute

from expressing an opinion on anything other than the statutory questions as to who the deceased was, and where, when and how the deceased came by his or her death (subject also to the right of the coroner to issue a Report for the Prevention of Future Deaths). The inquest may examine wider issues, and the process then narrows so as to exclude from the inquest determination any factors other than those relating to the statutory questions.

24. This Inquiry starts from a completely different basis. It has detailed terms of reference and within those no constraints at all as to the conclusions that I may reach or the recommendations that I may make. While of course the Inquiry is highly likely, throughout its investigative process, to consider issues that in the end do not form part of my final report, I do not believe that the “funnelling” analogy would justify any attempt on my part to go beyond the matters that I consider properly to fall within the Terms of Reference.
25. Mr Odogwu relied on the High Court case of *R (Speck) v Coroner for the District of York* [2016] EWHC 6 (Admin) to support his argument that this Inquiry has a duty to investigate those matters which caused, or at least arguably appear to have caused, the mistreatment under investigation. He submitted that this was a low threshold and should be met where there was an issue that required further investigation or where enquiries might reveal a breach, but that it was not limited to where there was a *prima facie* case at the outset.
26. It is important to consider the passage of the judgment of Holroyde J from which this proposition is taken:

28. ...It is in my judgment clear, from the line of decisions beginning with Lewis and Allen, that a coroner conducting an article 2 inquest has a discretion to investigate matters which may possibly have contributed to the death, but his only duty is to investigate those matters which caused, or at least arguably appear to have caused or contributed

to, the death. A coroner determining the scope of an inquest is therefore entitled to conclude that a particular issue is so remote from the causes of the death that it cannot even arguably be said to have contributed to the death, and on that ground to exclude it from consideration. The coroner is entitled to distinguish between issues which at least arguably might prove to have been contributory factors in the death, and those which cannot even arguably be said to have made any real contribution to the death. Having drawn that distinction, the coroner may decide in the exercise of his discretion to investigate the former; but he has no discretion to investigate the latter. It is in my judgment clear, from the line of decisions beginning with Lewis and Allen, that a coroner conducting an article 2 inquest has a discretion to investigate matters which may possibly have contributed to the death, but his only duty is to investigate those matters which caused, or at least arguably appear to have caused or contributed to, the death.

27. It appears to me that Holroyde J was saying that a coroner (and, by extension, the Chair of an inquiry into alleged breaches of Article 2 or 3) has a discretion to investigate matters that are possibly causative (i.e. in respect of which further enquiries *might* reveal a breach) but that the duty to investigate exists only where there is, essentially, a *prima facie* case. I do not believe, therefore, that the case of *Speck* assists Mr Odogwu's submission. I do, however, maintain an open mind as to whether issues may be identified that appear to have played a causative role in the mistreatment at Brook House which are not currently included in the Inquiry's list of issues and, if they are, will seek evidence on those issues.
28. Mr Blake on behalf of the Home Office drew a distinction between Article 2 cases and those engaging Article 3, on the basis that in an Article 2 case there has always unquestionably been a death, whereas in an Article 3 case the first issue to be determined is whether or not inhuman or degrading treatment in breach of Article 3 has occurred. Mr Sharland QC submitted that authorities relating to Article 2 cases cannot simply be applied to Article 3 cases, because different considerations apply.

29. It is right that this Inquiry has to determine whether mistreatment amounting to a breach of Article 3 occurred. From that point, though, it seems to me that the investigative obligations arising under Articles 2 and 3 are similar. There is no dispute that the investigation must be thorough, independent and effective. However, the precise nature and scope of this investigation are matters within my discretion, and are subject always to the boundaries placed upon them by the Terms of Reference.
30. I agree with a submission made by Mr. Goodman on behalf of the Reverend Ward: the Inquiry's scope should not be artificially determined. I consider that the most effective and appropriate means of testing whether my current list of issues is comprehensive is through obtaining evidence of acts of deliberate mistreatment of detainees in breach of Article 3 at Brook House and following where that evidence leads. In assessing why any mistreatment took place, I consider it highly likely that the inquiry will need to examine potential failings in the Adults at Risk policy and in the operation of Rules 34 and 35 as part of understanding the background to that abuse.
31. I have previously stated my view that this Inquiry needs to build upon the findings of other relevant reviews and investigations. This Inquiry will not seek to duplicate the work of others. However, if the evidence received by the Inquiry indicates that I should revisit the work or conclusions of other investigations, then I will not hesitate to do so, and if required I will revise my list of issues accordingly.

Kate Eves
Chair to the Brook House Inquiry
6 January 2021