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Case No: CO/852/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2017

Before:

MR JUSTICE OUSELEY

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Between:

THE QUEEN	**Claimant**
On the Application of "AB" (a child, by his Litigation Friend)	
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Defendant**
-and-	
YOUTH JUSTICE BOARD	**Interested Party**
-and-	
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

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- -

Dan Squires QC (instructed by **The Howard League for Penal Reform**) for the **Claimant**
Tom Weisselberg QC and **Sarah Hannett** (instructed by the **Government Legal Department**) for the **Defendant** and **Interested Party**
Caoilfhionn Gallagher QC and **Hayley Douglas** (instructed by the **Equality and Human Rights Commission**) for the **Intervener**
Hearing dates: 25-27 April 2017

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Approved Judgment

Mr Justice Ouseley:

1. The Claimant, anonymised as AB because of his youth, who turned 16 after the start of proceedings in February 2017, is serving a 12-month Detention and Training Order, DTO, in Feltham Young Offender Institution. He is due for release in July 2017. His behaviour is, on any view, challenging. He has been removed from association in circumstances which the Claimant's lawyers, the Howard League for Penal Reform, describe as "solitary confinement", and as "prolonged solitary confinement". This is said to involve a breach of the YOI Rules, and Articles 3 and 8 ECHR. The YOI Rules are said to have been further breached in relation to the provision of education.

2. The Secretary of State for Justice, the Defendant, SSJ, and the Youth Justice Board, YJB, the Interested Party, accept that the Claimant's removal from association was, in large part, in breach of the YOI Rules, and that he has not received the education which he should have received. There is a dispute about what remedy is appropriate. They deny that Article 3 was breached but concede at this level that Article 8 was breached in certain respects. The YJB has the general duty to monitor the operation of the youth justice system, advising the SSJ about it, and promoting good practice within it.

The background to AB

3. AB, who was born in 2001, has had a very difficult childhood, suffering emotional and physical abuse, and witnessing domestic violence between his parents, when he was very young. His father, who has drug and alcohol problems, and suffers from schizophrenia, took the 5-year-old AB and his sister hostage in the family home; there was a siege, and when the police entered, the father took an overdose in front of AB and collapsed. He also saw an uncle die from a drug overdose. He was placed on the Child Protection Register when 6 months old and again when 6 years old, because of the likelihood of emotional abuse. His parents could not care for him, and from the age of 7, he has been in a succession of residential placements which all broke down. A full Care Order was made in August 2015. AB has learning difficulties and has had a Statement of Special Educational Needs, SEN, since 2007, amended twice, most recently in 2015. He has been diagnosed as having post-traumatic stress disorder, PTSD, Conduct Disorder and Attention Deficit Hyperactivity Disorder, ADHD.

4. The Claimant has been "known to the police" since he was ten, and has a series of convictions. He received a 12-month DTO in June 2015, which he served in another secure establishment, from which he was released on licence on 23 December 2015. While there he was abused by officers. On 13 April 2016, he received a further 12-month DTO for offences committed before he was sent to a secure training centre, STC, for offences of criminal damage and assault at school (fighting with other pupils, pushing and grabbing a teacher, smashing windows) and, as a thirteen-year-old in 2014 for sexual assault. He was detained in Cookham Wood YOI until 12 October 2016, when he was again released on licence. On 13 January 2017, following earlier pleas of guilty, he received a further 12-month DTO for other offences, some committed in Cookham Wood YOI and some committed after release, in the care home in which the local authority placed him. He also breached the requirements of two periods of conditional discharge.

5. These more recent offences were significant for his management in Feltham YOI. In April 2016, he had assaulted a prison officer by biting him during the course of restraint, and in June 2016 had assaulted an officer, punching him several times in the side of the head. This was a planned revenge attack for being "disrespected." Those were the Cookham Wood offences for which he was sentenced in January 2017. But they were not the only incidents at Cookham Wood. He assaulted officers on three later occasions, first punching one, two weeks later kicking one while staff were attempting to retrieve an improvised weapon, and the next day, 4 September 2016, assaulting three officers by punching one in the face, kicking one in the face and kneeing one in the face. He had to be restrained by staff on occasions and sometimes would struggle; he would try to bite them and spat at them. In the care home, on 2 December 2016, while intoxicated, he indecently exposed himself to and tried to kiss a female carer.

6. He was remanded to Feltham YOI on 10 December 2016, after pleading guilty to the care home offences. He had committed those offences while on bail, after pleading guilty on 22 November 2016 to the assaults on the Cookham Wood YOI officers.

7. The pre-sentence report, PSR, dated 10 December 2016 makes for disturbing reading. He had a history of violent offences, including assaults on members of staff, which appeared to be a pattern of behaviour when faced with a confrontational situation. His long history of physically and verbally aggressive behaviour indicated a child who was likely to have experienced significant harm. His impulsiveness, aggressiveness and destructive tendencies were self-evident. There had been several incidents of his displaying inappropriately sexualised behaviour. He could not articulate himself when frustrated and this led to violent outbursts; a lack of emotional maturity led to his lashing out. He had convictions for arson and possession of CS gas. His current risk of causing serious harm was "High".

8. The author of the PSR also concluded that the offender's risk of "dangerousness" was "High", in the light of his extensive and frequent past offending, his increasingly violent, sexualised and verbally aggressive behaviour whether in a STC or care home, and towards staff or fellow residents. At one, he had had to receive education on a one-to one basis, and he was segregated from young females. He had had to be restrained 8 times within 5 days. An SEN Report from 2015 said that staff, "particularly female staff", were wary of working with him on a one-to-one basis. He had refused to engage with mental health services in relation to his sexualised behaviour on many occasions. Even under 24-hour supervision, care and support, he had still managed to offend.

9. The PSR described the problems he had created in secure accommodation before he was transferred to the STC, where eighteen incidents were recorded against him in eleven weeks. At Cookham Wood YOI, his abusive, aggressive and threatening behaviour to staff and inmates, including the preparation of a weapon, and setting a fire, had led to him being on segregation for a large part of his time there and on "3-officer unlock". That requires three officers to be present whenever he is removed from his room. Less serious versions of some of these incidents were provided on behalf of AB.

10. On arrival at Feltham YOI, the Claimant was placed in the induction unit, Bittern, and immediately put on "single unlock" which means that the young offender cannot leave his room when any other detainees are out of their cells. This has the effect of removal from association. He has remained on single unlock throughout his time at Feltham. He has also been on 3-officer unlock for some of the time there. This regime was deployed at the start of AB's detention, because of his history of violence against prison officers at Cookham Wood. Its later continuation was for his safety. He could not be left alone with any female member of staff because of his conviction for a sexual offence, and indeed his abusive behaviour towards women. This was explained to him.

Removal from association: the Rules and the admitted breaches

11. S47 (1) of the Prisons Act 1952 permits the SSJ to make rules for the regulation and management of YOIs. The Young Offender Institution Rules, SI No.2000/3371, are the relevant Rules.

12. Rule 49 deals with removal from association:

> "(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that an inmate should not associate with other inmates, either generally or for particular purposes, the governor may arrange for the inmate's removal from association for up to 72 hours.
>
> (2) Removal for more than 72 hours may be authorised by the governor in writing who may authorise a further period of removal of up to 14 days.
>
> (2A) Such authority may be renewed for subsequent periods of up to 14 days.
>
> (2B) But the governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days starting with the date the inmate was removed under paragraph (1).
>
> (2C) The Secretary of State may only grant leave for a maximum period of 42 days, but such leave may be renewed for subsequent periods of up to 42 days by the Secretary of State."

13. The policy in the Prison Service Order, PSO, 1700 produced by NOMS, was amended in September 2015, and the relevant guidance is entitled "Reviewing and Authorising Continuing Segregation and Temporary Confinement in Special Accommodation". It imposes requirements stricter than those in the Rules for a young person between 15 and 17 years old. Removal from association for longer than 72 hours, and after each period of 14 days, requires review by the Segregation Review Board, SRB; Rule 49(2) and (2A). Once a young person has been removed from association for a continuous period of 21 days, and at 21 day intervals

thereafter, the authorisations required by Rule 49 (2B) and (2C), are given by the Deputy Director of Custody, DDC, at the National Offender Management Service, NOMS, under the Ministry of Justice. They are external to the YOI. A NOMS Director must also review continuous segregation after 91 days.

14. The SSJ conceded that AB's removal from association had been unlawful from 10 December 2016 until 19 April 2017, except for the period from 1 to 4 March 2017, because of a failure to comply with the procedural requirements contained in the September 2015 Guidance for removal from association for such periods, and so removal was not properly authorised. A declaration to that effect was not opposed. I shall make such a declaration, the terms of which I expect counsel to agree. The SSJ apologised to AB for those failures.

15. The period of removal from association from 10 December 2016 to 1 March 2017 was unlawful because none of the SRB reviews required by the Rules or Guidance had occurred. There should have been SRB reviews after 72 hours and after each period of 14 days. Mr Knight, the Governor of Feltham YOI, said that the first formal SRB review did not take place until 1 March 2017, but the documentation is in the form of an initial authority for segregation. After 21 days and every 21 days thereafter, there should have been DDC reviews. The first DDC review did not take place until 3 February 2017. It authorised AB's removal from association until 24 February 2017, when another DDC review took place. The review on 1 March 2017 authorised removal from association until 4 March 2017. It was only for that period that both the required authorisations were in place.

16. On 6 March 2017, AB was removed from management under R49, which was erroneously thought to mean that he was no longer removed from association. There were no further 14 day SRBs until 27 and 30 March 2017, and again on 5 and 12 April, each then authorising removal from association. There were DDC reviews on 6 and 19 April 2017, each authorising removal from association. However, by 10 March 2017, a NOMS Director was required to undertake a separate review after 91 days continuous segregation, but none took place until 19 April when authorisation for removal from association was granted. At the date of the hearing, the Claimant's removal from association has not contravened the Rules or the Guidance.

17. There were however, weekly Risk Management Meetings, RMM, after 24 January 2017 at which the Claimant was discussed, with a variety of experience and function represented. Their purpose was to agree support plans for young people, who had been removed from association, aimed at returning them to association as soon as possible. There were also Multi-Disciplinary Meetings, MDMs.

18. The SSJ has given evidence about the steps being taken to prevent repeated failures of the sort which occurred in this case, which centre on training officers who make these decisions, highlighting the Rules and Guidance, to make it clear that young people on single unlock are being removed from association and require the application of R49 and Guidance to them. I decline Mr Squires' request to make some unspecified but broader declaration about the policies which it is asserted Feltham YOI, and perhaps other YOIs pursue in relation to segregation and which the Claimant says is unlawful. The Grounds seek no such relief. The brief assertion in the Grounds that there appears to be an unlawful practice of removing offenders

from association informally, and that the position which the Claimant finds himself in is not uncommon, does not warrant a claim that the absence of specific dispute by the SSJ on that point amounts to agreement and affords a basis for a wider declaration. I am not prepared to find that such a practice does exist on the material before me, although the steps to be taken, and the error of 6 March, suggest that this is not a unique occurrence either. AB gave no evidence about any wider practice of informal removal. Dr Laura Janes, a solicitor and Legal Director of the Howard League for Penal Reform, who also acts as AB's solicitor, gave some evidence about it in her first witness statement only three weeks before the hearing. All of this could reinforce the contentions of AB without amounting to a separate claim for relief. Besides, if it is informal segregation which is at issue, and if this case is an example of it, as the Grounds suggest, the declaration which I am making will show that single unlock is removal from association, and requires the application of the Rules and Guidance.

The Rules on education and the admitted breaches

19. S11(2) of the Children Act 2004 requires the Governor of a YOI, amongst others, to make "arrangements for ensuring that- (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children…" Ms Gallagher QC, who appeared for the EHRC and referred to this provision, accepted that on the facts it was now irrelevant to the ECHR grounds of challenge, and academic in relation to R49, although she submitted it remained relevant to the provision of education. The SSJ did not dispute that it was applicable to the YOI. Indeed, Mr Weisselberg said that the YOI had regarded the best interests of the children in the YOI as a primary consideration in how they were treated in detention. Ms Gallagher also referred me to s18A Education Act 1996 which imposes a duty on local authorities to provide for the reasonable needs of children subject to youth detention in their area; suitability required regard to be had to any special educational needs. The provision is interesting for the importance attached to education in detention, but gives rise to no issues in this case.

20. By Rule 3(1), the aim of a YOI shall be "to help offenders to prepare for their return to the outside community". Rule 3(2) states that the aim shall be achieved:

> "in particular, by –(a) Providing a programme of activities, including education, training and work designed to assist offenders to acquire or develop personal responsibility, self-discipline, physical fitness, interests and skills and to obtain suitable employment after release."

21. Rule 37(1) provides:

> "(1) An inmate shall be occupied in a programme of activities provided in accordance with rule 3 which shall include education, training courses, work and physical education."

22. Rule 38 deals with education and provides:

> "(1) Provision shall be made at a young offender institution for the education of inmates by means of programmes of class

> teaching or private study within the normal working week and, so far as practicable, programmes of evening and weekend educational classes or private study. The educational activities shall, so far as practicable, be such as will foster personal responsibility and an inmate's interests and skills and help him to prepare for his return to the community.
>
> (2) In the case of an inmate of compulsory school age, arrangements shall be made for his participation in education or training courses for at least 15 hours a week within the normal working week."

23. Rule 41 covers physical education in these terms:

> "(1) Provision shall be made at a young offender institution for the physical education of inmates within the normal working week, as well as evening and weekend physical recreation. The physical education activities shall be such as will foster personal responsibility and an inmate's interests and skills and encourage him to make good use of his leisure on release.
>
> (2) Arrangements shall be made for each inmate, other than one to whom paragraph (3) and (5) applies, to participate in physical education for at least two hours a week on average or, in the case of inmates detained in such institutions or parts of institutions as the Secretary of State may direct, for at least 1 hour each weekday on average, but outside the hours allotted to education under rule 38(2) in the case of an inmate of compulsory school age."

24. NOMS Guidance to Governors of YOIs, among others with the care and management of children in custody, is that there should be a variety of activities each day in which the young person is involved, and that there should be a training and education programme which meets their individuals needs with an Individual Learning Programme and timetable.

25. Education in YOIs is provided under contracts between the MoJ and education providers which includes a requirement that they offer 27 hours of education per week, and for those unable or unwilling to attend timetabled lessons, the contracts provide for up to 15 hours per week of education to be offered individually or in small groups outside the normal educational environment. A large majority of the teachers are female.

26. Here again, the SSJ conceded that there had been breaches of the Rules. Although an educational assessment had been carried out on 14 December 2016, AB was not allocated to an educational pathway. The pathway consists of the group with which a detainee would attend all lessons, including physical education; it ensures that the group is safe for the individual and provides a suitable curriculum for them. He was not allocated to a pathway while he remained in the induction unit since the pathways are allocated according to the main residence unit to which an offender is sent, and because the risks he posed were being assessed. There were two particular

difficulties: he was on single unlock which meant that the usual small group provision for education was not suitable for him, and most of the teachers were females with whom he was not allowed to be alone. Special provision therefore had to be made.

27. It was not until the MDM of 24 January 2017 that the YOI realised that AB had not been provided with education packs which would have enabled at least some form of private study in his room. These were provided thereafter. During February, AB attended about 5 or 6, hourly or so, sessions from Kinetic Youth, a programme of life skill training intended to help him to reintegrate with other inmates; he was out of his cell for this but on his own, with the male worker. From 16 February, he has been working with the outreach education provider, out of his cell, also on a one to one basis focussing on English and Maths. During the two months to mid-April, he received in total just over 15 hours of teaching.

28. There have been problems even with this level of educational provision: many sessions had to be cancelled because of operational staffing problems; he cannot be out of his room when others are out of theirs, which requires more staff than were he able to mix more normally with other offenders. On a couple of occasions, AB has had to go to other meetings, legal or with the Community Mental Health Team, CMHT, and once decided to go to the gym instead.

29. The SSJ starts from the premise that AB's exclusion from the normal process of education is lawful in the interests of managing the risks he poses to inmates and staff, and to himself as inmates respond to him. That, taken by itself, is not in dispute. There may also be exigencies which, in the short term, prevent the provision of education as the Rules require; these may include an outbreak of disorder or illness, as happened for a short while here, or the sort of event which could lead to exclusion from an ordinary school, pending the making of alternative arrangements. Nicola Davies J, in *R (MA) v Independent Adjudicator HMYOI Ashfield* [2013] EWHC 438 (Admin), said that access to education could not be unfettered when there is a good reason to impose a limit in the interests of sensible steps for managing risk. There had been very serious disturbances at Ashfield YOI, and the inmates had been reintroduced to educational provision gradually for risk management purposes, not punishment.

30. I accept that Rule 38 may have to yield at times to the greater exigencies of managing risk in a YOI, and *Ashfield* provided a very good example. But that is not the substance of the issue here. The Rule should be interpreted so as to accommodate such necessities, but such flexibility has to be limited by the cause of the problem, its degree, duration and the steps being taken to overcome the problem, so as to return to the education required by the Rule. The YJB's evidence from Mr Savage, its Head of Contracts, was that one significant reason for shortfall in educational provision in Feltham YOI was the number who could not receive it either because of the risks they posed to others or which others posed to them; staff shortages had been part of the problem. He identified a number of measures in train to try to deal with it. The SSJ accepts that she has failed to comply with the Rule here but asserts that "it has not been possible" to provide what it required, and that the failure was caused by the difficulties posed by AB to young people, staff and to female teachers.

31. The Rule, however, does not permit education not to be provided for 15 hours a week on that account. It has not been possible to provide it because not enough thought, effort and resources have been put into it. I understand how doing so removes resources from elsewhere for someone who may not be thought deserving of so much attention. But that is not what the Rule permits, and there are obvious reasons why those who are troublesome in the way AB is and for the reasons he is, cannot be left merely to drift in their education, as if they were responsible adults making adult choices. He is in his GCSE year and has special educational needs.

32. The SSJ, quite rightly, accepts that it is not enough simply to point to the difficulties which AB undoubtedly poses, and that not enough has been done here. She does not dispute that a declaration should be granted to the effect that the YOI has not provided the 15 hours of education a week required. Mr Weisselberg assured the Court that the SSJ expected suitable arrangements to be in place from 24 April on, and that Rule 38 would be complied with thereafter. The period of educational provision, 27 hours a week, which the provider has contracted with SSJ to provide to young people in detention, is not relevant.

33. Mr Weisselberg resisted Mr Squires' suggestion that I should issue a mandatory injunction requiring the provision of 15 hours' education, in the terms of the Rule. I agree. A declaration is enough. I hope that counsel can agree a suitable form of words.

34. Besides, it is clear that there is a debate, not fully argued at all, about the extent to which private study, through the provision of work sheets, complies with Rule 38(2). As Ms Gallagher pointed out, there had been no assessment of his ability to advance his education through such sheets. An injunction should tell the recipient exactly what she has to do, and so to avoid contempt proceedings. It would be quite wrong to grant an injunction in such general terms, and then for an issue as to the meaning of the Rules to be determined in the course of a committal application, which requires the contempt to be proved to the criminal standard. Such proceedings, were there any reasonable doubt about what was required, would be bound to fail. There may also be other issues to which such a general provision could give rise, and the ability of AB to avoid education on a day to day basis cannot be denied. He cannot put someone at risk of contempt proceedings by his own refusal to co-operate, however difficult his circumstances may be, however many his needs and however much he should receive very particular care. Mr Squires' proposal, for a generally expressed but nonetheless mandatory injunction, fails at an elementary level.

Article 3 ECHR: the law in general

35. This is the main issue between the parties in the light of the concessions made by the SSJ and the remedial measures being put in place to ensure compliance with the procedural requirements for removal from association, and the provision of education. Article 3 ECHR is invoked by AB to strike at what Mr Squires contends is solitary confinement. If it exceeds 15 days, he contends that it is prolonged solitary confinement, and therefore inhuman or degrading treatment in breach of Article 3, incapable of justification. Mr Weisselberg submits that whether treatment is inhuman or degrading in breach of Article 3 depends on all the facts, rather than upon rigid rules, good for all time and circumstance. The facts therefore need to be

examined; they are very largely not at issue, but aspects received quite different emphases.

36. Article 3 prohibits anyone being "subjected to torture or inhuman or degrading treatment or punishment." It is "inhuman and degrading treatment" which is alleged in this case. Such ill-treatment must reach a "minimum level of severity" if it is to fall within the scope of Article 3.

37. Whether the treatment in question reaches that minimum level depends on the facts. The ECtHR has emphasised that this calls for "an intensely fact-sensitive inquiry"; see also *R (Dennehy) v Secretary of State for Justice* [2016] EWHC 1219 (Admin), [99] Singh J. Where the threshold is crossed, "it is not permissible for the state to seek to justify its treatment of the person concerned", as Singh J said in that same paragraph. But that is not to say that the reason for the treatment is irrelevant to whether the threshold is crossed.

Article 3: The treatment of AB in Feltham YOI

38. There is no suggestion that the physical conditions of the YOI or of AB's cell or room, as it is sometimes called, breached Article 3. The focus of the claim is on the regime of removal from association, with single unlock, which meant that he was allowed out of his cell for half an hour a day. Three-officer unlock reinforced the difficulties of letting him out of his cell.

39. As I have said, AB was placed in the induction unit on arrival on 10 December 2016, was removed from association and placed on single and three-officer unlock. This was based upon his record of behaviour at Cookham Wood YOI. Mr Squires points out that there are no records of the reasons for this; that may be so, but I am quite satisfied from all the material that that was the reason, rather than it being simply happenstance or malevolence. On 11 December, on his time out of his cell, he played table tennis with an officer as he was to do on 4 occasions in the period to the end of January. On 12 December 2016, the social worker assessed AB: he had no physical health problems, but he had ADHD, PTSD and Conduct Disorder; he was not taking all the medication he should because it was not all available to him. He had no current thoughts of suicide or self-harm, and was eating and sleeping well. Certain contact arrangements were made, including obtaining his solicitor's contact number. He was also seen by the Community Psychiatric Nurse and the CMHT. This included review by a consultant psychiatrist and an associate specialist. He was immediately placed on the agenda for the weekly Risk Management Meeting, RMM. The case notes record at induction that AB "knows a lot of boys" at Feltham.

40. On 14 December, he had an educational assessment. But he started shouting through his door, "most of the afternoon", demanding that staff attend to him, pressing his bell wanting things, and then becoming abusive and threatening, telling an officer to watch himself when AB got out, and to check out how many staff he had "banged out" at Cookham Wood. This led, two days later, to his being awarded 7 days' loss of television, association, 50% of earnings and canteen. His induction was not yet complete. On 15 December, the Unit Manager spoke to him about shouting out of his door at other "YPs" (young persons); AB asked how he could come off three officer unlock, and was told that his behaviour at Cookham Wood

was the reason for it, and how he behaved at Feltham would decide how his risk to officers was assessed. It became a sensible discussion. AB's case worker also first saw him that day, and "answered his numerous questions," setting boundaries and explaining how things worked, which he accepted, saying that he did not want trouble but a fresh start.

41. On 16 December, AB, at his request, saw a member of the CMHT. He also asked about a behavioural chart for short term goals and punishments which he had found helpful at Cookham Wood. He was worried about his behaviour when on 7 day losses, which could lead to him becoming frustrated, smashing his cell or trying to assault others. He had no other strategies for dealing with this frustration.

42. On 18 December, AB made racially and religiously insulting comments to and about Muslims and Islam, for which he was awarded a further 7 days losses as before. He was to remain on single unlock because it was thought his safety would be compromised were he unlocked with others after such abuse. But he maintained his "habit of shouting out of his door and stirring things up on the unit." AB's safeguard induction was completed on 20 December, with him identifying those whom he knew in Feltham and where he came from. In his conversation with staff when out of his cell, he was aware that he would be moved off the induction unit soon, but not to the unit he requested as it was full. The case notes record that over the Christmas period, he refused to go for his medication on one occasion, spent one morning ringing his bell to see anyone to get him out of his cell, and on another day complained again that he was not allowed to call his brother, aged under 18, whom he had been refused permission to call.

43. AB's social welfare check was completed on 29 or 30 December. On 29 December, he continued to complain about the refusal of permission to call his brother. He threatened to smash the face of anyone who affected that relationship, and that he would attack staff just as he had done at Cookham Wood, if the sentence he received at the imminent court hearing treated him as a public danger. He also threatened that he would "kick off" if he was sent to units he did not want to go to, where he knew young people he did not get on with, and did not go to the one which he had chosen. He had a further conversation with the social worker next day, who updated him on the expected arrival of work booklets for his education. He also played table tennis with staff that day, as happened on a number of occasions. He was "desperate" to be moved from the induction unit.

44. AB was moved to Heron Unit, as he had recently said he wanted, on 2 January 2017. He was moved with the intention of attempting to reintegrate him with different young people. He had not been moved earlier as non-essential moves had been on hold because of an outbreak of norovirus at the YOI. He remained on single unlock and three officer unlock. Within a few hours, he told a joke to the unit which he did not regard as racist; but it would readily be taken as such and indeed was; the case notes record that "the unit didn't take kindly to this." He was threatened by others. On 10 January 2017, his case worker saw him at his request and various points were discussed; he had a substance issue assessment also on 10 January 2017, with which he decided to engage.

45. On 11 January 2017, AB was returned to the induction unit, because his behaviour had made integration on Heron impossible. It was hoped that he could be prepared

for a move to another unit from the induction unit. By the next day, he was recorded as having "already unsettled the unit with shouting out." He had shouted out that he was the boss on the wing, one YP had been assaulted by a group in the STC, and shouted out sexual threats to YPs' mothers and families. He made racist comments. Other YPs started to shout back in retaliation, to which AB responded by threatening to assault staff if YPs continued to shout at him. AB complained that server workers were tampering with his food so he had to have it brought to his cell. He otherwise collected it from the canteen.

46. On 13 January 2017, AB attended court and was sentenced to a 12 months DTO. Next day, his abuse of staff when told that he only had ten minutes left out of his cell, led to the Governor talking to him to calm him down. But next day, he threatened to "smash" a particular officer's face when he next came out of his cell, because the officer had refused to unlock AB first, to collect his meal. He told an officer that he would do "whatever it took to get transferred out" to Cookham Wood; this was perceived as a threat. Cookham Wood refused to have him back because of his behaviour there. The case notes record his behaviour as worsening, and that he had no ability to understand the rules; he was spending most of the day shouting out of his door, demanding things. On 18 January, he shouted abuse at the YPs on the unit; and received a further adjudication for 7 days' losses, as before. This also generated a "Positive Attitudes Created Together", PACT, a monitoring tool where behaviour has become unacceptable, with the aim of assessing the individual, and then planning for interventions; it can also be used to plan for reintegration of those removed from association.

47. Next day, he was again removed from the induction unit, this time to Eagle Unit, with the same aim of attempting to integrate him with others. The Governor spoke to his social worker and to Barnardo's about AB's time out of his cell. The same pattern of behaviour persisted for a day or so: abuse yelled at other YPs on the Unit, abuse of staff, constant use of the bell, and warnings. Staff, social worker and Barnardo's had conversations with AB about his behaviour. He asserted that his rights were being breached by the single unlock. But on 22 January, he is recorded as having made a "good start" on Eagle, polite, respectful and compliant.

48. The first MDM was held on 24 January; the Youth Justice Board wanted to look at moving AB back to Cookham Wood. AB's caseworker, a psychologist, a representative of the Youth Offending Team, a Youth Justice Board monitor and AB himself were present. AB wanted to receive education, in English and Maths in particular, as he would be taking exams in them, were he not in detention. AB was now taking his ADHD medication every day. He needed money from his social worker because he was still paying fines for the damage he had caused at Cookham Wood, and it was agreed both that this would be chased and that it was a positive sign that he had not damaged anything in his time at Feltham. Those present, perhaps AB apart, agreed that he should not be moved from Feltham because he was beginning to make positive relationships there. AB was told that Cookham Wood had refused to take him anyway; the talk of a transfer was seen as a distraction. Various interventions and programmes were discussed with him and he was encouraged to take them, including those to address substance misuse, but he needed to address short term goals so as to come off single unlock, including by obeying unit rules and not shouting abuse out of his cell. AB agreed to try his best

with them. He accepted that he did not ask for and would not receive visits from his parents as he was worried that they would be attacked; no reason for that is given in the notes. On 29 January, the Initial Health Screen form for segregation was completed. On 31 January, he was given a warning for rudeness, abuse and constant misuse of his cell bell; but the case notes record that he was settling in well on Eagle Unit, and beginning to develop positive relationships with staff. He was seen by the CMHT, for support with his ADHD. He had been making regular phone calls to permitted numbers.

49. A DDC review of AB's removal from association on 2 February authorised removal from association until 24 February. The review said that his current isolation was "solely based on a desire to keep him safe from harm from others." AB was receiving support from his caseworker, social worker and unit staff. Their primary focus was to keep AB safe from harm and to "recognise the efforts made to safely integrate him." It was AB's behaviour which "has driven the current situation." The DDC recommended a short-term assessment of risk and need, STARN, and a MDM to address AB's needs. Mr Squires saw 2 February as the end of the first phase of AB's detention in which he had had no education, no face to face contact with any other YP, and was accompanied by two officers when he went for his morning ADHD medication and during the half hour he used for showering, making a telephone call and exercise, which he did alone unless he was playing table tennis with an officer.

50. Mr Squires' second phase to 16 February 2017 covered the period when AB began to receive weekly sessions of the Kinetic Youth programme, each lasting about one hour, which he attended alone but out of his cell. These were intended to provide a form of life skills, through developing the ability to engage in discussions in meetings, and presentational skills, with a democratic political theme. The case notes record that he had misused the cell bell, spat at an officer and thrown an unknown liquid at him; he had fashioned a "shank" out of a plastic knife, and that, one day, 9 February, he had been out of his cell for most of the morning to meet the CMHT and his lawyers. Arrangements were being made for him to use the gym for an hour a week on a one-to -one basis. He started this on 10 February and it has continued regularly. Also on 10 February, the Head of Therapies, a Chartered Psychologist, noted that AB's behaviour had stabilised in terms of a safe system of work. But the persistence and variety of his sexualised behaviour meant that the "no lone female contact" should continue, though it said that the records showed no incidents of sexualised behaviour since arrival at Feltham. If he continued in this way, and subject to assessment, an "awareness note" so far as lone females were concerned should suffice. She hoped to engage in work with him on his sexualised behaviour soon. On 16 February, he was rebuked for shouting crude, sexual comments to a female interventions officer. An Initial Health Screen form was again completed.

51. A trainee psychologist, Ms Anderson, completed the STARN recommended by the DDC on 13 February. The assessment was needed because he had been on single unlock since arrival and his behaviour towards YPs made it difficult to integrate him safely into the mainstream. The assessment was to address his outstanding needs. It was not an assessment of AB's ability to cope with removal from association or of the risk AB posed to women. Ms Anderson thought that AB's safety and security,

and that of others, was compromised due to his attitudes and behaviour; interventions to develop his self-control and to counter his attitudes towards the use of violence were required; discussions with a personal officer or member of the chaplaincy were recommended to address his racial comments and their impact. He should be referred to CMHT for therapeutic assessments concerning trauma and sexual behaviour; a personal officer should be allocated to help him engage with this work. He needed to be motivated to set goals and to change his behaviour, for which he would need support and guidance.

52. On 15 February, there was a second MDM, which AB (for 20 minutes), his solicitor and thirteen others attended. The consensus was that AB should remain at Feltham, and not go to Cookham Wood, which he still wanted; and his risk to others meant that he should not be placed in a secure children's home or secure training centre. A plan for his time in detention and upon his release was required. AB was not getting his gym sessions or open air exercise because of a lack of resources. There was to be a review in three weeks. A plan was to be created. This ended Mr Squires' second phase.

53. Mr Squires' phase three marked the point at which AB began to receive one-to-one English and Maths lessons, though these were intermittent and of varying duration. Gym sessions started again on 21 February, but he was told that he needed to improve his attitude if he wished to continue them. The records show incidents of abuse towards officers, including racist comments, and threats, and sexually abusive notes thrown out of his cell. He had been told several times that this was inappropriate, but he had not been placed on report. He was also seen by staff about contact with his brother and girlfriend, both under 18, and telephone contact with his father. On 23 February, another Initial Health Screen form was completed. AB was moved from Eagle Unit to Heron on 24 February because other YPs had been throwing faeces through his door; this was an "ongoing issue", seen as the reaction of "collective dislike" for AB by other YPs because of the racial abuse and sexualised language he shouted at them from his cell. The restrictions on telephone contact with the parents was discussed with them by the YOI social worker. The further DDC review of the removal from association on 24 February noted that AB's removal from association was still justified because of the need to safeguard him.

54. It seems that at a point between about 2 and 11 January, concerns about the effect of AB's behaviour or his own safety from other inmates was adding to the concerns, present from the outset, about the risk he posed to the safety of officers and staff. However, by about this time, judging from the 17 March witness statement of Mr Knight, Governor of the YOI, segregation once based on their initial concern for the safety of staff, as a result of AB's behaviour at Cookham Wood, had moved to a view that that could now be managed, but that his past and continuing behaviour towards other young people created a risk towards him, and required segregation for his own safety, while that issue was tackled. But risk to staff remained present, coming to the fore on later occasions. Mr Knight set out the measures which were being taken and were to be taken to address the problems. He estimated that at around the time of this statement, AB was spending about three hours out of his cell each day. Dr Janes estimated that he was out of his cell for around two hours a day only when he got to Wren, after 23 March. She had written to Mr Knight about this

3 hour estimate but had received no reply by the time of her second statement of 23 April. The dispute between Dr Janes and Mr Knight over the details of AB's regime continued through further witness statements.

55. AB's arrival on Heron appears to have been quiet but for one period of shouting through his cell door. On 1 March, formal authority for removal from association was given until 4 March, the brief period for which AB's removal complied with Rule 49. The reasons given for his separation on Heron were "the risks he poses to others & being at risk from others due to racist, violent & sexually inappropriate behaviours towards other YPs & staff." He received a slightly more elaborate version of this, which also referred to the failure of all attempts to re-integrate him. The next Initial Health Screen form said that he would remain segregated until 4 March 2017, when there should have been an SRB review.

56. On 2 March, AB began to take his exercise with another YP, P, with whom he built a good relationship. This is what marks the end of Mr Squires' third phase and the start of his fourth, which lasted to 23 March 2017, when AB moved to Wren. There were various occasions when he had conversations with staff, in or out of his cell; he made a threat to "smack" an officer, and made an inappropriate sexual comment to a female health care assistant, then swearing at her.

57. On 6 March, a manager concluded that he was no longer being managed under R49, because of his association with another prisoner. This uncommunicated misunderstanding led to the cancellation of a DDC and SRB reviews which were due to take place. He was not placed under R49 management again until 27 March, although he continued to be discussed at the weekly RMMs.

58. On 8 March, AB agreed to attend offender behaviour courses, due to start in a week or so. However, on 13 March, AB made a threat to a female officer that he was going to cut her face, and when told that was unacceptable, said that he did not like her; but he would try to think before he said things. While the paperwork for the adjudication was being prepared, he made a further serious threat to the same officer.

59. This led to AB being moved from Heron to Jay Unit, along with P; they continued to exercise together if their behaviour was good. The first few days after his arrival on Jay on 16 March show positive remarks about his behaviour, engaging well with his intervention programmes and psychologist. On 21 March, however, AB set a fire in his cell, lighting tissues in his waste bin; he panicked as it caught and tried to put it out with tap water, and then emptied the contents down the toilet. He was angry at being bullied and taunted by fellow YPs, and wanted to get out of his cell and out of the unit. He had got annoyed at the noise a neighbour was making and had accidentally broken his television. The Fire Brigade was called but had nothing to do.

60. After a night on Heron, AB was moved to Wren on 23 March, which it was thought would have a calmer atmosphere, and would be "a place of safety". This is the start of Mr Squires' fifth phase up to 15 April 2017, when the sixth and final phase began. Wren is a health care unit, and deals with those with mental health problems, or substance misuse problems, as well as providing respite for those with complex needs in custody. It would also permit AB still to have a television in his

room, which was important to him; he still could not safely mix with other YPs on Wren, because of the variety of problems which they all had. On 27 March a mistakenly "initial" segregation authority was given; an SRB was to follow in 72 hours. An Initial Health Screen form was again completed. On 30 March, and on 5 and 12 April, SRBs were conducted and further Initial Health Screen forms were completed. AB continued to have access to the gym. There are records of problems still, but a number of days passed without significant ones, with periods of good behaviour and compliance with requirements such as removing pictures of naked women from his walls, although argumentative at other times. He was engaging better with the psychologist.

61. On 6 April, he swore and threw a broom handle at an officer's chest when he was told that he had to clean his room daily. There was also a DDC review: removal from association continued to be necessary to keep AB safe from harm, but it was disappointing that the efforts to integrate him had not made greater progress. There was a further SRB on 12 April, which noted that AB's behaviour had "slipped somewhat". Again it was thought that he could not mix safely with others, but the prospect of a move to another unit from Wren caused AB great anxiety.

62. There are no records of anything untoward then until 15 April, when AB was moved from Wren to Ibis, the Care and Separation Unit. His behaviour had been deteriorating, and he had been warned that he would be moved if that continued. He then blockaded his door, was on a dirty protest with faeces and urine on his room floor; he dismantled a cupboard door, and used it and the kettle plug as a weapon, smashing up some of the contents of the room. He threw hot water at the staff, and greased his body to make removal difficult. AB said later that he had done this as he was angry at receiving an adjudication for something he had not done. On Ibis, he received daily visits from the Duty Governor.

63. A further MDM took place on 19 April, attended by much the same group of people including AB's solicitor, with AB joining for the last part of the meeting. The Head of Admissions said that AB had been offered regular weekly gym sessions, but had not always taken them up. AB later said that apart from the one when he was on adjudication, he had always taken them up. AB was being offered open air exercise sessions but did decline them at times. Education was problematic in Wren as AB did not like working in his room; he also found it difficult to concentrate for more than half an hour at a time, but he had been out of his room on Wren for over three hours a day. AB received regular welfare checks. The risk assessment plan for AB to mix with selected other YPs had been completed but AB was having quite a negative influence on P. There had been a decline in his behaviour with racist comments and threats. The possibility of a place in a secure children's home was considered, at the request of Dr Janes and AB, but was later concluded by the YJB to be inappropriate for AB. There was a discussion about AB being removed from Ibis; one participant said that he would not remain in it; but attempts at reintegration had also failed. A return to Wren, the Healthcare Unit, was mooted. Dr Janes' third witness statement said that the impression had been that change of unit to permit integration with other young people was some way off. AB, when he joined, said that he was angry at being in his cell for 24 hours a day, and without television, and at his losses; he wanted to work with the psychologist and needed to be active to stay out of trouble.

64. The case notes record that on 20 April, AB had told the Duty Governor that he wanted to remain on single unlock, and have his hour out each day. On 21 April, however, officers were set to move AB from Ibis back to the induction unit for a fresh start; this was to involve his careful reintroduction to association with selected young people and enough staff to prevent trouble. Dr Janes said that she did not know of this proposed move, it was not discussed at the meeting on 19 April, and that it had not been discussed with her: AB was very concerned about the potential risk to his safety of being reintegrated. After an episode of shouted racial abuse, as AB's removal was being prepared, another young person passed AB an envelope which AB refused to hand over, and inserted into himself so far that it could not be reached with a full search. The staff suspected this was "spice". The move did not take place.

65. Next day, Saturday 22 April, an incident took place which, as described by Mr Knight involved assaults, attempted hitting with the broom, punching, and the attempted choking of an officer even when AB was being restrained.

66. On Sunday 23 April, in paragraphs 6 and 7 of his third statement, Mr Knight describes a yet graver incident. After repeated misuse of his bell and shouting at staff, there came a time, 22.30 approximately when he again pressed the bell; staff thought that he was choking under his bed, and entered the room wearing protective clothing. AB became very violent; it took 15 minutes to bring him under control. He bit one officer on the face, and kicked two others in the stomach; one female officer was taken to hospital in an ambulance, where she remained next day; another attended A&E. The matter is now being investigated by the police, including, Dr Janes said in a recent email, the possibility that AB may have been the victim of offences by officers. The Claimant's solicitors informed the Court that the investigation with the Claimant as the alleged victim led to a decision to take "no further action" against two officers "but with recommendations that the prison deal with the matter internally". I read that, and her comments in her third statement, as all relating to the events of the Sunday.

67. Staff now felt that AB was at risk of self-harm and opened the necessary file. The three officer unlock is also now with a camera. He will remain in Ibis until he can be moved safely elsewhere.

68. AB described how he felt in his witness statements. He had a television in his room, and said that all he could do was to lie on his bed to watch it. Other YPs would turn the power off, to stop him watching and he would have to get the Governor to turn it back on. He found books boring, and felt tired from doing nothing and having no motivation. He sometimes had bad dreams.

69. A registered nurse certified AB as fit to be removed from segregation on seven occasions between 29 January and 12 April 2017, and a GP did so once. The form used was the Initial Health Screen which required a flowchart to be completed, one box of which asked whether the YP would be "able to 'cope' with a period of segregation", and another whether the practitioner thought that the YP's mental health "would deteriorate significantly if segregated". AB was seen on four occasions by the CMHT, and was taken to the health centre to see a nurse each day for his ADHD medication, which AB said took about 10-20 minutes, in addition to

his half hour out. AB received roughly weekly input from the psychologist from 8 March.

The Hales-Adshead Joint Report and other evidence

70. On behalf of AB, there was a joint report from Dr Hales, a consultant psychiatrist in adolescent forensic psychiatry, currently a consultant at Cookham Wood YOI, and Dr Adshead, a consultant psychiatrist in adult forensic psychiatry and psychotherapist, both approved under s12(2) of the Mental Health Act 1983. It related to AB himself, and is dated 4 April 2017.

71. Dr Hales drew on the assessment of AB which she had prepared in August 2016, the discharge notes she had written as AB's treating psychiatrist at Cookham Wood, and a one hour interview on 27 March 2017 at Feltham YOI.

72. AB was reviewed at Feltham YOI by the consultant psychiatrist and an associate specialist on 12 December. He was put on one of the medications he had been taking at Cookham Wood on 13 December, but declined to take up the offer of the other, until 23 December, following a medical review on 20 December. She referred to the YOI records of his challenging behaviour, and to the medical records.

73. Dr Hales noted the problem which the practice that he could not be alone with a woman had had for his education; she said that she had met AB alone on legal visits with officers outside, and, knowing AB well, did not feel threatened by him at any time, nor had the officers bringing AB to her expressed concern that he was a risk to her. At interview with her, AB showed no formal thought disorder, his speech was coherent, he had no psychotic symptoms and was alert and orientated. He described himself as bored, "cheeky" and as having mixed feelings about medication. Staff, he said, were "strict but fair" except for his removal from association which was "strict but unfair".

74. She analysed the position as follows:

> "3.37 AB presented as much the same as when I met with him regularly at HMYOI Cookham Wood. His medical notes indicate recurrent impulsivity with him making frequent rude / abusive statements that could be considered rude or threatening but were just things he said without thinking. On assessment, he showed some signs of maturity compared to when he was a HMYOI Cookham Wood, noting that if he had a private therapist he would be able to continue therapy on leaving prison. He was able to talk about his behaviour towards officers and noted that he had not assaulted any. However, he was not yet able to think about why his behaviour may have placed him at risk from peers; this is consistent with the institutionalisation he has had during childhood, in open and secure accommodation. Furthermore, his shouting out of abusive things to peers is also a common presentation of young people with ADHD and conduct disorder."

75. Dr Hales diagnosed AB as having "ADHD, which required high dose medication to control the impulsivity, hyperactivity and poor attention." She also diagnosed a "mixed disorder of conduct and emotions of childhood." His history of childhood neglect and abuse led him to mistrust those in authority; he pushed boundaries to test whether they were caring but firm. He found it hard to accept care and consideration as that had not been part of his childhood. That explained his conduct disorder: breaking rules, being "assaultative" and threatening to those in authority or trying to care for him. These behaviours, uncorrected, could fulfil the criteria for "a mixture of borderline and antisocial personality disorder."

76. She continued: "A young person with ADHD would find remaining alone in a cell with little activity very difficult to manage. As AB himself noted, when bored he can be naughty. Those with ADHD need a full timetable to keep their minds and bodies active to prevent them from engaging in negative behaviours due to boredom." His childhood traumas meant that those in authority needed to be able to understand what he was trying to communicate through his behaviour and to encourage him positively to engage in prosocial communication.

77. It was Dr Adshead's task in the joint report to comment on the "impact of solitary confinement" on AB. She specifically wished [4.1] to draw the Court's attention to the general international "policy and professional consensus that children and young people should not be held in conditions of solitary confinement because there is evidence that solitary confinement can:

(a) cause direct harm to mental health,
(b) worsen any pre-existing mental health condition and
(c) affect the development of important neural connections in the brain that specifically take place during puberty and adolescence."

She summarised the effect of a number of papers about the adverse effect of solitary confinement on adults, children and on those who have experienced childhood trauma. She then said this, followed by the joint conclusions:

> "4.7 In a case like AB's, the concern must be that solitary confinement is acting as a further form of childhood trauma and adversity; that induces fear, anger, social isolation and shame. AB has indicated that he believes that he has been placed in solitary confinement as punishment, and to make him feel bad for things he has done. It does not appear from Dr Hale's interview that he experiences being 'banged up' as protection.
>
> 4.8 Further, there is evidence that AB is already psychologically vulnerable and may therefore be especially vulnerable to the effects of isolation. It is known that he had been exposed to significant childhood adversity in the form of (i) parental substance misuse (ii) parental mental health problems (iii) exposure to domestic violence in the home and (iv) exposure to emotional abuse. AB has already been diagnosed with PTSD because of some of these events.

> 4.9 Therefore, in a case like AB's, there are grounds for concern that the experience of solitary confinement may significantly increase the risk that (a) there will be an exacerbation of the damage that has been done by previous childhood adversity and (b) the confinement itself will act as a further form of adversity that will make his mental health problems worse not better. This effect will be both short term but also may be long term into adulthood.
>
> **5 Conclusion by Dr Hales and Dr Adshead**
>
> 5.1 There is evidence that prolonged solitary confinement of children creates a significant risk of causing long term psychiatric harm; that is especially so for people with pre-existing mental health conditions, like AB. Placing children like AB in solitary confinement for prolonged periods creates a risk of long term harm which may not be detected at the time because of the uncertain effect on neuronal development. Effects might be quite subtle; and not manifest themselves until some other stressor takes place; this is common post-traumatic process.
>
> 5.2 Further, there is a strong professional consensus that solitary confinement is especially risky for adolescents and should not be used."

78. Dr Janes gave some evidence in her witness statement of 5 April that the problems faced by AB were "systemic" in Feltham YOI, at least, based on her experience of representing clients detained there. She described how she found AB on her visits, and attributed tiredness, lethargy, extreme twitchiness and anxiety to the effects of isolation, as she had noticed with others. She expressed her concern that AB was being adversely affected in the short and long term by the impact of what she termed "prolonged solitary confinement." AB, she said, did not present with particularly unusual features for a young person in custody, acting for whom had given her some experience. Dr Janes later expressly denied that this was or was intended to give the impression of being expert evidence.

79. Mr Knight responded to this in his second statement, quoting what Healthcare had told him: no concerns had been raised about the restricted regime having a significant impact on AB, though it was agreed that it would have an impact in the short and long term. There had also been an improvement in AB's engagement with services and in his behaviour at Feltham compared to his previous stays, which countered what Dr Janes said to a degree.

80. Dr Janes also referred to other ways of managing AB, including the use of a secure children's home, a route she had raised at the MDM, and which had been rejected after consideration and with reasons, whenever raised by those who had the responsibility for dealing with AB.

81. Mr Squires put considerable weight on a decision of the Federal District Court for New York in *VW and Others v Ondaga County Sheriff* (2017 WL 696808, 22

February 2017). A group of 16-17 year olds, held in conditions of confinement like those, he said, in which AB was held, alleged that this breached the US Constitution 8th Amendment prohibiting "cruel and unusual punishment". The District Judge granted a preliminary injunction requiring the 23-hour solitary confinement to cease immediately. The regime was in place for the safety of inmates and staff, and the Judge accepted that a clear entitlement to relief had to be shown for such an order at that stage, or that, without such relief, very serious damage would result. He accepted that "juveniles face an objectively sufficiently serious risk of harm from the solitary confinement practices at the Justice Center." He accepted expert evidence of a "broad consensus among the scientific and professional community that juveniles are psychologically more vulnerable than adults… Juveniles shared the same increased vulnerability to long-term or even permanent, psychological damage." He rejected the Center's argument that the continued practice of solitary confinement was necessary for the maintenance of discipline.

82. One of the experts whose evidence the District Judge accepted was Dr Kraus, Professor of Child and Adolescent Psychiatry in Chicago's Rush University Medical Center. His evidence was submitted to me as an exhibit to the witness statement of Dr Janes. This evidence consisted of his report in *VW*, annexed to a short report on AB, with an appropriate statement about his duty to the court. He set out a brief description of AB's regime and circumstances, along with references to AB's own statement about how he felt tired and without motivation. This he described as solitary confinement. His opinion was that there was a high likelihood that children in correctional facilities would have underlying severe mental health problems, which such a regime would worsen. Solitary confinement for juveniles worsened or made likely mental health concerns including PTSD, psychosis, anxiety disorder, major depression, hypervigilance, agitation, lack of trust and suicidal ideation or behaviour. AB's regime was "likely to create a significant risk of the child suffering the kinds of long-term consequences" to which I have referred. If an adolescent were traumatised in certain ways, it could cause permanent changes in brain development; trauma caused by solitary confinement created a high likelihood of such changes. These were more likely in those already suffering from mental illness, because the trauma of social isolation was increased. His report for VW also said that those juveniles who were in or who had been in solitary confinement and were not currently exhibiting obvious serious harm are at risk of harm; it can lead to some of the symptoms already noted, but some juveniles may be good at concealing them. He stated that there was "a clear medical consensus that for those juveniles with mental illness, the risk of serious harm [from solitary confinement] is especially great." And later: "Medical professionals, including organisations like the American Medical Association, agree that juveniles with mental illnesses should not be placed in solitary confinement for longer than one hour without a comprehensive evaluation from a physician. Solitary confinement should never be used to punish people with mental illnesses." Dr Adshead agreed, in her report, with what Dr Kraus had said in his report for *VW*.

83. Dr Janes also exhibited the report in *VW* of Dr Krisberg an expert in Corrections law, which is valuable for its description of the physical conditions in the Center about which Dr Kraus expressed his opinions. They were "deplorable…amongst the worst that I had seen in my decades of touring correctional facilities."

The case law on segregation

84. There is no Strasbourg authority on segregation or removal from association of children. The segregation of adults, however, has been considered by the Strasbourg Court and by the Supreme Court.

85. In *Ramirez-Sanchez v France* (2007) 45 EHRR 49 at [118] the ECtHR said:

> "The Court has considered treatment to be 'inhuman' because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment is 'degrading' within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3."

The Court continued at [119] saying that the treatment, to breach Article 3, had to "go beyond the inevitable element of suffering and humiliation connected with a given form of legitimate treatment," and the measures taken had to be necessary to attain the legitimate aim being pursued. This notorious terrorist had been in solitary confinement for more than 8 years, and concerns had been expressed by the Committee for the Prevention of Torture about possible long-term effects of isolation on him, concerns which the ECtHR shared, yet it found no violation of Article 3. Segregation from the prison community was not of itself a breach of Article 3.

86. Singh J at [100], in *Dennehy*, cited *Ahmad v United Kingdom* (2013) EHRR 1 at [178] which concerned the treatment in a very high security prison in the USA which someone extradited to the USA would face. The ECtHR set out some of the factors which it had found decisive to the question of whether treatment in prison breached Article 3:

> "… in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:
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> • the presence of premeditation;
>
> • that the measure may have been calculated to break the applicant's resistance or will;
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> • an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was

> implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;
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> • the absence of any specific justification for the measure imposed;
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> • the arbitrary punitive nature of the measure;
>
> • the length of time for which the measure was imposed; and
>
> • the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. …"

I also accept that the age of a prisoner is relevant, though none of these factors are necessarily of themselves individually determinative. It depends on all the facts. Age was one of the factors listed in *Ramirez-Sanchez v France*, above, at [117] where the ECtHR said that the assessment of the minimum level of severity depended "on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some case, the sex, age and state of health of the victim…"

87. Although *Ahmad* concerned an adult, it was accepted in that case that there was no specific minimum period of segregation which would lead to a breach of Article 3; it was one of the relevant factors and its significance could depend on what other factors were present.

88. The ECtHR in *Ahmad* considered the effect of measures short of total sensory deprivation, which of itself would be inhuman treatment. It then set out other points, also cited in *Shahid v Scottish Ministers* [2015] UKSC 58, [2016] AC 428, at [31] which are relevant. I need to set them out but I can take more of them from Singh J's judgment in *Dennehy* at [104-109]:

"At para. 207 of its judgment in Ahmad the Court said:

> "Other forms of solitary confinement which fall short of complete sensory isolation may also violate Article 3. Solitary confinement is one of the most serious measures which can be imposed within a prison and, as the Committee for the Prevention of Torture has stated, all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities. Indeed, as the Committee's most recent report makes clear, the damaging effect of solitary confinement can be immediate and increases the longer the measure lasts and the more indeterminate it is."

"The Court went on to say at para. 208:

> "At the same time, however, the Court has found that the prohibition of contact with other prisoners for security,

> disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. In many states parties to the Convention more stringent security measures, which are intended to prevent the risk of escape, attack or disturbance of the prison community, exist for dangerous prisoners."

"At para. 209 the Court said:

> "Thus, whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."

"At para. 210 the Court said:

> "In applying these criteria, the Court has never laid down precise rules governing the operation of solitary confinement. For example, it has never specified a period of time, beyond which solitary confinement will attain the minimum level of severity required for Article 3. The Court has, however, emphasised that solitary confinement, even in cases entailing relative isolation, cannot be imposed on a prisoner indefinitely."

"At para. 211 the Court said:

> "Equally, although it is not for the Court to specify which security measures may be applied to prisoners, it has been particularly attentive to restrictions which apply to prisoners who are not dangerous or disorderly; to restrictions which cannot be reasonably related to the purported objective of isolation; and to restrictions which remain in place after the applicant has been assessed as no longer posing a security risk."

"At para. 212 the Court said:

> "Finally, in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure. First, solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in para. 53.1 of the European Prison Rules. Secondly, the decision imposing solitary confinement must be based on genuine grounds both *ab initio* as well as when its duration is extended. Thirdly, the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide

> substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by. Fourthly, a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order to ensure that the solitary confinement measures remain appropriate in the circumstances. Lastly, it is essential that a prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement."

89. Mr Weisselberg pointed to the circumstances of *Shahid*, in which Article 3 was at issue. Shahid's segregation, for his own safety, first on remand and then while serving his sentence for the racially aggravated abduction and murder of a 15 year old, lasted 56 months, divided into two periods of 11 and 45 months. He was locked in his cell for between 20 and 22 hours a day; he exercised and went to a gym in the segregation unit; he received visits and could use the prison phone; after a while he had a television; he received newspapers but no work or other occupation in his cell and educational provision was not generally available; he could not attend religious services, but after a while attended classes for Muslim prisoners.

90. Lord Reed commented at [36], in a judgment with which the whole Court concurred: "Without under-estimating the unpleasantness of the symptoms reported by the appellant, it is not suggested… that he suffered any severe or permanent injury to his health." On the facts, Article 3 was not violated. Isolation was partial and relative. It was relevant that segregation was imposed for his own safety. Its duration was undesirable and exceptional. There could have been improvements. The procedural protections available were not as effective as they should have been, and indeed were not complied with in a number of respects. Article 8 was declared to have been breached for quite substantial periods, for which the declaration was just satisfaction.

91. The issue in *R* (*Bourgass and Hussain) v SSJ* [2015] UKSC 54, [2016] AC 384 was not whether his treatment breached Articles 3 or 8, but whether the procedural protections had been adequate. However, Lord Reed's judgment, in which the whole Court concurred, was relied on by Mr Squires for a number of points. The Supreme Court, at the outset, described removal from association and segregation and solitary confinement as one and the same. Bourgass' segregation, [22], involved him being locked in his cell for 23 hours a day; he exercised alone out of his cell; he had no association with other prisoners; educational courses were provided in his cell; he received visits but for much of the time without physical contact; he saw a member of the chaplaincy from time to time, and he saw members of the staff of the segregation unit when they opened the door for his meals; he was permitted books, a radio and, subject to his behaviour, a television. At [125 -126], Lord Reed said that the critical question was whether the segregation was justified having regard to all the relevant circumstances, which included the reasonableness of any apprehension that association with other prisoners might lead to a breakdown in good order and discipline, and the consequences to the prisoner and to other prisoners of segregating or not segregating him. This was an exercise of judgment taken with access to a variety of sources. On judicial review, the court had full jurisdiction to review such evaluative judgments, and the test of their

reasonableness had to be sensitive to the context. "The potential consequences of prolonged segregation are so serious that a court will require a cogent justification before being satisfied that the decision to authorise the continuation of segregation is reasonable."

92. In *R (Howard League for Penal Reform) v SSHD* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484, Munby J considered a challenge to the whole system of YOIs. He noted at [10] that children in YOIs were vulnerable and needy, disproportionately from chaotic backgrounds, and many had suffered abuse and neglect. They often had unstable homes or were not living at home at all; and many had been long without schooling. Many had a history of treatment for mental health problems. This, submitted Mr Squires, was all part of the background to be considered when judging compliance with Article 3. Between [56] and [66], Munby J considered ECtHR jurisprudence on Articles 3 and 8 concerning custody. He drew the following conclusions at [65]-[67]: those Articles protected children in YOIs. They imposed positive obligations on the authorities to take reasonable and appropriate measures to ensure that children in YOIs were treated with respect by staff and fellow inmates as fellow human beings and not in such a way as to debase or humiliate them, and that they were not subject to inhuman or degrading treatment or punishment by fellow inmates. In a passage relied on by Mr Weisselberg, he said, [67]: "Such measures must strike a fair balance between the competing interests of the particular child and the general interests of the community as a whole (including the other inmates of the YOI)" but always having regard to the best interests of the child as a primary consideration, to their inherent vulnerability in a YOI, and to the need for the YOI to provide effective protection from ill-treatment whether at the hands of staff or other inmates, of which the staff have or ought to have knowledge.

Other Reports

93. The absence of domestic and ECtHR authority on the issue of segregation for young offenders led Mr Squires to place before the Court the views of other bodies and experts. He contended that all had concluded that prolonged solitary confinement was inhuman and degrading treatment and "should be absolutely prohibited".

94. Mr Squires emphasised some, [95-99 below], because they were relied on by Lord Reed in *Shahid*. In about 2003 the Secretary of State issued Prison Service Order 1700 ("the PSO"), a non-statutory document concerned with segregation. It acknowledges that the number of self-inflicted deaths in segregated settings is disproportionate. It continues at p 29:

> "Research into the mental health of prisoners held in solitary confinement indicates that for most prisoners there is a negative effect on their mental wellbeing and that in some cases the effects can be serious. A study by Grassian & Friedman (1986) stated that, 'Whilst a term in solitary confinement would be difficult for a well adjusted person, it can be almost unbearable for the poorly adjusted personality types often found in a prison.' The study reported that the prisoners became hypersensitive to noises and smells and that many suffered

> from several types of perceptual distortions (e.g. hearing voices, hallucinations and paranoia)."

95. According to a report published in June 2015 by the Prisons and Probation Ombudsman for England and Wales, 28 prisoners took their own lives while being held in segregation units in England and Wales between January 2007 and March 2014.

96. An interim report submitted to the UN General Assembly in August 2011 by Juan E Méndez, the then Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment expressed particular concern about prolonged solitary confinement (or segregation, as it was also termed), which he defined as solitary confinement in excess of 15 days. He noted that after that length of time, "according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible"; (para 26). He also noted that lasting personality changes often prevented individuals from successfully readjusting to life within the broader prison population and severely impaired their capacity to reintegrate into society when released from prison; (para 65). Juan Méndez, in a part of the Report not quoted in *Shahid*, also referred to the severe mental pain or suffering which solitary confinement may cause when used for a prolonged period for juveniles or persons with mental disabilities, which could amount to cruel, inhuman or degrading treatment or punishment. States should abolish solitary confinement for juveniles.

97. The previous Special Rapporteur, Manfred Nowak, annexed to an earlier report submitted in July 2008, the Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007. It stated, in a passage cited by the Special Rapporteur:

> "It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90% of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions."

98. Similar conclusions were reached by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in its 21st General Report of 10 November 2011. It referred to evidence that solitary confinement "can have an extremely damaging effect on the mental, somatic and social health of those concerned", which "increases the longer the measure lasts and the more indeterminate it is"; (para 53). It considered the maximum period for which solitary confinement should be imposed as a punishment to be 14 days; (para 56(b)).

99. The Istanbul Statement adopted at the International Psychological Trauma Symposium, in a part not referred to in *Shahid*, defined solitary confinement as "the physical isolation of individuals who are confined to their cells for twenty-two to

twenty-four hours in a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative." Those available "are seldom freely chosen, are generally monotonous and are often not empathetic."

100. Mr Squires also referred me to the following materials, not referred to in *Shahid*. The General Assembly of the United Nations promulgated the UN Rules for the Protection of Juveniles deprived of their Liberty in 1990. Mr Squires cited Rule 67, which comes under the heading of "Disciplinary procedures". "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned." The General Assembly's 2015 "Mandela Rules" on minimum standards for the treatment of prisoners, defined solitary confinement as "confinement for 22 hours or more a day without meaningful human contact." It was prolonged if exceeding 15 consecutive days. The imposition of solitary confinement should be prohibited for prisoners with mental or physical disabilities, as it already was for women and children.

101. General Comment No.10 of 2007 of the UN Committee on the Rights of the Child, UNCRC, referring to Article 37 of the Convention on the Rights of the Child itself, which for these purposes uses materially the same language as Article 3 ECHR, repeated the sort of language of Rule 67, but expressly applying it to children.

102. The UNCRC, in its fifth periodic report on the UK, in 2016, expressed its concern that "segregation, including solitary confinement, is sometimes used for children in custody, including in young offenders' institutions," and recommended that the use of solitary confinement for them should cease immediately.

103. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published a report on 19 April 2017 into its visit of the previous year. It visited Cookham Wood YOI, among other places. It referred to a large minority on a "separation" list because of repeated violence or for their own protection. This meant that the juvenile, who was alone in the cell, with only a television for company, was unlocked only for 30 minutes a day for solitary exercise and to be accompanied to pick up food, which he then ate alone. It referred to two young offenders in particular: one who spent 23.5 hours a day lying in his bed, under the covers, looking blankly at the TV screen, talking to and meeting no one. Another, aged 15, had been held in such conditions for several weeks without information as to how much longer he would be so held. The CPT said that "they were being effectively held in conditions of solitary confinement. In the CPT's view holding juvenile inmates in such conditions amounts to inhuman and degrading treatment." Such "separation" heightened the juveniles' sense of frustration and their tendency to lash out when allowed out of their cells.

104. It recommended that the YOI rules be amended urgently "to reflect the increasing trend at the international level to promote the abolition of solitary confinement as a disciplinary sanction in respect of juveniles." Until then, whatever form removal from association took, it should only be a last resort and with continued access to education, physical exercise and the possibilities of association.

105. The 2015 Annual Report of the UK's National Preventive Mechanism, NPM, presented to Parliament by the SSJ in November 2015, is the report of the body set up under the Optional Protocol to the Convention Against Torture, OPCAT, to fulfil the UK's duty to provide independent monitoring of its places of detention. In the section entitled "Isolation and solitary confinement", it identified the various reasons why detainees were separated from others. "At their most severe, isolation practices can amount to solitary confinement." It adopted the definition from the Istanbul Statement above, for that purpose. It noted practices amounting to solitary confinement outside formal isolation facilities in at least one YOI. It concluded that "children… should never be held in conditions that amount to solitary confinement."

106. The summary to a 2012 report from Human Rights Watch, HRW, and the American Civil Liberties Union, ACLU, "Growing Up Locked Down," referred to the particular vulnerability of juveniles to the experience of solitary confinement, when they are at a formative stage of life, and may lack the resilience of adults. It could have a profound effect on their rehabilitation, exacerbating or making more likely short and long-term mental health problems, and the commonplace consequence of a denial of physical exercise was harmful to their health and well-being. The authors said that solitary confinement of young people often did serious damage to their development and psychological and physical well-being. They were not aware however of any studies which looked specifically at the effects of "prolonged solitary confinement" on adolescents, but said that "many experts on child and adolescent psychology" were of the view summarised above. That view would not therefore have been based on any specific study, so far as they were aware.

107. Mr Squires, conscious of the point, pointed to the reports of Dr Kraus as more recent evidence, along with the studies referred to in the report. Dr Kraus however provides references to two papers from 2002 and 2006, but does not refer to any discernible content from them, and most of what he refers to in the report for this particular case are policy statements by various bodies dating back to the 1990 UN Rules to which I have already referred. In the report for *VW* which he appended, there are scarcely any specific papers referred to; he listed all the papers he had written, but that may have been simply to establish his credentials. Neither identifiably refers to a report which could fill the gap which the HRW/ACLU report identified; indeed I could not find a reference to any post 2012 study, and even if I missed it, the report still does not identifiably fill it. This sort of evidence has its limitations.

Conclusions on Article 3

108. This case is solely about the treatment which AB received when removed from association. I start with the point that, whilst it may only take one particular facet of the treatment for the treatment as a whole to breach Article 3, nevertheless the judgment has to be whether the treatment of this young person in detention breached Article 3. I judge it to be very relevant that it is only this one aspect which is relied on: the conditions in the cell, facilities in the cell, food, sanitation and health care are all satisfactory. On the other hand, removal from association brought with it, not just segregation but, for part of the time at least, inactivity in confinement, save what boredom and frustration led him to devise.

109. I reject however the theme which underpinned Mr Squires' submissions, which is that "prolonged solitary confinement" of a young person, i.e. for more than 15 days, of itself breaches Article 3. The purpose of Mr Squires' primary argument is not to highlight aspects of the harm which can be done depending on circumstances but to contend that once the removal from association here constituted "solitary confinement," it also lasted for over 15 days, and amounted to "prolonged solitary confinement", which therefore breached Article 3. I am not persuaded that the question of whether treatment breaches Article 3 should be determined by so mechanistic an argument, or that that which falls within a non-judicial definition of "solitary confinement", when "prolonged", also on a non-judicial definition of "prolonged", necessarily amounts to a breach of Article 3. That sequence of reasoning is unsound.

110. First, it is wholly inconsistent with the jurisprudence of both ECtHR and UK Courts, that the judgment of whether treatment breaches Article 3 is very fact sensitive. All the cases cited above, *Ramirez-Sanchez*, *Ahmad*, *Shahid*, *Bourgass*, and *Dennehy*, domestic and ECtHR, show such a fact sensitive approach to Article 3.

111. Second, none of those cases have dealt with the segregation of a young person in detention, but that is no reason to adopt a different approach. More striking perhaps is the absence of any supportive domestic or ECtHR authority, in the light of what Mr Squires submits is an international consensus that "prolonged solitary confinement" for a young offender does breach Article 3. And although *VW* was an interesting decision of a US Federal District Judge, it is not a decision at a higher Federal level, nor was I shown one. Mr Weisselberg also rightly cautions this Court against interpreting an Article of the ECHR in a way which the Strasbourg Court has not yet seen fit to do.

112. Third, I consider that Mr Squires' approach takes the legitimate use of UNCAT and the Convention on the Rights of the Child, CRC, far too far. These Conventions have not been incorporated wholesale into domestic law. So far as material for this case, the Conventions are no more than an interpretative aid for Article 3, and the ECtHR would use them for that purpose. But the language of those Conventions adds nothing to the language of Article 3. There is no Article in either which deals with the topic of segregation of young people. The language of Article 3 is not ambiguous either, as Mr Weisselberg submitted. The resolution of ambiguities is not necessarily the limit of the interpretative role which the ECtHR gives to other international conventions, though UK Courts may do so; *R (SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, a case on benefit caps. I detect from that decision a high degree of caution and strictness about the interpretative use to which the CRC could be put, where not part of applicable UK domestic law. There is no issue of the sort considered in *Zoumbas v SSHD* [2013] UKSC 74, [2013] 1 WLR 3690, as to the relevant test for the weight to be given to the interests of a child under Article 8 in a case concerning the removal of a parent.

113. Fourth, I do not attach any real weight to General Comment No.10 of the UN Committee on the Rights of the Child, which is not directed so much as to the meaning of the UN Convention on the Rights of the Child itself, as to its application. Giving interpretative weight to an international Convention where

there is ambiguity in another Convention with which consistency is likely, or where materially similar language is used, is not the same at all as adopting the views of its Committee as to whether particular circumstances breach it. Giving weight to such views of the Committee is not really an exercise in interpretation at all. Doing so is still less appropriate when the relevant Convention being interpreted is a different one, the ECHR, with its own Court which decides not just its autonomous meaning, but its fact sensitive application. Whether circumstances amount to a breach of the ECHR is a matter for the judicial body tasked with deciding the issue in the case before it, and not for the UNCRC. The Committee, legitimately, may well be trying to bring about what it sees as desirable changes in policy and practice, but it is not performing a judicial function. Besides, the language of the Comment, with that of the UN Rules, Rule 67, does not advance AB's case. The removal from association was not a punishment or disciplinary measure in the sense used in the Rule or Comment, and is more obviously directed at treatment intended to degrade or humiliate.

114. Fifth, Rule 67, the Istanbul Statement at the International Psychological Trauma Symposium of 2007, and the 2011 Méndez Report, adopt definitions of "solitary confinement", for the purposes of setting international standards. But presented in Court, they can divert the debate away from the true issue before the Court, which is whether the treatment breached Article 3, to a different issue which is whether the removal from association here constituted "solitary confinement" for the purpose of either the Mandela Rules or the Istanbul Statement, adopted by the NPM, and then "prolonged solitary confinement". Deploying the concepts of solitary confinement and prolonged solitary confinement, as Mr Squires did, obscures the one true issue, which is whether the treatment is inhuman or degrading. It simply switches the issue to the definition of "solitary confinement" and "prolonged solitary confinement", to argue that all forms of treatment within the definition, which the Istanbul Psychologists devised, and which the UN Mandela Rules and NPM adopted, breach Article 3. These concepts however may be given a very broad application, seemingly covering treatment with a very considerable range in severity and justification; as is evident from the *VW* case, solitary confinement comes in a variety of circumstance, including purpose, reason and conditions, which all go to the question of whether Article 3 is breached.

115. It is therefore for this Court to decide whether, on the facts of the case, a particular individual has been treated in a way which breaches Article 3. Other bodies, lawyers or psychiatrists or committees, are entitled to have a view on that issue but I do not and in my view should not treat them even as persuasive. To do so would undermine the judicial function of the High Court. That is of course not to deny their evidence of the risk of harm to juveniles or those who are mentally ill. But it is at least important to see the evidence for what it is truly worth to the judicial decision which I have to make. Although the CPT reached a view about two young people in Cookham Wood and Article 3, it did not automatically apply the definition to all those who were on the separation list, at least as I read it, for what assistance that would have afforded.

116. I do not see Mr Squires' approach as the approach applied by the Supreme Court in *Shahid* or *Bourgass*, although in the latter it encompassed removal from association and solitary confinement in the one very large general concept. But I do not regard

that as requiring removal from association to be treated as "solitary confinement" within the definitions relied on by Mr Squires: it may or may not be; it rather depends on the facts, and the answer to that question either way, does not of itself answer the Article 3 question either way. What those two judgments reflect is acceptance at a general level of the underlying evidence that isolation may harm the inmate, that that is worse where the individual is already suffering from mental illness, and when the individual is a child.

117. I did not find the *VW* decision of any real assistance; I am not satisfied that the circumstances are sufficiently similar nor that the decision of the Federal District Judge should be persuasive anyway. I must reach my own decision on the facts before me. I did not find the report of Dr Kraus for the *VW* case of any assistance of itself either, given that it does not deal with the position in the UK or YOIs or Feltham YOI or of AB. There was only Mr Squires' assertion that the circumstances in Feltham and New York were materially similar. I did not find Dr Krisberg's report for *VW* of any assistance beyond that it confirmed how different in fact the detention conditions in that case were.

118. I move on to the circumstances here. But first I must deal with three pieces of evidence about which some procedural controversy arose: the first witness statement of Dr Janes dated 5 April 2017, the report of Dr Kraus dated 30 March 2017 for these proceedings, which also attached his *VW* report, and the joint report dated 4 April 2017 of Dr Hales and Dr Adshead. The Claimant had made an application for the admission of all of this evidence, to which the SSJ and YJB consented in an order made on an application dated 5 April 2017. Mr Weisselberg told me that this had all been a bit of a muddle, and that his clients had intended to object but that the consent had been given too quickly, and they did not want to appear to be preventing evidence going before the Court. Nonetheless, he submitted that he could make submissions about its admissibility and certainly about weight. Mr Squires submitted that it was before the court pursuant to an Order that it be admitted, there was no counter evidence, and I should accept it as such. Mr Weisselberg was concerned that whatever findings I might make about AB, I should not make general findings about whether 22 hours a day in a cell on removal from association, for more than 15 days was of itself a breach of Article 3. The SSJ had not had a fair opportunity, in view of the shortness of time between the presentation of that evidence and the hearing, 22 days, in which to respond.

119. Mr Weisselberg first criticised Dr Janes' evidence as purporting to be expert evidence when she was no expert, was clearly not independent, and had provided no certificate as required by CPR. She riposted that it was not expert evidence at all but was her observations of AB and her experience of other cases. I see no objection to her broad assessment that AB is similar to many other clients she has had. That is a legitimate recounting of the experience of a specialist solicitor. Parts of her evidence are commentary on the facts which she recites which is not uncommon in judicial review and to which I see no real objection. But parts are objectionable, if not expert, as they are accepted not to be: for example [5] and her assessment of whether AB should have been seen as a danger to women. There appears to be a judgment as to the causes of AB's behaviour in Feltham, though it seems no more than a sensible parent might observe. Part deals with what she calls "the systemic problem" which I do not accept as relevant to this case; this case is

about AB, and not about other cases, nor is it a challenge to the general regime of removal from association, notwithstanding certain general points in the Grounds. No relief is sought more generally. Part headed "Evidence of Risks of solitary confinement on children" summarises and quotes from Dr Kraus' report for *VW*; it adds nothing to whatever that report brings.

120. That part also exhibited a report from the Children's Commissioner dated September 2015 entitled "Isolation and solitary confinement of Children in the English Youth Justice Secure Estate". This might be relevant to some broader challenge, but there is none; she cites part which emphasises that "[prolonged or frequent] isolation can often serve to worsen these problems as the children failed to learn the important lessons of social order and interaction which they will need when they leave the establishment. In that sense, isolation can have long-term negative impacts on a vulnerable child and can contribute to the perpetual vicious cycles of release and re-offending." I do not see that as likely, at that level of generality, to be controversial. But the admission of her evidence, cannot be taken as admission of the whole report as evidence, let alone as unchallengeable. Issues of relevance and weight are in play. If there were a broader challenge, it is unlikely that this material would have been left so late in the day, or that the perhaps relaxed attitude towards its presence would have been taken. Besides, were there a broader challenge, and the findings I had to make were as far-reaching as the Howard League seemed to suggest, and certainly as did the EHRC, I would be reluctant to make them without the party challenged being able to respond to what is suggested were important documents on an issue of importance.

121. Much of that applies, second, to the role of the report of Dr Kraus for these proceedings. I am not prepared to give weight to this report from Dr Kraus either. Of its nature, it is not a report which is peculiarly directed to the position of AB; rather AB is just one of those to whom his general *VW* report applies. I am not satisfied that Dr Kraus has shown an awareness of the position in Feltham YOI or of the full facts about AB for his comments in that report to add greatly to the position in his earlier one for *VW*. His reports treat all that he encompasses within "solitary confinement" as alike in effect on any young person or on any young person with mental health problems. They reflect what Drs Hales and Adshead refer to as an international consensus about the risk of harm to young people, more so to those with mental health problems from "solitary confinement".

122. Third, the Joint Report is directed towards AB, is in proper form, and comes from experts. I do not see why, addressed as it is to AB's circumstances, and from experts familiar with the English youth justice system and, in the case of Dr Hales, familiar with AB, I should give not it the weight which its merits deserve. Mr Squires is entitled to say that it was admitted by consent and that it stands uncontradicted. Mr Weisselberg is of course entitled to point to what he submits are weaknesses. The report was based on an assessment some 6 months earlier, save for a one hour interview; the conclusion that AB seems much as he did on leaving Cookham Wood suggested that his experience in Feltham had not caused any harm. That left AB to rely on assertions that harm would not necessarily be visible at this stage to found the allegation of harm for the Article 3 case.

123. Moving from those procedural considerations, it is not alleged that R49 of itself breaches Article 3, or that removal from association of itself does. Indeed, Mr

Squires asserted that, had the education requirements been met along with the requirements for physical exercise, there would have been no solitary or prolonged solitary confinement, on the definitions of those phrases which he deployed. Mr Weisselberg did not accept the assumption underlying that proposition, which was that all the 15 hours of education had to be provided in the presence of a teacher with none in private study.

124. It is not alleged that anything was done by the staff intending to humiliate or degrade AB. This is an important aspect on the jurisprudence of the ECtHR. No part of the period when he was removed from segregation involved the use of removal from association as punishment; there was no use of "solitary confinement" as a punishment, or keeping someone in a dark cell. This is an important aspect of some of the reports upon which Mr Squires relied.

125. Instead, there has at all times been a considered and proper justification for the removal from association; initially to protect officers, then to protect officers from AB and AB from inmates whose anger he aroused by his shouting abuse, sexual, racist and more general, and with a greater emphasis on the latter from mid-January onwards. AB's behaviour created significant challenges for the YOI. Proper application of the Rules for review of removal from association is very unlikely to have brought about desegregation in the light of AB's developing behaviour. He should have had education earlier, which would have got him out of his cell earlier and for longer periods. But there would still have been a justified, and reasonable, extensive removal from association with fellow inmates. This is very relevant to whether treatment breaches Article 3.

126. AB was not simply left on segregation to serve his period of detention: he was moved from induction unit to other units, with a view to reintegrating him. He was returned to the induction unit from Heron after 9 days, on 11 January 2017, because his abuse of fellow inmates made reintegration unreasonable. The aim was, after a planning process, to try to integrate him again, this time in Eagle, on 19 January. But the same problem emerged and on 24 February he had to be moved to Heron. The behaviour of other inmates was undoubtedly very unpleasant but the YOI had a duty to ensure AB's safety; it is all very well questioning whether the incidents were investigated and offenders punished, but AB's actions and presence created a very serious inhibition to his remaining on Eagle for the purpose of reintegration. The YOI returned AB to Heron on 24 February, where a cautious start on reintegration was made with P, but his serious threats to a female officer led to removal, with P, to Jay. Again, he had to be moved; the YOI tried the health care unit, Wren, from which deteriorating behaviour led to Ibis, the care and separation unit. This is a pattern of justified segregation, a series of attempts and planned interventions to end it by reintegration, thwarted by AB's own behaviour, which meant segregation, single and three-officer unlock remained reasonably justified, albeit that they created some of the additional problems of segregation: greater isolation for longer periods with often little activity.

127. His segregation was reviewed, albeit not with the frequency or at the level required by the Rules. But the justification for continued segregation and what was happening to him was considered on quite a number of occasions by those with a variety of relevant expertise and experience, including weekly RMMs after 24

January 2017. I have set those out when dealing with the breaches of the Rules on removal from association and in the narrative of the YOI records.

128. He received proper medical care and attention. He was seen initially by the Community Psychiatric Nurse. On 12 December, he was seen by a consultant psychiatrist and another specialist doctor. He saw the CMHT on a number of occasions, at least once at his request. I accept that the repeated use of the Initial Health Screen form is limited in the information or analysis imparted, and that it was completed by a nurse, except for one occasion. Nonetheless, it did involve medical consideration of his ability to cope with segregation and the risk of significant deterioration in his mental health on eight occasions though not necessarily from a mental health professional. He received his daily medication for ADHD from a nurse. He received roughly weekly input from the psychologist after 8 March. He was placed on Wren on 23 March, the health care unit, which deals with those with mental health problems, though he again had to be moved. However, the clear practice is that his mental health in segregation was monitored and he received care for it. I note that it is not suggested by Drs Hales and Adshead that there were signs of any actual deterioration in AB's mental health during his segregation, in their report dated 4 April, which referred to the one hour interview on 27 March. Dr Hales, who had treated AB at Cookham Wood, noted that he had "presented as much the same" as when she had met him regularly in Cookham Wood.

129. AB was also in contact with his solicitors from an early stage, as their telephone number was one of the first he was permitted to use. In the YOI, he had a case worker and social worker, in addition to the assistance he received from unit staff over his behaviour.

130. AB has not been kept in what Singh J described in *Dennehy* as "total solitary confinement". This is itself a concept which does not feature in the lexicon of Mr Squires' reports but it is plainly relevant to whether treatment breaches Article 3.

131. Mr Squires' argument drew on a definition of "solitary confinement" which focused on hours in cell. Mr Squires summarised his submission as to the position as follows. In the first six weeks, AB was out of his room for only 3½ hours. Thereafter, the time increased by periods which varied from week to week. The seventh week was 4½ hours increasing to 6 hours or so for the next 7 weeks, though in two the increase was to 8 and 11 hours. Thereafter, he was out for between 6 and 10 hours with three weeks when he was out for 9-10 hours, in the week. The variation, particularly latterly, seemed to depend on periods of education, gym or psychology. After 23 March, he was out of his room for an hour each day; before that he was out for about ½ hour a day for the purposes of showering, exercising and making phone calls. Dr Janes said in her first witness statement that he was out for "around two hours" after 23 March. He ate his meals in his cell. These periods exclude legal visits, but otherwise include all the purposes for which he was out of his room.

132. I have already commented on the limited role of the 22 hour in cell definition of "solitary confinement" in determining the issue before me. I also accept Mr Weisselberg's point that the assessment of time in and out of cell includes both a quantitative and qualitative element. I also accept his submission that the YOI case

records cannot be read as if they were a comprehensive daily record of all periods spent by AB in or out of cell; they were not compiled for that purpose, and it is evident from comments about what he was doing that he was out of his cell for periods not specifically recorded. Although I reject the precision of the calculations of time in cell proffered by Mr Squires, I am not persuaded by Mr Knights' very broad assessment that AB averaged 3 hours a day out of his cell, particularly when there was no response to Dr Janes' challenge to it, even on a broad basis explaining the averaged daily components.

133. I shall consider Article 3 on the basis that there were periods, particularly early on, where AB was in his cell for over 22 hours a day for more than 15 days at a stretch. There may have been days when he was out of his cell for only half an hour, but it is probable that the combination of his daily half hour out, his daily 20 minute or so trips for medication, and his trip to the canteen to collect his food, which was not all the time, meant he was out of his cell for about 1 hour a day routinely. There were other occasions when he left his cell for meetings, adjudications, Kinetic and education provision, and this may have exceeded an hour, so as to bring the daily total over 2 hours, but not on a daily or regular basis. Kinetic began on 16 February and education out of cell at around the same time. From 23 March, he was out of his cell, on his own case, for around 2 hours. I do not think that, simply on the basis of time out of cell, that his own evidence supports the claim that Article 3 was breached thereafter.

134. His constant use of the cell bell to make demands of prison staff, and exchanges, through the cell door or in a cell, with officers about his behaviour, and calmer conversations at other times provided a limited form of social contact. He also generally had a television, which can provide a form of stimulus and human voice. Out of cell, he had contact with officers. One or more played table-tennis at times with him. He went to the gym, though there were some breaks in attendance; he had some open air exercise. After several weeks had passed, he exercised with P for some weeks.

135. I need then to consider the report from Drs Hales and Adshead. This does not show that any, let alone significant harm, has been done to AB. It does not purport to say so either. What Mr Squires submits is that the sort of treatment AB received created a serious risk that his known mental health problems would be significantly worsened, in circumstances where the worsening could be set for the long term, without becoming immediately apparent. That breached Article 3.

136. I have three reservations. First, and notwithstanding the muddled circumstances surrounding the consent order for the admission of this evidence, a problem arises with the way the argument developed, as adumbrated above. The evidence does not show any worsening of AB's problem. A focus on studies, drawn on by advocate or from Dr Kraus, to contend that there is a serious latent risk, requires a fair notice that that is the thrust of the point. I do not think that was apparent until the hearing when Mr Weisselberg pointed to the absence of evidence of actual harm in the Joint Report. In any event, I am not prepared to make findings which the Claimant, or more probably his lawyers, would regard as of wide impact, without being satisfied that a fair opportunity to understand and to respond to the specific point as it evolved had been given.

137. Second, while harm may be seen during the treatment at issue, and some of the papers deal with that, I am far less clear that the serious risk that latent harm is being done, emerging months or years later, caused by "solitary confinement" has been established. The emergence of actual problems later may be quite difficult to attribute to any event or course of treatment. Third, I can envisage circumstances in which a significant risk of a serious effect, especially if the risk is deliberately imposed as part of the treatment, breaches Article 3 cases. A potential but latent and not deliberately inflicted risk seems to be quite different, although there can be no hard and fast lines. The case relied on by Mr Squires was a "foreign" case, *Saadi v Italy*, (2009) EHRR 49; but the role of risk there is quite different from that in "domestic" Article 3 cases. I do not accept that any particular period out of cell has been shown to create or to negate a serious risk of latent harm, especially when taken with all the other circumstances. I have very little sense either of the degree of risk or of worsening which any particular period is said to involve, and certainly not for AB. This evidence does not persuade me that Article 3 was breached.

138. Mr Squires accepted that if the first phase which he described, that is the period from 10 December 2016 to 2 February 2017, a total of 55 days, did not involve a breach of Article 3, then no part of the period would have done. This was the period where his treatment was worst, notably because of the want of educational activity, coupled with a lack of face to face contact with people of his own age. I accept AB's description of how he reacted to his time in cell: he was bored, though it was his view that books were boring – he was not deprived of them; he had a television except when he lost it as a punishment or when power was turned off before he could get it back on again. He had no educational provision in his cell through work books or education packs until about 25 January. I have no difficulty accepting that the lack of mental and physical activity contributed to his frustration and so to his disruptive behaviour, in word and deed.

139. There were a number of failings on the part of the YOI during this period in particular. Shortcomings and failures, even if quite serious, do not of themselves show a breach of Article 3. But he still represented a very difficult person to manage in the YOI, and the YOI were always seeking to reintegrate him. Taking all the circumstances of that period together, I am not persuaded that it was treatment which breached Article 3. The threshold for "inhuman and degrading treatment" is not so low. The later periods of detention come nowhere near a breach of Article 3.

140. I have not dealt separately further with the EHRC submissions which adopted, with modest elaborations, those of Mr Squires.

Article 8 ECHR

141. Mr Weisselberg conceded, at first instance only and reserving the position of the SSJ in the Court of Appeal, that removal from association "engaged" in the sense of interfered with AB's Article 8 rights. ("Engaged" has no particular meaning in this context and can be used, indifferently, to cover whether some right falls to be considered, or is interfered with or is breached.) Mr Weisselberg's concession was based on *R (Syed) v Secretary of State for Justice* [2017] EWHC 727 (Admin), in which Lewis J concluded that the removal of a prisoner from normal association into a specialist unit for challenging behaviour, interfered with his right to respect for his private life. He then went on to consider the justification for the interference

and whether it was in accordance with the law. This may be heading to the Court of Appeal. I decline Mr Squires' invitation to consider that issue and, he hoped, to add my voice to that of Lewis J. I doubt my views would add much weight, particularly as I should follow *Syed* unless satisfied that it was wrong. Lewis J provides the jurisprudence that the Court of Appeal would need to digest.

142. That leaves however the question of whether the interference was, in other respects, justified. The correct questions are set out in *Syed* [65], citing *Shahid v Scottish Ministers* [2015] UKSC 58, [2016] AC 428, Lord Reed at [39]: (1) did the interference pursue a legitimate aim? (2) Was the interference necessary and proportionate to that aim? (3) Was the interference in accordance with law? Mr Weisselberg conceded that Article 8 had been breached because of the failure to apply the procedural requirements of Rule 49 and the Guidance until 19 April 2017, except for the period 1–4 March, which meant that the interference was not in accordance with the law. He submitted that a finding to that effect would provide just satisfaction for the purposes of s8(3) Human Rights Act 1998. I am satisfied tht AB would have remained removed from association had the Rules been properly applied. But that leaves questions (1) and (2).

143. The right approach to those questions was agreed in *Syed*, by reference to *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384, Lord Reed, at [125-126] (although these paragraphs do not deal with ECHR rights):

> "125. The critical question is whether the prisoner's continued segregation is justified having regard to all the relevant circumstances. Those will include the reasonableness of any apprehension that his continued association with other prisoners might lead to a breakdown in good order and discipline within the prison; the suitability of available alternatives; the potential consequences to the prisoner if authorisation is granted; and the potential consequences to others if it is not. The answer to the question requires the exercise of judgment, having regard to information and advice from a variety of sources, including the governor, health care professionals and the prisoner himself.
>
> 126. In proceedings for judicial review, the court has full jurisdiction to review evaluative judgments of that kind, considering their reasonableness in the light of the material before the decision-maker, whether the appropriate test has been applied, whether all relevant factors have been taken into account, and whether sufficient opportunity has been given to the prisoner to make representations. This court has explained that the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests: see, for example, Pham v Secretary of State for the Home Department (*Open justice Society Justice Initiative intervening*) [2015] 1 W.L.R. 1591. The potential consequences of prolonged segregation are so serious that a court will require a cogent justification before it is satisfied that

> the decision to authorise its continuation is reasonable. It should also be noted that although judicial review does not usually require the resolution of disputes of fact, or cross-examination, that is not because they lie beyond the scope of the procedure. Judicial review is a sufficiently flexible form of procedure to enable the court to deal with the situation before it is required: see, for example *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 W.L.R. 419."

144. I shall set out my conclusions on questions 1 and 2 briefly in the light of my conclusions on Article 3. Mr Squires put the case on Article 8 very much on the basis that this removal from association was unjustifiable; it was very much a repeat of his Article 3 arguments in a different framework.

145. I am satisfied that the interference by removal from association was in pursuit of the legitimate aims, with differing emphases at differing times, of protecting staff from AB, and protecting AB from other inmates. I do not accept that, for justification or proportionality, the SSJ has to show that the YOI had exhausted all other methods of control of AB, or of other inmates whom he provoked and whose reactions in some instances would have been disciplinary offences in the YOI. In truth, those options are quite limited. Meetings did consider alternative places of detention, and rejected them for sound reasons. They did try to reintegrate AB, over time, but failed because of his behaviour and they tried to associate him with P. Programmes of support in behavioural self-restraint were instituted. It was not specifically argued that the failure in the provision of at least some education increased the intensity of the interference, and could not be justified or proportionate, as shown by the SSJ's concession.

146. A declaration will be just satisfaction.

Conclusions

147. I will make a declaration that the YOI rules on removal from association and on education were breached. Article 3 ECHR was not breached. I shall make a declaration that Article 8 was breached because the interference with his rights was not in accordance with the law.