



Neutral Citation Number: [2021] EWHC 810 (QB)

Case No: QB-2016-003809

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/03/2021

**Before:**

**PETER MARQUAND**  
**(Sitting as a Deputy High Court Judge)**

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**Between:**

**LEE NEWELL**  
**- and -**  
**MINISTRY OF JUSTICE**

**Claimant**

**Defendant**

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**Nick Armstrong** (instructed by **ITN Solicitors**) for the **Claimant**  
**Jack Holborn** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> February 2021

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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PETER MARQUAND

*Covid-19 Protocol: This judgment has been handed down remotely by circulation to the parties' representatives by way of e-mail, and by release to Bailii. The date and time for hand down will be deemed to be Wednesday, 31 March 2021 at 2pm.*

## **Peter Marquand:**

### **Introduction**

1. The Claimant, Lee Newell, is a convicted murderer serving a whole life term. On 27 November 2014, he was attacked by Gary Vinter, another prisoner serving a whole life term, whilst they were in the exercise yard of the Close Supervision Centre (CSC) at HMP Woodhill, which is a prison for which the Defendant is responsible. The Claimant suffered significant injuries as a result of this attack, including brain damage and the loss of sight in his right eye. He makes a claim in negligence and for a breach of Article 3 of the European Convention on Human Rights (ECHR) against the Defendant. He seeks damages and/or a declaration of the breach of his Article 3 rights for the failure of the Defendant, so he says, to prevent him from being harmed by others in custody, specifically, Mr Vinter. The Defendant does not dispute that it owed a duty to the Claimant to keep him reasonably safe and not to breach his Article 3 rights, but it is said on the facts, those obligations were met. Furthermore, the Defendant states the Claimant is out of time to bring a claim under Article 3 and the time limit should not be extended.

### **The issues**

2. The issues I have to determine are as follows:
  - i) on the facts, did the Defendant keep the Claimant reasonably safe and if not, what are the causal consequences;
  - ii) should the Claimant be granted an extension of time under section 7(5)(b) of the Human Rights Act 1998, the claim having been issued after the expiry of the time limit prescribed in that Act;
  - iii) was there a breach of the operational duty under Article 3 of the ECHR by the Defendant;
  - iv) if the Claimant is successful under issue (i) above, what is the level of compensation (quantum) to which he is entitled; and
  - v) if the Claimant is successful under (iii), what is the quantum to which he is entitled and should there be a declaration of the breach of Article 3?

### **The relevant legal principles to be applied**

3. The burden of proof is on the Claimant to prove negligence and a breach of his Article 3 rights. The standard of proof is on the balance of probabilities.
4. The parties agreed the relevant law was set out in *Stenning v Secretary of State for the Home Office* [2002] EWCA Civ 793 where Brooke LJ at paragraph 45 endorsed the principles quoted at paragraphs 24 and 25 as follows:

“24. The only case cited to the judge at the hearing was the unreported judgment of this court in *Palmer v The Home Office* (CAT 25 March 1988). In that case the claimant had been stabbed by another prisoner who had been convicted of three

murders and other very serious offences of violence. The aggressor was described as a loner with a paranoid personality. He generally behaved himself, but he was usually unco-operative with staff. He was said to be an angry, bitter and very dangerous man.

25. In his judgment, with which Dillon LJ agreed, Neill LJ quoted with evident approval a passage in Halsbury's Laws, 4th Edition, Vol 37, para 1140, which was to the following effect:

“The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, including the prisoners. Actions will lie, for example, where a prisoner sustains injury at the hands of another prisoner in consequence of the negligent supervision of the prison authorities, with greater care and attention, to the extent that it is reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other prisoners; or if negligently put to work in conditions damaging to health; or if inadequately instructed in the use of machinery; or if injured as a result of defective premises.”

Neill LJ added during the course of his judgment that:

“Those in charge of prisoners have a difficult task. Clearly except in extreme cases, of which obviously there are some, those responsible for prisons cannot keep prisoners permanently locked up and segregated from other prisoners.””

5. A claim for a breach of Article 3 ECHR is brought under section 6(1) of the Human Rights Act 1998 ('the HRA'). There is a time limit for such claims in section 7(5) as follows:

“Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.”

6. There is no 'stricter time limit' in this case. The Defendant says this claim is brought outside the time limit of 1 year and the discretion to extend time should not be exercised. The Claimant seeks that extension of time. In relation to the exercise of my discretion to extend the time limit, Mr Armstrong referred me to the review of the

relevant authorities on section 7(5)(b) in *Solaria Energy UK Limited v Department for Business, Energy and Industrial Strategy* [2020] EWCA Civ 1625 and paragraphs 42 to 53 in particular. Mr Holborn drew my attention to *Kimathi v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) which deals with section 33 Limitation Act 1980 and in particular to paragraphs 115, 125, 134 and 135.

7. Article 3 provides:

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

8. The allegations pursued by the Claimant relate only to the operational duty under Article 3. The parties agreed that the relevant test for that operational duty was the same as the operational duty under Article 2. This is quoted at paragraph 12 of the Supreme Court judgment in *Rabone and another v Pennine Care NHS Foundation Trust* [2012] UKSC 2. In this case there will be a breach of the positive obligation where the authorities knew or ought to have known at the time of the existence of a real and immediate risk of a breach of Article 3 to an identified individual or individuals from the acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. There is no dispute between the parties that what happened to the Claimant was sufficient to amount to a breach of Article 3.

9. In *Rabone*, Lord Dyson stated at paragraph 37:

“I accept that it is more difficult to establish a breach of the operational duty than mere negligence. This is not least because, in order to prove negligence, it is sufficient to show that the risk of damage was reasonably foreseeable; it is not necessary to show that the risk was real and immediate. But to say that the test is a high one or more stringent than the test for negligence does not shed light on the meaning of “real and immediate” or on the question whether there was a real and immediate risk on the facts of any particular case.”

10. As to a ‘real risk’ at paragraph 38 Lord Dyson rejected a submission that the risk had to be a ‘likelihood or fairly high degree of risk’ and referred to the evidence as establishing that ‘it was a substantial or significant risk and not a remote or fanciful one’. At paragraph 39 the judgment continues:

“...In the case of *In re Officer L* [2007] 1 WLR 2135, para 20, Lord Carswell stated that an apt summary of the meaning of an “immediate” risk is one that is “present and continuing”. In my view, one must guard against the dangers of using other words to explain the meaning of an ordinary word like “immediate”. But I think that the phrase “present and continuing” captures the essence of its meaning. The idea is to focus on a risk which is present at the time of the alleged breach of duty and not a risk that will arise at some time in the future.”

11. The standard demanded for the performance of the operational duty is reasonableness, as per *Rabone* paragraph 43. Whether or not the reasonable performance would have made a difference is relevant to damages under Article 3, see Lord Dyson MR as he was at paragraph 29 of *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252. It is also not necessary for a Claimant to succeed to show that their identity was known. It is sufficient that the authority knew or ought to have known that there were victims (paragraph 25 *Sarjantson*).

## **Background**

### The CSC System

12. Within the prison population, there are a relatively small number of prisoners who are highly disruptive and represent a high risk. Rule 46 of the Prison Rules 1999 (SI 1999/78) gives the Secretary of State for Justice power (delegated to the CSC Management Committee) to place such prisoners in a CSC. The procedure for operating the CSC system is set out in the 'Close Supervision Centres Operating Manual' dated January 2014 ('the Manual').
13. The Claimant and Mr Vinter were both such prisoners and placed in the CSC at HMP Woodhill. The CSC at HMP Woodhill has 3 wings: housing unit 6A (HU6A), housing unit 6B (HU6B) and 6C wing, which comes under Managing Challenging Behaviour. Wing HU6A usually accommodates those who are being assessed for their suitability at the CSC. Once assessed and a plan for their management has been developed, the prisoner will be transferred to HU6B. At the time of the attack, and in the weeks preceding it, the Claimant and Mr Vinter were on HU6B.
14. The regime in the CSC is designed to provide a range of activities with a view to rehabilitating the prisoner so that they can re-join the mainstream prison population. The Manual (page 31) sets out a range of activities available to a prisoner including providing meaningful activities to occupy constructively a prisoner's time and opportunities to engage with staff and others in formal and informal settings.
15. The CSC Behavioural Management System is set out at page 38 of the Manual and it has 3 aspects to it. First, behaviour management which is achieved through an Incentives and Earned Privileges Scheme (IEP). Secondly, Regime Risk Assessment and thirdly, Unlock Levels. The IEP operates on 4 levels, basic, entry, standard and enhanced. Those on the basic regime will be reviewed after 7 days and a decision may be made to move from that level, but if it is not made the decision must be reviewed no less than every 7 days. The level that a prisoner is on determines the nature of the privileges that they can earn (page 38 to 40 of the Manual).
16. Prisoners are entitled to associate with others, but rule 46 permits the removal from association and the Manual makes it clear that all prisoners should be individually assessed, not just for the suitability for activities, but also for the risk that they pose to themselves and others. There are 2 levels of that risk assessment: 'Routine – Mixed Unlock' and 'Restricted – Singular Unlock' (which is abbreviated to 'single unlock'). Under routine mixed unlock, an individual may be unlocked with other prisoners, but a risk assessment may determine the identity of those other prisoners. A single unlock is imposed where a risk to others is considered too high to enable the prisoner to

participate in mixed association or mixed activities. Although such a prisoner will not then associate with other prisoners, they will be able to interact with staff.

17. The 'unlock level' is again determined by a risk assessment of each prisoner and determines the number of prison officers that are required safely to unlock the prisoner from his cell. For example, '3 officer unlock' means that 3 members of staff are required.
18. An important entitlement for prisoners is exercise, which should be provided on a daily basis in excess of 30 minutes as a matter of routine (the Manual page 32). The CSC at HMP Woodhill has 4 exercise yards, two for HU6A and two for HU6B. Prisoners are escorted by the relevant number of staff (depending on their unlock level) to the exercise yard and locked in the yard to undertake their exercise. A prison officer remains outside the yard, in a secure corridor, and is able to observe the prisoners through a window in the door to the exercise yard.

#### Communication and recording information

19. There are a number of different records made by the staff of the CSC about their communications with prisoners and observations on their behaviour and conduct. These are as follows:
  - i) the Mercury intelligence report ('Mercury') – this is an intelligence database for each prisoner. A member of staff who has a piece of intelligence about a particular prisoner will input that information into Mercury, including the date and time of acquiring the intelligence, the subject heading of the intelligence and the intelligence itself. This material is then assessed by an intelligence analyst. This assessment will bring together other information available to the analyst and he/she will then communicate it to the governor in security to make a final assessment. That governor would feed that information back by email, if he/she thought necessary. That feedback would be by email to the Custodial Manager and the Head of the CSC, which in this case was Mr Alan Parkins. The analyst's assessment may also be passed on orally, if someone from security attended a DRAM (see below). A prison officer putting information on to Mercury cannot see the analyst's assessment or any other entries.
  - ii) NOMIS (also referred to as C NOMIS) – this is a database for each prisoner in which staff are able to record any information about their interactions with the prisoner. The entries on NOMIS may be viewed by any member of prison staff. The time and date of the entries are logged. Entries that are made on the Mercury system by a prison officer should also be included on the NOMIS system.
  - iii) Weekly report – this is a report prepared every week by a prisoner's personal officer. The Manual (at page 30) makes it clear that it is an 'essential ongoing record of the prisoners', attitude, behaviour and progress.' These reports are prepared at the end of the week, either on the Saturday or Sunday. They are signed off by the prisoner's personal officer and then by the supervising officer.

- iv) The Dynamic Risk Assessment Meeting (DRAM) - every prisoner on HU6A and HU6B is risk assessed every week, usually on a Wednesday at a meeting at around 10.00 hours. Minutes of that meeting are taken, including recording those members of staff in attendance and a record of the decisions taken about each prisoner.
  - v) The Prisoner Risk Assessment – after the DRAM, a pro forma risk assessment document is completed by the prison officer and endorsed by the Head of CSC. That risk assessment includes a summary of a prisoner’s unlock status, his prisoner history, measures that are known to increase or decrease the prisoner’s risk and a ‘running’ record of the outcome of the DRAMs.
  - vi) The monthly review for the CSC Management Committee – once a month a report is prepared for a meeting conducted by the CSC Management Committee reviewing prisoners nationally within the CSC system. The weekly reports form a key part of the monthly review. The review considers whether the prisoner should remain within the CSC and highlights areas of risk, progress and other relevant factors.
  - vii) The Wing Observation Book – each Wing has a book into which members of staff manually enter their observations about particular prisoners on a day-to-day basis. This observation book is open to all staff members to view.
20. On each wing, twice a day, the members of staff have a meeting to discuss information about each prisoner. Those meetings are not minuted.
21. For each prisoner a document is created called ‘Know Your Prisoner’ (KYP). This is updated annually and a hard copy is kept in the Wing Office in a folder, but the document is also available electronically. The document contains a large amount of information about the prisoner’s offences, behaviours and risks.

### **The witnesses**

22. The Claimant provided a witness statement that was agreed by the Defendant and he did not give oral evidence. The Defendant called 3 witnesses, Mr Alan Parkins, who was Head of the Special Units (i.e. the CSC) at HMP Woodhill at the relevant time. Mr Russell Bowen, who was a supervising officer on HU6B at the relevant time and Mr Joe McFarlane, who was a prison officer on CSC at the relevant time. On the day of the attack, Mr McFarlane was the prison officer in the secure corridor outside the exercise yard.
23. All 3 witnesses who gave oral evidence did their best to assist the court. However, Mr Parkins’ evidence was unsatisfactory in a number of respects as first, the witness statement originally served on his behalf was replaced by an amended statement due to an inaccuracy. Secondly, in cross examination it was apparent that the amended statement was also inaccurate in a number of respects.

## The facts

### The background to the risk posed by Gary Vinter

24. The KYP updated in September 2014 for Gary Vinter records that he had been convicted of murder in 1996. Shortly after his release from prison in relation to that crime, he murdered his wife and received the sentence of a whole life term. He also had a number of other convictions. The following entries in the KYP are particularly relevant:
- i) He had a history of disruptive and volatile behaviour whilst in custody.
  - ii) There is a record of 6 assaults on other prisoners whilst in custody.
  - iii) His behaviour appears to fluctuate, he can maintain a period of engaging appropriately with staff and the regime, but at other times it can be challenging including non-engagement with staff, destroying property and aggressive or violent behaviour. He is more stable when he is having access to the regime he prefers, but changes to his routine unsettle him and he can become frustrated or angry over this.
  - iv) On 23 May 2013 he made threats to ‘attack and kill any prisoner he gets the chance to’. In particular it is recorded that he reported that ‘he would not attack staff but would go through them to get to a prisoner...’
  - v) Since transferring to HMP Woodhill in May 2014 ‘his presentation has remained the same.’
  - vi) He is recorded as a high risk of harm to prisoners in custody. A violence risk assessment report assesses him as a high risk of future violence and that he had used weapons in several of his violent acts whilst in custody. ‘The risk of harm could be severe or death if he were to use weapons or lose control of his temper.’
  - vii) Under a subheading asking how soon the risk was likely to happen it is recorded: ‘Mr Vinter’s risky behaviours are readily exhibited when he is triggered. He previously made threats to harm/kill another prisoner, which suggest that there is a current risk of violent behaviour.’
  - viii) Under the section asking what triggers are linked to the risk, it is recorded that: he ‘appears to have difficulties in managing his emotions appropriately and uses violence and aggressive behaviour as a way to vent his anger or frustrations; potential triggers appear to be hearing information he does not like, ‘feeling disadvantaged or being treated unfairly, having limited control over plans/decisions made regarding his progression through prison and others behaving in a way he does not like.’ ‘[He] appears to consider himself above the rules of the prison...Therefore orders to comply with rules he does not agree with or feel apply to him could trigger violent or aggressive behaviour’; ‘when told something he does not want to hear, this has culminated in him damaging property or making threats to staff’; and he ‘may also be violent for



instrumental reasons, such as a way to manipulate others or get what he wants (e.g. a move to another prison).’

- ix) Protective factors are recorded as: likes to use the gym on a regular basis, which may help in managing/releasing any frustrations; he is more comfortable with a regular regime; he appears to be more stable when he has built up a good relationship with staff; positive relationships are likely to be affected when he felt aggrieved by the system or hears information he did not like; and adopting an open and transparent approach ‘may assist in reducing any anxieties or triggers related to not knowing future plans regarding his progress.’
25. Mr Bowen said that he was likely to have seen the KYP for Mr Vinter as he always liked to educate himself on the prisoners. He made it his business to know about prisoners, although he did not have a clear recollection of looking at this KYP. However, he would have been aware in his own mind about the past history of the prisoners and there was an expectation to have an overview and understanding of them.

#### The build up to the attack

26. A number of the weekly reports are missing (I will return to this below). However, Mr Parkins confirmed that the monthly reports contain each weekly report for that relevant month, which may have been ‘cut and pasted’ from the weekly report itself. That does seem to be the case when comparing monthly reports to those weekly reports that do exist. References to the weekly reports that follow include those that are found now only in the monthly reports. It seems that a complete record of the Mercury and NOMIS entries for Mr Vinter has been provided. References to entries on Mercury, NOMIS, weekly reports, the DRAM minutes, risk assessments and monthly reports are to those that relate to Mr Vinter, unless stated otherwise.
27. In September 2014 the Claimant was on HU6A and Gary Vinter was on HU6B. The DRAM minutes for 3 September record that Mr Vinter had submitted an application requesting that he was moved to HMP Long Lartin, because he thought the gym facilities there were better. The minutes of the meeting record ‘he has made no threats to staff, but states his mental health is suffering.’
28. On 6 September an entry is made on Mercury, which is repeated in the NOMIS. It is categorised as ‘threats to staff/others’ and the reporter has recorded Mr Vinter as: ‘becoming increasingly frustrated at the regime’. The intelligence assessment is that Mr Vinter will vent his frustration at the regime but: ‘he always maintains he does not intend to hurt staff’ and that he has acted on his threats before.
29. On 7 September an entry in NOMIS records Mr Vinter’s unhappiness with the size of his portion of melon which results in him throwing his food along the landing.
30. On 11 September the DRAM records again the request to return to HMP Long Lartin and Mr Vinter’s refusal to engage with the team. Mr Vinter was on single unlock by his own choice and it is recorded that he did not ‘want to associate with any other prisoners on the unit as his “head is not in the right place.”’

31. An entry on NOMIS for 14 September records Mr Vinter enquiring about his move to HMP Long Lartin and a further entry on 17 September records another polite enquiry and he was informed that feedback had not yet been received. These conversations are noted in the weekly report for the 14 to 20 September and that Mr Vinter ‘appeared in a more settled frame of mind’ possibly due to the forthcoming transfer.
32. The DRAM on 29 September identified that the Claimant was now on HU6B and there was a discussion recorded over the association groups. The minutes record ‘the team felt that there were no ideal groups but that the following groups would provide the safest regime for all concerned’. It is at this point that the Claimant and Mr Vinter were put in the same association group, with another prisoner (‘Prisoner X’). The association group changes were also recorded in Mr Vinter’s risk assessment document and the weekly report covering the 21 to 27 September, which in addition records Mr Vinter generally had a settled and compliant week.
33. The DRAM minutes for 1 October record an exchange about the move ‘but certain assurances have to be given before [Mr Vinter] is moved’. Otherwise, no changes are made. On 3 October an entry on Mercury and on NOMIS made by Mr Bowen is categorised as ‘inappropriate behaviour’. Mr Vinter is recorded as remonstrating with Mr Bowen over part of the routine overrunning without informing him. Mr Bowen records that he does not feel intimidated. The analyst’s assessment is: ‘all staff are aware of [Mr Vinter’s] frustrations and “treat with caution”’. The weekly report for 28 September to 4 October record that Mr Vinter had been getting on well with the Claimant (and another prisoner whose name is redacted) and that he was polite and compliant.
34. The DRAM minutes for 8 October are exactly the same as the minutes for 1 October, including a typographical mistake.
35. The weekly report ending 11 October noted that Mr Vinter was engaging well with the Claimant and no particular concerns were recorded. However, the monthly report ending on 11 October under the section ‘violence in prison’ records that Mr Vinter ‘is reported to have stated that he had no wish to harm others but that he has limited incentive to not be violent (09/09).’ It is likely that 09/09 means that that information was provided on 9 September, although it does not appear in Mercury or NOMIS.
36. On 15 October the DRAM minutes record Mr Vinter feeling let down. However, the weekly report for the week ending 18 October documents he was polite and settled. The DRAM minutes of 22 October record Mr Vinter’s unhappiness at the transfer not having taken place and that staff are to monitor the situation. The weekly report ending 25 October records that Mr Vinter put himself on single unlock as he had not heard any news about the transfer. However, once it was confirmed to him that he was still on the transfer list he went back to his association with the Claimant and Prisoner X. This is also recorded on the NOMIS for 26 October.
37. On 29 October the DRAM minutes record that Mr Vinter was looking forward to his transfer and that he was asking on a daily basis and it is recorded: ‘he knows we cannot tell him. Otherwise, he is in good spirits.’ On 5 November the DRAM minutes record that Mr Vinter remained settled, although he was anxious over his move.

38. There are a number of entries in the various records evidencing that Mr Vinter was either stable, polite or compliant with the regime. For example, 7 September, 13 September, 14 September, 20 September, 27 September, 1 October, 11 October and 18 October. On the 25 October, 26 October and 2 November his politeness and good interaction with his peers has been recorded. On 8 November the NOMIS records his politeness and appropriate demeanour towards staff and this was repeated in the weekly report covering that date and the monthly report covering the period 11 October to 8 November. However, in evidence Mr Bowen agreed that the indications were that Mr Vinter was becoming frustrated.
39. On 11 November there is an entry on Mercury, which in evidence Mr Bowen said was possibly made by him. This records that having believed he would not be out of HMP Woodhill by the following week, Mr Vinter stated: 'If im (sic) not out of this jail by the weekend, I will be out of this jail by the end of the weekend" [Mr Vinter] also stated that he wont (sic) be smashing up cells this time to force a move as he cant (sic) afford to do so.' This is categorised as a 'threat to staff/others'. The intelligence assessment records that staff were aware of the threats Mr Vinter had issued due to the delay in his transfer. It was recorded that the matter was to be referred to the violence reduction coordinator (VRC) and was to be discussed at the DRAM, which was to take place on 12 November. Mr Bowen explained that the VRC was responsible for attempting to decrease violence in the establishment.
40. On 12 November Mr Bowen made an entry on Mercury recording the conversation that took place that day at 10.00 hours as follows:
- "... [Mr Vinter] has told me his mental state is being affected due to the delay in his move to HMP Long Lartin. He went on to repeat his previous statement that if he is still in this jail at the weekend, he will force a move at the weekend. He then said "you know what im (sic) talking about, how long did it take [name redacted] to get shipped out after what he did"!!"
41. This information is categorised again as 'threat to staff/others'. The intelligence assessment is recorded as follows:
- "intel noted, this information was talken (sic) to the weekly DRAM today and the decision was made not to document this on his individual risk assessment. Unit staff are aware if (sic) the threats that have been made and have been fully briefed by the unit SO. CNOMIS case note entries and obs book entries have been requested. VRC has been emailed"
42. This entry is repeated on NOMIS on 14 November. Mr Bowen could not explain why it was recorded 2 days later, but thought it may be that he remembered on that day he had forgotten to put it on NOMIS or alternatively, security might have called him and reminded him to do it. He would have 'cut and pasted' from the Mercury entry into NOMIS. Mr Bowen explained that the incident that Mr Vinter was referring to related an attack on a governor, which resulted in the prisoner being removed from HMP Woodhill. Mr Bowen said that in his mind he assumed that Mr Vinter was intimating he would do the same and assault a member of staff. He explained that the categorisation was selected from a drop-down menu, which had many possible

options to select. He picked the option based on what he perceived the threat to be. The threat was vague, but it was very specific as it went to a prison officer or more senior member of staff. It can be seen from another Mercury entry for 4 December 2014 (page I147 of the supplementary bundle) that there is a categorisation ‘threats to prisoners’.

43. Mr Bowen explained that he had no clear recollection of this particular conversation, but he was involved in similar conversations with Mr Vinter, although not on a daily basis. There were a number of conversations when Mr Vinter was not moving within the timeline that he thought he should. This was a subject that was on Mr Vinter’s mind. Mr Bowen explained that from these conversations he walked away knowing it was not ‘hot air’. Mr Bowen said he had no way of knowing how the threat might manifest itself, but he took the threat seriously. He thought it was likely that Mr Vinter would do something, but certainly not what he did on 27 November or something of that severity. However, Mr Bowen accepted that Mr Vinter was capable of catastrophic violence, including against other prisoners and he agreed that Mr Vinter was capable of using the highest level of violence.
44. The DRAM on 12 November is recorded as starting at 10.00 hours and Mr Bowen is not recorded as being present, but another officer from HU6B is present, Mr Stevenson. Mr O’Brien, from the counterintelligence unit, was also present. Mr Bowen explained that Mr O’Brien would have access to the Mercury intelligence and assessments. The records concerning Mr Vinter from that DRAM minutes are as follows:

“behaviour summary: Mr Vinter has been unsettled as he has not been moved to Long Lartin yet. He stated that if he was not moved before the weekend there may be problems; issues discussed and now appears settled.

Association [redacted] and [the Claimant] ...

[Association groups]: ‘there was a discussion about the association groups and it was felt by the meeting that no changes could be made at this time...[redacted] [the Claimant] & [Mr Vinter]’

45. Mr Armstrong put to Mr Bowen that the entry in the DRAM was brief and should have been more detailed, which Mr Bowen accepted. Mr Armstrong also put it to Mr Bowen that the Mercury intelligence report from 10.00 in the morning had not been discussed at that meeting. Mr Bowen accepted this was not documented, but felt sure that he would have passed the information on to Mr Stevenson. I find that the intelligence report was discussed at that meeting based on the fact that the intelligence assessment accompanying that note on Mercury refers to the information as having been taken to the DRAM ‘today’. The essence of the report is also recorded in the minutes of the DRAM. The prisoner risk assessment that would have been completed following the DRAM on 12 November is missing. None of the witnesses were able to explain why a decision would have been made in the DRAM not to document this intelligence within that risk assessment. In any case, no alteration to Mr Vinter’s association was made.

46. Mr Bowen's evidence was that staff were aware of Mr Vinter's increasing frustrations in the month prior to the attack. Mr Parkins' evidence was that as head of the unit he visited daily and spoke to the prisoners asking whether 'all was okay?'. He explained that the prisoners would tell him if there was a problem and he would speak to staff to try and resolve any issues. He said he would only put significant interactions onto NOMIS or members of staff might put on an entry in on his behalf. In his witness statement, Mr Parkins explained that following the monthly central CSC Management Committee meeting, when Mr Vinter's transfer had been discussed, he fed that back to the custodial managers at the units, who would have then fed back that information to the individual prison officers. However, he spoke to Mr Vinter himself 'at least once after one of those meetings' to inform him that the move had been agreed, but that it was taking time to find an alternative place. There are no specific entries from Mr Parkins prior to the attack to that effect. Mr Parkins said that he could not recall the detail of conversations with Mr Vinter, but if he had expressed any concerns, he would have tried to reassure him. However, he had had more than one conversation with Mr Vinter along those lines. Mr Parkins was aware that Mr Vinter was not happy with the amount of time the transfer was taking and Mr Vinter had expressed his frustration to him, although he did not express any threats directly to Mr Parkins. However, he was aware that Mr Vinter had made threats if the move did not happen. Mr Parkins accepted that the record-keeping was poor, but I find that Mr Parkins did have conversations with Mr Vinter in order to reassure him as this is likely to have occurred on some of the daily visits (see also the entry on 25<sup>th</sup> November on NOMIS).

#### The DRAM of 19 November

47. There is another Mercury report for 12 November recording an interaction as having occurred at 17:30 hours. This entry was made on 17 November 2014 again, possibly by Mr Bowen. Mr Bowen accepted that this would be a second intelligence report for 12 November. The intelligence is recorded as:

"I was speaking to [Mr Vinter] with regards to his transfer to Long Lartin which had been agreed at the September CSC meeting. He stated to me that if he was not out of this prison by Friday next week (21/11/2014) then he would be annoyed and he would be "kicking off". He also stated that he always carries out what he says. He said that if I came to him and told him that he was not moving then I had better do it from behind a shield. I took this as a threat towards myself. [Mr Vinter] was advised as to his behaviour."

48. This is categorised again as 'threats to staff/others' and the intelligence assessment is as follows:

"Mr Vinter likes to get his own way, He has [previous intelligence] to show this, he will make his demands and then makes threats to kick off if he does not get his own way. The intel on file shows that sometimes he does assault staff and prisoners to get his own way. Staff are very much away (sic) of the threats and risks that come from [Mr Vinter]. Obs book and NOMIS all updated. To be [referred] to unit 6 CM's and

[Governor] Parkins. TO be included in the weekly DRAM report.”

49. In fact, there is no entry on NOMIS and the Wing Observation Book (referred to in the quote above as ‘obs book’) for that day is missing. The weekly report for the 9 to 15 November, which covers the date the intelligence was provided, but not the date it was recorded on Mercury, refers to Mr Vinter’s ‘ongoing’ issue about his move. It is recorded that he has made ‘indirect threats of force’ and initially said he would put those threats into action if he was not moved by 16 November. He is reported as saying that he would not be ‘smashing up’ prison service property as ‘he could not afford to pay the money in fines.’ It is recorded that this leaves the threats ‘open ended’. Mr Bowen is recorded as explaining the position to Mr Vinter and he stated: ‘he would give the management team ...until...21/11/14...until he acts on his threats...’ It is also recorded he remained polite ‘and causes staff no undue issues’.
50. Mr Bowen explained in evidence that the weekly report considered at the DRAM on the 19<sup>th</sup> would have been the one covering the week of the 9 to 15 November, which would have been prepared either on the 14 or 15 November. The reference in that weekly report to Mr Vinter not damaging prison service property was because there had been a change in policy which meant that when such damage was caused prisoners were required to pay for it and Mr Vinter did not have much money.
51. The DRAM of 19 November is again recorded as having taken place at 10.00 hours. Mr Bowen was not present and neither was Mr Parkins. There was a representative from security as well as Mr Stevenson (on this occasion spelled with a ‘v’ instead of a ‘ph’, but I assume it is the same person from HU6B as on 12 November and nothing turns on this in any case). The entry is as follows:
- “Unlock: 2 officer
- ...
- regime: STD
- Behaviour summary: Mr Vinter has given a deadline of this weekend to be moved off the unit. He has stated that he will cause disruption and has implied that he will assault staff. The meeting decided that his unlock should be increased to 3 officers and he would be spoken to by [redacted] and informed of this.
- Update: Mr Vinter was spoken to and he seemed to accept the increase in unlock. He acknowledged that staff are working for him and trying to get him out of the unit....
- [Association groups:] ‘this was discussed and no changes could be made.’”
52. Although he was not present at this DRAM, Mr Bowen explained that the Wing Observation Book and the weekly report about each prisoner would be taken to the DRAM and an oral update provided. There was access to NOMIS via computer in the

office where the DRAM was held and it would be consulted, if needed. For example, if there was a discussion and a point needed clarification then the NOMIS would be the point of reference. The KYP document, Mr Bowen said would have been available electronically in the office where the meeting was held, although he did not think it was always looked at in the DRAM. As I have already stated, any intelligence assessment would have to be provided by the representative from security. It is likely that the intelligence reported for 17:30 hours on the 12 November was discussed in the meeting through the security representative or the weekly report, although they contain similar information. The implication that Mr Vinter would assault staff must have come from the statement that the information should be given to him 'from behind a shield' and because Mr Vinter had said he would not damage property. However, the intelligence analyst had recorded 'sometimes he does assault staff and prisoners to get his own way.' As a result of this threat, the unlock level was increased to 3 officers. The discussion about association groups (which is not just limited to Mr Vinter) does not result in any change. It should be noted that the minutes of the DRAM inaccurately record at the beginning of the entry that Mr Vinter was on two officer unlock. Mr Vinter's prisoner risk assessment would have been completed on the same day as the DRAM. The document available appears to be incomplete as only the first page is available, but it also incorrectly records him as being on two officer unlock. Mr Vinter's prisoner risk assessment document does record in the 'prisoner history' section that he has a history of assaults on prisoners, but it does not identify a history of assaults on staff. The entries in the 'prisoner history' section are identical on all of the relevant prisoner risk assessments for Mr Vinter.

#### The DRAM of 26 November

53. The weekly report for the 16 to 22 November is missing. The monthly report covering 9 November to 6 December includes the weekly report for the 9 to 15 November and the 23 to 29 November, but those for the 16 to 22 and 30 November to 6 December are not quoted. Mr Parkins said that staff were fastidious in preparation of these reports and he would be surprised if one had not been available.
54. There are a number of NOMIS entries prior to this meeting and it is reasonable to infer that that information would have been available either orally, through the weekly report, if it had been prepared, or by way of oral update from the prison officers attending the meeting. The relevant parts of the NOMIS entries are as follows:
  - i) 20 November – '... Polite to staff on interaction.'
  - ii) 21 November – '[Mr Vinter] had told Lee Newell (who had been making threats to staff) to calm down and relax. [Mr Vinter] was polite to staff'
  - iii) 24 November – '... [Mr Vinter] spoke in a joking tone asking 'is the bus here yet?'. His transfer is still his main focus.'
  - iv) 25 November – there is a more substantial entry recording the escalation to 3 Officer unlock following the DRAM on 19 November. It records that Mr Vinter declined his association periods and associated during gym and exercise periods. It records that he mixed well with his peer group 'and has a good rapport with other peers on the wing'. Mr Vinter is said to maintain an

appropriate and polite demeanour in his approach with staff. The entry on 21 November is referenced and it states ‘also spoken to by management regarding his impending transfer and accepts reasoning in (sic) delays.’ The week is referred to as ‘steady’.

55. The substantial entry for 25 November reads rather like a weekly report. This was not suggested during the hearing, but it is possible that this entry was created to stand in place of the weekly report. In support of this conclusion, it is recorded as being made by the ‘personal officer’ and described as a ‘report’ on the NOMIS entry, as opposed to the majority of the other entries which are described as ‘general’.
56. The monthly report, to which I have already referred, also contains a record of some information prior to 26 November. Under the heading ‘behavioural targets’ and the subheading ‘criminal attitudes’ Mr Vinter was recorded as being polite to staff and the incident on 21 November is recorded. In addition, on 24 November there is a note that Mr Vinter refused a direct order to move cells. Under the subheading ‘cognitive distortions’ referring to information on 21 November it is stated that Mr Vinter accepted the delay of his prison transfer. There is a record that on 25 November Mr Vinter ‘...is reported to have spoken to staff about his refusal to move cells stating that he “thinks it is a windup”’.
57. The minutes for the DRAM of 26 November record that Mr Parkins and Mr Bowen were present, as was Mr O’Brien from the counterterrorism unit. Mr Bowen explained that his role at a DRAM was to provide information from the unit. Mr Vinter is recorded as being on two officer unlock, which Mr Holborn accepted was a typographical error. As can be seen from the other documentation that I have referred to, Mr Vinter was on three officer unlock at this point. The behaviour summary is as follows:

“Mr Vinter has been unsettled as he has still not been transferred to Long Lartin. His risk is high, but currently making no threats. Gov Parkins to speak to Long Lartin to attempt to speed up the process.”
58. The association for Mr Vinter referred to is one person, whose name has been redacted (but is likely to be Prisoner X). At the end of the minutes, the record of the discussion about association groups is recorded as: ‘it was felt by the meeting that no changes could be made at this time.’ Who is in which association group is mainly redacted. As above, Mr Vinter is recorded as being in a group with one other, who is probably Prisoner X. The Claimant, is referred to as being on ‘single unlock’.
59. On 20 November, the Claimant had been involved in an incident where he had attempted to conceal a razor blade. His unlock had been increased to 5 officer and he had been placed on the basic regime. The minutes of the DRAM for 26 November record that he was on 5 officer unlock. He is recorded on single unlock, in other words he was not allowed to associate with other prisoners. The Claimant’s weekly report covering this day, records that the Claimant’s unlock was decreased from 5 to 3 officer unlock at the DRAM. The NOMIS has an entry timed at 11:54 hours on the 26 November stating he is ‘now’ on 3 officer unlock. The DRAM minutes appear to be incorrect on the number of officers required to unlock the Claimant.



### Events on 26 November after the DRAM

60. Mr Vinter's weekly report covering the 23 to 30 November, which will have been written after the attack on the 27th, records that the Claimant re-joined his exercise group on 26 November and that Mr Vinter had 'good rapport with other peers on the wing and maintains an appropriate and polite demeanour in his approach with staff.'
61. Mr Vinter's prisoner risk assessment completed on 26 November records the same under 'prisoner history' namely assaults on prisoners, but not on members of staff. Reference is made to the DRAM of 26 November and Mr Vinter remaining on three officer unlock.
62. The Claimant's relevant weekly report covering 26 November records that the Claimant was authorised to re-join Mr Vinter in the association group and took exercise with him on that day. This entry follows the paragraph about the reduction to 3 officer unlock (see paragraph 59 above). There is no reference in the Claimant's NOMIS to the change in the Claimant's association. There are entries recording concerns over the Claimant self-harming. The separate entry relating to the change in the Claimant's association and the minutes of the DRAM makes it likely that, sometime after the DRAM, but on the same day, a decision was made changing the Claimant from single unlock and allowing him to associate with Mr Vinter. As can be seen from paragraph 15 above, the basic regime that the Claimant was on should have been reviewed on 27 November, having been placed on it on 20 November. Nevertheless, it seems that it took place a day early, perhaps because of his comments about self-harming, but that is speculation and the reason for the timing of the change is not material.

### The 27 November and the attack

63. On the morning of 27 November, the Claimant and Mr Vinter were placed together in the exercise yard of HU6B. Within about 10 minutes of being placed in the yard, and having been observed to have been in conversation with the Claimant with no apparent issues, Mr Vinter punched the Claimant to the ground. He then proceeded repeatedly to punch and kick the Claimant in the head. It is not necessary for me to go into any more detail about the attack at this point as no allegations are being pursued against the Defendant that make this necessary. I will detail the extent of the injuries suffered by the Claimant in the paragraphs below.

### The nature of the risk posed after 19 November

64. In his witness statement, Mr Bowen explained that it was not unusual to hear 'vague and open threats' from prisoners as a way to try and obtain what they wanted. Mr Parkins also gave evidence that it was not unusual for prisoners to make threats for the same reason. Mr Bowen stated: 'unless the threat is specific, for example aimed at a particular person, it is difficult to take any action based upon it'. However, Mr Bowen accepted in cross examination that the threat did not need to mention a specific person and that a threat towards a member of his group would be enough to take away the prisoner's association with that group. He accepted that for Mr Vinter the group at risk would be the Prisoner X and the Claimant. He accepted that Mr Vinter had a history of attacking prisoners in the past. Mr Parkins said that there had to be a threat to somebody before association was removed, but he agreed that a

named threat was not necessary. Mr Parkins explained that the decision to remove association was not his decision alone: it would be done by the DRAM. Mr Parkins said that if a prisoner said that he would assault another prisoner, they would act on that and remove the person's association from all other prisoners. If the threat was made to a specific prisoner then they would remove association with that particular member of the group. Mr Parkins agreed that Mr Vinter had a history of assaulting prisoners in the past, as noted on the KYP and prisoner risk assessment documents.

65. Mr Parkins accepted that the threats referred to in the Mercury reports of the 11 and 12 November were not confined to staff, although Mr Parkins pointed out they were not specific to prisoners either. Mr Parkins said that any prisoner is a threat to another prisoner, but he agreed that Mr Vinter was a general threat to property, prisoners and staff. Mr Parkins accepted for the DRAM of 26 November, when he was present, there was no analysis of Mr Vinter's risk to other prisoners evident from the minutes. There was no weekly report available and he had no recollection of the conversation. However, he accepted that such an analysis needed to take place about the risk to prisoners and would have expected it to be detailed in the minutes. He suggested the minute taker had not taken the minutes properly.
66. Mr Parkins explained that following a Mercury report it would be assessed by an analyst who would develop that report and assess whether it was related to any other issues. The analyst would email about it to the governor in security who would undertake a final assessment. The governor in security would feed that back usually to the custodial manager and to Mr Parkins and they would disseminate that to staff. At the DRAM, a member of security staff would provide the relevant intelligence. Mr Parkins was not aware of any emails coming from security or the governor about Mr Vinter.
67. I find on 19 November Mr Vinter was a risk to prisoners and staff as accepted by Mr Parkins. Although not recorded, I find that this risk to prisoners was considered as there is reference to association groups being considered. I find that the risk will have increased after the expiry of Mr Vinter's self-imposed deadline of 21 November. The DRAM of 19 November considered this risk and acted by increasing his level of unlock to 3 officers and maintaining this position at the DRAM of the 26 November.

#### Single unlock

68. If Mr Vinter had been placed on single unlock on either the 19 or 26 November, he would not have been able to exercise with other prisoners. In that circumstance the attack would have been avoided. In his witness statement, Mr Bowen gave evidence that at the DRAM meetings Mr Vinter's threats were discussed and taken seriously (this was also Mr MacFarlane's evidence) and that his unlock level was increased from 2 officers to 3 officers on 19 November. Mr Bowen explained that the unlock levels are a reflection of the risk of a prisoner. He stated 'in my view it was all that could really be done in response to his threats'. He explained that the increase in the number of officers gave extra protection to staff, to other prisoners (as there were more officers to be able to control him) and to Mr Vinter in case he became non-compliant and violent. Mr Armstrong referred Mr Bowen to a number of entries concerning other prisoners who had been placed on single unlock, but Mr Bowen explained that these prisoners were on HU6A, which is the assessment unit and more commonly used single unlock. Mr Vinter had been on single unlock on previous

occasions, but that was at his own request. However, he agreed that where the security level justified it, there was no obstacle to putting an individual on single unlock (as did Mr MacFarlane) and the prison rules did not provide a threshold for this, so that if the security needed it, then single unlock would be done.

69. Mr Parkins agreed that single unlock was available to stop prisoners associating and there was no reason not to remove association if it was needed for security reasons. Association is important for a prisoner, but it would be considered and discussed. Mr Parkins pointed out that despite Mr Vinter being on a whole life tariff there was still a rehabilitation element and the aim of CSC was to rehabilitate prisoners to return to the mainstream prison population. Mr Parkins said in the DRAM of 26 November he could not recall if a conversation had taken place about whether or not to put Mr Vinter on single unlock, but that he was fairly confident that all the professionals would have discussed this and a decision had been made not to take him off association. He did not accept that the only outcome of such a discussion would have been to have used single unlock. This was because there had been no specific threat to a prisoner, the threats were generalised in that he had said something was going to happen and this might be for numerous reasons. However, he agreed that Mr Vinter was a general risk to staff and prisoners, but he said it was hard to say why the DRAM would come to the decision not to remove association, as he could not recall the decision. He accepted that following such a discussion removal of association might have been the outcome although he might have been kept in his association group. Mr Parkins' exchanges with Mr Armstrong on this point demonstrated some reluctance on his part to answer the questions being asked about Mr Vinter's risk to other prisoners, such that association should have been removed. He answered by stating he could not recall what had happened, as opposed to answering why if the risk to staff was acknowledged by the increase in unlock level to 3 officers, the risk Mr Vinter posed to prisoners did not require removal of association.
70. Mr Parkins explained that a removal of association had to be justified and warranted, it could not be done for no reason.

#### What Mr Bowen is said to have said

71. Mr Armstrong took Mr Bowen to a transcript of Mr Bowen's cross examination by Mr Vinter's counsel at his criminal trial for the attack on the Claimant. In the course of that cross examination, it was put to Mr Bowen that in a conversation with Mr Vinter, he, Mr Bowen, had said to Mr Vinter: 'well do not do anything silly. If you do jump anybody, let it be [the Claimant]'. The transcript records that Mr Bowen denied making any such comment. Mr Bowen was also shown an extract from the Wing Observation Book for 27 November recording an interaction with Mr Vinter as follows:
- "... and then he added that he had been messed about for too long over his transfer and that he had warned staff that something would happen. He added that he knew staff would rather he assault (sic) another prisoner than a member of staff."
72. Mr Bowen again categorically denied that he had said such a thing to Mr Vinter or that he was now trying to back away from having made such a comment.

73. The entry from the Wing Observation Book quoted above is evidence of Mr Vinter's belief, but does not support the allegation that Mr Bowen had made such a comment to Mr Vinter. I have not heard evidence from Mr Vinter and I put little weight on what at his criminal trial he asked his counsel to put to Mr Bowen. Mr Bowen categorically denies making that comment and I accept his denial in the circumstances.

**Conclusions on the first issue – was the Claimant kept reasonably safe?**

74. The Claimant's submissions were that Mr Vinter represented a risk to an identified group of prisoners, he was known to use violence in order to achieve what he wanted. The absence of any record of a consideration of the risk he presented to prisoners meant that the issue was not considered and it should have resulted in the withdrawal of association. The Defendant's submissions were that notwithstanding the threats and known risk, a decision was taken to allow association to continue and in the circumstances that was justified.
75. I should acknowledge that those members of the prison service who are responsible for the custody of prisoners such as the Claimant and Mr Vinter carry out a very valuable and difficult job on behalf of society. It requires them to make difficult decisions, including assessments of a variety of risks and balancing competing interests. In reaching my conclusions on this first issue I am careful not to analyse it with the benefit of hindsight.
76. The key decisions to analyse are those made on the 19 and 26 November at the DRAMs on those dates. Mr Bowen accepted that he would have had the type of information contained within the KYP document within his mind and the key information from that document was in any event summarised in the individual prisoner risk assessment. The KYP records the risk that Mr Vinter posed to other prisoners and this history is noted in the individual risk assessments completed after the DRAM. There are limited references in Mr Vinter's KYP to a history of assaulting members of staff and this is not noted on the prisoner risk assessment. In the KYP it refers to him considering that staff might be injured incidentally in order that he may reach and harm a prisoner. Mr Bowen knew, and I infer that other prison staff on HU6B knew, that Mr Vinter was capable of using severe violence in order to achieve his ends.
77. Mr Bowen and Mr Parkins' evidence was that they were both aware that Mr Vinter was becoming frustrated as the move to HMP Long Lartin was taking too long from his perspective. The KYP records the history of using violence in order to achieve what he wanted, including specifically referring to a prison move and the intelligence assessments in the Mercury reports from 6 September, 3 October, 11 November and 12 November (on both occasions) evidence his increasing frustration and threats.
78. The threat on 11 November excluded damaging property and therefore by implication was made towards staff and/or prisoners. The records of the threats on 12 November were both categorised as a threat towards staff. However, the intelligence assessment of the Mercury report for the incident on 12 November at 17:30 hours would have been available in the DRAM of 19 November and specifically refers to Mr Vinter's history of assaulting staff and prisoners to get his own way. Mr Parkins accepted that the threats were not confined to staff. Of course, there were only two prisoners who could have been at risk from Mr Vinter, as there were only two people in his

association group, one of whom was the Claimant. The potential threat as it related to prisoners therefore related to an identifiable group.

79. Mr Vinter had given a deadline initially of 16 November which he subsequently extended to 21 November. On 19 November the information available to the DRAM about his risk resulted in the increase to 3 officer unlock. On 26 November Mr Vinter's risk is referred to as 'high' and the level of unlock maintained. An additional factor by then is that the deadline of 21 November had passed. The record in the KYP supports the conclusion that this would have increased the risk of action by Mr Vinter, because his deadline had passed without the result that he desired.
80. Prison staff may have been falsely reassured because of Mr Vinter's compliance with the regime and also how he appeared to be getting on with the Claimant. Although between the 20 and 26 November the Claimant would not have been associating with Mr Vinter. There was no evidence about any association with Prisoner X. Staff may also have been reassured by explanations given to Mr Vinter for the delay and in the past his previous acceptance of those explanations. However, the records show that the association groups were not considered as ideal in any case.
81. I find that there was a discussion at the DRAMs on the 19 and on 26 November about the association groups and decisions were made at both meetings to allow Mr Vinter to associate with the Claimant. I find that the note of the DRAM meeting of 26 November is inaccurate about Mr Newell being on single unlock and the NOMIS entry and monthly report reflect accurately that on the 26 November the Claimant exercised with Mr Vinter.
82. However, I find that the decision at the 26 November DRAM to allow Mr Vinter to associate with the Claimant was in breach of the Defendant's duty of care, notwithstanding any reassuring (falsely as it turned out) features. The risk on 26 November was high, the deadline of the 21 November had elapsed, the risk applied to staff and/or prisoners and the effect of maintaining the three officer unlock meant that Mr Vinter's opportunity to use the violence that he was well known for, would arise in the exercise yard when he was with other prisoners in his association group, the prison officers being locked outside the yard. There was a failure on the 26 November either to consider the opportunity that this presented to Mr Vinter, or to discuss it at all to this extent. If it had been discussed, the conclusion that should have been reached was to take steps to remove Mr Vinter's association with other prisoners. I reject Mr Parkins evidence that it 'might' have been one of the decisions taken. Mr Parkins was reluctant in evidence to accept this conclusion and the reasons that he gave for the DRAM allowing Mr Vinter to continue associating with other prisoners, based on the general nature of the threat, are not credible when viewed against Mr Vinter's history and the nature of the risk by the time of the DRAM on 26 November.
83. I find that single unlock for Mr Vinter was reasonable and practicable. Both Mr Bowen and Mr Parkins accepted that single unlock would be used if it was justified for reasons of security. As I have already concluded, the group of prisoners to whom the risk applied was identifiable, albeit nobody had been named as the potential victim. Single unlock had been used for the Claimant between the 20 and 26 of November when he presented a risk because he had taken a razor blade, which shows that single unlock was practicable for prisoners who represent a risk to other prisoners. I do not accept that single unlock could not have been used in the

circumstances as it would have remained under review on a weekly basis at the DRAMs depending upon the continuing risk that Mr Vinter posed. Furthermore, the removal of association would not have been open ended as the decision to transfer Mr Vinter had been agreed and therefore any period of single unlock would have only been, at most, until that transfer took place. Presumably, Mr Parkins would have made additional efforts at the monthly meetings to achieve Mr Vinter's transfer if he had been on single unlock. If Mr Vinter had been placed on single unlock on 26 November then the attack would not have occurred. Therefore, I conclude that the Claimant succeeds on the first issue.

### **Conclusion on the second issue – the time limit in s7(5)(b) HRA**

84. The time limit in section 7(5)(b) HRA expired on 27 November 2015. The claim form was issued on the 26 July 2016, which is eight months later and served on 21 November 2016. The letter of claim is dated 31 May 2018 and the letter of response dated 13 August 2018. The Particulars of Claim are dated 25 January 2019 and include complaints about inadequate disclosure.
85. The letter of claim refers to previous correspondence between the parties and that only limited disclosure had been received. Mr Holborn referred to a disclosure request before service of the claim form, which was in September 2016. As can be seen from the background above some documentation remained missing. There was no evidence before me of the extent of any searches that had been made for missing documentation, or an explanation about why documentation was missing.
86. In re-examination Mr Bowen stated that his recollection of whether he is likely to have seen the KYP and the circumstances of Mr Vinter's assault on other prisoners in the past would have been better if he had been asked to recollect such matters earlier. Mr Parkins said that he would have had a better recollection of his conversations with Mr Vinter if asked closer to the time. He would also have been able to assist in looking for the missing weekly reports, as he would have been at the prison and he would have had a better recollection of why they had not been completed. He would have had a better recollection of the DRAM of 26 November and the discussions about Mr Vinter's risk level. The Claimant has no recollection of the attack on 27 November or the morning leading up to it.
87. There are six potential sources of documentation that might provide evidence for this aspect of the case. The Mercury records and the NOMIS entries, both of which appear to be complete. The minutes of the DRAMs, again which appear to be available and the monthly reports, which again appear to be available. The weekly report for the week ending 22 November is missing, as identified above and this would have been the report available to the DRAM of 26 November. However, there is a detailed NOMIS entry dated 25 November that appears to cover similar material. The only entries provided from the Wing Observation Book are dated 27 November, after the attack. As I have indicated above, there is no evidence explaining why earlier relevant entries from the Wing Observation Book have not been disclosed.
88. The Defendant's expert report from Doctor Poole, neuropsychiatrist, contains an extract from a report by a neuropsychologist, Doctor Meina prepared in August 2015. This indicates that the Claimant still had some problems with short-term memory, but he no longer needed prompting to complete tasks. The extracts from the Claimant's

medical records contained within the neuropsychology evidence of Doctor Vesey, the Claimant's expert, record that by March 2015 the Claimant was still demonstrating memory problems resulting in 'ongoing confabulation within conversation, continued difficulties with initiation, organisation, planning and problem-solving within tasks...' The joint statement of Dr Vesey and Dr Poole at paragraph 5 record some long-term cognitive impairment, although its degree is difficult to establish, as the Claimant remains in the prison environment. The experts agree the impairment was worse in the past and significant recovery and improvement has been made. Dr Poole believes any cognitive impairment and loss of functioning to be mild and Dr Vesey believes it to be moderate at least.

89. When considering the exercise of my discretion under section 7(5)(b) HRA I must not put any qualification to, or gloss on, the words 'equitable having regard to all the circumstances'. 'Equitable' must mean being fair to each side (as per Lady Hale in *A v Essex County Council* [2010] UKSC 33 quoted at paragraph 50 of *Soleria*). I also bear in mind what Lady Hale stated at paragraph 116 of *A v Essex County Council* (quoted at paragraph 51 of *Soleria*) that expedition is less obviously necessary in cases seeking a declaration of rights or a claim for damages.
90. The substantive issue to be determined is whether or not the Defendant knew or ought to have known of an immediate risk to the Article 3 rights of the Claimant. Mr Holborn, accepted in the course of his closing submissions that the risk was a 'real' one. Mr Holborn also accepted if the Defendant failed on the first issue that would amount to a failure to take reasonable steps to avoid the risk. I need to analyse whether it would be equitable having regard to all the circumstances of the case to extend the time limit in that context and in particular in relation to the two DRAMs of 19 and 26 November.
91. The delay before issuing the claim form was eight months, which is a relatively short period of time after the expiry of the time limit. I also consider the delays in service and notification of the details of the claim to the Defendant as set out at paragraph 84 above. The Claimant had a significant head injury and initial brain injury that for some months, at least until March 2015, caused an impairment of his mental functioning and impairment of his organisational skills. There is some evidence that there was a level of impairment at least until August 2015. The Claimant was also a prisoner and this will have had some impact upon his ability to obtain advice. The factual witnesses called by the Defendant gave evidence that their recollection was impaired due to the delay. There was no specific evidence that their recollections about key matters might have been better, had proceedings been issued within the one-year limitation period. However, I accept, generally that it is likely that the witnesses' recollection of events will have been impaired by the passage of time. Nevertheless, they were able to give accurate recollections of a number of events and circumstances and usual practices. I accept that the Defendant is prejudiced to some extent by the delay due to the impact on the witnesses' recollections.
92. It is recognised that witnesses' memories may not give accurate recollections, notwithstanding that oral evidence is the 'gold standard' (see paragraphs 95 to 100 in *Kimathi*). Often, it is the documentary evidence that underpins the analysis of the cogency of the oral testimony. The Wing Observation Book entries are missing, but the evidence was that significant information should be recorded in Mercury and the NOMIS and the Wing Observation Book would be available at the DRAM. The other

key missing document is the weekly report for the week ending 22 November (the content of the other missing weekly reports being in the relevant monthly reports). First, the Defendant had available to it the other documentation I have referred to above, including the NOMIS entry of 25 November. Secondly, although there may be information not recorded elsewhere, the weekly reports include summaries of information recorded on Mercury and NOMIS and would in any case have not included a record of information after the 22 November up until the DRAM of 26 November. The relevant monthly report does not include an extract of this weekly report. Mr Parkins cannot explain why that is the case, but it is possible that even if he had been at the prison it would have remained 'lost'. The key documents are the minutes of the DRAMs of 19 and 26 November, when the decisions on risk and association are made and should be recorded. These documents are both available. There is no evidence documents were destroyed in the normal course of business due to the delay. The documentary evidence available to the court is not significantly affected by any delay and there is little or no prejudice to the Defendant from the missing documentation.

93. There is no evidence<sup>1</sup> about the steps taken by the Claimant to obtain advice on which to consider whether he acted promptly and reasonably once he knew whether or not the act or omission of the Defendant might be capable of giving rise to the claim. Other circumstances to consider are that the Claimant has a good claim under Article 3 and he will be precluded from bringing that claim if I do not exercise my discretion. Mr Holborn said that the Claimant was not prejudiced in this way because he had the claim in negligence and if he was successful in that claim, he would recover equivalent damages. One of the issues I have to decide if the Claimant is successful, is whether or not there is a difference in the damages award between the tortious claim and the HRA claim. However, in any case, even if there is no difference in damages, what the Claimant would lose is the opportunity of a declaration of the breach of his rights, which is prejudicial to him. However, the Defendant will lose the protection of the time limit if I do grant the extension.
94. I have to consider whether or not it is proportionate and fair to both parties to allow this aspect of the case to proceed. I bear in mind that there is no evidence of the steps taken by the Claimant until the claim form was issued. Nevertheless, for some months, the Claimant was suffering from significant cognitive dysfunction and in prison, which provides a justification for some delay. The period of delay to issue the claim form is relatively modest at eight months and the Defendant was on notice at around 10 months after expiry of the limitation period following a request for disclosure. I bear in mind that the Defendant's witnesses' memories will have faded to some extent. I consider that the documentation available to the Defendant has not been materially affected by any delay. The missing weekly report may never have been identified in any case and the Defendant has not provided any evidence of searches for documentation or explanations about why documentation is missing. My conclusion is that the cogency of the evidence (documentary and oral) is not affected to the extent that there is any significant prejudice to the Defendant's ability to defend this claim. The Claimant has a good claim under Article 3 and the period of delay in the context of a claim for a declaration and damages is relatively short. Accordingly, I

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<sup>1</sup> During the trial, I refused the Claimant permission to adduce a witness statement from his solicitor, for reasons given at the time.



am satisfied the Claimant has discharged the necessary burden and I exercise my discretion and extend the time to permit the claim to be brought.

**Conclusions on the third issue – was there a breach of Article 3?**

95. There will be a breach of the positive obligation under Article 3 where the authorities knew or ought to have known at the time of the existence of a real and immediate risk of a breach of Article 3 of an identified individual or individuals from the acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. As I have stated above, it is accepted that the risk posed by Mr Vinter was a ‘real’ one. Mr Holborn also accepted if the Defendant failed on the first issue that would amount to a failure to take reasonable steps to avoid the risk.
96. The issue therefore is whether or not the Defendant knew or ought to have known at the time of the existence of an immediate risk. The information available to the Defendant considered prospectively was as follows:
- i) the information contained in the KYP, including that Mr Vinter posed a risk to other prisoners, he used violence when he became frustrated and to achieve his objectives. The violence could be very severe or result in death;
  - ii) Mr Vinter had become frustrated about the delay in his transfer;
  - iii) Mr Vinter had made three threats by the end of 12 November;
  - iv) Mr Vinter could appear compliant with the prison regime;
  - v) The intelligence assessment of the second piece of intelligence of the 12 November recorded his history of using assaults on staff and prisoners to get his own way;
  - vi) Mr Vinter represented a risk to staff and prisoners;
  - vii) the association groups were not ideal; and
  - viii) there was an opportunity for Mr Vinter to assault another prisoner in his association group in the exercise yard.
97. After the DRAM on 19 November, Mr Vinter was spoken to and is recorded as acknowledging staff are working to try and get him out of the unit. However, by the time of the DRAM on 26 November Mr Vinter’s deadline of the 21 November had expired. The NOMIS entry of 25 November also refers to Mr Vinter being spoken to by management about the transfer and accepting the reasons for the delay. However, it has been accepted that Mr Vinter presented a risk and that his threats were real. After the expiry of the deadline of the 21 November the risk was present and continuing and increasing every day that went past the deadline. I note however, that there were no more threats made and there are records that Mr Vinter was associating well, but those responsible should have known not to be reassured by this, given the information in the KYP. The additional factor on 26 November was the Claimant’s return to association with Mr Vinter and the opportunity this provided to Mr Vinter. The risk posed by Mr Vinter, was a present and continuing one and as per *Rabone*

was immediate and became so on the 26 November. As a result of the failure to appreciate this, reasonable steps were not taken (as I have found in deciding the first issue) and if they had been, the attack on 27 November would have been avoided. The claim of a breach of Article 3 is established.

#### **The fourth issue – quantum of damages under the first issue**

98. From the point of view of the injuries to the Claimant, the circumstances of the attack on the Claimant are that the two men were initially in the exercise yard apparently without issue. At 9:25:34 Mr Vinter grabbed the Claimant and punched him in the head with his right hand, causing the Claimant to fall to the ground. Over another seven seconds Mr Vinter punched the Claimant to the head with his left hand, approximately 16 times. Mr Vinter then kicked the Claimant in the head eight times over a period of seven seconds, using alternating feet. He then left the Claimant, but returned to kick him in the head another four times. Finally, Mr Vinter returned to the Claimant and kicked him in the head with his left foot. At 9:27:12 Mr Vinter was removed from the yard.
99. The Claimant was admitted to hospital and ventilated on intensive care and eventually required a tracheostomy. He had a hole placed in his skull to allow monitoring of his brain pressure. He was transferred from the John Radcliffe Hospital in Oxford to the intensive care unit in Milton Keynes on 13 December 2014. On 22 January 2015, the Claimant was transferred to the Oxford Centre for Enablement.
100. In addition to the head injury, the Claimant's right eyeball was ruptured. His other injuries were swelling over his right eye and cheekbone, a 6 cm laceration above his right eye and a 4 cm laceration of the left eyebrow. There were fractures of his right cheekbone and his orbits, the one on the right being more severe. He had fractures of his nasal bone and base of skull. There were also lung contusions (bruising). The fractures of this his right orbit and cheek were treated surgically, including the placement of titanium plates and screws. The injury to the left orbit was treated conservatively. As a result of the surgery, he has a scar on the right side of his head extending from the top of the scalp to the upper aspect of his right ear. There is a further scar underneath the right eyelid. There is concave hollowing in the Claimant's right temporal region measuring about 8cm by 8cm to a depth of 2 cm.
101. The Claimant is left with orbital asymmetry. The right eye ball is sunken within the socket and there is some restriction in opening his right eye. He is blind in the right eye and accordingly has no binocular function. He has reduced ability to undertake near tasks that require near depth perception. This loss of vision is permanent. However, he does not require registration as sight impaired. There is no chronic eye pain and his lifetime risk of sympathetic ophthalmia in the left eye is in the range of 0.1% to 0.3%. The Claimant could have surgery to improve the appearance of his eye (and eye prosthesis is one option). He has altered sensation over the right cheek, side of the nose and upper lip and on his forehead and scalp. He has pain on the right front orbital rim, as a result of one of the titanium plates. Surgery to remove the plate is not recommended. His nasal bridge is flattened and he has poor air entry through both nostrils.
102. I have set out at paragraph 88 details of the Claimant's cognitive function after the accident and more recently. Doctor Vesey, for the Claimant and Doctor Poole, for the

Defendant agree that the Claimant had a traumatic brain injury as a result of the attack. Doctor Poole calls it severe, but Doctor Vesey calls it very severe, although they agree that the difference is of limited clinical significance. The experts agree that the Claimant shows symptoms of anxiety and that he had pre-existing anxiety, but they disagree to some extent on whether or not it is associated with the effects of the attack (Doctor Vesey believing that to be the case). The experts were of the view that the Claimant's behaviour may have become less disruptive since the attack. They agree that there is unlikely to be further significant clinical improvement. There is no evidence of a risk of epilepsy.

103. The parties agreed the appropriate bracket in the 15<sup>th</sup> edition of the Judicial College Guidelines (JCG) for the loss of an eye, as set out below. The Claimant initially relied on chapter 3(A)(d) at the upper end of the range for the brain injury, but the Defendant put forward the higher bracket 3(A)(c), albeit at the lower end of the range. For the facial fractures, the Claimant sought to apply chapter 9(c)(i) JCG. Mr Armstrong indicated the separate injuries should be cumulated, but the Mr Holborn stated that was not the correct approach with overlap between the different guidelines. He relied on two case reports, referred to below. The Defendant argued that because the Claimant was in prison, his loss of amenity was less than if he had been at liberty and said the appropriate award in this case was £75,000. It is agreed the 10% *Simmons v Castle* uplift applies.

104. The relevant JCG are set out below, starting with Chapter 3(A) for brain injury:

“(c) Moderate Brain Damage (iii) Cases in which concentration and memory are affected, the ability to work is reduced, where there is a small risk of epilepsy, and any dependence on others is very limited ... £40,410 to £85,150

(d) Less Severe Brain Damage

In these cases the injured person will have made a good recovery and will be able to take part in normal social life and to return to work. There may not have been a restoration of all normal functions so there may still be persisting problems such as poor concentration and memory or disinhibition of mood, which may interfere with lifestyle, leisure activities, and future work prospects. At the top of this bracket there may be a small risk of epilepsy.

The level of the award within the bracket will be affected by:

- (i) the extent and severity of the initial injury;
- (ii) the extent of any continuing, and possibly permanent, disability;
- (iii) the extent of any personality change;
- (iv) depression.

...£14,380 to £40,410”

105. The JCG for blindness at chapter 5(A) is as follows:

“(d) Total Loss of One Eye

The level of the award within the bracket will depend on age, psychiatric consequences, and cosmetic effect.... £51,460 to £61,690”

106. The JCG for facial fractures at chapter 9 is as follows:

“(c) Fractures of Nose or Nasal Complex

(i) Serious or multiple fractures requiring a number of operations and/or resulting in permanent damage to airways, difficulty breathing, and/ or nerves or tear ducts and/or facial deformity.

...£9,990 to £21,700”

107. In *Sparks v Clayton* (2002) Lawtel reference AM 0502940 a court awarded a man aged 44 at the time of the incident £77,245<sup>2</sup>. In an accident he suffered head and facial injuries with fractures to his skull, nose, upper and lower jaw with facial lacerations and dental injuries. One of his eyes was badly injured but after surgery he achieved effectively normal vision, although complications were likely in the future including cataract and glaucoma. There was significant scarring around the face, which was obvious at a conversational distance. There was psychological damage with intermittent depression and he was difficult to live with. In *Foss v City of Westminster* (1981) Lawtel reference AM 0012343 the court awarded an 18-year-old man £90,959<sup>3</sup> (uplifted as described previously). In a road traffic accident, the Claimant had fractured his skull and had a complete personality change. His sense of taste and smell was affected and he was blind in one eye, without the prospect of a prosthetic eye.
108. The correct approach is not just to simply add the different amounts attributable to each injury to come up with a total but to look at the totality of the evidence to come to quantification. The extent of the brain injury alone is at the top of the bracket of chapter 3(A)(d) and the bottom of chapter 3(A)(c). The evidence is that the Claimant’s cognitive impairments do not significantly affect him on a day-to-day basis. The Claimant is now totally blind in one eye and he has a cosmetic abnormality that may be alleviated by surgery. The Claimant has significant facial injuries and nasal injuries, but there is an overlap between the JCG guidelines for facial injuries and eye injuries. The authorities of *Sparks* and *Foss* referred to are quite old and therefore I treat them with some caution, but the injury suffered by the Claimant is more severe than that in *Sparks*, in particular in relation to the eye. In *Foss* the brain injury was more severe than the Claimant’s with a personality change, the senses of taste and smell were affected and there was no prospect of a prosthetic eye. Whilst I accept that it is necessary to consider any loss of amenity to the Claimant as a result of his injuries in the circumstances in which he finds himself, I do not accept the

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<sup>2</sup> Relevant uplifts applied and agreed by the parties. Rounded to nearest pound.

<sup>3</sup> Relevant uplifts applied and agreed by the parties. Rounded to nearest pound.

argument put forward by the Defendant. Although because of his circumstances, there are certain things that the Claimant will not be able to experience, the very nature of his imprisonment means that impairments in his cognitive functioning, vision and mental health are likely to be of increased significance to him. The Defendant's assessment of the general damages is too low. Standing back and looking at the evidence in the round, the appropriate award in this case is £85,000 for general damages and that is the sum that I award and to which interest will need to be added.

### **The fifth issue -quantum of damages under the third issue**

109. The Parties wished to make further written submissions on the fifth issue. However, having circulated the draft Judgment dealing with the other issues, the Claimant sought nothing more in damages.

### **Final order**

110. The Parties agreed a final order in light of this Judgement, including a declaration of a breach of the Claimant's Article 3 rights and interest on the general damages of £7,377.53.

### **Conclusion**

111. On the 27 November 2014 the Claimant, who is a prisoner serving a whole life term, was attacked by Mr Gary Vinter (another whole life term prisoner) and suffered serious injuries, including to his head and brain. I have found that the Defendant was in breach of its obligation to keep the Claimant reasonably safe and awarded £85,000 in general damages, plus interest. I have also found there was a breach of the Claimant's Article 3 rights and a declaration of that breach is made, by consent.