Neutral Citation Number: [2012] EWCA Civ 668

Case No: C4/2011/1000

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
DIVISIONAL COURT
SIR ANTHONY MAY, PRESIDENT
[2010] EWHC 3541 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2012

Before :

LORD JUSTICE PILL
LORD JUSTICE PATTEN
and
LORD JUSTICE MCFARLANE

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Between :

The Queen (on the application of MM and AO, a child by her mother and litigation friend)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

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- -

Mr H Southey QC and Ms N Finch (instructed by **Birnberg Pierce**) for the **Appellant**
Mr J Eadie QC and Ms S Fatima (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates : 2 April 2012

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Judgment

Lord Justice Pill :

1. This is an appeal against a decision of Sir Anthony May P on 2 December 2010 whereby he refused an application by MM and by AO, a child, by her mother and litigation friend, for a mandatory order requiring the Secretary of State for the Home Department ("the Secretary of State") to make arrangements for an independent inquiry claimed to be required for compliance with article 3 of the European Convention on Human Rights ("ECHR"). The appellants also sought a declaration that the Secretary of State has acted unlawfully by failing to make such arrangements. The claim was based on an alleged breach of the procedural obligation imposed by article 3.

2. Article 3 is headed "Prohibition of Torture" and provides:

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

Article 2 provides that "Everyone's right to life shall be protected by law" and the procedural obligation was defined in that different context by Lord Bingham of Cornhill in *R (Amin) v Home Secretary* [2004] 1 AC 653, at paragraph 31:

> "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 learnt from his death may save the lives of others."

<u>The events</u>

3. The claim arises out of events at Yarl's Wood Immigration Removal Detention Centre, for which the Secretary of State is responsible, where the appellants were detained on 17 June 2009. Sir Anthony May set out the facts and there is no appeal against his findings:

> "10. Yarl's Wood is an Immigration Removal Centre where unsuccessful asylum seekers may be detained administratively by the United Kingdom Borders Agency. In addition no doubt to individuals, there may be families there, some with young children. In mid June 2009 the two claimants in the present proceedings were detained there. The first claimant is an adult, there with his wife, daughter and niece. The second claimant is a child; she was there with her mother. Some of the families were concerned that their children and babies were becoming sick and not receiving adequate medical treatment. They were concerned that the children were showing signs of trauma. There were other complaints relating to health and nourishment. No doubt tensions were raised by the prospect of their removal and perhaps by attempts to forestall this. Concerns had been publicly expressed about the harmful effects

of immigration detention on children, in the light of which the government and the UKBA are, I understand, considering modifications to procedures.

11. The families concerned and their perception that UKBA were unwilling to meet the families together led to a peaceful protest which included, on 16th June 2009, the families taking mattresses and so forth into the corridors, where they would remain until a UKBA representative came to speak with them. It is unnecessary for present purposes to consider the detail of this process, nor the rights and wrongs of the events which led to it. Suffice to say that UKBA and Serco, UKBA's contractor who managed the detention centre, were sufficiently concerned to consider taking action to stop the protest.

12. On 17th June 2009, there was a conference call in which 18 people of various disciplines participated which considered and planned an intervention to stop the protest. The Secretary of State defending these proceedings says the ensuing intervention operation was carefully and properly planned. The claimants say that there were deficiencies in the planning especially with regard to the children.

13. The plan was that groups of officers would identify named detainees including the first claimant to be accompanied by force, if necessary, to a secretion unit. Other officers were to identify distressed children to take them to a large classroom prepared to receive them.

14. The intervention took place in the early afternoon of 17th June 2009 when approximately 30 detention custody officers executed the planned intervention. There are issues of fact as to the extent to which force was used or was necessary. It is accepted that children were separated from their parents. I was told that at some stage the incident became very noisy and that this appeared to coincide with the intervention officers approaching and taking hold of a man referred to as Solomon. The first claimant says that he suffered bruising and pains as a consequence of the manner in which he was restrained. Another man says that he was pushed, kicked and had his hair pulled. It is said some children were hurt. The children became distressed and women, mothers in particular, became very distressed not least when an officer sought to separate one mother from her baby.

15. A number of children separated from their parents were placed in a nursery or classroom. It was recorded that at least two children were very distressed but later calmed down. At least two of the parents were separated from their children for significant periods. The first claimant was separated from his family for nine days. Subsequent statements from detention

> centre officers indicate that the atmosphere and tension was very high. The word "pandemonium" is used. Children were very upset. Public concern was expressed after the incident by the Children's Society and an organisation called Bail for Immigration Detainees which subsequently applied to intervene in these proceedings but were refused.
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> 16. This brief account of the intervention could be greatly enlarged but it is not necessary to do so for the relatively confined purposes of the present proceedings. Importantly however, there is CCTV material recording the incident which was also the subject of a video recording which is available. It has not been necessary for me to view the video, but it represents valuable contemporary visual evidence, no doubt available to resolve or help resolve factual disputes which might arise.
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> 17. On 29th June 2009 the claimant's solicitors wrote to UKBA making a number of complaints about the treatment of the families. UKBA treated this as a letter of complaint to be investigated by its Professional Standards Unit. The PSU undertook this investigation and asked the claimant's representatives for evidence. The claimant's representatives proceeded to obtain signed statements from nine families, which they provided in August and September 2009, with the other statements provided in late September 2009."

4. The PSU is a formally established complaints investigation unit within UKBA but is not hierarchically independent of UKBA and its investigation would not in itself constitute an independent investigation for the purposes of article 3. By letter of 14 July 2009, the appellants wrote on behalf of all nine families inviting UKBA to commission an independent investigation into the families' treatment at Yarl's Wood, including the intervention on 17 June 2009 and its aftermath. It was submitted that an independent investigation was required to comply with the article 3 obligation.

5. In letters on behalf of the Secretary of State, it was not accepted that there was an arguable claim for a breach of article 3. It was also argued that the PSU investigation into the incident would comply with the procedural obligations imposed by article 3. Factual assertions by the appellants were challenged and it was stated that a complaint to the Prisons and Probation Ombudsman ("PPO") could be renewed and civil proceedings could be brought.

6. The PSU reported on 2 March 2010. The President described it, at paragraph 30:

> "The PSU report is, as I read it, an admirably thorough document which in its 68 closely typed pages examines in detail and with reference to the evidence obtained the health care, education, catering and social work services complaints of each individual complainant and then, with reference to the second and third of the terms of reference, the planning and execution of the intervention, with reference to individual adult

> complainants including Solomon and the first claimant. It concludes that the intervention was necessary giving detailed reasons for that conclusion."

Solomon was removed from the jurisdiction on the day after the incident at Yarl's Wood.

7. On 24 October 2010 a report prepared on behalf of the appellants by Mr Stevens of Justice Care Solutions Limited, independent consultants, was submitted. The President described it at paragraph 38:

> "This long and detailed report criticises material aspects of the planning and implementation of the intervention, expressing the opinion that in material respects particularly relating to the children it was inadequate and inappropriate. The details do not matter for the present purposes."

8. Mr Eadie QC, on behalf of the Secretary of State, now accepts that there is sufficient evidence to raise a case under article 3. The procedural obligation has been triggered by the submission of the allegations in that report.

9. In the meantime, by letter dated 16 July 2010, the PPO had stated that the PPO is precluded from investigating complaints about cases currently the subject of civil litigation or criminal proceedings. That principle was stated to apply to the judicial review by then commenced.

10. For the appellants, Mr Southey QC relied on the seriousness of the incident of 17 June 2009. The incident was highly distressing, including the separation of children from parents for a significant time. That it had significant effects, particularly on children such as the second appellant, was demonstrated by psychiatric and psychotherapists' reports. In the reports, the subsequent problems of those present were linked with the incident. Considering the separation of a child from its family in *E v Chief Constable of the Royal Ulster Constabulary and Another* [2009] AC 539, Baroness Hale stated, at paragraph 9:

> "The special vulnerability of children is also relevant to the scope of the state to protect them from such treatment."

11. It was submitted that issues arose as to the way in which the intervention was planned. There was a particular need to protect children, who are known to be particularly vulnerable, from events such as these. Physical force had been used. Dealing with a mass protest involved careful planning and execution. It was particularly important that lessons be learned by the state from events as serious as these. A joint paper by the Royal Colleges has acknowledged the detrimental effect of detention on children.

<u>The authorities</u>

12. The scope of the article 3 duty, and the ways in which it can be performed, has been the subject of intense scrutiny in the courts in recent years. Mr Southey relied, by way of analogy, on the high duty to investigate that arose under article 2 of the ECHR when a suicide had occurred as illustrated in *Amin* and in *R (L (A Patient)) v Secretary*

of State for Justice [2009] AC 588. The need for thorough and independent investigation applied to children as much as to suicides and attempted suicides, it was submitted. In *L*, Lord Rodger of Earlsferry referred, at paragraph 65, to the position of a prisoner who is "incapable of looking after his own interests . . . he certainly cannot take proceedings by himself on the basis of any recollection he may have." A child is in the same position, it was submitted. Citing *Edwards v United Kingdom* 35 EHRR 487, 515 Lord Rodger also stated, at paragraph 74:

> "if there has to be an independent investigation the sooner it starts work the better."

13. The UN Convention on the Rights of the Child 1989 ("the 1989 Convention"), article 3(1), provides that in all actions concerning children, the best interests of the child shall be a primary consideration. The threshold for an application of article 3 of the Convention on Human Rights is lower if children are involved, it was submitted, and especially when the children are in a closed environment, as in the present case. This process "needs to be built into government at all levels" (UN General Comment (No.5) 2003 on the implementation of the 1989 Convention).

14. Central to the analysis of article 3 duties by the domestic courts has been the decision of the European Court of Human Rights ("ECtHR") in *Banks v United Kingdom*, 2007, application no. 21387/05, a case concerning allegations by prisoners that they had been assaulted in prison by prison officers. The court held that the applications alleging breach of the investigatory obligation imposed by article 3 were inadmissible, as being manifestly ill-founded.

15. The court held that there is a "different emphasis" as between articles 2 and 3. In the context of article 2, "the obligation to conduct an effective investigation into allegations of the unlawful use of force attracts particular stringency in situations where the victim is deceased and the only persons with knowledge of the circumstances are officers of the state". (page 10) By contrast, in the context of article 3, "the victim of any alleged ill-treatment is, generally, able to act on his own behalf and give evidence as to what occurred". Having referred to the criminal proceedings in the case, the court concluded, at page 11:

> "Accordingly, the Court is not persuaded that this is a case in which issues arise under the procedural head of Article 3 of the Convention and would consider that the applicants' complaints fall rather to be considered under Article 13 of the Convention.
>
> However, even assuming that Article 3 in its procedural aspect was engaged in this case, the Court would make three points.
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> First, in the normal course of events, a criminal trial, with an adversarial procedure before an independent and impartial judge, must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility for unlawful acts of violence (*McKerr v. the United Kingdom* 34 EHRR 553, para 134; see also *Menson v. the United Kingdom* (2003) 37 EHRR CD 220 where the ability of the State to enforce the criminal

> law against those who unlawfully took the life of another was described as decisive when deciding whether the authorities complied with their positive and procedural obligations under Article 2).
>
> Second, where the allegations are not of intentional violence as such but raise issues of negligence, a civil or disciplinary remedy may be sufficient to provide protection under Article 2 … Similar considerations would arise under Article 3. The Court would note that the present applicants' claims in their civil proceedings included allegations of systemic negligence and they could have thus raised any alleged failings in management, administration, training and supervision which could be linked to their ill-treatment. These proceedings were, however, settled.
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> Thirdly, insofar as the applicants asserted that there were wider issues which were not ventilated in either criminal or civil proceedings and in respect of which a public inquiry was necessary, the Court would emphasise that the procedural element contained in Article 3 of the Convention imposes the minimum requirement that where a State or its agents potentially bear responsibility for serious ill-treatment the events in question should be subject to an effective investigation or scrutiny which enables the facts to become known. There is no indication in the present case that the facts have not been sufficiently investigated and disclosed, or that there has been any failure to provide a mechanism whereby those with criminal or civil responsibility may be held answerable. The wider questions raised by the case as to the background of the assaults and the remedial measures apt to prevent any recurrence in a prison in the future are, in the Court's opinion, matters for public and political debate which fall outside the scope of Article 3 of the Convention (see *mutatis mutandis*, *Taylor Family and Others v. the United Kingdom* (1994) 79-A DR 127)."

16. In *R (AM) v Secretary of State* [2009] UKHRR 973, there was a disturbance in a prison on 28 November 2006 during which, it was alleged, the way prisoners were treated involved a breach of article 3 and that, before the disturbances, there was a culture of oppression, bullying, violence and neglect at the prison. By a majority, it was held in this court that the issues raised by the claimants on the facts were such as to trigger the state's obligation under article 3 to investigate what had arguably been inhuman or degrading treatment, both reactive and systemic, in a custodial institution. Relief was given by way of a declaration that the Secretary of State had failed to meet the United Kingdom's obligation under article 3 to institute an independent inquiry.

17. On the facts, Longmore LJ dissented on the ground that he saw no reason why the legitimate article 3 complaints "could not be dealt with by recourse to the ordinary processes of law available in the United Kingdom". While he dissented on the facts, Longmore LJ's analysis of the duty under article 3 was unanimously adopted in this

court in *R(P) v Secretary of State* [2010] QB 317 (Ward, Jacob and Stanley Burnton LJJ). Longmore LJ, at paragraph 77, summarised the view of the ECtHR in *Banks*, if the procedural aspect of article 3 was engaged:

> "(i) to the extent that allegations of criminal responsibility for acts of unlawful violence were made, the appropriate way of dealing with them was a criminal investigation;
>
> (ii) to the extent that allegations of negligence were being made, civil proceedings might well be sufficient even for the purpose of both Article 2 and Article 3 even though civil proceedings could be (and had in that case been) settled;
>
> (iii) to the extent that wider issues were raised which were not ventilated (or would not be ventilated) in criminal or civil proceedings those were matters for 'public and political debate which fell outside the scope of Article 3 of the Convention'."

18. Having stated that the application in *AM* was remarkably similar to that in *Banks*, Longmore LJ continued:

> "79. It seems to me that in the present case the allegations of breach of Article 3 can be properly dealt with by the combination of the availability of criminal proceedings and civil proceedings, just as the allegations in *Banks* could be properly dealt with. The availability of those proceedings thus constitutes compliance with the procedural obligation of Article 3 on the facts of this case. The focus of any inquiry which the court is empowered to order has to be on the alleged breach of Article 3. The wider inquiry which Liberty wants is no doubt "a matter for public and political debate" but does not fall within Article 3.
>
> 80. [Sedley LJ] takes the view that criminal and civil court proceedings will not ordinarily suffice when allegations of systemic and multiple breaches of Article 3 are made. I think that this puts the matter too widely. If a particular individual or, as in this case, three individuals make one or more allegations of conduct amounting to a breach of Article 3, I see no reason why they cannot be investigated by the police and the courts in the ordinary way. It cannot be right, in my view, that merely by adding an allegation that the conduct is systemic one can be entitled to a public inquiry. There can hardly be a requirement for a public inquiry every time somebody plausibly alleges institutional violence or institutional racism on the part of the authorities. Unless the state's recognised ways of investigating such allegations by the use of legal proceedings or the Ombudsman are appropriate, there will be a risk that there will be considerable public expenditure to little purpose.
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> …

> 83. There must also be a margin of appreciation for the Secretary of State to decide when to hold and when not to hold a public inquiry. The resource implications can be considerable. The Secretary of State's decision in the present case seems to me to be within the margin she must undoubtedly have."

19. Elias LJ, with Sedley LJ forming the majority, stated:

> "103. In my judgment the procedural requirement of an Article 3 investigation will often be less onerous than an Article 2 investigation. I would accept the observation of Sedley LJ that there is not a formal distinction between the requirements for the two Articles, and that in cases of near death, for example, the protection afforded by the two Articles may merge into one another. But what is required depends on the circumstances, and there are typically four significant differences between Article 2 and Article 3 cases which will be likely to be reflected in the appropriate procedures.
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> 104. First, as Mitting J observed, the duty under Article 2 arises from the fact of a death in which the state may in some way be implicated, whereas the duty under Article 3 arises only when there is an arguable breach of the substantive rights. Second, as Lord Phillips pointed out in *L* (para 20) death is always treated as a matter of particularly grave concern and the need for a very full investigation into a death, whether state agents are suspected of being at fault or not, is particularly important. Third, as Lord Rodger observed in the same case, one of the differences between a death and a near death is that in the latter situation a prisoner who has his mental faculties intact, is "prima facie, in a position to take the appropriate civil proceedings afforded by English law in respect of any perceived violation of his article 2 Convention right." A fortiori is that the case where infringements of Article 3 are alleged. Fourth, there are likely to be far fewer Article 3 breaches resulting from systemic wrongdoing. The combination of civil and, if necessary, criminal or disciplinary proceedings will often suffice in those circumstances to meet the Article 3 requirements."

20. Referring to *Banks*, Elias LJ stated, at paragraph 110:

> "In particular, in so far as the case suggests that civil or criminal proceedings will sometimes - indeed will generally - be sufficient to satisfy an Article 3 procedural obligation, it is in my view fully in line with established authorities. Similarly, the case confirms that Article 2 procedural obligations will generally be more stringent than those under Article 3, not least because the victims in the latter case are alive and can pursue their own claims. Finally, it confirms that the scope of an Article 3 investigation is limited in the manner I have indicated.

> It will be remembered that an important feature of the case was that the claimants were seeking to have an investigation into the whole culture of violence in Wormwood Scrubs prison which it was alleged (on powerful evidence) had existed throughout the 1990s. That certainly raises issues going well beyond the circumstances of the particular allegations of ill treatment, and I do not find it surprising that the court felt that this lay outside the scope of an Article 3 investigation. (That is not to say that there may not have been a strong case for an inquiry, but not as an element of an Article 3 obligation.)"

21. Elias LJ did, however, distinguish the case from *Banks* on its facts stating, at paragraph 115:

> "Whilst in many, perhaps most, Article 3 complaints the combination of civil and criminal procedures will be enough to satisfy the Article 3 procedural obligations, I do not think that was the position here. In my judgment there are features of this case which required the Secretary of State to set up an independent investigation in May 2007, even though the alleged breaches are of Article 3 rather than Article 2. Its focus would, however, have had to be the alleged ill treatment and not the wider cultural or institutional difficulties which brought the problems to a head in the first place."

The features identified by Elias LJ, at paragraphs 116 to 118, were that the claimants were in custody and that there was evidence of many defects in the way in which the prison was run, that the allegations included complaints of systemic ill-treatment arising from the methods of managing the disturbance and that many officers were brought into the prison on the relevant night and it would be difficult to identify potential individual wrongdoers.

22. The value of resorting to the PPO was recognised in *AM*, Sedley LJ noting, at paragraph 28, the claimants' acceptance "that their complaints could have been dealt with in conformity with article 3 by an ombudsman investigation", and Longmore LJ referring, at paragraph 81, to "a complaint to the ombudsman being 'an available recourse'."

23. Giving the leading judgment in *P*, Stanley Burnton LJ approved a distinction of approach as between article 2 and article 3 and concluded, at paragraph 58:

> "Article 2 was not engaged in this case, where there was no immediate risk to P's life. Where Article 3 may be engaged, an inquiry is not mandatory. Whether the Secretary of State is bound to conduct an inquiry depends on the circumstances of the case, including the availability of other means of eliciting the relevant facts, such as civil proceedings and investigation by the prison ombudsman. To impose an obligation to hold a Human Rights inquiry has significant resource implications, a matter of growing concern when the resources of public authorities are increasingly constrained. Good reason for an

> Article 3 inquiry must be shown. In the present case, all the relevant facts are known: why P was kept at Feltham and not transferred until after Dr Williams had re-assessed him and why there was some delay thereafter."

24. In *AM* as well as in *P*, the need to consider the demand on resources was recognised, in *AM* by Longmore LJ, at paragraph 83, and by Elias LJ, at paragraph 112. Elias LJ stated that if there were a requirement for an independent inquiry whenever anyone in custody made allegations that there had been a breach of article 3, "the financial cost would be wholly disproportionate to the benefits."

25. In *R (on the application of Mousa) v Secretary of State* [2010] EWHC 3304 (Admin), allegations that claimants were ill-treated by members of the British armed forces while in detention in Iraq were considered. Richards LJ, sitting with Silber J, stated, in the judgment of the Divisional Court, at paragraphs 111 and 112:

> "*AM* makes clear that the mere fact that systemic issues are alleged does not automatically engage an obligation to hold a public inquiry but that such an obligation can extend to systemic issues in an appropriate case. The scope of the investigation required is highly fact-sensitive. The main focus is on the particular allegations of ill-treatment and on the identification and punishment of any wrongdoers, but the investigation may also need to cover questions of system, management and institutional culture where those questions are sufficiently closely related to the ill-treatment alleged.
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> 112. Where the line is to be drawn is a matter of fact and degree."

26. It was held that there is no neat categorisation and Richards LJ referred to the distinction drawn in *AM* "at least by Elias LJ, between the causes of the disturbances at Harmondsworth, which it was not necessary to investigate for the purposes of article 3, and the manner in which the disturbances were managed and controlled, which formed part of the circumstances of the ill-treatment alleged and fell within the scope of the investigative obligation." That is stated to be an example of line-drawing on particular facts.

27. The court in *Mousa* went on to consider the issue of timing. It was held, at paragraph 120:

> "It is clear that article 3 imposes requirements of promptness and reasonable expedition in the discharge of the state's investigative obligation. It seems to us, however, that those requirements can be applied with a sensible degree of flexibility without falling below the standard prescribed by the Convention."

At paragraph 121, it was stated:

> ". . . article 3 cannot require everything to be done at once. It must allow for reasonable phasing of an investigation. The matter must be looked at as a whole when deciding whether the requirements of promptness and expedition have been met. . . . Thus, work directed at fulfilling the main purpose of an article 3 investigation, namely the identification and punishment of wrongdoers, is already in hand. In those circumstances, if there are good reasons for deferring a decision whether to take the additional step of establishing a public inquiry into systemic issues, we do not think that the requirements of promptness and reasonable expedition under article 3 are infringed."

At paragraph 122, it was stated:

> "If delay were liable to jeopardise the effectiveness of any investigation of systemic issues that might ultimately be called for, then that would be a powerful factor against deferral."

28. Having considered the factors involved in that case, the court concluded, at paragraph 134:

> "Taking everything into account, we are satisfied, as we have said, that the investigative obligation under article 3 does not require the Secretary of State to establish an immediate public inquiry. It is possible that a public inquiry will be required in due course, but the need for an inquiry and the precise scope of the issues that any such inquiry should cover can lawfully be left for decision at a future date."

The judgment of Sir Anthony May P

29. The judgment of Sir Anthony May was delivered after the decisions in *AM* and *P* but before the decision in *Mousa*. He accepted the submissions of Mr Eadie, for the Secretary of State, that the court should look at all the circumstances and, if appropriate, at a combination of processes. The availability of civil proceedings may be sufficient either alone or in combination. The fact that an in-house investigation was not by itself article 3 compliant did not deprive it of all value. The court should be astute not to create financial burdens for the state unnecessarily.

30. At paragraph 39, the President referred to the Secretary of State's concession that she was obliged to achieve an article 3 compliant investigation:

> "that is an investigation into the allegation that her [the second appellant's] post traumatic stress disorder resulted from her witnessing an intervention which itself constituted in her case an infringement of her Article 3 rights."

31. The President concluded, at paragraph 40:

> "In the light of this concession by the Secretary of State, the issues in these proceedings are very considerably narrowed.

> Given the acceptance that second claimant now raises an arguable case under Article 3, so as to trigger the investigative obligations, the real issue of substance is whether, as Mr Eadie puts it, that obligation is satisfied by a combination of the PSU report, the claim in civil proceedings which the claimants and others have started, and, if the availability of those proceedings alone are not sufficient, a reference to the Prisons and Probation Ombudsman."

32. The President noted the jurisdiction the PPO would have and stated, at paragraph 42:

> "This in my view is plainly sufficient to encompass an investigation concerning the necessity and appropriateness of the conduct of the intervention on 17th June 2009, including the treatment of the children."

That finding was elaborated somewhat at paragraph 52:

> "Since, as I have said, in my view the Ombudsman's terms of reference are sufficient to enable him to investigate the intervention on 17th June 2009 and its immediately surrounding facts, they are sufficient for an investigation into the extent to which proper protection was provided for the children during and in the aftermath of the intervention, which is the heart of the second claimant's arguable Article 3 claim. The Ombudsman's jurisdiction could also extend to some other matters not within the ambit of an arguable Article 3 claim but that is not a matter for present consideration."

He added, at paragraph 53:

> "In the result therefore the only arguable impediment to the otherwise compliant Ombudsman's investigation which the claimants themselves initiated is the current existence of the civil claims which the claimants have themselves initiated."

33. The President expressed general conclusions at paragraph 59:

> "The notable feature of this case is that the families have actually started their civil litigation in which they actually claimed damages for violation of their Article 3 rights. It seems to me that the resolution of these claims will require the court to determine the very matters which a legitimate Article 3 investigation would need to look at. In the case of the present second claimant, for instance, the court will need to determine whether her psychological trauma, assuming that is established, was the result of an unjustified inadequately planned and executed intervention, which did not adequately take care of the second claimant's welfare and needs. Her case will not stand alone because other claimants have their claims. The court will not be without factual material because of the report and efforts

> of the PSU. The evidential position is unlikely to be much different from that before an Ombudsman or other investigator. There should be little difficulty in identifying individual officers who may be culpable because of their preserved statements and availability of the video tend CCTV material. Those who participated in the planning are all known and recorded. In short, I find it difficult to see how the necessary scope of the civil proceedings would differ from the legitimate scope of an Ombudsman's or other investigator's investigation. I do not see that there are systemic questions beyond an analysis of the system which was actually used in this intervention."

34. The President distinguished the case, on its facts, from *AM*. He stated, at paragraphs 60 and 61:

> "60 . . . I conclude that in the present case the availability of civil proceedings which the claimants have started and are conducting, in the light of the antecedent PSU investigation, fulfils the State's Article 3 investigative obligation and that there is no good reason for the court to require the Secretary of State to put in place a different independent investigation.
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> 61. Whether in the light of this, the claimants choose to enable themselves to proceed before the Ombudsman by discontinuing the present proceedings, or whether the Secretary of State chooses to enable the Ombudsman to proceed notwithstanding civil proceedings are matters for the parties."

35. When considering the claim for declaratory relief, the President repeated his conclusion that "All or most of the evidence that was ever going to be available to any form of investigation has been gathered and preserved by the PSU." He added at paragraph 66:

> ". . . the Secretary of State was not, in my judgment, obliged to institute a snap independent investigation in the summer of 2009."

Submissions

36. Mr Southey accepted that children are not now held in immigration removal centres in the United Kingdom but families may still be removed against their will and those it is intended to remove are accommodated in family accommodation centres. Mr Eadie submitted that the question whether children should be deported at all is in any event well outside the range of enquiries which the alleged breach of article 3 in present circumstances requires. Mr Eadie submitted that the risk of repetition of the incident is minimised by the changes in system that have occurred. Those changes were not explored in any detail in evidence.

37. Mr Southey criticised, in the present context, both the scope and the content of the PSU report. Its terms of reference did not require it to give particular consideration to

whether the planning of the intervention took into account the particular needs of the children involved. The investigation was largely focused on the actions of the detainee custody officers during the intervention itself and their interaction with the children. It was assumed that the Office of the Children's Champion ("OCC") was responsible for promoting the best interests of children when its role was to advise UKBA staff of their responsibilities under the Code of Practice for Keeping Children Safe from Harm. It was also wrongly assumed that Bedfordshire Social Services were involved in the planning process. The two named social workers were under contract to UKBA. Child welfare personnel were not present during the intervention. It would be open to the PPO, on an investigation, to involve child welfare professionals.

38. As to the adequacy of the civil proceedings in an article 3 procedural context, it was submitted that the claims will not be a substitute for an independent investigation of the intervention. Findings of fact will be specific to the claims and will not include recommendations for the treatment of detainees in the future. The claims have a largely compensatory role and are unlikely to determine individual responsibility. It was submitted that the issues are far narrower than those in *Banks* and relate directly to the planning and conduct of the intervention.

39. Mr Southey made the further point that the civil claims may be compromised without a judicial determination of the issues or admissions of fault. Lessons would not be learnt. While the adult claimant could decide for himself whether to settle or proceed, the litigation friend of the infant claimant would be obliged to settle if, on a consideration of the risks of litigation, a reasonable offer was made. In that event, there would be no judicial determination on the relevant issues.

40. Draft terms of reference for a public inquiry have been submitted to the court. These begin with a request for an investigation as to whether the intervention was lawful in the context of the events leading up to it. The other proposed terms relate essentially to a request "to investigate whether the planning process for the intervention on 17 June 2009 was lawful", having regard in particular to the Secretary of State's obligations to the children detained.

41. The PPO would not be obliged to accept complaints where there has been a delay of more than 12 months and the opportunity for investigation may have been lost, it was submitted. Moreover, delay is likely to jeopardize the effectiveness of any investigation, the passage of time making it more difficult to locate and interview witnesses whose memories may in any event have faded. In the meantime, similar interventions may be planned without lessons having been learned. In post-hearing submissions in reply, Mr Southey described present procedures for removal but such evidence cannot be received at this stage. It would not in any event have affected the outcome of this appeal. The best interests of children principle emerging from the 1989 Convention requires states to maintain a continuous system of child impact assessments and an independent inquiry is a necessary part of any such assessments.

42. It was submitted that the duty to order an independent inquiry arose as soon as it was clear that the incident was distressing, had caused children to be separated from their parents and that serious harm had resulted. That was all known to the Secretary of State soon after June 2009 and certainly by October 2009.

43. Mr Eadie referred to the PSU report in detail to demonstrate that the intervention had been carefully planned to minimise its effect on children. He accepted that representatives of Social Services were not present during the intervention itself but they had been involved in its planning.

44. In the PSU report, it was stated, by way of summary, that "the evidence available has shown that an intervention was necessary on Crane Unit because the process had begun to interfere with the good order of the Centre and prevented staff undertaking their duties safely." The planning of the intervention is considered in detail in the report including references to children. Those present at a conference call on the morning of 17 September 2009 included a representative of Bedford Social Services and a representative from the OCC responsible for promoting the views and best interests of all children and young people. The object was stated to be "to ensure that the interests of the children specifically and the impact on the family units were given due consideration." The plan (paragraph 3.8 of report) provided that three detainee custody officers (DCOs) would be designated as child welfare officers. "They will specifically look out for any child who is becoming or is in a distressed state and then take them to a classroom where they will be supervised by a teacher." Annex 6 to the report sets out the mass of material available and retained for any subsequent enquiries, including correspondence, internal PSU communications, complainants' statements, CCTV-video disc and medical records.

45. Mr Eadie advanced nine propositions to be considered in relation to a breach of the procedural requirements of article 3: first, the form of intervention depends on the circumstances and flexibility is required; secondly, even when a breach of article 2 is alleged, it is necessary to consider a combination of processes; thirdly, procedural requirements in article 3 may be less onerous than in article 2; fourthly, the procedural requirement must be focused on article 3 allegations and not be expanded into wider political issues, such as whether children should be deported; fifthly, civil, criminal and disciplinary procedures are often or generally enough to satisfy article 3 procedural requirements; sixthly, civil proceedings may be sufficient, even if they settle; seventhly, the ability to refer to the PPO is both a relevant strand and sufficient in its own right; eighthly, the court must be astute not to put onerous duties on the state unnecessarily; ninthly, a non-independent investigation at the first stage is not problematical in principle, as shown in *Morrison v Independent Police Complaints Commissioner* [2009] EWHC 2589 (Admin), at paragraph 52, citing *Stojnsek v Slovenia* No. 1926/03, Judgment 23 June 2009.

46. In this case, the issues were considered by the police who did not take proceedings. Civil proceedings have been commenced and, since the President's judgment, particulars of claim served. Mr Eadie submitted that their scope is more than sufficient to cover article 3 concerns. He relied on the statement of the ECtHR in *Caraher v United Kingdom*, application no. 24520/94, Judgment 11 January 2000, declaring an application inadmissible. The court stated, at page 16:

> "To the extent that the applicant also alleges that civil proceedings are *per se* an ineffective way of challenging the adequacy of the training of and instructions given to soldiers, the Court would note that civil proceedings are a standard method of challenging negligent conduct and practices of official bodies."

47. In the civil proceedings, the particulars of claim of MM, dated 31 January 2012 are comprehensive and include 163 paragraphs. The claim is for unlawful detention and for damages, including aggravated and exemplary damages. Allegations of conduct contrary to article 3 are made. The events of 17 June 2009 are described in considerable detail as are government policy documents and statements and the Code of Practice for Keeping Children Safe from Harm, issued under the UK Borders Act 2007.

48. AO's particulars of claim, dated 14 February 2012, include 124 paragraphs and claim a declaration that the Secretary of State has acted incompatibly with the claimant's rights under article 3 and 8 of the ECHR and damages, including aggravated and exemplary damages, and just satisfaction for the breach of fundamental rights. False imprisonment, negligence, assault and misfeasance in public office are also alleged. The events leading up to and following the intervention on 17 June 2009 are described and policy documents set out.

49. In reply to the allegation that the procedural obligation arose in 2009, Mr Eadie also relied on the statement of Elias LJ in *AM*, at paragraph 104, that "the duty under article 3 arises only when there is an arguable breach of the substantive rights". There cannot be a breach of article 3 without fault (Stanley Burnton LJ in *P* at paragraph 49). No arguable breach occurred, it was submitted, until Mr Stevens's report was submitted in October 2010.

Conclusions

50. The intervention at Yarl's Wood on 17 June 2009 was UKBA's response to an organised and prolonged protest by a considerable number of detainees at this Immigration Removal Centre. For present purposes, the need for intervention is not seriously challenged and what is criticised is the way in which the intervention was planned and conducted and its consequences managed. The emphasis is upon the particular intervention and, unlike in *AM*, systemic wrongdoing is not alleged. It is accepted on behalf of the Secretary of State that evidence about the intervention and its consequences is sufficient to raise a case under article 3 of the ECHR so that the obligation to consider what investigation is required to comply with article 3 has arisen.

51. Mr Southey's submissions have covered a broad field, but essentially the submission is that the duty arising from the presence of children at Yarl's Wood was such that an independent investigation into the planning of the intervention was required and required promptly. Children are still detained pending removal and, while the system may have changed, the situation which arose at Yarl's Wood in June 2009 may recur. What occurred was unprecedented and unusually distressing. Lessons need to be learnt as to how an intervention should be planned and carried out in such circumstances.

52. Emphasis is placed on the need for an investigation independent of government. It was accepted on behalf of the appellants that an investigation by the PPO would be article 3 compliant but the possibility of such an investigation has been deferred. That puts the Secretary of State in breach of article 3, it was submitted.

53. The submission must be considered in the light of the burgeoning caselaw on this subject. What distinguishes this case from others, it was submitted, is what was described as the child dimension. There is such potential for harm in situations like that at Yarl's Wood that the incident, and in particular its planning, need to be independently investigated so that lessons can be learned.

54. In this context, there was, in my judgment, value in the promptly conducted PSU investigation. It was not independent of government but it was thorough and systematic and involved the marshalling and retention of a considerable amount of evidence. To debate at this stage whether or not its conclusions were sound is not the point; what has to be considered is its relevance to the article 3 procedural duty and, in my judgment, its content gives it significant relevance.

55. The civil proceedings are also relevant, as the cases demonstrate, as a means of investigation and learning lessons. The trials will of course be conducted by an independent judge. The range of issues raised in the pleadings, which were not before the President, is such that, though the trial judge's focus will be upon the facts of a particular case, investigation of the planning and conduct of the intervention will inevitably be required.

56. The possibility of a PPO investigation remains. Any such investigation has been deferred because court proceedings have been commenced and their outcome must not be prejudiced. However, in the performance of his duties, the PPO may well, in the light of those proceedings, conduct a separate investigation. The considerable material, including CCTV footage obtained, and obtained promptly during the PSU investigation, will assist any investigation by the PPO.

57. I do not accept that an independent investigation, whether it takes the form of a public inquiry or some other form, routinely arises upon the occurrence of events such as those at Yarl's Wood on 17 June 2009, even if children are involved. An application must be considered on its merits, having regard to the nature, scale and consequences of the incident, the likelihood of recurrence, and the existence of other investigations conducted or available. The costs involved in a further investigation may also be taken into consideration as a factor.

58. What investigation has been or is being conducted is a very relevant consideration. The issue is put as being a far narrower one than that in *Banks*. It is not suggested that broader issues such as whether children should be deported or detained can in any circumstances be permitted if there is to be compliance with article 3. These are matters for public and political debate.

59. I do not consider that the possibility that the civil claims may settle bears upon the claim for a declaration. Nor do I consider that the child dimension is relevant in that respect. A litigation friend may well decide to settle if that is what duty requires but a state is not obliged to set up a system whereby people, whether adults or children, could continue to litigate even if it was not sensible to do so. I do accept that whether in the event civil claims have proceeded to judgment, or whether they have not, may be a factor in a subsequent decision as to what, if any, further investigation is required. It was the decision of the appellants in these proceedings to bring the civil claims.

60. I have used different terminology because of the way arguments have been put in this court but I respectfully and fully agree with the conclusions of the President as cited in paragraphs 7, 29 and 31 to 35 of this judgment. I express agreement in particular with the President's finding at paragraph 53, cited in paragraph 32 above.

61. The reason a PPO investigation, which would on any view be article 3 compliant, cannot be commenced now is because the appellants have initiated civil proceedings. That exercise of choice does not in present circumstances convert something sufficient into something insufficient. A state is not in general obliged to provide a system in which two avenues of remedy can be pursued in parallel. The option of a PPO investigation once the civil proceedings are resolved remains open.

62. In my judgment, a declaration that the Secretary of State has acted unlawfully in failing to make arrangements for an independent inquiry cannot be granted, even if an arguable breach of substantive rights had been established. The events were not such as to require a snap independent investigation in 2009. Neither is a mandatory order requiring the Secretary of State to do so now required. The standard arising from the Secretary of State's duty in relation to children is a high and comprehensive one. However, events to date, those in June 2009 and subsequently, including the PSU report, the Justice Care report of 24 October 2010, and the appellants' civil proceedings have not given rise to a situation in which a further investigation is required to comply with article 3.

63. I would dismiss this appeal.

Lord Justice Patten :

64. I agree.

Lord Justice McFarlane :

65. I also agree.