IN THE CENTRAL LONDON COUNTY COURT

CLAIM NO. 2YJ09540

BETWEEN:-

RADISLAV KRSTIC

Claimant

-and-

(1) MINISTRY OF JUSTICE
(2) SECRETARY OF STATE FOR JUSTICE

Defendants

JUDGMENT

Background to these proceedings

1. Srebrenica is a small mountain town in North East Bosnia and Herzegovina. Between about 11 and 13 January 1995, during the Bosnian war, it was the scene of the genocidal massacre of some 8,000 Muslim Bosnians, mainly men and boys. It has come to be recognised as the worst atrocity on European soil since the Second World War. Those responsible for the massacre were units of the Bosnian Serb Army, at which time the Claimant, Radislav Krstic, was a high ranking officer, holding the rank of General-Major.

2. In December 1994, the Claimant stepped on a landmine and suffered severe injuries to his right leg, which had to be amputated below the knee. He was fitted with a prosthetic leg, but had returned to duty at the time of this massacre.

3. On 11 November 1998, the Claimant was indicted for war crimes by the International Criminal Tribunal for the former Yugoslavia ("ICTY"), in The Hague, in connection with these mass killings. On 2 December 1998, after the Bosnian war was over, the Claimant, who had been leading a covert existence

under an assumed name, was captured in a joint NATO SFOR operation conducted by British and U.S. forces, his car having been disabled by spikes on the road. Rubber bullets were fired at his car and he was dragged through its window for some 500 metres to a waiting helicopter, in the course of which his prosthetic leg was lost. As a consequence of this and further incidents in the helicopter, he suffered personal injuries which required hospital treatment.

4. He was immediately taken to The Hague, where, within 5 days of his being abducted, he was brought before the ICTY. He denied any responsibility for what had occurred at Srebrenica. On 2 August 2001, he was convicted of genocide, complicity to commit genocide, extermination and 2 counts of murder, and he was sentenced to 46 years imprisonment. He appealed his conviction to the Appeal Chamber of the ICTY, which, on 19 April 2004, allowed the appeal in part and reduced his sentence to 35 years' imprisonment (less time served), on the basis that he was not guilty of genocide, but of aiding and abetting genocide. To this day, however, the Claimant maintains his innocence.

5. The ICTY does not have facilities for the long-term imprisonment of convicted war criminals and on 20 December 2004 he was transferred to this country to serve the remainder of his sentence. This was done in pursuance of an agreement between the United Nations and the Government of the United Kingdom on the enforcement of Sentences of the ICTY, which had been concluded at The Hague on 11 March 2004. Following his arrival in this country, he was briefly detained at HMP Belmarsh, and on 23 December 2004 he was transferred to HMP Frankland.

6. The Claimant's wife, to whom (as with the other members of his immediate family) he was very close, died in 2005, after a fairly protracted illness. This, coupled with the dramatic circumstances of his capture and strong and continuing sense of injustice about his conviction and imprisonment, combined to bring him very low.

7. He was transferred to HMP Wakefield on 23 September 2009, retaining his Category A status.

8. On 7 May 2010, while the Claimant was imprisoned at HMP Wakefield, at which time his involvement in the Srbenica massacre had gained notoriety throughout the prison, his throat was cut by 3 murderous Muslim fellow-prisoners. He was fortunate to escape with his life. After this, there were other, but less serious incidents at HMP Long Lartin and HMP Woodhill, to which institutions he was successively transferred, of which complaint is also made in these proceedings.

9. It was as a consequence of this attack at HMP Wakefield and the conditions in which he was subsequently confined at other prisons that these proceedings were brought by the Claimant, who seeks damages for personal and psychiatric injury he claims to have sustained. He alleges that these injuries were caused by the negligence and human rights violations of Her Majesty's Prison Service, for which the First Defendant, the Ministry of Justice, is responsible. The Second Defendant, the Secretary of State for Justice, has been joined to these proceedings as a defendant to the human rights claims.

10. This case, which has its origins in these earlier matters, highlights the contextual importance of determining the standard of care required from the prison service when claims are brought against it by prison inmates for lack of care for their safety. Decisions taken by prison authorities regarding the management and well-being of prisoners in their care have often to be taken in difficult circumstances and in a complex environment. That considerable caution is required by a court when called upon to judge the prison service's actions is well recognised.

The trial

11. The trial involved 3 hearings and took place over a period of 9 days, during the period 15 September 2014 to 15 December 2014. This judgment has been delayed, in large measure, as a consequence of administrative difficulties

following the conclusion of the hearings, of which the parties are aware, although it has also taken longer to prepare that I had originally envisaged, which I regret.

12. The Claimant was present throughout almost the whole of these proceedings by video-link to the Polish prison, Piotrkow Trybunalski, to which the Claimant was transferred in April 2014 and where he continues to serve his sentence. His solicitor was with him throughout. I am grateful to both the Court Service and the Claimant's legal representatives for having arranged for this to be carried out so efficiently.

13. The Claimant gave his evidence with the aid of an interpreter, although he speaks some English and understands it better, without any perceived disadvantage. There was also written medical evidence adduced on his behalf. In addition, I heard evidence from 2 prison officers, each holding governor grade, in respect of conditions at HMP Wakefield and HMP Woodhill at the relevant times, and generally in relation to the standard of care which the Defendant contended was appropriate to the circumstances.

14. There were, in addition to this evidence, 9 hearing bundles and a variety of supplemental documentary documents produced from time to time during the trial. This volume of material was deemed necessary by the parties, who left no stone unturned in their efforts to advance their respective cases in their best possible lights. Both counsel, Mr Adam Sandell for the Claimant and Mr Oliver Sanders for the Defendants, provided very full written opening and closing submissions, with copious references to documents and authorities, which were a tribute to their skill and industry. Whilst I remain grateful for this assistance, and despite the length of this judgment, I have not considered it necessary to deal with every point they have made and my failure to do so must not be taken as meaning that their respective submissions were not considered.

Preliminary observations on the Claimant's case

15. It is self-evident that a genocidal atrocity directed at Muslims on the scale of what occurred in Srebrenica, even in times of other ethnic and religious violence and recurrent atrocities, would provoke a sense of great outrage at all levels of society, and especially within the Muslim community of this (and any other) country. And there are a significant number of Muslim prisoners serving sentences of imprisonment in this country, many for crimes of great seriousness and of exceptionally unpleasant kinds, as in the case of the Claimant's 3 attackers at HMP Wakefield.

16. It is this obvious factor, coupled with the many and increasing warnings of very serious physical reprisals against the Claimant by fellow Muslim prisoners at HMP Wakefield, including the threat of death, that lingered with me from the outset of these proceedings. That, of course, cannot be determinative, but it provided me with a cogent indication of the nature and standard of the duty required by the prison service to take care for the Claimant's safety.

17. I was, however, constrained to remark at an early stage of the case that prisons are not holiday camps, as it seemed to me at times that certain of the Claimant's complaints had become distant from the realities of prison life, albeit that following what appears to have been an attempt on his life it was inevitable that his sensitivity to any form of hostility, physical and verbal, would be heightened. I have therefore borne in mind throughout the observations of Latham LJ in **The Home Office v. Robert Butchart** [2006] EWCA Civ 239 at [20], that the prison service's responsibilities "have to be assessed in the light of the inevitable constraints imposed by what is reasonably practicable in a prison community."

The Claimant's factual case

18. As I have recorded, the Claimant was brought to the UK on 20 December 2004. He was first taken to HMP Belmarsh, and on 23 December 2004 he was transferred to HMP Frankland, where he remained until his transfer to HMP Wakefield on 23 September 2009. HMP Frankland is a high security prison, which houses long-term prisoners, mostly Category A and B and many being regarded as dangerous. It is critical to observe at this early stage of the judgment that, in addition to a segregation unit, it has wings dedicated to vulnerable prisoners, including the Claimant. (He was given a Category A classification because of the nature of his convictions and the perception that, although himself not dangerous, there was a risk that his former associates might seek to secure his escape from custody.) This move excited the attention of the press, which gave graphic publicity to his move to HMP Wakefield. Although the then Home Office apparently refused to disclose the location of the prison to which he was being moved, it was wholly ineffectual.

19. HMP Wakefield is another high security prison which houses many very dangerous prisoners, including a significant number of Muslims, some holding extremist views. In contrast to HMP Frankland, where the Claimant had been safely housed within the confines of its Vulnerable Prisoner Unit (VPU), during a period of about 5 years, HMP Wakefield had no dedicated VPU.

20. The Claimant states, and there is no real reason to doubt this, that when he was moved to HMP Wakefield he was quickly recognised by some Muslim prisoners. He was transferred between wings on several occasions, because, he was told, Muslim prisoners had recognised him and had apparently threatened to kill him. In the absence of a VPU, for a time, he was even relocated to the induction wing for his personal safety, which lends support to the recognition by the prisoner staff that additional care was necessary to protect an elderly (then 60 year old) physically and psychologically vulnerable prisoner.

21. It is not surprising, given the notoriety of his convictions for such heinous crimes, that the Claimant was subjected to some unpleasantness at HMP

Frankland by its Muslim inmates. The prison 'bush telegraph' alone meant that the nature of his crimes quickly became common knowledge. Although he says that, as a consequence of this disclosure, he was always frightened and under constant stress, he was never physically harmed. The steps taken by the prison staff for his safety were effective, at least to the extent that there was no manifestation of actual physical violence directed at him, although the Claimant was not able to say what these measures were.

22. The Claimant's transfer to HMP Wakefield, which is in Yorkshire, on 23 September 2009 was in deference to his wish to be moved from a prison in Northumberland to one further south, to make it easier for his family to visit him. His file and other records relating to his stay at HMP Frankland should have been transferred with him to HMP Wakefield, but these appear to have been lost. I deal with this below.

23. It was immediately recognised by the prison authorities at HMP Wakefield that the other inmates, including (and in particular) the Muslim prisoners knew about the Claimant and the nature of his crimes. He asserts that the prison authorities at HMP Wakefield must have received intelligence and a full report of the Claimant's stay at HMP Frankland and thus of the safety issues that had to be addressed.

24. On 18 October 2009, the following article appeared in the Sunday People newspaper:

> "**Mass killer at 'Mansion'**
>
> A Serbian warlord jailed for the massacre of 8,000 people has been moved to Britain's Monster Mansion prison.
>
> Radislav Krstic, the man behind Europe's worst atrocity since the Second World War, now has a 10 ft by 6 ft cell in Wakefield jail, West Yorks.
>
> The nick earned this nickname because it is home to some of the country's vilest inmates, including Baby P's stepdad, Steven Barker, child murderer Robert Black and cannibal Robert Maudsley.

Krstic 61, was moved from lowerprofile Hull prison, where he has been since 2004.

He has been given a new name but lags got wind of the genocidal maniac's arrival and greeted him by banging the bars of their cells.

They have also dubbed him The General because of his military background. A source said 'There are some nasty people in here but this guy is now the biggest monster in the Mansion.'

Bosnian Serb commander Krstic was jailed for 35 years after being convicted of genocide by the International War Crimes Tribunal at The Hague in 2001.

Krstic and fugitive Ratko Mladic presided over the Srebrenica massacre in July 1995. About 8,000 Bosnian Muslim men and boys were shot in cold blood and buried in mass graves.

Britain houses the killer under a deal where war criminals are shared among different nations' prisons.

Krstic, who has a prosthetic leg, is on a general wing, but is being closely monitored.

It is understood MI5 helped to provide him with a new identity and paperwork for last month's jail switch was kept to a minimum. Soham child killer, Ian Huntley is among previous Wakefield inmates.

The Ministry of Justice said: 'We do not comment on individual prisoners'.

What do you think?"

25. The entries for the previous day, 18 October 2009, in a Ministry of Justice Intelligence Report, a running record in which matters of significance were recorded by prison staff at HMP Wakefield, record that the Claimant's offences were "War crimes genocide", and that the Category Code normally was "TP (Threats to prisoners)", the report's text reading:

> "Article in The People (18/10/09) The article talks about KRSTIC 287 and his offences of war crime and the massacre of around 8,000 which he was involved in. – Gov authorised the issue of the paper to all wings."

Albeit with the wisdom of hindsight and recognising its dangers in a case such as this, the impracticality of attempting to sanitise or exclude all communications with the outside world and the difficulties of managing a high security prison such as Wakefield, the Governor's decision to allow its issue to all wings nevertheless struck me as unnecessary, likely to be inflammatory and thus open to serious question. As the case progressed, and the dangerous nature of the prisoner population at HMP Wakefield was revealed to me – a state of affairs which existed at the time of this press article – I have been forced to conclude that this decision was flawed.

26. This report is one of the 'key intelligence' documents at HMP Wakefield relied upon by the Claimant and to which extensive reference was made throughout the case. He places considerable reliance on these, as contemporaneous records that were not prepared in contemplation of litigation or self-serving. Their importance lies in the fact that a significant number of entries following the Claimant's transfer to HMP Wakefield reveal that his presence was provoking a growing groundswell of hostility towards him, which the Claimant contends demonstrated the heightened need for vigilance and that robust steps were required to protect him. It is contended on his behalf that these warnings, which in the case of a man convicted of such terrible homicidal crimes, had to be taken seriously and acted upon accordingly. And it is his case that the accumulation of these warnings were not heeded, if they were, that any steps taken for his safety fell short of what the circumstances reasonably required.

27. The Ministry of Justice's evidence was to the effect that, correctly understood by experienced and trained prison officers, the response to this intelligence was adequate and that the attack on 7 May 2010 was one which could not reasonably have been foreseen by them and over which the prison service had no reasonable control.

28. Acknowledging the difficulty of administering a prison, especially a Category A prison housing dangerous and violent prisoners, and the need to strike a balance between allowing inmates to enjoy rights, such as access to

newspapers and depriving of them of privileges without apparent good reason, I reiterate my concern that the governor authorised this article's distribution "to all wings". Be that as it may, recognising that a balance had to be struck and the efficiency of the 'bush telegraph' within the prison, it was nevertheless inevitable that the Claimant's history should have alerted the prison authorities to the need for particular vigilance to ensure his safety and the implementation of all such practicable steps as might be taken to protect him from the risk of reprisals by dangerous Muslim prisoners, of which there were a significant number. An important factor is that the configuration of D-wing, in which the Claimant was housed, was not a VPU and did not easily lend itself to the protection of vulnerable prisoners, in contrast to the better suited facilities at HMP Frankland.

29. At this point, it is appropriate to stress that this case is not about indifference on the part of the prison authorities at HMP Wakefield to the Claimant's safety, but rather whether there were failings and errors of judgment on their part which passed the negligence and/or human rights thresholds. The task of running such prisons, must not be underestimated. I have no doubt that, in the main and with the resources available to the Ministry of Justice, every reasonable effort is made to achieve and maintain appropriate standards of care, but this of itself is not an answer to the present claims.

30. I return to the key events after the Claimant's arrival at HMP Wakefield on 23 September 2009. I take these from the summaries prepared by both counsel. However, although there is agreement about recorded detail, they inevitably part company on the significance I should attach to this.

31. Included among the key documents disclosed by the Ministry of Justice, whose disclosure was protracted and very unsatisfactory, are 3 so-called 'Red Flags'. Mr Sandell contended that, in the context of all other known intelligence, these provided cogent and realistic warnings that the Claimant was to be the victim of a serious physical attack. He relied heavily on the following:

(1) (a) The publication of the Sunday People article on 18 October 2009. Despite its highly inflammatory tone, the Governor nevertheless authorised its distribution to all wings of the prison.

(b) Even allowing for the 'bush telegraph' and the fact that the Claimant's convictions would probably have become generally known, I agree with Mr Sandell that this was a serious error of judgment. Its distribution cannot have achieved any real purpose, other than to excite hostility, particularly among the significant number of dangerous and extremist Muslim prisoners at HMP Wakefield.

(2) (a) On 29 October 2009, a 'Problem Profile' was created, for the express purpose of "Managing the risk to former Bosnian General, Mr Radislav Krstic". It is recited that: "Information used in this document is sourced from HMP Wakefield 5 x 5 SIS Intelligence System" – a system for grading the quality of information received by prison staff; A = always reliable and E = untested source. It is marked "Restricted" and its introduction is in these terms:

> "This problem profile has been opened following information received that Muslim offenders located on the same wing as Mr Krstic are aware of his identity and the offence he was convicted of. It will look at possible repercussions from the Muslim community and the issues that could be raised during the current trial of former Serbian political leader Radovan Karadzic."

And the section headed "Inference" is in these terms:

> "Intelligence suggests that Muslim offenders currently located on D-wing are now aware of Mr Krstic's identity following what appeared in a national newspaper on Sunday 18th October 2009."

(b) The press article is set out in full, which, coming as it did within 11 days of the Sunday People article, casts a further shadow over the governor's decision to allow its issue to all wings.

(c) The section headed "Predictions" states:

"It is predicted that some of the Muslim community at HMP Wakefield may take exception to Mr Krstic and could feel it necessary to take action against him."

(d) The "Impact Study" sets out the following:

"Mr Krstic is a high profile offender who was sentenced to 35 years imprisonment for atrocities towards Muslim civilians in the Bosnian war of the 1990's

Mr Krstic's profile could now be raised as the trial of Radovan Karadzic begins, as Mr Karadzic is charged with genocide and atrocities similar to those of Mr Krstic and Mr Krstic took his orders from Mr Karadzic, among others, during the conflict.

Should anything happen to Mr Krstic, it would not only be damaging to HMP Wakefield and the Prison service as a whole, but it would also be a major embarrassment to the British Government as Mr Krstic was convicted at The Hague and has been entrusted into the UK's care to serve part of his sentence here.

Recent intelligence has suggested that Muslim offenders at HMP Wakefield are now aware of Mr Krstic's crimes and it is possible that Mr Krstic could now be under threat from retaliation by either Muslim offenders who may have lost friends/relatives during the Bosnian conflict, at the hands of Mr Krstic's men or by other Muslim offenders who would see the harming of Mr Krstic as a major coup for the Al-Qaeda movement and also bringing high profile media attention to their cause.

Mr Krstic was previously located at HMP Frankland, where he resided on an enhanced vulnerable offender wing and had no contact with any Muslim offender and with this in mind, it may be beneficial to consider a more appropriate environment for Mr Krstic." (My emphasis)

There was no "enhanced vulnerable offender wing" at HMP Wakefield.

(e) The "Recommendations" were for the gathering of further intelligence, first to establish "whether the risk to Mr Krstic is genuine", which puzzles me. It appears to me that the prison authorities were clearly alerted to the potential of danger to the Claimant, in no small measure fanned by the Sunday People article.

(f) Finally, under the heading "Prevention" it is again observed that: "Considerations to be made over the location of Mr Krstic and the possibility of moving him to a safer environment."

(g) This document was updated on 6 January 2010, when it was recorded that, at that time, there was "No further intelligence ….. to suggest that Mr Krstic may be at threat".

(3) (a) Very shortly following this update, on 26 January 2010, a Security Information Report (SIR) was prepared by officers on D-wing, where the Claimant resided. This was the first of Mr Sandell's Red Flags. This document was another running record of significant information coming into the possession of officers throughout the prison, for submission and evaluation by analysts, who then provided their assessments on the reliability of the intelligence.

(b) It is important to note that if credence were given to everything that is reported, then prisons could quickly become unmanageable. So there is a threshold which must be reached, before the taking of robust steps, as opposed to monitoring, become the imperative. One of the critical questions in this case is whether the various items of intelligence relied upon by the Claimant, either in isolation or cumulatively, reached or even exceeded that threshold.

(c) The content of this report was that a Mr Yaqub, a fellow prisoner, had approached the reporting officer on D-wing and said: "Krstic is a dead general [or dead man] walking."

(d) There was no reference in the summary of supporting/related intelligence to the Problem Profile or to the nature of the Claimant's crimes, and thus to the nature of the risk to which he was exposed, as Mr Sandell was at pains to point out. However, in view of the

Intelligence Assessment in the same SIR, this is perhaps not a sustainable criticism. It is in these terms:

> "Due to the media and public interest surrounding Mr Krstic case, most offenders are likely to be aware of his status. Due to the nature of Mr Krstic's crimes a number of offenders are likely to want to gain some form of retribution. All Res + Wing managers are aware of Krstic and this information".

(e) The comments of the Security Manager and Governor were to continue to monitor and report concerns via SIR.

(f) This intelligence was classified as Grade B, meaning that it was regarded as "mostly reliable".

(g) It is clear that the person making the intelligence assessment, as well as all others involved, when it was further considered, were aware of the media attention, which must be taken primarily as a reference to the recent Sunday People article.

(4)(a) The second of Mr Sandell's Red Flags, described by him as "chillingly specific", was the SIR prepared on 15 March 2010 . Its factual content was this:

> "I received information that [redacted] are planning to attack Krstic A 5400 AE. [Redacted] has been holding Muslim meetings with the above-named offenders to discuss this, they are also discuss assaulting a member of staff."

(b) The subject heading, again in relation to D-wing, was: "Possible attack on high Profile prisoner & staff". The Intelligence Assessment was in these terms:

> "Mr Krstic is high profile offender, he has recently stated he is 'not surprised by the behaviour of Islamic extremists towards him' which support that he may know he could be at threat from Muslim offenders. However, it is unclear how or why they may attack a member of staff"….

(c) The Security Manager's and Governor's comments were for the staff to continue to monitor the situation and report concerns via SIR.

(d) The printed instructions at the beginning of the SIR form state that if the informant considered the information supplied "to have High Security consequences you should [x] ACTION IMMEDIATELY red box above and then hand this immediately to either the Security Manager, Duty Governor or Orderly Officer." However, yet again the information was not regarded as passing the threshold where immediate action was required.

(5) On about 25 March 2010, the Claimant met a prison officer (Fisher), with an interpreter. He raised concerns about his safety and said that he had not felt safe to leave his cell, except for essential matters. The prison officer assured him that he was safe.

(6)(a) Between 22 to 26 March 2010, a delegation from the European Committee for the Prevention of Torture (CPT), part of the Council of Europe, visited the UK for the purpose of monitoring the enforcement of sentences imposed by the ICTY. In its report dated 21 July 2010, the CPT recorded the following:

> "11. In the course of the delegation's visit to Wakefield Prison in March 2010, Radislav Krstic stated to the delegation that he feared for his safety from certain inmates who might wish to target him. As a result, he did not avail himself of outdoor exercise every day or take part in any sports or other activities which would require associating with inmates. Prison officers on D Wing and prison management were clearly informed of his concerns. During the visit the CPT's delegation examined documented prison intelligence which clearly lent credence to Mr Krstic's fears. Further, the inmate's allocation to an English language class had been delayed by the prison authorities due to the risk potentially involved in his association with other prisoners in the class.
>
> Nevertheless, the prison management informed the CPT's delegation that no special protective measures were required [such as the organization of separate access to the outdoor

exercise yard], as Mr Krstic was not considered to be particularly vulnerable compared to other prisoners at Wakefield Prison and that, at any rate there was no further dispersal prison as safe as Wakefield Prison."

(b) The report then describes the assault on the Claimant by 3 prisoners in his cell and the injuries he sustained.

(c) It was also recorded that the Claimant had been transferred to HMP Long Lartin on 13 May 2010, where [e]very effort has been made …… to ensure that Mr Krstic has absolutely no contact with other prisoners." It continued:

"The clear instructions from prison management to staff were to prevent any inmate in Long Lartin Prison having access to Mr Krstic."

(d) Assuming the accuracy of what is written, this throws further valuable light on the acknowledged vulnerability of the Claimant to physical and verbal attack by other prisoners, at a time when his mental state was badly damaged.

(7) (a) The third Red flag was, according to Mr Sandell, waved in full view of the prison authorities responsible for the Claimant's care on 25 April 2010, that is, only 12 days before the attack on him. The record is contained in the Wing Observation book, which is another daily log, recording matters of interest coming to the attention of prison officers on duty in each wing. The SIR relating to the entry below (assuming one was prepared) has gone missing.

(b) The entry for 25 April 2010 by an officer on D-wing recorded that a prisoner –

" ….. came to me, & asked me if there was a prisoner on D- wing that is in for a crime for a mass killing of Muslims. He said there is tension on the wing, between Muslims [on] this wing & another Muslim prisoner on another wing. He feels that some of them are plotting to assault this prisoner, so to get a transfer to another prison, as they don't want to be here. He would not mention any names when question."

(c) Be that as it may, there is no evidence that this or any SIR was treated as sufficiently serious to warrant the taking of active steps to protect the Claimant.

(8) (a) On the same day, 25 April 2010, another SIR was prepared, the content of which was this:

"On Sunday 25th April 2010, during the morning period, I observed a lot of movement around [redacted]'s (A 5726 AF) cell. He was visited at various points by Campbell (A 9888AA), O'Connell (A 9886 AC), Ahmed (A 9756 AA), Krasniqi (A 9561 AA), Khalid (A 5453 AC), Kennedy (A 9950 AA), Lee (A 8334 AA), Connerton (A 9549 AA)."

(b) This group was described as a mixture of Muslims and non-Muslims. Krasniqui and Khalid were both known to be Muslims extremists and dangerous, and were 2 of the Claimant's 3 attackers. Campbell, who was identified on 15 March 2010 as one of the prisoners planning to attack the Claimant (Red Flag 3) was also identified as a participant, providing another link to what was potentially afoot regarding the Claimant.

(9) On 26 April 2010, in a letter to a former fellow inmate at HMP Full Sutton, Khalid wrote: "Akie there are only 4 brothers in the whole jail that are on this ting. Me [redacted] and the rest are sisters Wahahi." This is, to some extent, equivocal, although coupled with the other intelligence circulating at that time, that an attack in the name of religion was planned on another prisoner, this letter must have triggered concern and the need for further close enquiry, as to whether something, perhaps very serious, was afoot.

(10) The day before the Claimant was attacked, the third of his assailants, Quam Ogumbiyi, arrived at HMP Wakefield. He is recorded as having recognised Khalid from his time at HMP Full Sutton.

The attack

32. The Claimant's assailants were Indrit Krasniqi, Ilyas Khalid (who had changed his name from Christopher Braithwaite) and Quam Ogumbiyi. Each had a serious record for extreme violence and for serious indiscipline in the prisons in which they had resided, which I enlarge upon below. They are Muslims who were known to hold extremist Islamic views

33. They were housed in the same unit as the Claimant. As he was known to be a notorious war criminal, whose offences involved the massacre of Muslims on an almost unimaginable scale, an amputee with a prosthetic leg, elderly and defenceless in the face of a determined attack by men much younger in years and physically very much his superior, Mr Sandell contends that this manifestly exposed the Claimant to risk of serious harm and should not have been allowed to happen.

34. Moreover, Mr Simon McDonnell, a senior prison officer at HMP Wakefield at the time, acknowledged that when the attack took place there had been well-known problems in the high security estate of the general prison population and risks of reprisal attacks on the Claimant had already been identified as possibilities.

35. I summarise the histories of these men, with indications of their behaviour at the various prisons in which they had earlier been housed:

    (1) **Indrit Krasniqi**

        (a) He had convictions for murder, attempted murder and actual bodily harm, which included the organised torture and execution of a victim in a revenge attack.

        (b) H was known or thought to be an Islamic extremist, of which dramatic examples during the period 31 October 2008 to 24 April 2010 included (i) his cheering and kicking his cell door when news of any British service personnel's death was announced; (ii) preaching to those who would listen and referring to Caucasians as "white trash"; and (iii) being active

in a group of Muslim prisoners which referred to all non-Muslims as "pork eating filth" who they would walk over and should be bombed, stating further that: "Jihad is God's will" and "they would carry out God's work".

(c) Throughout this period and at earlier prisons in which he was housed he had a history of repeated violence towards other prisoners.

(d) An OASys risk assessment completed on 1 April 2010 identified him as posing a significant risk to other prisoners.

(2) **Ilyas Khalid**

(a) He was convicted of murdering an old schoolfriend, inflicting horrible injuries on her. He had a series of earlier convictions, including ones for violence and damage to property.

(b) On 21 February 2010, he was transferred to HMP Wakefield from HMP Full Sutton, where he had over 100 SIRs to his credit, including many which involved threats to assault prison officers, bullying and inciting religious behaviour.

(3) **Quam Ogumbiyi**

(a) He was convicted of the murder of a neighbour, whom he had stabbed in the chest. He had a number of previous convictions.

(b) During the period 15 November 2005 to 19 April 2010, he had a very bad prison history, involving indiscipline, violence and aggression towards other persons and possession of weapons (including home-made ones). An OASys risk assessment carried out in 2009 indicated that he had "a readiness to use a knife in relatively trivial situations [which] indicates the potential for more serious harm with minor provocation." He was identified as posing a risk to his fellow prisoners.

(c) Prior to his transfer to HMP Wakefield, he had been detained at HMP Full Sutton, where he was part of a group of Muslim

prisoners engaged in actual violence and threats of violence towards non-Muslims.

36. The attack itself is described in the Claimant's witness statement and there was no challenge to his account of what occurred.

37. On 7 May 2010, at about 10. 40 am the Claimant was in his cell when these 3 men entered. He immediately recognised Krasniqi and saw that he was carrying a bladed implement in his right hand, in the event a razor-blade attached to a toothbrush handle. To this day, and with every justification, he believes that they had come to kill him. They grabbed the Claimant's shoulders and hands and kicked his legs from under him, causing him to fall to the ground. Immediately after this, Krasniqi cut the Claimant's neck and the others cut his face, and forehead. He was unable to defend himself and shouted for help, but none came. The attack he described as prolonged one. He heard one of the men say "He's finished", after which they left his cell. He thought he was going to die. He was attended to by a fellow-prisoner from a neighbouring cell, who removed items of his own clothing and held them to the Claimant's wounds to stem the flow of blood. The Claimant believes that this man's intervention saved is life. The Claimant said that whilst being given first aid in his cell before being taken to hospital, he told a prison officer who was kneeling by his side: "I told you this was going to happen." This was not challenged.

38. The Claimant was taken to hospital, where his injuries were treated under general anesthetic. The nature of his injuries, both physical and psychiatric, are dealt with below. Suffice it to say that the Claimant, who was indeed fortunate to escape with his life, was subjected to a terrible experience, the horrors of what occurred still living with him. He was left with deep and extensive scarring, as well as severe and lasting psychiatric harm.

39. The Claimant's assailants were subsequently charged with attempted murder and each was convicted of causing him grievous bodily harm with intent, it being a matter of some surprise that they were acquitted of the joint charge of

attempted murder. In February 2011, the trial judge, (Henriques J) sentenced each of them to life imprisonment, reflecting his view of the gravity of the offence.

The Claimant's subsequent complaints

40. Following the attack on 7 May 2010, and after a short stay in the prison hospital, the Claimant was transferred on 13 May 2010 to HMP Long Lartin and then on 20 September to HMP Woodhill. On 10 June 2010, at which time the Ministry of Justice was clearly very embarrassed by what had occurred, especially because of its international repercussions, issued the following instruction (the emphasis being in the original):

> "Mr Krstic is considered to be at threat from all prisoners who may come into contact with him. **Considering the level of threat of harm against him he is not to come into contact with any other prisoners.**"

This was not observed.

41. The Claimant alleges that, as a consequence of the attack upon him, he became deeply anxious and depressed, his condition having since been diagnosed as post-traumatic stress disorder (PTSD). In this state, which is not surprising given the nature of the attack to which he had been subjected, he was sensitive and vulnerable to any form of hostility from his fellow prisoners. His complaints after 7 May 2010 and his transfer from HMP Wakefield include these:

    (a) While at HMP Long Lartin, he was subjected to regular abuse and threats, some in Serbian which is his native language.

    (b) On 29 October 2010, at HMP Woodhill, he was openly threatened by Muslim prisoners, spat at and he witnessed a throat cutting gesture by another prisoner.

(c) Activities occurred the following day, accompanied by further throat cutting gestures, suggesting that another attack upon him was imminent.

(d) On various occasions throughout his stay at HMP Woodhill, he was subjected to abuse, threats and harassment, all of which combined to heighten his already anxious state.

(e) On about 24 March 2011, his remaining leg was kicked by a Muslim prisoner, albeit no injury was caused. And on another occasion, he was 'sandwiched' between 2 prisoners when queuing for food and subjected to what has been described as "intimidating banter".

It is alleged that all of this, in the context of the earlier incident, exacerbated his already serious mental health problems and that he should not have been placed in an environment where this was allowed to happen. Assuming these complaints to have been true, it is hard to disagree.

42. Understandably, the Claimant, with the assistance of solicitors, applied to the ICTY for a transfer out of this jurisdiction, to serve the remainder of his sentence elsewhere. The UK Government resisted this, insisting that adequate procedures that would ensure his safety were in place, but the ICTY concluded, in its Decision on the Claimant's Application for Transfer out of the Jurisdiction dated 4 October 2011, that the Claimant should be transferred to another enforcement State for the remainder of Mr Krstic's sentence." While the terms of that Decision are confidential, I have had the benefit of considering it and of hearing submissions on it.

43. While the views of Judge Patrick Robinson, the ICTY's appointed judge who conducted the investigation, are not binding on me, they provide guidance on the significance and weight attached to the Claimant's complaints.

44. Notwithstanding, it does not necessarily follow from this that that the prison authorities at HMP Woodhill were negligent or that they were responsible for breaches of any of the Claimant's human rights.

45. The Claimant gave his evidence via video-link. He was thoroughly, but fairly, cross-examined by Mr Sanders. His evidence about the attack itself was uncontroversial. However, he was strongly challenged on both his account of events following his move from HMP Wakefield and the mental consequences of the 7 May 2010 attack.

The Defendants' factual case

46. Mr Sanders' preliminary contentions were that although the offences of which the Claimant had been convicted were exceptional and put him at risk from certain other prisoners, that risk was not of itself exceptional and did not differ materially from the risks posed by e.g. sex offenders and those committing serious offences against children.

47. He submitted also that the need for the Claimant's isolation from Muslim prisoners with a propensity for violence was impractical and unjustified; that facilities and systems in place at HMP Wakefield and thereafter at HMP Long Lartin and HMP Woodhill were adequate; that reasonable steps to protect him had been taken; and that the individual matters relied upon following the attack did not, either individually or cumulatively, demonstrate negligence or breach of any duty owed by the prison authorities.

48. Two witnesses were called for the defence. The first was Mr McDonnell, who joined the prison service in 1991. He received a series of promotions over the years, having worked throughout at HMP Wakefield, and was promoted to Governor Band B and Head of Security and Intelligence in November 2011. He had responsibility for Local Security Strategy and Key Accountability in September 2009, when the Claimant arrived at HMP Wakefield. He explained, as I have pointed out, that, on his arrival, the Claimant's intelligence history at HMP Frankland would have travelled with him, to ensure that any known risks were identified and correctly managed. Unfortunately, this history has been lost, depriving his legal representatives of the opportunity of

investigating it fully and the risk assessment that was carried out when he arrived.

49. Mr McDonnell acknowledged that prisoners could be violent towards each other, as well as to prison staff, for which reason systems are in place to assess and reduce the risk of such violence occurring. Other topics he dealt with included the Violence Reduction Policy in force at the material times and training of prison officers to deal with violence and bullying, who would have included those responsible for the Claimant's care.

50. He described the purpose of the Wing Observation Book, which, as I have said, is a running log of general wing matters. These are reviewed by residential managers and entries are checked daily by the Duty Governor and Orderly Officer. The system has not changed since the Claimant was at HMP Wakefield.

51. He explained that SIRs are raised by prison officers to highlight specific areas of concern, inevitably including threats and concerns about possible violence. An example he gave was if a prison officer knows or believes that particular prisoner(s) have a known grudge or concern about another prisoner, or are planning to assault another prisoner, an SIR would be raised for initial assessment by an intelligence officer as to its reliability, following which security staff, who met regularly, would assess the urgency of dealing with the matter. Any required action ranges from immediate, 24 hours or 72 hours. Required action could be anything from monitoring, segregation via a wing move or full segregation in the segregation unit or a transfer.

52. Mr McDonnell explained that a Problem Profile would be generated by an intelligence analyst where significant connected intelligence of concern is received. He stressed that the analysts' job is to develop all available intelligence strands, of which he detailed various. These would necessarily include the intelligence and other records to which I have referred.

53. Mr McDonnell stated that he had limited knowledge of Krasniqi and Khalid. He referred to Krasniqui's adjudication history, which was a poor one, but suggested that he had shown an inclination to improve his behaviour. An OASys report completed on 1 April 2010 classed the risk posed to other prisoners as medium. He asserted that there was nothing in Kasniqi's case notes history from September 2009 to May 2010, or in any SIR, to suggest that he posed any threat to the Claimant. Mr McDonnell knew that he was a Muslim.

54. In Khalid's case, he acknowledged his appalling record of serious and unpleasant violence, but despite his history of assaulting other prisoners whilst at HMP Full Sutton, Mr McDonnell likewise stated that between 19 February 2010 and 7 May 2010 there was nothing in his case notes history to indicate that he posed a threat to the Claimant. He knew that Khalid was a Muslim.

55. Mr McDonnell did not know Ogumbiyi, who is also a Muslim. His assessment on arrival at HMP Wakefield on 6 May 2010 noted his unwillingness to share a cell with sex offenders. His prior adjudication history showed that between June 2007 and May 2010 he had been charged with fighting or assault on 7 occasions, despite which his OASys assessment was that he posed a low risk to other prisoners. He stated that there was nothing to indicate that Ogumbiyi's arrival at HMP Wakefield posed any threat to the Claimant.

56. Mr McDonnell stated that, in the absence of "any knowledge of violence or threatening behaviour" on the part of the 3 men, no specific steps were taken to safeguard the Claimant.

57. He dealt briefly with the SIRs of 15 March 2010 and 26 April 2010, which respectively indicated that some prisoners were planning an attack on the Claimant and that he was to be assaulted. He 'contextualised' these, by explaining that in 2010 the Security Department at HMP Wakefield was dealing monthly with 500 – 600 SIRs, which equates to a maximum of about 20 per day. However, whilst not actually suggesting that this was an unduly onerous task, he appeared to suggest that this volume of material placed some

undue pressure on the analysts. Otherwise, I do not altogether understand the materiality of this.

58. He explained again that a security analyst assessed the information contained in the SIR "to judge its reliability" and that "[a]fter careful examination of both SIRs neither was considered to be of significance and therefore no specific actions were taken (etc)". Having stressed the importance of 'contextualising' these SIRs, however, he failed to make any significant point; in fact, he did not satisfactorily address the way in which the Claimant's case on these was put, which itself very much depended on 'contextualising' the contemporaneous records. The explanation that these had been properly considered by experienced analysts and senior officers, who had taken the appropriate decisions, struck me as a rather thin.

59. In answer to Mr Sandell's questions, regarding the qualifications of the security analysts employed at the prison, he stated that they were "specialists", having received a fortnight's training, consisting of 2 separate courses of one week each. As I understood it, they are not part of the prison service as such, but are employed as civilian members of the prison staff. Depending on what these revealed, and what the analysts were able to say about them when reviewed at regular security meetings, over which Mr McDonnell himself often presided, perhaps 15 – 20 minutes would be spent discussing each SIR.

60. As I have stressed, unlike HMP Frankland, where the Claimant had been safely housed for some 5 years, HMP Wakefield has no VPU. This aspect was the subject of robust criticism by Mr Sandell, who forcefully made the point that, because of this, the Claimant's transfer to that prison was wholly inappropriate. Be that as it may, Mr McDonnell explained that the Claimant was on a floor (or unit) on which 3 prison officers were always on duty and that the Claimant would also have been checked at regular intervals throughout the night.

61. The other witness called by the defence was Mr Neil O'Connor, the Head of Residence at HMP Woodhill, who described the risk assessment carried out

when the Claimant was transferred to HMP Woodhill and his management at that establishment. He confirmed that the Claimant had made various complaints, assumed to be recent, about the various incidents he alleges took place. Nevertheless, his evidence was to the effect that that the Claimant's management was appropriate, in the light of everything that was known at the time. Although he was probed about these matters, it is probable that these incidents occurred, as the complainant has described. However the questions whether their occurrence involved breaches of common law or human rights duties owed to the Claimant or were causative of any psychiatric damage to him remain.

The law

62. The starting point must be to accord recognition of the difficulties of managing any prison, especially an establishment such as HMP Wakefield, which houses some of the country's most dangerous criminals. This undertaking is self-evidently considerable and specialised, bearing in mind the nature of its prison population and the need to protect all prisoners in its care while respecting their essential rights, at the same time discharging the paramount obligation of preventing escape and ensuring that the protection of the public is not thereby compromised.

63. I recognise these very real difficulties and the great caution that must be exercised when a court is called upon critically to examine the manner in which the prison service has discharged its duties when claims are brought against it. In this connection, Mr Sanders drew my attention to a number of important authorities.

    (a) In **Palmer v. Home Office** (unreported) C.A., Neil LJ declined to hold that the employment of a plainly dangerous prisoner in the prison tailor shop and entrusting him with scissors with which he stabbed a fellow prisoner was negligent. The assessment of the assailant as not posing a particular risk was held by the Court of Appeal to be reasonable.

(b) In **R (F) the Secretary of State for Justice** [2012] EWHC 2689 (Admin), Haddon Cave J made this observation:

> "55. In my judgment, absent Wednesbury irrationality, it will be a rare case in which the court can be said to be entitled properly to interfere with prison authorities' exercise of professional judgement when balancing the potentially competing – and sometime irreconcilable – rights of prisoners and their transfers. The Court is ill-equipped to second-guess the prison authorities on these sorts of judgments. The business of running and managing the prison system is complex and multi-faceted."

(c) Also underlining such difficulties is **Hartshorn v. Home Office** [1999] Cly 4012 CA, in which Stuart-Smith LJ emphasised the following (in the final page of the transcript):

> "It is important to appreciate that this case depends on its own particular facts. In any prison there is some risk that prisoners will be violent to each other. If they are determined to attack other inmates they are usually cunning enough to do so at a time when someone's back is turned or there is no immediate supervision. Unless there is a known propensity to violence by the aggressor, known animosity to the victim or particular vulnerability of the victim, such attacks cannot be prevented, because it is impossible to segregate such people or supervise them all the time."

Mr Sandell's case, of course, is that known propensities to violence existed, there was known animosity to the Claimant and he was particularly vulnerable, so that the attack upon him could and should have been anticipated as a realistic possibility and prevented. Nevertheless, as a general proposition the point is made.

(d) Mr Sanders contends that all matters relied upon by the Claimant constituted " vague threats" of which "there is no evidence that any of them was linked to or presaged the

incident." He went on to point out the difficult task of identifying real as opposed to fanciful threats, as "posturing talks, threats and intimidating between prisoners are commonplace features of prison life". He rightly submitted also that the Court should not apply hindsight, but should seek to put itself in the position of the prison authorities at the time of the incidents complained of. He referred to **Stenning v Secretary of State for the Home Office** [2002] EWCA civ 793, where Brooke LJ stated (with emphasis added):

> "63. Although we must remember that the judge had the opportunity of seeing the witnesses, which we did not, and we must always beware of retrying a case on the transcripts, there really was no evidence which entitled a judge to hold that either the lifers' unit or the senior staff at Wakefield were negligent in the decisions they took about Mr Purkiss in the autumn of 1996. **It would have been quite wrong for any judge to make a finding of negligence in this case without the help of a witness expert in the difficult discipline of risk assessment and in our judgment the judge was wrong to make such a finding in this case.**"

This case concerned a dangerous prisoner entering the claimant's cell at HMP Wakefield where he was held prisoner for some hours before being severely injured with a craft knife. Mr Sandell's contention is that, in contrast to what occurred in that case, there is ample evidence which entitles me to hold that the prison authorities were negligent in the decisions they took regarding the Claimant's care.

64. Mr Sanders relied heavily on the emphasised passage from Brook LJ's judgment. His starting point was that I should decline to decide this case without the assistance of an expert "in the difficult discipline of risk assessment". When I sought to explore this, I was not enlightened as to what

sort of expert there could be. A retired prison officer? An 'old lag' with extensive experience of prison life, from the 'other' side? It is scarcely credible that either party would have accepted a single joint expert or that the court would have considered it appropriate to require such an appointment. And if conflicting views were expressed by opposing experts, especially in a case such as this, the Court might well be left with the added difficulty of having to distinguish between the two. Mr Sandell, in his engagingly robust way, stated that there was no such expert and that, given the nature and volume of material at my disposal, I could properly determine whether the prison service had been negligent in its care of the Claimant. I agree with him.

65. Although the task has not been an easy one, especially given the volume of material and the very extensive competing submissions I have had to consider, I am satisfied that this is a case I can properly decide without the involvement of expert(s). As I see it, Brooke LJ's observation was made in a particular case concerning the risk posed by a particular individual. It was not intended to essay any rule of general principle. No other case of this nature has been drawn to my attention, in which an expert in the "difficult discipline of risk assessment" was called.

(1) Negligence

66. There is no real difference between the parties regarding the common law principles involved and I do not therefore find it necessary to refer to every case that was drawn to my attention. The relevant principles have been distilled without controversy and I will apply them. At the risk of undue repetition, they are these:

    (a) The first duty of every prison governor is to confine persons committed to prison and placed in his or her custody in accordance with the Prison Act 1952 and to prevent their escape.
    (b) Those with responsibility for operating prisons owe prisoners a duty to take reasonable care to prevent them from being

assaulted by fellow prisoners who pose a serious risk of causing them physical harm or psychiatric injury; see **Home Office v. Dorset Yacht Co. Ltd** [1970] AC 1004, at 1040 F and **Home Office v. Robert Butchart** [2006] EWCA civ 239 at [17] and [20].

(c) An action will lie "where a prisoner sustains an injury at the hands of another prisoner in consequence of the negligent supervision of the prison authorities, with greater care and supervision, to the extent that it is reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other prisoners"; **Palmer v. The Home Office,** Court of Appeal Transcript, 25 March 1988 p. 4 and **Stenning v. Secretary of State for the Home Office** supra [25] Where a prisoner is at particularly high risk of attack, the duty is simply whether the prison authorities took all reasonable steps to protect him; **Steele v. Northern Ireland Office** (1988) 12 NIJB 1, p. 7.

(d) The courts recognise that those having the charge of prisoners have a difficult task. Nevertheless, there are cases where it will be necessary to go so far as to keep prisoners permanently locked up or segregated from other prisoners, in order to ensure their safety; **Palmer v. The Home Office** supra, p. 14.

(e) These duties have to be judged with the difficulties of managing a prison in mind, being cautious not to impose standards of care that, in the prison environment, especially in a high security prison such as HMP Wakefield, are particularly difficult and complex; see observations of Stuart-Smith LJ in **Hartshorn v. Home Office** set out in para 63(c) above.

(f) There are limits to the preventative steps and performance of these duties require, especially when the segregation of prisoners has the effect of isolating them or of affecting their treatment in ways that are perceived as preferential or

special. Responses to particular situations, however, must be reasonable and proportionate to the resources available to the prison authorities, although in a case of threatened serious physical harm I would hold that measures that might otherwise be regarded as exceptional must nevertheless be taken to protect the target prisoner, if that is what it takes to keep him safe.

(g) All this comes to no more than the discharge of the duty by prison authorities to take reasonable care for a prisoner's safety.

Was the Ministry of Justice negligent?

67. This issue concerns only the Ministry of Justice, which is the responsible department on behalf of the Crown for the operation of prisons in this country.

68. The starting points, as I see them, is to understand who the Claimant is, how it was that he came to be serving a very lengthy term of imprisonment in this country and the facilities at HMP Frankland in which he was housed for about 5 years, virtually from the time of his arrival in this country to serve his sentence, and his transfer to HMP Wakefield.

69. He was a very senior officer in the Serbian army at the time of the Srebrenica massacre involving the cold-blooded genocidal massacre of some 8,000 defenceless Muslim men and boys. This event provoked international outrage, and to the Muslim community as a whole. It was recognised from the outset that he was at risk of physical reprisal from the many dangerous Muslim members of the UK prison population, with whom the Claimant might come into contact.

70. His vulnerability, bearing in mind his age and being an amputee with a prosthetic leg, was immediately identified when he arrived in this country. It was manifestly sensible, therefore, that he should be housed at HMP

Frankland, which had a dedicated VPU and where he remained without serious problems, until his transfer to HMP Wakefield on 23 September 2009.

71. The move to HMP Wakefield was seemingly prompted, as I observed, to accommodate the Claimant's wish to be closer to London and thus to make it easier for family visits. But it has not been explained to me, at least in terms that I can sensibly understand why HMP Wakefield, which has no VPU, which had been deemed essential for the Claimant's safe custody when risk assessed on his arrival in this country, was selected for his transfer. To my mind, simply to accommodate a wish to be closer to London could not have been a rational basis for deciding on that location, unless the prison authorities at HMP Wakefield, were realistically confident that measures to protect him would be as effective as they had been at HMP Frankland.

72. HMP Wakefield had no facilities for protective confinement, which were as effective as those within the VPU at HMP Frankland, and the Claimant's safety, it seems to me, would have to depend, at least in large measure, upon his being housed in the proximity of dangerous prisoners who could be relied upon not to attack or otherwise interfere with him in a hostile way.

73. Although a change of identity is a recognised precaution in the case of a vulnerable prisoner, no attempt appears to have been made to conceal the Claimant's identity prior to his arrival at HMP Wakefield. Moreover, the matters that were taken into account when he was risk assessed on his arrival from HMP Frankland are not known, because, as I have said, the relevant records are missing. In the light of the unhappy picture that emerged of his stay during the next few months, and, as I have said, I decline to make the assumption that all relevant matters were properly taken into account and that the Claimant was correctly assessed. Responsibility for the loss of these records lies with the Ministry of Justice.

74. The conclusion I have reached is that the Claimant should not have been transferred to HMP Wakefield. It lacked the appropriate facilities to ensure his

care, by preventing him from being brought into contact with very dangerous prisoners with obvious motives for harming him.

75. It is very pertinent to note that the Governor of HMP Whitemoor, which like HMP Wakefield does not have a VPU, when contacted about the Claimant's proposed transfer, stated that he did not consider it appropriate to hold a prisoner at such risk in the segregation unit, either for the duration of accumulated visits or to hold him there on a permanent basis. This was clearly a sensible view, which compounds my difficulty in understanding why it was thought reasonable to house the Claimant at HMP Wakefield.

76. Mr McDonnell acknowledged that the decision that the Claimant should not share a cell was partly in recognition of the risk this posed. However, and very surprisingly, he was unable to say whether any and, if so, what action was taken in response to the Problem Profile, which so clearly flagged up the serious dangers that existed.

77. For these reasons, I agree with Mr Sandell that a realistic assessment of the Problem Profile, assuming this to have been considered before a decision to take the Claimant was reached, as it must have been at HMP Whitemoor, should have led to the Claimant's transfer to a safer prison than HMP Wakefield. Indeed, Mr McDonnell conceded in cross-examination that the concerns about the Claimant's identity and convictions becoming general knowledge within the prison population would have caused him to be moved to a VPU "if there had been one in existence".

78. In my judgment, the accumulation of the Red Flags and other intelligence identified in para 33 above, in an environment where it is obvious that the Claimant could not be as safe as he had been at HMP Frankland, pointed remorselessly towards the carrying out of a physical attack on the Claimant by dangerous extremist Muslim prisoners.

79. Mr Sanders sought to persuade me that it was only by deploying hindsight and "reverse engineering" when interpreting the Red Flags (and other intelligence received during these times) that it is possible to establish the existence of an "interconnected, cumulative, escalating chain of events". He drew attention to the temporal gaps between the Red Flags and other items of intelligence received by the prison authorities and sought to show that none of this, viewed separately, had the cogency attributed to it by the Claimant. I disagree. All this intelligence, including the Problem Profile, had then, as now, to be read as an emerging pattern, which properly trained security analysts and a well-resourced security committee should have realised had become very serious. Two of the Claimant's 3 Muslim assailants, known to be violent criminals with extremist views, were housed in the same unit as the Claimant, and the third (Ogumbiyi) joined it the day before. Yet the view taken of this accumulating and, to my mind, explicit intelligence, appears to have been little more than to keep an eye open and monitor the situation.

80. If this information had been pieced together, which should have been a relatively straightforward exercise, rather than looking at each item on what, in some measure at least, appears to have been a piecemeal basis, the danger to the Claimant and the need for decisive steps to ensure his safety have been taken before the 7 May 2010 attack took place. Mr Sanders' piecemeal analysis of these warnings, seeking to explain each as unreliable and lacking in real substance, ignores the obvious imperative of viewing all this intelligence as cohesive whole in the context of the Claimant's circumstances.

81. Recognising the difficulties of administering any prison, and one such as HMP Wakefield, I conclude that the Ministry of Justice failed in its legal duty of care owed to the Claimant and that, as the result, the attack on 7 May 2010, which could and should have been avoided, took place.

82. The incidents at HMP Long Lartin and the more serious ones at HMP Woodhill during period 13 May 2010 to 15 Decmeber 2011 (when the Claimant was transferred from this jurisdiction) raise different considerations. Although the evidence about this was challenged, I find that these did take

place as the Claimant has described. About those matters, the Claimant was essentially truthful. Although he had abundant scope for doing so, I do not believe that he exaggerated them or the impact they had on him.

83. While Judge Robinson's assessment of the Claimant's complaints is not binding on me, it comforts me in respect of my own conclusions about these incidents.

84. The seriousness of the 7 May 2010 attack caused HM Government serious embarrassment, because of its perceived failure to house the Claimant to the standards required by the ICTY. This resulted in the Ministry of Justice's decision not to allow him any contact with other prisoners. The inevitable psychological harm caused to the Claimant, coupled with the risk of further attack unless stringent precautions were taken, must or should have been recognised by the prison authorities. It was in that state of things that Ministry of Justice recognised the need to keep the Claimant apart from the general prison population, if necessary by his isolation. This does not, however, appear to have been done at either HMP Long Lartin or HMP Woodhill.

85. I therefore hold further that any exacerbation of the Claimant's psychological condition whilst at HMP Long Lartin and thereafter (and principally) at HMP Woodhill resulted from the prison authorities' further negligence, in exposing him to these environments in disregard of his known vulnerability to both physical and psychological harm. Whilst attempts were made in the hope of striking a reasonable balance between what was required to ensure the Claimant's safety and allowing him some normality of life within the prison environment, in the exceptional circumstances as they were known the Claimant should not have been put in situations where, as occurred, he was exposed to physical and mental hostility, which harmed him further.

(2) Human Rights Act 1968

86. The first point is whether, as originally formulated, the Ministry of Justice was the correct Defendant. Although the point is technical, even having been

described as "an arid one" in **Nickinson v. Ministry of Justice** [2012] EWHC 304 (QB), Mr Sanders correctly points out that the position must be got right.

87. Mr Sandell, stoutly maintaining that the Ministry of Justice is the correct defendant to the human rights claims, drew my attention to a variety of cases in which human rights claims against the Ministry of Justice had proceeded with without challenge as to the correctness of the defendant. Mr Sanders, however, contends that human rights claims do not fall within the Crown Proceedings Act 1947 and that it is the Secretary of State for Justice who is the relevant public authority for the purposes of claims under the Human Rights Act 1998. He says, and I agree, that the failures to take the point, even at the highest levels, cannot be relied upon as having established binding precedent.

88. The authority cited to me by Mr Sanders was **Malcolm v The Secretary of State for Justice** [2011] EWCA Civ 5138, by which I consider myself bound. . Thus, at [2] Richards LJ stated:

> "Whilst the M of J was the correct defendant for the purposes of the misfeasance claim, as the appropriate authorised government department under s. 17 of the Crown Proceedings Act 1947, that section does not apply to the claim under the Human Rights Act 1998 and it is strictly speaking the Secretary of State for Justice who is the relevant public authority and the appropriate defendant for the purposes of that claim. We granted the appellant permission to amend the title of the proceedings accordingly at the hearing of the appeal."

89. As in that case, I gave permission for the Secretary of State for Justice to be joined as the Second Defendant in these proceedings, for the purposes of the human rights claims. Notwithstanding, Mr Sandell has continued vigorously to contend that the Ministry of Justice is the competent defendant, deploying arguments that the Court of Appeal was in error and that I should not follow **Malcolm v The Secretary for Justice**. The issue therefore continues to be an arid one.

90. The next point that arises is whether the human rights claims, or any of them, are statute-barred, the claims being under Article 3 ECHR (Prohibition of inhuman or degrading treatment or punishment) and ECHR Article 8 (which provides for a right to respect for private life). These claims relate also to the incidents both at HMP Wakefield and subsequently at HMP Long Lartin and HMP Woodhill.

91. Having regard to my findings in relation the negligence claims, I share Mr Sanders' concerns whether separate findings of breach or awards of damages under these articles are necessary or appropriate. Before reaching that stage of analysis, however, there is the issue of limitation which the Claimant must surmount. Section 7 (5) of the Human Rights Act is in these terms:

> (5) Proceedings under sub-section (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."

92. The claims in pursuance of s. 7 (1) (a) were brought on 19 March 2012, that is to say, nearly 2 years after the attack on the Claimant and just within 12 months of the kicking incident at HMP Woodhill on 24 March 2011. Mr Sanders contends that the human rights claims relate to continuing breaches and that time should run from the date when the continuing acts ceased, that is, within 12 months of the bringing of these claims; **Somerville v. Scottish Ministers** [2007] 1 WLT 2734 at [51] is relied upon.

93. I find difficulty in equating the facts of that case which was concerned with prisoners being removed from association with other prisoners ("segregated") under applicable prison rules, with the facts of the instant case, where damages are largely claimed in respect of particular incidents, albeit that these

occurred, or were permitted to occur, as a consequence of what is alleged were breaches of EHCR Articles 3 and 8. I prefer Mr Sanders interpretation, that time runs in all cases from the actual incidents that occurred, which leaves in time only the single kicking incident.

94. Mr Sandell, however, also relies on s.7 (5) (b) of the Human Rights Act and invites me to extend the period for advancing these claims on the ground that it would be "equitable having regard to all the circumstances". He draws attention to Mr Sanders' acknowledgement that the courts take a relatively flexible approach to extensions to human rights cases, for which proposition there is ample authority. Mr Sandell relies on a variety of matters – the negligence claims are within time and are based on the same facts, the Ministry of Justice has been on notice of a claim since 6 October 2010, it has failed badly to discharge its disclosure obligation and the Claimant, although represented by experienced solicitors from the earliest stages of this matter, was seriously distressed at the material times.

95. In addition to these matters, Mr Sandell contends that:

    (a) "There is a public interest in the Human Rights Act challenge being heard: it relates to the safety of others detained in prisons operated by the Ministry.

    (b) The investigatory duty challenge was not pursued in part on the basis that the trial and judgment would discharge the State's investigatory duty, and the requirement of the learning of lessons, under Article 3. That cannot happen if Article 3 claim does not receive judicial consideration."

96. These points are not ones to which I can subscribe in support of the Claimant's application of an extension of the time limit. I do not regard this as a test case; the facts and circumstances in which the present claims have arisen are exceptional ones. If any lessons are to be learned, my finding of negligence should be sufficient. And with no disrespect to him, Mr Sandell does not hold a brief for the general prison population.

97. With regard to the other grounds advanced on the Claimant's behalf, Mr Sanders' responses are in summary these:

    (a) If the tort claims succeed a separate finding of breach or award of damages under ECHR Article 3 or 8 would not be necessary or appropriate.

    (b) In particular, having regard to s. 8 (2) of the Human Rights Act, the domestic courts are required to have regard to and be guided by the 'equitable' approach of the EHCR. Because the Claimant will be adequately compensated by an award of damages, effectively including any in respect of possible Article 3 breaches, so that no further award of damages under Article 8 would be appropriate, the pursuit of the human rights claims would in practice be moot.

    (c) These claims have only now been brought against the correct party.

    With the exception of (c), I accept these as valid reasons for refusing any extensions of the limitation period on the grounds relied upon by the Claimant. I therefore refuse permission.

98. With regard to the 'kicking incident' at HMP Woodhill on 24 March 2011, I am satisfied that any award of damages for breach of ECHR Article 3 (if established) would not be appropriate, having regard to the award of damages in the Claimant's favour in respect of his negligence claims which take that incident into account. I am satisfied also, as Mr Sanders has submitted and I have accepted, that if a breach of ECHR Article 3 was involved, separate consideration of the Article 8 claim would be unnecessary. To give consideration to this remaining claim, would be disproportionate and a sterile exercise, determining nothing of principle and adding nothing of substance to what the Claimant has achieved.

99. For all these reasons, I will not deal with any of the human rights claims.

Damages for negligence

100. As with most other important issues in this case, there is virtually no point of contact between the parties. Their respective views on causation, the severity of the Claimant's injuries and the appropriate measures of damages remain far apart.

101. There is no claim for special damages and the claim for aggravated damages has been abandoned. The Claimant therefore seeks damages, for the following:

(a) The assault of 7 May 2010, which necessitated medical treatment under general anesthetic, and for the pain and suffering that followed.
(b) Psychiatric injuries.
(c) The perpetuation of his ill-treatment by other prisoners at HMP Long Lartin and HMP Woodhill, which exacerbated his psychiatric injuries.
(d) Scarring.
(e) Explempary damages.
(f) Interest.

(1) Assault, pain and suffering and scarring

102. The attack was a terrifying one, accompanied (as it was) by the parting words of one of the assailants, which the Claimant clearly heard, to the effect that he was going to die ("He's finished"). And that is what he thought.

103. The Claimant was held down by his 3 assailants, who cut his throat, temple and forehead with a bladed weapon. He was attended to by another prisoner, who applied pressure to his wounds, before being taken to hospital, where he underwent suturing and debridement of these lacerations under general anesthetic. He was returned to the prison wing at HMP Wakefield the same day, where he remained in isolation until his transfer from that prison. There was one laceration of 10 – 15 cms in the left submandibular region,

another of 6 – 8 cms in the right temporal region and a third of 2 cm on his forehead. As a consequence of the attack, the Claimant suffered the constant tension of reliving its horrors, both while awake and in nightmares.

104. The scarring, which I could not observe on the video-link, but only on photographs, is clearly extensive and, contrary to Mr Sanders' robust assertions to the contrary, clearly disfiguring. The scars provide him with a daily reminder of the horrific experience he underwent. Taking into account the Claimant's age (now 66 years) and the likely time he must still serve to complete his sentence (although he may become entitled to early release) their impact in a social context is limited. Mr Sanders' categorisation of these as "trivial" or "less significant" (in the context of what he submits would be an appropriate award), was a bold one. The wounds were such that these assailants were charged with attempted murder and then convicted of causing grievous bodily harm with intent, for which each received a life sentence of imprisonment. The fact that catastrophic injuries were not actually sustained does not detract from the gravity of these injuries.

105. I do not consider it appropriate to make a separate award for the scarring, but take that into account when assessing the damages for the wounding, which will take into account also the pain and suffering that followed.

106. The wounds, which mercifully were not more severe, were nevertheless inflicted in horrific circumstances, for which full account must be taken when assessing the attendant pain and suffering. The submandibular scarring I assess as moderate to severe permanent disfigurement, that to the upper right side of the face as not particularly prominent, although clearly visible on close inspection, and that to the forehead as trivial, in the sense that its effect is minor only. Taking all these different factors into account, as well as the Claimant's age and current circumstances, I conclude that an appropriate award under these heads of claim is £17,500.

(2) Post traumatic stress disorder (PTSD)

107. This head of claim is also hotly disputed by the Ministry of Justice, in connection with which there are substantial difficulties of causation. The reports of the medical experts concerning his psychiatric condition are premised in large measure on the accuracy of the symptoms described by the Claimant himself. The truthfulness of what he described about his symptoms and the timing and circumstances of their onset is challenged. The Ministry of Justice disputes that any such condition was caused by or contributed to by the assault on 7 May 2010.

108. The Claimant alleges that he suffered serious and lasting psychological injury as a consequence of the attack, over and above the pain and substantial suffering occasioned by the incident itself. He contends further that as a consequence of what occurred during the period 7 May 2010 and 13 December 2012 (when he was removed to The Hague) there was a serious deterioration of his mental condition.

109. The Claimant's compromised mental state has its origins in earlier times. The loss of his leg was plainly a matter of significance, although after being fitted with a prosthetic leg he quickly returned to active military duty. Save that this disability rendered him vulnerable to physical attack, and perhaps to other forms of hostility at later times, I conclude that, of itself, this was not a major cause of his present condition. However, the death of his wife in 2005 and detachment from his family, to whom he remains very close, undoubtedly combined with other factors to make him depressed.

110. Of greater importance are the circumstances of his seizure and abduction on 2 December 1998 to stand trial at the ICTY, to which I refer in para 8 above.

111. His arrest and removal from his country and family to face trial has been the focus of the Ministry of Justice's challenge that the PTSD from

which he suffers must be attributed to the attack on 7 May 2010 and to subsequent events.

112. The Claimant does not deal with these earlier matters in his witness statement, but he was cross-examined about them in some depth. He also described his earlier time at HMP Frankland, stating that, whilst he was under constant stress, through fear of reprisals from some Muslim prisoners, he was not physically or emotionally harmed.

113. In a report of the CPT after visits to HMP Frankland on 11 and 12 July 2005 and between 2 and 4 December 2007, in both cases to ensure that the Claimant was being detained in compliance with the high standards of care required by the ICTY, a rather different picture to that painted by the Claimant emerged.

114. In the first report, the following is set out:

> "…. As regards his psychological condition it was apparent from interview with the delegation's psychiatrist that the prisoner was showing signs of depression, which need to be addressed to prevent deterioration of his mental condition. The prisoner said that he continued to experience frequent nightmares and flashbacks in connection with his arrest in 1998, to have chronic headaches and to continue to experience phantom pain (where the leg was amputated). It emerged from the documents supplied by the ICTY register that in 1999 antidepressant and epilepsy treatment was recommended; although there was no indication whether the prisoner was actually given such treatment."

There is a footnote which reads:

> "…. The prisoner alleges that the SFOR personnel who arrested him hit him on his hands and legs, dragged him 500 metres to a helicopter, shoved him inside the helicopter and put a sack over his head. While he was being dragged across the ground, the prosthesis on his right leg fell off. Although treated for his

injuries at the American Division (North) in Tuzla, he apparently still had visible injuries when he arrived at The Hague.

115. The second report noted that the Claimant –

> " …. stopped attending his English language lessons following the death of his wife at the end of 2005, and had to give up his work at the charity workshop in September 2006 due to a hernia. Further, it appears that he had discontinued his visits to the gym and did not engage in recreational activities in the prison wing…."

116. In the section dealing with "Healthcare", the following appears:

> "…. The prisoner has refused any treatment for depression.
>
> …. The prisoner told the delegation that he suffered from insomnia and that, when he managed to sleep, he continued to experience frequent nightmares and flashbacks in connection with his arrest in 1998. He complained about having chronic headaches and tinnitus and that he continued to experience phantom pain (where the leg was amputated). He also complained of a loss of appetite, a loss of interest in daily activities, a lack of energy, anxiety and irritability. Such symptoms could be caused or aggravated by the depression from which he is suffering.
>
> The delegation gained the impression that Radislav Krstic felt that he had lost most of the points of reference which had provided his life with meaning: his professional status had been expunged; close family members, most importantly his wife had died; his physical health was deteriorating; and he had almost no opportunity to speak his native language. Consequently, he felt abandoned in an unfamiliar and remote environment".

117. The parties' joint psychiatric expert was Dr. R. W. Latcham MA, MD, FRCPsych, who produced 2 reports. The first report, which is dated 3 February 2014 is comprehensive and impressive. It identifies the many documents with which he was provided for the purpose of his psychiatric assessment of the Claimant, which included earlier medical and psychiatric reports. The CPT reports referred to above were not provided to him, at that time. Dr. Latcham's first report sets out the Claimant's relevant personal history leading up to and subsequent to the 7 May 2010 attack, to the extent that Dr. Latcham considered this necessary.

118. Dr. Latcham interviewed the Claimant at The Hague, where was then detained, and his expert opinion included the following:

1. "Mr Krstic has suffered repeated adversity but has not developed psychiatric disorder in response to that adversity until his imprisonment in England.
2. Mr Krstic suffered grief at the time of his wife's terminal illness in 2005 and her death in 2006. He showed symptoms that could have been diagnosed as depression for about three months at that time.
3. Mr Krstic had an increasing sense of danger in English prisons which had begun to cause nightmares before he was assaulted in May 2010 demonstrating vulnerability for the development of PTSD,
4. Since and because of the assault on Mr Krstic in 2010 he has suffered PTSD fulfilling criteria set out in DSM – V, and as diagnosed by a number of specialists.
5. The PTSD would have continued had he been immediately transferred to The Hague, but his further 'provocation', as he puts it, worsened the PTSD causing a marked deterioration in 2011.
6. His symptoms include or having included
    i) Recurrent involuntary and distressing memories of the event.

ii) Recurrent distressing dreams in which the content/ or effect of the dream are related to the traumatic event.

iii) Intense psychological distress and exposure to external queues that symbolise or resemble an aspect of the traumatic event.

iv) Avoidance and efforts to avoid distressing memories, thoughts, and feelings about the event.

v) Avoidance of and efforts to avoid external reminders (conversations, situations) arousing distress memories, thoughts, or feelings about the traumatic event.

vi) Negative alterations in cognitions and mood (particularly in 2011) associated with the traumatic event, shown by negative beliefs and expectations about his treatment, that people cannot be trusted and a diminished involvement in activities (even allowing for a realistic desire for self protection).

vii) Marked alterations in around and reactivity shown by irritability (especially in 2011), hypervigilence, being easily startled, and sleep disturbance.

viii) He has not developed enduring personality change; he is no longer fearful of others since moving to The Hague, nor is he emotionally distant, particularly from his daughter.

ix) Treatment (EMDR) for PTSD in The Hague has not been successful and has been abandoned because it caused intense anxiety. Anti-depressants have only effected some improvement in his sleep.

x) The prognosis is poor. There may be some improvement in Mr Krstic's symptoms with the passage of time, and with further treatment after release such as trauma focused therapy."

119. On 25 May 2014, Dr. Latcham prepared an addendum report dealing with the CPT reports, which set out the passages I set out above. In the light of these and 2 other medical reports (of Dr. R. Amana Niaman and Dr. Kenny-Herbert) his revised opinion was as follows:

> "Mr Krstic gave an account to me that he had no nightmares and no psychiatric problems after any of his experiences in the war including witnessing the deaths of others and his own injury in the landmine explosion resulting in the amputation, including the amputation itself.
>
> I took a detailed history of his arrest in December 1998 which appears [in my first report] which accords with the description given to the CPT. He told me
>
> > …. at no stage has he ever psychological difficult because of that arrest and again in particular no nightmares in spite of not seeing his wife and daughter for ten days.
>
> The visits of the CPT were 18 months apart and some 6 and 8 years after Mr Krstic's arrest.
>
> The implications from the reports must be that Mr Krstic has suffered with the nightmares and intrusive memories about his arrest since the time of his arrest until the visits.
>
> It is unlikely therefore that he would have forgotten those experiences caused by the arrest. He was able to remember the same precise details of the arrest not only when he saw the delegation from CPT on two occasions but also when I interviewed him 15 years after the arrest demonstrating a good memory for that period in his life.
>
> The assault on Mr Krstic in his cell is of course the kind of experience that can cause PTSD. When I asked Mr Krstic why he had managed psychologically at the time of his arrest

> "…. he said that he knew that he could not be killed during [the arrest] even though he was in his perception treated so badly, and it was belief in his innocence and thoughts of his family that maintained his psychological equilibrium at that time….
>
> If Mr Krstic did experience nightmares and intrusive memories of his arrest for all those years I am very surprised that on direct questioning he did not admit that me.
>
> If, as he told, he did not experience any psychological difficulties including nightmares because of his arrest then I am surprised that he told CPT that he did.
>
> Psychiatric diagnosis depends in large degree on the report of the patient.
>
> Mr Krstic's veracity is however a matter for the Court."

120. When cross-examined about this, the Claimant stated: "I do not remember at all saying anything like to the doctor from Strasbourg …. I absolutely did not say to the doctor from Strasbourg that I suffer from any nightmares about this….. It wouldn't be right to say nothing contained here is true. At that time I was very low due the loss of family members. I had severe phantom pains. I would wake up a lot and then remember events from my past life including the arrest. I don't remember telling this doctor this. This is his conclusion." I have taken this from a note provided by Mr Sanders, who justifiably contends that it is absurd to think that the 2 CPT reports were invented or were the result of misrepresentation, embellishment or extrapolation. Moreover, he points out that there is no evidence to suggest that the Claimant disputed the contents of these reports, which he would have seen, at the relevant times.

121. I am unable to accept that the matters recorded by the CPT relating to the Claimant's arrest on 19 December 1998 were not the direct result of what the Claimant told them or that what he told them at that time was not a genuine account of what he was experiencing. As a matter of common sense and from Dr Latcham records in his second report, I must conclude that the Claimant's evidence about these matters was untruthful. Perhaps there was an

element of the thought being father to the deed, but either way, his account of matters at trial was plainly wrong. Notwithstanding, I was not prepared to reject his evidence regarding the conditions of his subsequent confinements at HMP Long Larten and HMP Woodhill, which are credible, lacking any apparent exaggeration and gaining support from his contemporaneous complaints.

122. I am satisfied, as was recorded by the CPT, that the Claimant did suffer significant psychiatric difficulties, which I categorise as PTSD, following and as a result of his seizure and abduction on 2 December 1998 and of the events and experiences during the years that followed.

123. I have reached this conclusion despite the other evidence identified by Mr Sandell, who sought to dissuade me from taking this view, that did not mention the symptoms of PTSD, which the Claimant claimed only manifested themselves following the 7 May 2010 attack, but these do not disturb the conclusion I have reached regarding the accuracy and genuineness of what the Claimant stated to the CPT.

124. Mr Sandell's reference to Sedley LJ's observation in **Y (Sri Lanka) v. The Secretary of State for the Home Department** [2009] EWCA Civ 362 is of no assistance to him; indeed, quite the contrary:

> "…. A fundamental aspect of [psychiatric experts'] expertise is the evaluation of patients' accounts of their symptoms…. It is only if the tribunal has good and objective reason for discounting that evaluation that it can be modified or – even more radically – disregarded."

In the instant case, there is every good reason for revisiting and modifying the opinions expressed by Dr Latcham in his first report, whose enthusiasm for which had wilted very visibly by the time of his second report.

125. I have received no real assistance on the critical question of how Dr Latcham's original opinion must now be treated – it cannot be altogether disregarded, because of the horrific nature of the 7 May 2010 attack – which has again made my task a difficult one. Neither was I assisted by the extreme

and conflicting positions adopted by the parties: Mr Sandell, on the one hand, continued to argue that the Claimant's PTSD is solely attributable to the 7 May 2010 attack, whilst Mr Sanders urges me to altogether disregard the attack as a relevant factor, or at best to treat it as having made a minimal contribution to his condition. Both these positions are unrealistic.

126. Mr Sandell has drawn my attention to evidence over a period of time indicating that the Claimant's mental condition between 2 December 1998, when he was arrested, and 7 May 2010 was a good deal less severe than that described by the Claimant to Dr Latcham and confirmed by the Claimant in his evidence.

127. However, I do not accept that the earlier symptoms "were either largely resolved or were eclipsed by the grave and permanent deterioration in his mental health that was caused by the serious assault." Whilst the Claimant's symptoms today remain focused on the assault and the subsequent exacerbation of its consequences, I do not accept that this pre-existing condition can be classified only as vulnerability to the psychiatric harm that was caused to him.

128. The Ministry of Justice accepts that the Claimant is being treated for the symptoms of PTSD and I accept that these are as described by the Claimant to Dr. Latcham, despite the unsatisfactory nature of his evidence about the effects of his arrest. But, as I have said, it denies that this condition was caused or contributed to by the 7 May 2010 attack. In my view, this goes too far. It is impossible to conclude that this attack did not make a significant contribution to, or did not exacerbate, the condition that the Claimant acknowledged to the CPT on 2 occasions. (Although Dr. Latcham does not actually state this, the condition appears clearly to have been a form of PTSD.)

129. An assessment of the extent to which the Claimant's condition was worsened by the 7 May 2010 attack and subsequent events is required, so that the appropriate award of damages can be determined. Doing the best I can, I assess the level of increased seriousness at 50%, which takes into account all

factors I consider material to the aggravation of the mental condition described in the CPT reports. His condition, with a poor prognosis, is a wretched one and I am also satisfied that, as a result of the attack itself and of the conditions in which he was confined subsequently, this worsened markedly.

130. The quantum band in the Judicial College Guidelines appropriate (in April 2013) to the current seriousness of the Claimant's PTSD is £48,000 to £81,000, on the basis of full liability. In my judgment, an appropriate award on this basis would be £70,000 and I accordingly award £35,000 being 50% of that sum.

(3) Exemplary damages

131. Whilst I accept that I theoretically have jurisdiction to award exemplary damages, it would be a rare case indeed for such an award to be made in a case of negligence. For what worth, I have never encountered one. Mr Sanders supported this, with these citations:

(a) …. Exemplary damages can be awarded in actions of negligence but are now virtually unknown"; **Charlesworth & Percy**, 13th Edn. 2014, para 5 – 167.

(b) "It would not of course be expected that actions in negligence would lead to exemplary damages, either before or after **Rookes**, since the necessary mental element is not present; and it is thought that this would be true even of gross negligence". **See McGregor on Damages** 19th Edn. 2014, para 13015

132. There was nothing "oppressive, arbitrary or unconstitutional" on the part of the Ministry of Justice, in the sense explained in **Rookes v. Barnard** [1964] AC 1129, which could justify any such award. The matters set out at length by Mr Sandell do not persuade me otherwise and criticisms that this case has not been conducted in good faith I emphatically reject; indeed, it is the Claimant himself who, in a very important respect, is exposed to criticism in that regard.

(4) Interest

133. Interest is claimed pursuant to s.69 (1) and (2) of the County Courts Act 1984. In principle, I see no reason why interest should not be awarded on the damages I have awarded. However, if the Ministry of Justice contests this and/or the parties cannot agree the appropriate rate(s) and period(s) during which interest should run, I will hear argument.

Conclusion

134. The parties should to attempt to agree a form of order giving effect to this judgment, for my consideration. If this cannot be agreed or if there are any outstanding matters that require resolution, including any relating to costs, I will hear argument about these also..

135. I conclude by renewing my thanks to both Counsel for their valuable and very full assistance and also for the forbearance of the parties, for whom this case is important.

Antonio Bueno QC

6 October 2015

[With corrections inserted, 16 October 2015]