PROTECTING THE VULNERABLE AND INVESTIGATING STATE FAILURES:

PRIVATE LAW CLAIMS UNDER ARTICLES 2 & 3 ECHR

1. INTRODUCTION

1. Articles 2 and 3 ECHR – enshrining the right to life and the prohibition of torture, inhuman or degrading treatment – rank as two of the most fundamental rights in the ECHR and enshrine two of the most basic values of the members of the Council of Europe (*McCann v UK* (1996) 21 EHRR 97, para 147). Private law claims are a vital means by which these fundamental rights are upheld, and accountability for their violation secured within domestic law.

2. This paper considers how to use the protective and investigative obligations under Articles 2 and 3 in private law claims to secure accountability where public authorities fail to protect people in their care, fail to investigate and protect people against risks posed by other private individuals, or fail to investigate violations of the state's duty to protect people from death and serious harm.

3. The paper addresses the following topics in relation to both Articles 2 and 3:

   (1) The **substantive obligations** imposed by Articles 2 and 3:

      (i) The **negative obligation** not to take life unless "absolutely necessary" and the obligation not to inflict harm contrary to Article 3;
      (ii) The **general positive obligation** to establish a framework of laws, precautions and means of enforcement which will protect life and prevent the occurrence of torture, inhuman or degrading treatment, to the greatest extent possible;
      (iii) The **operational obligation** to take all reasonable preventative measures to protect people from known risks to their life or person.

(iv) The **protective obligation** owed to those detained by the state.

(2) The **procedural obligation** to conduct an effective investigation into possible violations of the substantive obligations.

(3) **Bringing private law claims**: procedure, the burden and standard of proof, and the test for causation.

(4) **Valuing private law claims**: what losses can be recovered and likely quantum.

(5) **Test case issues** for the near future.

2. ARTICLES 2 AND 3 ECHR

(1) The articles

4. Article 2:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
> *(a) in defence of any person from unlawful violence;*
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

5. Article 3:

> *No one shall be subjected to torture or to inhuman or de-grading treatment or punishment.*

(2) The minimum severity requirement for Article 3

6. Ill-treatment must reach a minimum level of severity to be capable of violating Article 3 (*Ireland v UK* (1979-80) 2 EHRR 25, para 162). Whether ill-treatment meets this severity threshold will depend on all the circumstances of the case, including the nature and context of the treatment, its duration, its physical and mental effects and,

where relevant, the sex, age and state of health of the victim (*Ireland v UK* (1979-80) 2 EHRR 25, para 162; *Costello-Roberts v UK* (1995) 19 EHRR 112, para 30; *Tekin v Turkey* (2001) 31 EHRR 4, para 52; *Selmouni v France* (1999) 29 EHRR 403, paras 99-100; *ZH v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69, para 76-77). The vulnerability of those detained by the state may be relevant when assessing whether the severity threshold has been met (*Keenan v UK* (2001) 33 EHRR 38, paras 110-115; *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882, para 58; *ZH v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69, para 76).

(3) Torture

7. Ill-treatment will only amount to torture where it is deliberate and causes very serious and cruel suffering (*Ireland v UK* (1979-80) 2 EHRR 25 para 167; *Gafgen v Germany* (2010) 52 EHRR1, para 90; *El Masri v Macedonia* (2013) 57 EHRR 25, para 197; *Al Nashiri v Poland* (2015) 60 EHRR 16, para 508).

8. Examples include:

   (1) Stripping a man naked and suspending him from his arms (*Aksoy v Turkey* (1996) 23 EHRR 553).

   (2) Beating up a suspect in custody (*Selmouni v France* (1999) 29 EHRR 403).

   (3) Forcing a pregnant woman to witness her husband's torture (*Aydin v Turkey* (1998) 25 EHRR 251).

   (4) Subjecting a detainee to electronic shocks, hot and cold water treatment, blows to the head, and threats to the detainee's children (*Akkoc v Turkey* (2002) 34 EHRR 51).

   (5) Rape (*Aydin v Turkey* (1998) 25 EHRR 251; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 215).

(4) Inhuman or degrading treatment or punishment

9. Treatment will be inhuman if it causes intense physical or mental suffering (*Ireland v UK* (1979-80) 2 EHRR 25, para 167; *Labita v Italy* (2008) 46 EHRR 50, para 120). Conduct causing solely mental anguish can amount to inhuman treatment (*Kurt v*

Turkey (1998) 27 EHRR 373). It has been suggested that the purpose and intention behind the treatment may be relevant in assessing whether the treatment is categorised as inhuman (*Gafgen v Germany* (2010) 52 EHRR1, para 88).

10. Treatment will be degrading where it arouses in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing him / her, where it is capable of breaking the victim's physical and moral resistance, or if it drives the victim to act against his / her own will or conscience (*Ireland v UK* (1979-80) 2 EHRR 25, para 167; *Keenan v UK* (2001) 33 EHRR 38, para 109; *Price v UK* (2002) 34 EHRR 53, paras 24–30; *Jalloh v Germany* (2007) 44 EHRR 32, para 68; *Labita v Italy* (2008) 46 EHRR 50, para 120). An adverse effect on the victim's personality that is incompatible with Article 3 is a relevant factor, as is the presence of an intention to debase the victim. However, treatment can be "degrading" where there is no such intention (*Ramirez Sanchez v France* (2007) 45 EHRR 49, para 118; *Raninen v Finland* (1998) 26 EHRR 563, para 55; *Keenan v UK* (2001) 33 EHRR 38, para 109; *MS v UK* (2012) 55 EHRR 23; *ZH v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69, para 76).

11. Examples of treatment held to be inhuman or degrading include:

    (1) "Grave" and "serious" crimes, including rape and serious sexual assault (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 215; *MC v Bulgaria* (2005) 40 EHRR 20, para 150). An assault resulting in numerous cuts and feelings of fear and helplessness has been held to meet the Article 3 threshold (*Milanovic v Serbia* (2014) 58 EHRR 33, para 87).

    (2) Handcuffing and transporting a seriously ill prisoner (*Tarariyeva v Russia* (App. No. 4353/03), paras 114, 117).

    (3) Official indifference exhibited by the authorities to a legitimate complaint, and a failure to investigate criminal actions committed by third parties (*Kurt v Turkey* (1998) 27 EHRR 373).

    (4) Severely overcrowded prison conditions (*Khordorkovskiy v Russia* (2011) 53 EHRR 32).

    (5) Failing to protect a woman from domestic violence (*Opuz v Turkey* (2010) 50 EHRR 28).

(5) Jurisdiction and the extra-territorial reach of Articles 2 and 3

12. It has been repeatedly stated that Articles 2 and 3 require the state to take appropriate steps to safeguard the lives and persons of those *within its jurisdiction* (*Osman v UK* (2000) 29 EHRR 245, para 115; *A v UK* (1998) 27 EHRR 611, para 22; *Edwards v UK* (2002) 35 EHRR 19, para 54). The concept of "jurisdiction" under Article 1 ECHR, the extraterritorial effect of the ECHR, and therefore the extraterritorial reach of the obligations imposed by Articles 2 and 3 has generated a substantial case law, both before the ECtHR and domestically (*Al-Skeini v UK* (2011) 53 EHRR 18; *Smith v Ministry of Defence* [2013] 3 WLR 69; *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697; *Jaloud v Netherlands* (App. No. 47708/08); *Al-Saadoon v Secretary of State for Defence* [2015] EWHC 715 (Admin)). This topic is particularly significant under Articles 2 and 3 as it delineates the reach of the Article 2 and 3 obligations in situations of armed conflict, e.g. the deaths of British serviceman abroad, and the deaths and mistreatment of non-British civilians in conflict situations. Nik Grubeck's conference talk will be addressing extra-territoriality and we have therefore not provided a detailed summary of the law in this area so as to avoid duplication.

3. THE NEGATIVE OBLIGATION

(1) Article 2

No force unless "absolutely necessary"

13. Lethal force used by state agents must be "no more than absolutely necessary", that is to say it must be strictly proportionate in the circumstances. This is a significantly higher standard than under other articles of the Convention, where the test is "necessary in a democratic society" (*McCann v UK* (1996) 21 EHRR 97, para 149; *Nachova v Bulgaria* (2006) 42 EHRR 43, para 94).

14. The Article 2 test for self-defence is whether the state officer who deployed lethal force acted on the basis of an honest belief perceived for good reasons to be valid at the time (*McCann v UK* (1996) 21 EHRR 97, para 200; *Jordan v UK* (2003) 37 EHRR 2, para 110). The UK domestic test for self-defence – (subjective) honest belief in the imminent threat, and the use of (objective) reasonable force in response to the threat as the officer (subjectively) perceived it to be – has been held to be compatible with Article 2 (*Bennett v UK* (2011) 52 EHRR SE7, para 70-74). This compatibility issue is currently being reconsidered by the ECtHR Grand Chamber in *Da Silva v UK* (App.

No. 5878/08). Where the domestic and ECtHR tests are not comparable there will be a violation of the negative obligation (*Dimov v Bulgaria* (App. No. 30086/05), para 84). The differences between domestic law and the ECtHR standard may be overcome through interpretation at the domestic level (*Giuliani and Gaggio v Italy* (2012) 54 EHRR 10).

15. There can be no absolute necessity to take life where it is known that a person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the person being lost (*Nachova v Bulgaria* (2006) 42 EHRR 43, para 95).

Planning of operations

16. Where use of force by state agents results in death, the circumstances must be strictly construed and examined. When considering whether the deprivation of life was "absolutely necessary", there must be an assessment of all the circumstances of the use of force, including the planning, control, management and execution of the operation that resulted in the recourse to lethal force (*Nachova v Bulgaria* (2006) 42 EHRR 43, paras 93-96; *McCann v UK* (1996) 21 EHRR 43, para 194).

17. Police operations that may include resort to lethal force must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and the loss of human life, all feasible precautions in the choice of means and methods must be taken, and alternative non-lethal solutions should be considered (*Finogenov v Russia* (App. Nos. 18299/03 and 27311/03), para 208; *Bektas and Ozlap v Turkey* (App. No. 10036/03), paras 57, 62). The requirement to minimise the risk to life applies to both the general population and the suspects / target of the operation (*Andronicou and Constantinou v Cyrpus* (1997) 25 EHRR 491, para 181).

18. Article 2 may also be violated where the state's planning and execution of the operation *following* the use of force does not minimise, to the greatest extent possible, the risk to life, for example because of a lack of immediate medical attention, poor information transfer, and a belated start to the response (*Finogenov v Russia* (App. Nos. 18299/03 and 27311/03), paras 237, 266; *Wasilewska and Kalucka v Poland* (App. Nos. 28975/04 and 33406/04), para 55; *McCann v UK* (1996) 21 EHRR 43, para 211).

(2) Article 3

Summary

19. The state is under an obligation to refrain from inflicting treatment or punishment that violates Article 3 (*Pretty v UK* (2002) 35 EHRR 1, para 50).

20. Any recourse to physical force which has not been made strictly necessary by the applicant's own conduct or medical / therapeutic necessity, diminishes his / her human dignity and will automatically amount to a breach of Article 3 (*Ribitsch v Austria* (1996) 21 EHRR 573, para 38; *Veznedaroglu v Turkey* (2001) 33 EHRR 59, para 29).

Restraint

21. The use of handcuffs or other instruments of restraint in connection with lawful detention will not normally violate Article 3 where the measures do not involve force or public exposure exceeding what is reasonably considered necessary (*Archip v Romania* (App. No. 49608/08), para 52). However, the use of restraint by law enforcement agents, even where they have no intention to humiliate the victim, can result in a violation (*ZH v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69, para 69, 77). Handcuffing a prisoner undergoing medical assessment or treatment may breach Article 3 (*Mouisel v France* (2004) 38 EHRR 34).

4. THE GENERAL POSITIVE OBLIGATION

(1) Article 2

Summary

22. The state is under a primary duty to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent practicable, protect life and provide effective deterrence against threats to the right to life (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 30; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 2; *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 89; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), paras 50-52). The substance of this general positive obligation will depend on all the circumstances, including whether the risk to life comes from state agents, how great the risk is, and the resources and responsibilities available to the relevant state body for preventing the risk in question (*Öneryildiz v Turkey* (2005) 41 EHRR 20, para 73).

23. There may be a violation of the general positive obligation, for example by failure to have in place proper systems, even though no risk has been identified to a specified individual (*Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681, para 31; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453, para 54).

Systems, training and guidance

24. The general positive obligation has been held to include the duty to:

    (1) Employ and train competent staff, maintain high professional standards, and adopt appropriate systems of work that will protect the right to life and diminish opportunities for self-harm (*Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681, paras 30, 45, 50, 97; *Mitchell v Glasgow City Council* [2009] 1 AC 874, para 66).

    (2) Put in place training, instructions, systems and equipment for state agents who are faced with situations where the deprivation of life may take place under their auspices and control (*Kakoulli v Turkey* (2007) 45 EHRR 12, para 110). Regulations must be adequate and sufficiently specific (*Tomasic v Croatia* (App. No. 46598/06); *Kilnic v Turkey* (App. No. 48083/99)).

    (3) Have in place sound systems which will detect and remedy individual failings and errors before harm is done, including errors at different organisational levels (*Öneryildiz v Turkey* (2005) 41 EHRR 20, paras 89-95; *Kakoulli v Turkey* (2007) 45 EHRR 12, para 106; *Kolyadenko v Russia* (2013) 56 EHRR 2, paras 158-159; *Mosendz v Ukraine* (App. No. 52013/08), para 91).

Legal framework for the use of force

25. The duty to refrain from taking life imposes a primary duty on the state to put in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force. National law regulating state operations in which lethal force may be used must secure a system of adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident (*Nachova v Bulgaria* (2006) 42 EHRR 43, paras 96-102). In the context of police use of firearms, or police restraint, detailed and precise guidance is likely to be necessary (*Kakoulli v Turkey* (2007) 45 EHRR 12, para 110; *Saoud v France* (App. No. 9375/02)).

26. The Court of Appeal has distinguished between the standard against which an operation involving potentially lethal force should be judged (it must minimise to the greatest extent possible the recourse to such force), and the standard against which the general administrative framework should be judged (the framework must contain reasonable, adequate and effective safeguards) (*R (FI) v Secretary of State for the Home Department* [2014] EWCA Civ 1272, para 41).

Public and private activities

27. The general positive obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life *may be* at stake. Where the obligation applies, the authorities are required to assess *all* the potential risks inherent in the relevant activity, and to take practical measures to ensure the effective protection of those whose lives *might* be endangered by those risks (*Öneryildiz v Turkey* (2005) 41 EHRR 20, para 71; *Kolyadneko v Russia* (2013) 56 EHRR 2, paras 158, 166; *Gorovenky and Bugara v Ukraine* (App. Nos. 36146/05 and 42418/05)).

Examples of the general positive obligation in practice

28. The general positive obligation has been held to include matters as wide-ranging as the provision of safeguards, regulations, supervision and oversight to protect the public from, and / or to prevent:

    (1) A violent attack by one school pupil against another, outside school premises, in circumstances in which the operational obligation (see below) was not engaged (*Kayak v Turkey* (App. No. 60444/08)).

    (2) Public health risks, such as a falling tree branch (*Ciechonska v Poland* (App. No. 19776/04)), the collapse of part of a balcony from a building (*Banel v Lithuania* (App. No. 14326/11)), and the dangers inherent in a waste disposal site (*Öneryildiz v Turkey* (2005) 41 EHRR 20).

    (3) Natural risks which can be guarded against, such as a flash flood (*Kolyadneko v Russia* (2013) 56 EHRR 2).

    (4) The slow dispatch of ambulances in response to an emergency call (*R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, paras 69-70).

(5) Issuing a firearm to a police officer who had displayed previous troubling behaviour (*Gorovenky and Bugara v Ukraine* (App. Nos. 36146/05 and 42418/05)).

(6) The risk posed to soldiers, in certain circumstances, for example from extreme temperatures in the field, or inadequate equipment, planning and training (*R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin), paras 66-73; *Smith v Ministry of Defence* [2013] 3 WLR 69, paras 63, 68; *R (Smith) v Oxfordshire Deputy Coroner* [2011] 1 AC 1, paras 87-89, 97, 105-106).

Public health

29. The general positive obligation has been held to apply in the public health sphere and extends to a general duty to compel hospitals to adopt appropriate measures and make regulations for the protection of patients' lives (*Cavelli v Italy* (App. No. 32967/96), para 49; *Tarariyeva v Russia* (App. No. 4353/03), para 74; *R (Takoushis) v HM Coroner for Inner North London* [2006] 1 WLR 461, para 96). However, individual rather than systemic negligence in the healthcare context will not amount to a breach of Article 2 (*Powell v UK* (2000) 30 EHRR CD 362; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 19).

(2) Article 3

30. Article 3 requires that the state take measures to prevent the infliction of treatment which breaches Article 3, including treatment inflicted by one private individual against another (*A v UK* (1998) 27 EHRR 611, para 22).

Criminal law provisions

31. The state is required to implement criminal law provisions to provide effective deterrence and punishment of violations of Article 3 (*A v UK* (1998) 27 EHRR 611; *MC v Bulgaria* (2005) 40 EHRR 20, paras 153, 166).

Legal framework for the use of force

32. Under Article 2, national law regulating state operations in which lethal force may be used must secure a system of adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident (*Nachova v Bulgaria* (2006) 42 EHRR 43, paras 96-102). In considering guidance on police restraint under Article 2, the ECtHR has stated that detailed and precise guidance is likely to be necessary (*Saoud v France* (App. No. 9375/02)). Similar standards will apply under Article 3.

Where a policy on the use of restraint allows extensive discretion on the circumstances in which such force can be used it may violate Article 3 (*R (C) v Secretary of State for Justice* [2009] QB 657). However, a degree of discretion and generality has been held to be permitted under Article 3: a policy allowing for the use of force to restrain persons subject to enforced deportation which permitted force where "necessary" was held to be compatible with Article 3 (*R (FI) v Secretary of State for the Home Department* [2014] EWCA Civ 1272, para 53).

Systems, training and guidance

33. The Article 2 general positive obligation has been held to include the duty to employ and train competent staff, maintain high professional standards, adopt appropriate systems of work, and have in place sound systems which will detect and remedy individual failings and errors before harm is done. An equivalent general positive / systems obligation is imposed by Article 3, requiring states to have in place adequate legislation and policies to prevent the occurrence of treatment violating Article 3, (although it may also be characterised as the systemic aspect of the procedural / investigative obligation under Article 3 (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 223)).

34. In *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 13 the Court found that the following systemic failings, which included failings over improper resource allocation, fell within and breached Article 3:

(1) A substantial failure to train relevant officers in the intricacies of sexual assaults and, in particular, drug facilitated sexual assaults.

(2) Serious failures by senior officers properly to supervise investigations by more junior officers and to ensure that they were conducting investigations in accordance with standard procedure.

(3) Serious failures in the collection and use of intelligence sources to cross-check complaints to see if there were linkages between them.

(4) A failure to maintain the confidence of victims in the integrity of the investigative process.

(5) Failures to allocate proper resources to sexual assaults including pressure from borough management to focus resources on other allegations.

5. THE OPERATIONAL OBLIGATION

(1) Article 2

Summary

35. The state is under an operational obligation to take preventative measures to protect an identified individual whose life is at risk where the authorities know, or ought to know, of the existence of a real and immediate risk to their life. The operational obligation will arise where the authorities are aware of the existence of a risk to life but are not aware of a named, specified individual who is at risk. The obligation can therefore be owed to a group of individuals facing a shared risk to life, e.g. the risk to members of the public from a violent gang known to be carrying out attacks in a particular area at a particular time. The state will remain subject to the operational obligation for as long as the risk to life persists. Whether the state owes the operational obligation is assessed by reference to the facts as they were or should have been known to the authorities *at the time of the risk*; subsequent evidence on whether operational measures would *in fact* have prevented the risk are not relevant in deciding whether, at the time of the risk, the state was required to meet the operational obligation. Where the operational obligation arises, the authorities must take those preventative measures within the scope of their powers which, judged reasonably, might be expected to avoid the risk to life (*Osman v UK* (2000) 29 EHRR 245, paras 115-116; *Sarjantson v Chief Constable of Humberside* [2013] EWCA Civ 1252, paras 18-22, 26-29, 31).

"Real and immediate" risk

36. A "real" risk to life is one that is "a substantial or significant risk and not a remote or fanciful one". It is not as high as a "likelihood or fairly high degree of risk", a threshold for which there is no support in the Article 2 authorities from the ECtHR (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 38). A risk of 5%-20% has been held to be "real" for these purposes (*Rabone v Pennine Care NHS Foundation Trust* [2010] EWCA Civ 698, para 73[1]).

37. An "immediate" risk to life is one that is "present and continuing" (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, paras 39-40). It is not necessary for the risk to be apparent just before death (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 40; *Renolde v France* (2008) 48 EHRR 969).

[1] This conclusion was not varied or criticised by the Supreme Court in *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, paras 33-43.

38. The “real and immediate” risk threshold has been described as “stringent”, “high” and “very high”. However, it should not be subject to a gloss to the effect that it imposes a test that can only rarely be met (*Re Officer L* [2007] 1 WLR 2135, para 20; *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225, paras 30, 66, 69, 115; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 39).

Source of the risk

39. The risk to life that triggers the operational obligation can come from either another private individual, a group of private individuals, or from a risk of self-harm (*Osman v UK* (2000) 29 EHRR 245; *Keenan v UK* (2001) 33 EHRR 38, para 92; *Renolde v France* (2009) 48 EHRR 42; *Sarjantson v Chief Constable of Humberside* [2013] EWCA Civ 1252; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72).

Risk to life, not risk of harm

40. A distinction should be drawn between evidence of a risk to life, and evidence of merely a risk of harm, which should not be equated with a risk to life with the benefit of hindsight (*R (Kent County Council) v HM Coroner for Kent (North-West District)* [2012] EWHC 2768 (Admin), para 46).

Knowledge of risk

41. The operational duty is triggered not only where the authorities know of the relevant risk, but also where they ought to know. Stupidity, lack of imagination and inertia do not afford an excuse to an authority which reasonably ought, in the light of what it knew or was told, to have made further inquiries or investigations. The authority is then to be treated as knowing what such further inquiries or investigations would have elicited (*Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225, para 34). It is not necessary that the failure to identify the risk to life should amount to gross negligence or willful disregard for there to be a violation of the operational obligation (*Osman v UK* (2000) 29 EHRR 245, para 116).

The operational obligation in non-custodial cases

42. The operational obligation exists in a wide range of custodial settings and in situations where dangers exist for which the state is responsible (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, paras 15-18). The ECtHR has held that the operational obligation may arise in a number of non-custodial settings, including a waste disposal site posing a threat to the safety of people living next to it (*Öneryildiz v Turkey* (2005) 41 EHRR 20), the eviction by police of a woman from her home where

she was at real and immediate risk of suicide (*Mammadov v Azerbaijan* (App. No. 4762/05)), and the obligation on school authorities to take precautions to protect pupils following closure of a school due to bad weather (*Kemaloglu v Turkey* (App. No. 19986/06), paras 36, 41).

43. In *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 the Supreme Court reviewed the Article 2 case law in considering the circumstances in which a non-detained psychiatric patient would be owed the operational obligation. The reasoning of the Court provides guidance on the circumstances in which the operational obligation will be owed outside detention settings. The operational obligation may be owed where there is a real and immediate risk to the life of an identified individual and:

    (1) There has been an assumption of responsibility by the state for the individual's welfare and safety, including by the exercise of control, but which does not involve detention or custody (paras 21-22); and / or

    (2) The individual is vulnerable. It is not necessary for the state to have assumed responsibility; the operational obligation may be owed solely because of the vulnerability of the individual (paras 21, 23); and / or

    (3) The risk faced by the individual is exceptional rather than an ordinary risk that an individual in that category of persons should reasonably be expected to take (paras 21, 24).

44. The scope of the operational obligation is still developing and the ECtHR has tended to expand the circumstances in which the operational obligation will be found to exist (*Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, para 25). This should be taken into account when considering whether the operational obligation is owed on a particular set of facts.

45. On the facts of *Rabone*, the operational obligation was owed to a voluntary, non-detained psychiatric patient. The NHS Trust had assumed responsibility for Melanie Rabone by admitting her to hospital (despite this admission being as a voluntary in-patient), and she was vulnerable as she had been admitted to hospital because of her risk of self-harm / suicide. She was exposed to an exceptional risk, not an ordinary one, because the risk against which she needed protection by hospital admission was of self-harm / suicide, and Melanie's capacity to make a rational decision to end her life

was to some degree impaired (*Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, paras 28, 30, 34).

46. There has been only one reported, subsequent application of the *Rabone* principles. A vulnerable and at-risk 14 year old boy known to social services (for drug and alcohol use, association with drug users, sleeping rough, and self-harm / suicide issues) and assessed as "in need" within the meaning of section 17 of the Children Act 1988, was not owed the operational obligation. The facts of this death were held to have entered "the potential territory" of the operational obligation, but were not sufficient for the obligation to be owed (*R (Kent County Council) v HM Coroner for Kent (North-West District)* [2012] EWHC 2768 (Admin), paras 49-52).

Reasonable steps in response to risk

47. The operational obligation does not amount to a requirement to prevent every possibility of violence and must be interpreted in a way which does not impose an impossible or disproportionate burden on the state (*Osman v UK* (2000) 29 EHRR 245, para 116; *Mastromatteo v Italy* (App. No. 37703/97), para 68). Consideration should be given to the authorities' operational choices concerning priorities and resources (*Öneryildiz v Turkey* (2005) 41 EHRR 20, para 107).

48. The steps that it is reasonable for the authorities to take in responding to a risk depend on the circumstances of the case, the ease or difficulty of taking precautions, and the resources available (*Re Officer L* [2007] 1 WLR 2135, para 21; *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, para 43). The operational obligation requires a graduated response which takes account of the nature and degree of the risk, so that a very high and specific risk will call for a heightened and different response compared to a more generalised threat. The operational obligation requires the authorities to think through the implications of the risk and decide what, if any action should be taken (*Re C's Application for Judicial Review* [2012] NICA 47, para 73).

49. A number of preventative measures may reasonably be expected to be taken in order to meet the operational obligation:

    (1) The communication of relevant and obtainable information, including in relation to psychiatric problems (*Edwards v UK* (2002) 35 EHRR 19, para 61; *Ataman v Turkey* (App. No. 46252/99)).

(2) Adequate monitoring of a suicidal prisoner (*Coselav v Turkey* (App. No. 1413/07), paras 60-61).

(3) The identification of psychiatric problems and a risk of self-harm (*Kilnic v Turkey* (App. No. 40145/98)).

(4) The provision of adequate medical care necessary to safeguard the life of an individual (*Tarariyeva v Russia* (App. No. 4353/03), paras 73-74, 80, 88; *Jasinskis v Latvia* (App. No. 45744/08), para 60).

(5) The provision of adequate psychiatric treatment for a dangerous detained man, in order to protect two individuals who were not detained (*Tomasic v Croatia* (App. No. 46598/06)).

(2) Article 3

Summary

50. The operational obligation under Article 3 mirrors the duty imposed by Article 2 (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 23). The state is required to take reasonable measures to protect individuals from a real and immediate risk of Article 3 treatment of which the authorities know or ought to know (*Z v UK* (2001) 34 EHRR 97, para 73; *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04); *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 23; *Al Nashiri v Poland* (2015) 60 EHRR 16, para 509). The Article 2 case law summarised above will apply in the Article 3 context.

Source of the risk

51. The risk of Article 3 treatment that triggers the operational obligation can come from either a private individual or individuals, or from a risk of self-harm (*Osman v UK* (2000) 29 EHRR 245; *Keenan v UK* (2001) 33 EHRR 38; *Renolde v France* (2009) 48 EHRR 42; *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04); *Sarjantson v Chief Constable of Humberside* [2013] EWCA Civ 1252; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72; *R (F) v Secretary of State for the Home Department* [2012] EWHC 2689 (Admin)).

6. THE OBLIGATION TO PROTECT DETAINEES

(1) Article 2

52. The protective obligations owed to detainees under Article 2 are addressed above under the negative, general positive, and operational obligations.

(2) Article 3

Conditions

53. Authorities are required to ensure that detainees are held in conditions which are compatible with respect for human dignity, and which do not subject detainees to excessive distress or hardship beyond that which is unavoidable as a result of detention (*Musial v Poland* (App. No. 28300/06), para 86; *Kudla v Poland* (2002) 35 EHRR 11, para 94). An assessment of the compatibility of detention conditions with Article 3 must have regard to the potential inability of mentally ill detainees to complain coherently or at all about their treatment (*Herczegfalvy v Austria* (1993) 15 EHRR 437, para 82; *Keenan v UK* (2001) 33 EHRR 38, para 110; *Musial v Poland* (App. No. 28300/06), para 87). When assessing whether oppressive conditions amount to a violation of Article 3, regard should be had to the cumulative effect of the conditions (*Ramirez Sanchez v France* (2007) 45 EHRR 49, para 119) and their duration (*Kalshnikov v Russia* (2002) 36 EHRR 587).

54. Conditions that may contribute to a violation of Article 3 include: overcrowding; lack of sanitation; lack of fresh air, daylight and exercise; inadequate food; and lack of ventilation (*Peers v Greece* (2001) 33 EHRR 51; *Dougoz v Greece* (2002) 34 EHRR 61; *Ostrovar v Moldova* (2007) 44 EHRR 19; cf *Grant v Ministry of Justice* [2011] EWHC 3379; *Malcolm v Ministry of Justice* [2011] EWCA Civ 1538).

Segregation

55. Segregation or solitary confinement may violate Article 3 (*Matthews v Netherlands* (2005) 43 EHRR 444; *Ramirez Sanchez v France* (2007) 45 EHRR 49, paras 125-150). Whether there is a violation will depend on: the particular conditions; the stringency of the measure; its duration; the objective pursued; the adequacy of any safeguards in place; the detainee's health; and the measure's effects on the detainee, including the detainee's mental vulnerability and susceptibility to suffering and a breakdown of physical and mental resistance (*Herczegfalvy v Austria* (1993) 15 EHRR 437, para 251; *Nasri v France* (1996) 21 EHRR 458, paras 58-61; *Keenan v UK* (2001)

33 EHRR 38, para 110; *Ramirez Sanchez v France* (2007) 45 EHRR 49, paras 125-150; *Ahmad v UK* (2013) 56 EHRR 1, para 212).

Healthcare

56. The authorities are under an obligation to protect the physical and mental health of detainees, and a lack of appropriate medical treatment may violate Article 3 (*Ilhan v. Turkey* (2002) 34 EHRR 36, para 87; *Keenan v UK* (2001) 33 EHRR 38, para 110; *Kudla v Poland* (2002) 35 EHRR 11; *Musial v Poland* (App. No. 28300/06), para 86). Conditions of detention may violate Article 3 where they contribute to a deterioration in mental health (*Aerts v Belgium* (2000) 29 EHRR 50, para 64). The compatibility of detention with a detainee's state of health should be determined by reference to the medical condition of the prisoner, the adequacy of the medical assistance and care provided in detention, and the advisability of maintaining the detention in view of the detainee's state of health (*Mouisel v France* (2004) 38 EHRR 34, paras 40-42).

57. The following matters have been held to breach Article 3:

(1) Inadequate medical records, a lack of monitoring and supervision, and a failure to ensure informed psychiatric input into the assessment and treatment of a mentally ill prisoner presenting a suicide risk. Combined with the imposition of segregation, this amounted to a violation of Article 3 (*Keenan v UK* (2001) 33 EHRR 38, paras 113-115).

(2) Delay in transferring a mentally ill man from a police cell to a psychiatric hospital despite the absence of an intention to debase or humiliate him (*MS v UK* (2012) 55 EHRR 23, paras 39-46).

(3) Detaining a suicidal detainee in a facility designed for healthy detainees, with limited access to psychiatric treatment (*Musial v Poland* (App. No. 28300/06), paras 89-97).

7. THE PROCEDURAL OBLIGATION

(1) Article 2

Automatic cases

58. The obligation to conduct an effective investigation into a death arises automatically in a range of cases where the possibility of state culpability and system failure is inherent in the circumstances of the death, including shootings by state agents, deaths in custody, deaths of military conscripts, and deaths of mental health detainees (*McCann v UK* (1996) 21 EHRR 97, para 161; *Edwards v UK* (2002) 35 EHRR 19, para 74; *Salman v Turkey* (2002) 34 EHRR 17, para 105; *R (Smith) v Oxfordshire Deputy Coroner* [2011], paras 84, 98; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, paras 58-59, 61, 113; *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), paras 72-91).

Arguable breach cases

59. The procedural obligation arises for any death occurring in circumstances in which it appears that one or more of the substantive obligations above has been, or *may have been*, violated, and it appears that agents of the state or systemic defects in a state system are, or *may be*, *in some way* implicated (*Jordan v UK* [2001] 37 EHRR 52, paras 105-109; *Edwards v UK* (2002) 35 EHRR 19, paras 69-73; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 3, 19; *Savage v South Essex Partnership Trust* [2009] 1 AC 681, para 4). An "arguable" breach is one that is more than merely fanciful. This is a low threshold (*R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453, para 60).

Suspicious death cases

60. The procedural obligation may also arise in limited cases where there is no arguable breach by or complicity in the death from state agents, but where the suspicious or heinous circumstances of the death require an Article 2-compliant investigation (*R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin), paras 52-54; *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7, paras 92-97; *Menson v UK* (2003) 37 EHRR CD 220).

Historic violation cases

61. ECtHR case law indicates that the procedural obligation may, in a limited set of circumstances, arise in relation to deaths occurring prior to the coming into force of the HRA, and even for deaths occurring prior to the UK's adoption of the ECHR.

62. The current position of the Supreme Court on this issue is that there is no obligation to conduct an inquiry into a death prior to the coming into force of the HRA (October 2000) or to re-open pre-HRA enquiries that did not comply with the procedural obligation (*Re McCaughey* [2012] 1 AC 725). This position has been followed in relation to the procedural obligation under Article 3 (*Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB)).

63. The current position of the ECtHR Grand Chamber, set out in a decision post-dating *Re McCaughey*, is that the procedural obligation can arise when the death took place before the ECHR had entered into force in the state in question (referred to as "the critical date") (*Janowiec v Russia* (2014) 58 EHRR 30, para 131). For a death occurring before the critical date the procedural obligation will arise if a plausible, weighty or compelling allegation, piece of evidence or item of information comes to light after the critical date that is relevant to the identification and eventual prosecution or punishment of those responsible for a death, and either of the following two tests are met (para 141, 144):

    (1) The "genuine connection" test. This will only be met if (i) the lapse of time between the triggering event and the critical date is reasonably short (a year was suggested) and does not exceed ten years, and (ii) a major part of the proceedings or the most important procedural steps of the investigation into the death took place (or ought to have taken place) following the critical date (paras 146-148).

    (2) The "Convention values" test. In extraordinary situations which do not satisfy the genuine connection test, the procedural obligation may still arise where it is necessary that there is an effective investigation so as to ensure that the guarantees and underlying values of the Convention are protected in a real and effective manner. The triggering event must be of a larger dimension than an ordinary criminal offence and must amount to the negation of the very foundations of the Convention, e.g. war crimes, genocide or crimes against humanity (paras 149-151).

64. There is a clear incompatibility between the decisions of the Grand Chamber and the Supreme Court. The Supreme Court recently heard argument in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for Defence* on whether to bring domestic law into line with *Janowiec v Russia*. The Court of Appeal in

Keyu ([2014] EWCA Civ 312) indicated that they considered that the ECtHR would likely find for the claimants were the case decided by the ECtHR (para 83). Judgment from the Supreme Court in *Keyu* is awaited.

The purposes of the investigation

65. The investigation intended to discharge the procedural obligation has a number of purposes, including to:

(1) Secure the effective implementation of the domestic laws which protect the right to life (*Jordan v UK* (2001) 37 EHRR 52, para 105).

(2) Investigate all the facts surrounding the death thoroughly, impartially and carefully (*R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, para 11).

(3) Ensure, so far as possible, that the full circumstances are brought to light and opened up to public scrutiny (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 31).

(4) Expose and bring to public notice culpable and discreditable conduct, ensuring the accountability and punishment of those at fault (*Jordan v UK* (2001) 37 EHRR 52, para 105; *Edwards v UK* (2002) 35 EHRR 19, paras 69, 71; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 31; *R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, para 11; *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 91).

(5) Allay suspicion of deliberate wrongdoing, if unjustified (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 31).

(6) Allay rumour and suspicions as to how the death occurred (*Jordan v UK* (2001) 37 EHRR 52, paras 128, 144).

(7) Rectify dangerous practices and procedures, correct mistakes, search for improvements, and learn lessons (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 31; *R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, para 11; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, para 29).

(8) Expose and establish past violations of the right to life, ascertain whether or not state agents have been in breach of duty under Article 2, and, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations of the right to life (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 5; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, paras 29, 87).

(9) Ensure that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his / her death may save the lives of others (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 31).

The requirements of the investigation

66. The investigation must meet a number of minimum requirements: the authorities must act of their own motion in initiating the investigation; the investigation must be independent; it must lead to a determination of whether any force used was justified; it must examine the circumstances surrounding the death; it must be capable of identifying and punishing those responsible; reasonable steps must be taken to secure evidence; it must be prompt; the investigation must involve a sufficient element of public scrutiny; and the next of kin must be involved to the extent necessary to safeguard their legitimate interests (*Jordan v UK* (2001) 37 EHRR 52, paras 105-109, 143; *Edwards v UK* (2002) 35 EHRR 19, paras 69-73; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, paras, 20, 32). Additional requirements have been developed in the case law. The requirements are considered individually below.

Independent

67. The persons responsible for and carrying out the investigation must be independent from those implicated in the events being investigated. This means not only a lack of hierarchical or institutional connection but also practical independence (*Jordan v UK* (2001) 37 EHRR 52, para 106; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 20(7)). Whether practical independence is achieved will depend on the particular facts of the case. A number of cases concerning the investigation of deaths and allegations of mistreatment of Iraqi civilians by British troops provide examples of how the courts have addressed the issue of independence in this context (*Al-Skeini v UK* (2011) 53 EHRR 18; *R (Ali Zaki Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin); *R (AB) v Secretary of State for Defence* [2013] EWHC 3908 (Admin), paras 44-45).

Examination of the circumstances surrounding the death

68. The investigation should examine:

(1) The facts and circumstances surrounding the death (*Jordan v UK* (2001) 37 EHRR 52, para 143; *Salman v Turkey* (2002) 34 EHRR 17, para 105; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 40; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 30; *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 94). The investigation should be broad enough to examine all the surrounding circumstances necessary in order to determine whether the state has complied with the substantive obligations (*Al-Skeini v UK* (2011) 53 EHRR 18, para 163), and in order to ascertain whether or not state agents have been in breach of duty under Article 2 (*R (JL) v Secretary of State for Justice* [2009] 1 AC 588, para 29).

(2) The central issues, circumstances and systemic defects that caused or contributed to the death (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 31, 36, 45; *Bubbins v UK* (2005) 41 EHRR 24, para 153; *R (Lewis) v HM Coroner for the Mid and North Division of the County of Shropshire* [2009] EWHC 661 (Admin), paras 80-99, 107-108, 129, 213-214; *R (Allen) v HM Coroner for Inner North London* [2009] EWCA Civ 623, paras 33, 40; *R (Lepage) v HM Assistant Deputy Coroner for Inner South London* [2012] EWHC 1485 (Admin), paras 52, 55).

(3) The events leading up to the death (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 31).

(4) Matters that potentially contributed to the death (*R (Lewis v HM Coroner for the Mid and North Division of the County of Shropshire* [2009] EWCA Civ 1403, para 28).

(5) Matters that could have had a real prospect of altering the outcome (*Opuz v Turkey* (2010) 50 EHRR 28, para 136; *R (Lewis v HM Coroner for the Mid and North Division of the County of Shropshire* [2009] EWCA Civ 1403, para 24).

(6) Shortcomings in the regulatory system (*Öneryildiz v Turkey* (2005) 41 EHRR 20, para 94).

(7) The operation at every level of the systems and procedures which are designed to prevent self-harm and to save lives (*R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, para 11).

(8) All the issues relevant for an assessment of the role and responsibility of state agents in a death (*Mammadov v Azerbaijan* (2014) 58 EHRR 18, para 123).

(9) Arguable breaches of the state's substantive obligations under Article 2 (*R (Allen) v HM Coroner for Inner North London* [2009] EWCA Civ 623, para 40).

Capable of identifying and punishing those responsible for the death

69. The investigation must be capable of identifying and punishing those responsible for the death, including state officials or authorities involved in whatever capacity in the chain of events in issue. This is not an obligation of result, but of means (*Jordan v UK* (2001) 37 EHRR 52, para 107; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 20(6); *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 94).

Securing evidence

70. Reasonable steps must be taken to secure all relevant evidence concerning the death and its circumstances (*Jordan v UK* (2001) 37 EHRR 52, para 107; *Edwards v UK* (2002) 35 EHRR 19, para 71; *Kakoulli v Turkey* (2007) 45 EHRR 12, para 123; *Ramsahai v Netherlands* (2008) 46 EHRR 43, para 321). The expectation on the authorities is a high one; even a relatively short delay in evidence collection, or difficulties in doing so caused by ongoing civil war and regular terrorist attacks, have been held not to alter the requirement to take reasonable steps (*Yasa v Turkey* (1999) 28 EHRR 408, para 104; *Al-Skeini v UK* (2011) 53 EHRR 18, para 173). The onus is on the authorities to ensure that action is taken with sufficient speed to ensure that perishable evidence is not lost (*Turluyeva v Russia* (App. No. 63638/09)).

71. The inquiry and investigation must be adequate to ensure that the quality of evidence is not undermined (*Jordan v UK* (2001) 37 EHRR 52, para 107; *Ramsahai v Netherlands* (2008) 46 EHRR 43, para 330). It has previously been held that the procedural obligation may be breached where appropriate steps are not taken to prevent police officers conferring following a fatal incident, even where they did not in fact confer (*R (Saunders) v Independent Police Complaints Commission* [2009] 1 All ER 379, paras 38-40). The ECtHR has found that such conferring can contribute to a breach of the procedural obligation (*Ramsahai v Netherlands* (2008) 46 EHRR 43, paras 321, 330).

72. The Court of Appeal has recently considered the issue of officers conferring following fatal incidents and accepted that, because of the risk of deliberate collusion or innocent contamination, the failure to separate police officers might impair the adequacy of the investigation into that death. However, whether the investigation is in fact materially impaired will depend on all the circumstances, including the effects of other safeguards in place to prevent deliberate collusion or innocent contamination. A failure to keep officers separate therefore does not necessarily render an investigation non-compliant with the procedural obligation (*R (Delezuch) v Chief Constable of Leicestershire* [2014] EWCA Civ 1635, paras 55-62).

73. The ECtHR Grand Chamber has recently found a violation of the procedural obligation in part because of a failure by the authorities to put in place precautions to prevent and / or reduce the risk of the shooter colluding with others in the period between the incident and his first questioning (*Jaloud v Netherlands* (App. No. 47708/08), paras 207-208, 227).

Power to compel witnesses to attend

74. The investigation must have the power to compel witnesses to attend to give evidence (*Jordan v UK* (2001) 37 EHRR 52, para 127; *Edwards v UK* (2002) 35 EHRR 19, para 87; *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, paras 43-45).

Expert evidence

75. Sufficient expert evidence must be called, where required. A failure to do so may violate the procedural duty (*R (Stanley) v HM Coroner for Inner North London* [2003] EWHC 1180 (Admin), paras 45-48; *R (Warren) v HM Assistant Coroner for Northamptonshire* [2008] EWHC 966 (Admin), paras 42-43).

Prompt

76. Whether an investigation has been sufficiently prompt is a fact-sensitive issue. Witnesses must be questioned promptly (*Bektas v Turkey* (App. No. 10036/03); *Al-Skeini v UK* (2011) 53 EHRR 18, para 174). Cases in which the promptness requirement has been breached suggest that delays of years, rather than months, will be have to shown (*Edwards v UK* (2002) 35 EHRR 19, paras 85-86; *Alexander v UK* (App. No. 23276/09); *Jordan's Application* [2014] NIQB 71).

Public scrutiny

77. The investigation must involve a sufficient element of public scrutiny of the investigation, or its results, to secure accountability in practice as well as in theory, to maintain public confidence in the authorities' adherence to the rule of law, and to prevent any appearance of collusion in or tolerance of unlawful acts (*Ramsahai v Netherlands* (2008) 46 EHRR 43, para 353). The degree of public scrutiny required will vary from case to case (*Jordan v UK* (2001) 37 EHRR 52, para 109). The cases reflect this fact-sensitive approach and therefore do not speak with one voice.

78. In *Edwards v UK* (2002) 35 EHRR 19 a prisoner had been killed by his cell-mate and no criminal trial had taken place as the cell-mate had pleaded guilty to manslaughter. A detailed inquiry had been conducted, hearing numerous witnesses in private, and publishing a detailed report with recommendations. The ECtHR held that the lack of public hearings contributed to a violation of the procedural obligation, noting that "where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the Court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible" (para 83).

79. Similarly, the Court of Appeal has previously held that in the case of an investigation into a failed suicide attempt, the procedural obligation required an investigation that would publish written evidence, take oral evidence and hear submissions in public. It was not sufficient for the investigation to publish a report that had been investigated in private, even where the deceased's family were provided with the evidence, afforded opportunities to suggest questions and lines of enquiry, and comment on the draft report (*R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, paras 21, 24, 35, 42, 46).

80. However, the ECtHR has more recently stated that the procedural obligation does not require all proceedings following an inquiry into a violent death to be public, nor does it necessarily require the outcome of the investigation to be made public where the deceased's family are provided with the outcome and are entitled to make it public (*Ramsahai v Netherlands* (2008) 46 EHRR 43, paras 321, 353-354; *Anguelova v Bulgaria* (2004) 38 EHRR 31, para 140).

Conclusions / findings of the investigation

81. At the least, the investigation must culminate in an expression, even if brief, on the central issues, circumstances and systemic defects that caused or contributed to the death (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 16-20, 31, 36, 45; *Bubbins v UK* (2005) 41 EHRR 24, para 153; *R (Lewis) v HM Coroner for the Mid and North Division of the County of Shropshire* [2009] EWHC 661 (Admin), paras 80-99, 107-108, 129, 213-214; *R (Allen) v HM Coroner for Inner North London* [2009] EWCA Civ 623, paras 33, 40; *R (Lepage) v HM Assistant Deputy Coroner for Inner South London* [2012] EWHC 1485 (Admin), paras 52, 55).

82. Case law from the ECtHR arguably suggests that the investigation should *determine* whether the state has complied with the substantive obligations under Article 2 (*Al-Skeini v UK* (2011) 53 EHRR 18, para 163), and should *assess* the role and responsibility of state agents in a death (*Mammadov v Azerbaijan* (2014) 58 EHRR 18, para 123).

Involvement of the next of kin

83. A number of factors are relevant in determining whether the deceased's family have been sufficiently involved in the investigation to satisfy the procedural obligation. These include:

    (1) Whether public funding has been provided to ensure that the deceased's family are legally represented and able to play an effective part in the investigation (*Jordan v UK* (2001) 37 EHRR 52, para 142; *Edwards v UK* (2002) 35 EHRR 19, para 84; *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520, para 60; *R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460, para 77; *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), paras 68, 70; cf *Main v Minister for Legal Aid* [2007] EWCA Civ 1147, paras 49-51).

    (2) The extent of the disclosure provided to the family (*Jordan v UK* (2001) 37 EHRR 52, para 134). The family must be given reasonable access to all relevant evidence in advance (*R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, para 46; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 632, paras 37, 46).

    (3) The extent to which the family were able to attend hearings into the death of their relative (*Edwards v UK* (2002) 35 EHRR 19, para 84).

(4) Whether the family were permitted to ask questions of witnesses, either through their own counsel or through an inquiry panel or chairperson (*Edwards v UK* (2002) 35 EHRR 19, para 84). There is no fixed requirement that an Article 2 investigation must allow the next of kin to cross-examine witnesses (*Mousa v Secretary of State for Defence* [2013] EWHC 1412 (Admin), para 216; *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, para 42). However, where there is no mechanism by which the family can put questions this may contribute to a violation of the procedural obligation (*R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, para 41; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 632, paras 26, 38).

(5) Whether the next of kin were informed of the substance of the evidence prior to the general publication of the results of the investigation (*Edwards v UK* (2002) 35 EHRR 19, para 84).

(6) The level of involvement and participation, if any, of the deceased's family in the range of other investigations into the death, e.g. criminal proceedings, internal reviews, independent investigations from bodies such as the Prisons and Probation Ombudsman (PPO) or the Independent Police Complaints Commission (IPCC)), including by means of interviews, updates and disclosure (*R (JL) v Secretary of State for Justice* [2009] 1 AC 588). It is not an automatic requirement that the next of kin be granted access to the state's investigation as it goes along, nor that the investigating authorities must satisfy every request for a particular investigative measure (*Ramsahai v Netherlands* (2008) 46 EHRR 43, paras 347-349). Where the next of kin are able to give evidence and make representations to the investigations into the death, the procedural obligation may be satisfied despite the level of involvement not being as great as the next of kin would have wished (*R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), para 96).

Assessing whether the procedural obligation has been met

84. Public or private law claims alleging a violation of the procedural obligation can be brought on the grounds that the minimum requirements set out above have not been met by the investigation(s) into the death in question. When considering such a claim it is important to bear in made that the form of investigation required to discharge the procedural obligation may vary according to the circumstances, and there is no single unified procedure that the state must adopt in order to comply with the procedural

obligation (*Jordan v UK* (2001) 37 EHRR 52, paras 105, 143; *Edwards v UK* (2002) 35 EHRR 19, para 69; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, paras 20(1), 32, 47, 63; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 20).

85. The obligation may be met, depending on the facts of the case, by a combination of investigative measures, and the entirety of investigative apparatus deployed by the state should be assessed (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, paras 47, 52; *R (P) v Her Majesty's Coroner for the District of Avon* [2009] EWCA Civ 1367, para 33; *R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, para 58; *R (Delezuch) v Chief Constable of Leicestershire* [2014] EWCA Civ 1635, para 62). However, whatever form of investigation is used, the minimum requirements must be met (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 32).

86. The following investigative measures may be relevant when assessing whether the procedural obligation has been met:

(1) **Criminal proceedings** against those involved in the death or against the corporate body responsible for those involved in the death. Criminal prosecution may provide, or form a decisive part of, the investigation required by the procedural obligation (*R (AB) v Secretary of State for Defence* [2013] EWHC 3908 (Admin), paras 32-35). Where criminal proceedings involve no trial (e.g. because the accused pleads guilty), or do not explore the wider circumstances surrounding the death (e.g. because the trial is focused on the mental state of the accused, but not on alleged failings by the state to protect the deceased), they are less likely to satisfy the procedural obligation without additional investigative measures (*Edwards v UK* (2002) 35 EHRR 19, para 75; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 30; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 35; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), paras 95, 98; *R (Medihani) v HM Coroner for Inner London (South)* [2012] EWHC 1104 (Admin), para 48). The absence of criminal charges may in certain circumstances violate the procedural obligation (*Öneryildiz v Turkey* (2005) 41 EHRR 20, para 93), although as a matter of general principle the procedural obligation does not *require* a prosecution, as the procedural obligation is an obligation of means, not results.

(2) **Disciplinary proceedings** against those involved in the death (*R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin), paras 91-95, 98-99; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), para 95). Disciplinary proceedings may be required in order to meet the procedural obligation even where a detailed IPCC investigation and an inquest have taken place if there have been no criminal proceedings (*R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin), para 52).

(3) An **internal, non-independent investigation**, e.g. an internal review conducted by the NHS Trust responsible for the healthcare provided to the deceased in custody. Whether there exists a requirement for the state's initial, pre-inquest investigation into a death to be independent from the outset is currently unclear from the domestic case law. In the context of the death of mental health detainees it has been held that there is no such requirement (*R (Antoniou) v Central and North West London NHS Foundation Trust* [2013] EWHC 3055 (Admin), paras 75-79 (this decision is currently under appeal)). Other decisions suggest independence is required from the outset and throughout (*Ramsahai v Netherlands* (2008) 46 EHRR 43; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588; *R (Independent Police Complaints Commission) v HM Coroner for Inner North London* [2009] EWHC 2681 (Admin), para 30; *R (Mousa) v Secretary of State for Defence (No.2)* [2013] EWHC 1412 (Admin); *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 212 (in the Article 3 context), although cf *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin) (paras 40, 47, 52-53)).

(4) An **external, independent investigation**, e.g. by the Prisons and Probation Ombudsman (PPO) or the Independent Police Complaints Commission (IPCC). The ability of external, independent investigations to satisfy the procedural obligation will depend on their extent and thoroughness, including whether the investigation considered, or was still considering the state's compliance with Article 2 (*R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin), paras 96, 101; *R (Medihani) v HM Coroner for Inner London (South)* [2012] EWHC 1104 (Admin), para 50; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), paras 95-96).

(5) An **inquest**. An Article 2 inquest is generally the means by which the requirements of the procedural obligation are satisfied (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 20, 47).

(6) A **public inquiry**.

(7) **Civil proceedings**. The case law is somewhat inconsistent on the role that civil proceedings can play in satisfying the procedural obligation. The obligation cannot be met by civil proceedings alone as they are not initiated by the state, do not involve the identification or punishment of any alleged perpetrator, and often involve no public element, e.g. if the claim is settled prior to trial (*Jordan v UK* (2001) 37 EHRR 52, paras 115, 141; *Edwards v UK* (2002) 35 EHRR 19, para 74; *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520, para 61; *R (Takoushis) v HM Coroner for Inner North London* [2006] 1 WLR 461, para 106). It has been regularly stated that civil proceedings cannot be taken into account when assessing whether the procedural obligation has been met and cannot discharge the procedural obligation (*Jordan v UK* (2001) 37 EHRR 52, para 141; *McKerr v UK* (2002) 34 EHRR 20, para 156; *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 111; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, para 70; *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin), para 57). However, later domestic cases have held that civil proceedings are relevant as they form part of the overall investigative response of the state to the death (*R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin), para 52; *R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin), paras 92-95, 100; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), para 95).

87. What combination of investigative measures will be sufficient to comply with the Article 2 procedural obligation will be fact-sensitive, and will depend on the extent to which the investigative measures to date have, in totality, discharged the purposes and requirements of the procedural obligation. Consideration can also be given to the investigations open to be taken in the future (*R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), para 99).

(2) Article 3

Arguable breach cases

88. The procedural obligation arises where the authorities are provided with credible or arguable allegations, or where there is a reasonable suspicion, that treatment in violation of Article 3 has taken place. This includes circumstances in which the alleged violation was perpetrated by one private individual against another, rather than by an

agent of the state (*Assenov v Bulgaria* (1999) 28 EHRR 652, para 117; *Selmouni v France* (2000) 29 EHRR 403, paras 79, 117; *Labita v Italy* (2008) 46 EHRR 50; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 4; *R (P) v Secretary of State for Justice* [2010] QB 317, para 48; *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04), para 74; *El Masri v Macedonia* (2013) 57 EHRR 25, para 186; *Milanovic v Serbia* (2014) 58 EHRR 33, para 85; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), paras 213-214, 216; cf *R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182, paras 29, 39).

89. In the Article 2 context, an "arguable" allegation is one that is more than merely fanciful. This is a low threshold (*R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453, para 60). The same threshold should apply to Article 3 allegations.

90. The allegation need not be made by the alleged victim (*OOO v Commissioner of Police of the Metropolis* [2011] EWHC 1246 (QB)).

Historic violation cases

91. The principles relating to the requirement to investigate historic death cases, summarised above, will apply to allegations of historic Article 3 ill-treatment (*Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB)).

The purposes of the investigation

92. The investigation intended to discharge the procedural obligation under Article 3 has a number of purposes, including to:

(1) Secure confidence in the rule of law in a democratic society (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 212; *Milanovic v Serbia* (2014) 58 EHRR 33, para 86; *Menson v UK* (2003) 37 EHRR CD 220, p.229; *Jordan v UK* (2003) 37 EHRR 2, para 108).

(2) Demonstrate that the State is not colluding with or consenting to criminality (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 212; *Milanovic v Serbia* (2014) 58 EHRR 33, para 86; *Menson v UK* (2003) 37 EHRR CD 220, p.229; *Jordan v UK* (2003) 37 EHRR 2, para 108).

(3) Guard against impunity (*El Masri v Macedonia* (2013) 57 EHRR 25, para 192; *Velev v Bulgaria* (App. No. 43531/08), paras 50, 62).

(4) Learn lessons in order to prevent similar future incidents (*AM v Secretary of State for the Home Department* [2009] UKHRR 973, paras 57-60; *R (Mousa) v Secretary of State for Defence* [2010] EWHC 3304, para 111; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 212). However, the case law does not speak with one voice on this issue, with some cases suggesting that wider questions of policy and resourcing fall outside the scope of Article 3 and are matters for public and political debate (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, paras 15, 58; *R (P) v Secretary of State for Justice* [2010] QB 317, paras 43, 57; *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin), para 47).

The requirements of the investigation

93. The minimum requirements that an investigation must meet in order to satisfy the Article 3 procedural obligation appear more fluid and context-specific than under Article 2.

94. Some earlier domestic cases, as well as ECtHR decisions, suggest that there is no distinction between the content and requirements of the procedural obligation under Article 3 and the obligation imposed by Article 2 (*R (Green) v Police Complaints Authority* [2004] 1 WLR 725; *Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin), para 16; *R (Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334, paras 12-13; *Mrozowski v Poland* (App. No. 9258/04), paras 34-44). More recently, however, the Court of Appeal has stated that there exists a "different emphasis" between the procedural obligations under Articles 2 and 3. This is primarily because the victim of an Article 2 violation will ordinarily be dead and it will only be others who have knowledge of the circumstances of death, e.g. agents of the state, whereas a victim of an Article 3 violation is generally able to act on his / her own behalf (*R (P) v Secretary of State for Justice* [2010] QB 317, paras 51-58; *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, paras 15, 19-20; *R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182, para 29; cf *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 226(ii), which doubts the relevance of this distinction between the respective procedural obligations under Articles 2 and 3).

95. It appears from the case law that an Article 3-compliant investigation should meet a number of minimum requirements, though they may vary according to the circumstances: the authorities must act of their own motion in initiating the

investigation; the investigation must be independent; it must be capable of establishing the facts of the case; it must be capable of identifying and punishing those responsible for a violation of Article 3; it must be thorough; reasonable steps must be taken to secure evidence; it must be prompt; and it must permit effective access to the investigatory process for the victim. A number of these requirements are addressed in more detail below.

Independent

96. The persons responsible for and carrying out the investigation must be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (*Bursuc v Romania* (App. No. 42066/98), para 103; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 32; *El Masri v Macedonia* (2013) 57 EHRR 25, para 184). Whether there exists a requirement for the investigation to be independent from the outset is currently unclear from the domestic case law. The Article 3 case of *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin) suggests that independence from the outset is not required (paras 40, 47, 52-53). In the Article 2 context of deaths of mental health detainees it has been held that there is no such requirement (*R (Antoniou) v Central and North West London NHS Foundation Trust* [2013] EWHC 3055 (Admin), paras 75-79 (this decision is currently under appeal)). However, the decision of *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB) in the Article 3 context states that the obligation to conduct an investigation, which should be independent, covers the entire span of a case from investigation to trial (para 212). A number of other Article 2 decisions also suggest that independence is required from the outset and throughout (*Ramsahai v Netherlands* (2008) 46 EHRR 43; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588; *R (Independent Police Complaints Commission) v HM Coroner for Inner North London* [2009] EWHC 2681 (Admin), para 30; *R (Mousa) v Secretary of State for Defence (No.2)* [2013] EWHC 1412 (Admin)).

Capable of establishing the facts of the case

97. The investigation should be capable of establishing the facts of the case (*Banks v UK* (App. No. 21387/05); *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04), para 74). In order to be effective an investigation may have to look beyond the paper evidence provided by the state (*El Masri v Macedonia* (2013) 57 EHRR 25, para 189).

Capable of identifying and punishing those responsible

98. The investigation must be capable of identifying and punishing those responsible for a violation of Article 3 (*Assenov v Bulgaria* (1999) 28 EHRR 652, para 102; *Labita v Italy* (2008) 46 EHRR 50; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 32; *El Masri v Macedonia* (2013) 57 EHRR 25, para 182; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 216). This is not an obligation of results, but of means (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 217).

99. The state is under an obligation to ensure effective prosecution of those considered responsible for alleged violations of Article 3, including both state agents and private individuals (*MC v Bulgaria* (2005) 40 EHRR 20, paras 153, 166; *R (B) v DPP* [2009] 1 WLR 2072). However, there is no right have an alleged perpetrator prosecuted in all cases (*Secic v Croatia* (2007) 49 EHRR 19, para 54). As Article 3 imposes an obligation of means, not of results, there will not be an automatic violation where a properly conducted prosecution fails to secure a conviction. However, this also means that there can be a violation of the procedural obligation due to an inadequate investigation even where the investigation results in arrest, charge and conviction (*Edwards v UK* (2002) 35 EHRR 19, para 71; *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04), para 74; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 217).

Thorough

100. The authorities must make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decision (*AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 32; *El Masri v Macedonia* (2013) 57 EHRR 25, para 183).

Securing evidence

101. The authorities must take reasonable steps to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical reports (*Beganovic v Croatia* (App. No. 46423/06), para 70; *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04), para 74; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 32; *El Masri v Macedonia* (2013) 57 EHRR 25, para 183). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of the investigative duty (*Premininy v Russia* (2011) 31 BHRC 9 (App.

No. 44973/04), para 74; *El Masri v Macedonia* (2013) 57 EHRR 25, para 183; *Al Nashiri v Poland* (2015) 60 EHRR 16, para 486).

Prompt

102. The investigation must be prompt and conducted with reasonable expedition (*Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04); *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 219). Action should be taken as soon as a complaint has been lodged or where there are other sufficiently clear indications that torture or ill-treatment might have occurred (*Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHHR 313, para 97).

103. Some domestic case law however suggests that Article 3 allows for a degree of flexibility and "reasonable phasing" of an investigation, with associated delay (*R (Mousa) v Secretary of State for Defence* [2010] EWHC 3304 (Admin), paras 120-121; *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 61).

Involvement of the victim

104. The investigation must permit effective access to the investigatory process for the victim (*AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 32; *El Masri v Macedonia* (2013) 57 EHRR 25, para 185; *Al Nashiri v Poland* (2015) 60 EHRR 16, para 486).

Assessing whether the procedural obligation has been met

105. Public or private law claims alleging a violation of the procedural obligation can be brought on the grounds that the minimum requirements set out above have not been met by the investigation(s). The manner in which the requirements of Article 3 are satisfied will vary according to the circumstances (*Aktas v Turkey* (2003) 38 EHRR 333, para 299; *Banks v UK* (App. No. 21387/05); *R (P) v Secretary of State for Justice* [2010] QB 317; *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668; *R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182). The circumstances include the nature, scale and consequences of the alleged violation of Article 3, the likelihood of recurrence, the existence of other investigations that have been or could be conducted, and the costs of conducting a further investigation (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 57).

106. A number of investigative measures are relevant when assessing whether the procedural obligation has been met:

(1) **Criminal investigation and prosecution** (*Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin); *Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin), para 16). There may be a breach of the procedural obligation even where the investigation ultimately results in conviction, for example if there were earlier operational failings falling foul of the procedural obligation (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), paras 154, 220). However, the fact of conviction will be relevant when assessing whether the procedural obligation has been met (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 160). When assessing whether a criminal investigation was adequate, the law should not impose an excessive burden on the police, and it may be relevant to consider the resources available, the nature of the offence, and whether the victim fell into an especially vulnerable category (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 224). Whether failings in a criminal investigation are sufficiently significant to violate Article 3 is a fact-sensitive judgment (*MC v Bulgaria* (2005) 40 EHRR 459, paras 167-168). The extent of the public authority's compliance with its own internal standards and policies is relevant, though not determinative, in this assessment (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 88; *T v Chief Constable of Staffordshire Police* Birmingham County Court (18 January 2013) Unreported, paras 41, 54).

(2) **Disciplinary proceedings** against those involved in ill-treatment may contribute to the discharge of the procedural obligation (*Banks v UK* (App. No. 21387/05)). Disciplinary measures against state agents will not satisfy the procedural obligation where the alleged violation requires an effective criminal investigation, e.g. an allegation of rape or sexual assault (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 222).

(3) An **internal, non-independent investigation**, e.g. by the Home Office or the body running an immigration detention centre (*AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 31; *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 54).

(4) An **external, independent investigation**, e.g. by the Prisons and Probation Ombudsman (PPO) or the Independent Police Complaints Commission (IPCC) (*Allen v Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967,

para 51; *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin)).

(5) A **free-standing inquiry**. The procedural obligation may but does not necessarily require a free-standing inquiry into allegations of a violation of Article 3. Particular emphasis has been placed on the resource implications in requiring a separate inquiry into alleged mistreatment (*R (P) v Secretary of State for Justice* [2010] QB 317, para 58; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, paras 68, 83, 112; *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 57; *R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182, para 29). Recent domestic case law suggests that it will be rare for a free-standing inquiry to be required (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668). An inquiry will not be necessary if all the facts are known (*R (P) v Secretary of State for Justice* [2010] QB 317, para 43). The availability of other investigations – including criminal, disciplinary and civil proceedings, and other investigations, e.g. IPCC – taken individually or collectively, may satisfy the procedural obligation without the need for a free-standing inquiry (*R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182, para 29; *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668; *Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin), para 16; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, paras 61, 65).

(6) **Civil proceedings against the state** may be relevant (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 55; *Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin), para 16; cf *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin), paras 60-69, which states that the investigative obligation cannot be satisfied by a judgment that leads only to the payment of compensation). Civil proceedings may not satisfy the procedural obligation where:

(i) The complaint is one of intentional violence, rather than negligence (*Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 (Admin); *Banks v UK* (App. No. 21387/05)).

(ii) The case involves inadequacies in policies or systems which a civil claim could not properly consider (*AM v Secretary of State for the Home Department* [2009] UKHRR 973, para 33). However, the Court of Appeal has subsequently indicated that civil proceedings may be capable of

investigating such issues (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 55).

(iii) The victims would be at a disadvantage in taking civil proceedings as compared to the state conducting its own investigation (*AM v Secretary of State for the Home Department* [2009] UKHRR 973, paras 144-118).

(iv) Delay until the civil proceedings take place will undermine their outcome (*Oyal v Turkey* (App. No. 4864/05), para 76). However, domestic authority suggests this may not be determinative (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 61).

(v) The civil proceedings settle, preventing a trial of the issues. However, this does not necessarily prevent the proceedings contributing to the discharge of the procedural obligation (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 59).

(7) **Civil proceedings against the perpetrator** of the treatment violating Article 3, even if successful, will not satisfy the procedural obligation where the alleged violation requires an effective criminal investigation, e.g. an allegation of rape or sexual assault (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 222).

(8) **Judicial review proceedings** (*Allen v Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967, para 51).

107. What combination of investigative measures will be sufficient to comply with Article 3 will be fact-sensitive. Factors which will tend to suggest that more investigative steps than merely criminal and civil proceedings are required include: the fact that the treatment in question occurred in a custodial setting; evidence of multiple systemic defects; difficulty in identifying potential individual wrong-doers (*AM v Secretary of State for the Home Department* [2009] UKHRR 973, paras 116-118).

108. Where there is no state complicity in an alleged breach of Article 3, e.g. treatment by one private individual against another, the measures required to satisfy the procedural obligation may be less than in cases of state complicity (*MC v Bulgaria* (2005) 40 EHRR 459, paras 150-151; *DJ v Croatia* (App. No. 42418/10), para 85; *Secic v Croatia* (2009) 49 EHRR 18, paras 52-53; *Beganovic v Croatia* (App. No. 46423/06), para 69; *Maryin v Russia* (App. No. 1719/04); *R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182, para 29; *Allen v Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967, para 43).

109. It has been suggested that satisfaction of the procedural obligation will depend on whether the investigation is proportionate to the seriousness and idiosyncrasies of the incident giving rise to the allegation (*R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182, para 44).

8. BRINGING PRIVATE LAW CLAIMS

(1) Procedure and "victim" status

110. The estate of the deceased can bring a claim under section 7(1) HRA 1998 for the violation of the deceased's rights under Articles 2 and 3.

111. Relatives of the deceased can bring claims for the violation of their rights under Articles 2 ad 3. Such claims are brought individually by each relative under section 7(1) HRA 1998. The relative must qualify as a "victim" of the violation. Parents, aunts, brothers and sisters, nephews, an unmarried partner, and an adopted daughter may qualify as victims (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, paras 46-48; *Yasa v Turkey* (1999) 28 EHRR 408, paras 63-66; *Velikova v Bulgaria* (App. No. 41488/98), para 98). For family members to bring claims as victims under Article 3, relevant factors will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, and the way in which the authorities responded to the family member's inquiries about the alleged violation (*Timurtas v Turkey* (2001) 33 EHRR 6, para 95).

112. The Article 2 substantive obligations may be violated where an individual's life is put at risk but he / she does not die. A surviving victim can therefore bring a claim (*Makaratzis v Greece* (2005) 41 EHRR 49, paras 51-55; *Kolyadenko v Russia* (2013) 56 EHRR 2, para 155; *Pankov v Bulgaria* (App. No. 12773/03)).

113. Where bereaved family members settle a non-HRA claim arising from the death which broadly overlaps with, and provides compensation for the same matters as are sought in the HRA claim, it is likely that the family members will lose their victim status (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, paras 46, 58, 61-62, 72).

114. Pursuant to section 7(5) HRA 1998, a claim made under section 7(1) must be brought before the end of the period of one year beginning with the date on which the act complained of took place. This period can be extended under section 7(5)(b) where the court considers it just and equitable to do so having regard to all the circumstances of the case (*Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133, para 43; *Weir v Secretary of State for Transport* [2004] EWHC 2772 (Ch)).

(2) Burden of proof

115. The burden of proving a violation of Articles 2 and 3 rests with the claimant. However, different evidential considerations will apply depending on the circumstances of the alleged violation.

116. Where the allegation arises from death or injury sustained in state detention, the ECtHR has stated that the burden of proof effectively falls on the state to provide a justification or plausible explanation (*Tomasi v France* (1992) 15 EHRR 1; *Aksoy v Turkey* (1997) 23 EHRR 553, para 61; *Assenov v Bulgaria* (1999) 28 EHRR 652, para 117; *Selmouni v France* (2000) 29 EHRR 403, para 87; *Salman v Turkey* (2002) 34 EHRR 17, para 100; *Grant v Ministry of Justice* [2011] EWHC 3379, para 71). The requirement to provide a plausible explanation is particularly stringent where the individual dies (*Salman v Turkey* (2002) 34 EHRR 17, para 99). Where state agents shoot and kill the deceased, the ECtHR has indicated that the authorities bear the burden of proving that the force used was absolutely necessary (*Bektas v Turkey* (App. No. 10036/03), para 57).

117. The Court of Appeal has made clear that in a domestic private law claim the burden of proof remains on the claimant. However, the defendant will almost inevitably face a high evidential burden to provide a plausible explanation for the death or injury and to demonstrate they are not responsible for a violation of Article 2 and / or 3 (*Sheppard v Secretary of State for the Home Department* [2002] EWCA Civ 1921, paras 10-13).

118. Where the allegation does not arise from injuries suffered in detention, the ECtHR has stated that it will examine all the material before it and come to conclusions on it (*Ireland v UK* (1979-80) 2 EHRR 25, paras 160-161). In a domestic civil claim this imposes a burden on the claimant to establish a violation (*Grant v Ministry of Justice* [2011] EWHC 3379, para 73).

(3) Standard of proof

119. The claimant must satisfy the balance of probabilities standard to establish a violation of Articles 2 and 3 (*Sheppard v Secretary of State for the Home Department* [2002] EWCA Civ 1921, para 10; *Grant v Ministry of Justice* [2011] EWHC 3379, paras 77, 78(3)). This is despite the fact that the ECtHR has stated that a violation of Article 3 requires proof beyond reasonable doubt (*Ireland v UK* (1978) 2 EHRR 25, para 161; *Kalashnikov v Russia* (2003) 36 EHRR 34, para 33), and that the facts amounting to a violation must be "convincingly established" (*Aerts v Belgium* (2000) 29 EHRR 50, para 66). The domestic courts have assessed this Strasbourg wording as amounting to the civil balance of probabilities, not the domestic criminal standard of proof beyond reasonable doubt (*Grant v Ministry of Justice* [2011] EWHC 3379, paras 77, 78(3)).

120. The standard of proof can be met by inferences and presumptions of fact (*El Masri v Macedonia* (2013) 57 EHRR 25, para 151).

(4) Causation

The operational obligation

121. Where the claimant alleges a breach of the operational obligation under Article 2[2], a number of domestic cases state that the claimant(s) is not required to establish on the balance of probabilities that the violation in question caused the deceased's death, i.e. it is not necessary to establish that it is more likely than not that the violation caused the death. Rather, the test for causation is a looser one and requires the claimant to show that there was a "substantial chance" or "real prospect" that without the violation the outcome would have been different (*Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225, para 138; *Savage v South Essex Partnership NHS Trust* [2010] EWHC 865 (QB), paras 82, 89). This reflects case law from the ECtHR (*Opuz v Turkey* (2010) 50 EHRR 28, para 136; see also *O'Keeffe v Ireland* (2014) 59 EHRR 15, para 149).

122. However, in *Sarjantson v Chief Constable of Humberside* [2013] 3 WLR 1540, a case involving an allegation of a breach of the operational obligation under Articles 2 and 3, the Court of Appeal held that the claimant is not required to establish a causative link between the alleged failings by the state and the death or serious injury in order to establish a violation. To establish liability the claimant merely has to show that the

[2] This presumably also applies to claims under the Article 3 operational obligation, and to claims under the general positive obligation imposed under Articles 2 and 3.

state was under an obligation to take certain steps, and failed to do so. Whether this would have made a difference is not relevant to liability, but may mean that there is no right to damages (paras 27-29). The Supreme Court refused the Chief Constable permission to appeal to the Supreme Court.

123. The difference between the approaches to causation in *Van Colle* / *Savage* and *Sarjantson* has not yet been addressed by the courts. The implications of the *Sarjantson* approach in the inquest context are due to be considered by the Administrative Court in *R (Wiggins) v HM Assistant Coroner for Nottinghamshire* CO/3656/2014 in July 2015.

The procedural obligation

124. In claims against the police or other public authorities alleging a violation of the duty to investigate under Article 3, the state will be liable where a step that should have been taken, but was not, would have been "capable" of leading to the apprehension and prosecution of the offender. "Capability" in this context involves a "causal connection" between the failing and the ability of the investigation to identify and arrest the perpetrator, i.e. whether had the step been taken, it could or might have led to the identification and arrest of the perpetrator (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), paras 221, 226(v), 287-298). Importantly, the claimant is not required to show that had the public authority taken the appropriate steps, the Article 3 treatment that the claimant suffered would not have occurred; it is not a "but for" test in relation to the harm sustained by the claimant. Rather, the claimant has to show that the public authority failed to take a step which was capable of identifying and arresting the perpetrator.

125. If it can be shown that had the investigative failings not occurred, the Article 3 treatment would not have occurred at all, this will aggravate the damages to be awarded for the violation. However, it is not necessary to prove this causal link in order to establish a violation of the procedural obligation (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB)).

9. VALUING PRIVATE LAW CLAIMS

(1) Violation of family members' rights under Articles 2 and 3

126. A claimant relative may be compensated for financial loss resulting from the death or serious injury of the deceased, including loss of financial support, if there is a clear causal connection between the loss claimed and the violation (*Akkoç v Turkey* (App. Nos. 22947/93 and 22948/93), para 133; *Bektas v Turkey* (App. No. 10036/03), para 74). The more uncertain the link between the violation and the loss claimed, the less likely it is that such loss can be successfully claimed (*Z v UK* [2002] 34 EHRR 3, para 120).

127. Neither the domestic courts nor the ECtHR have yet stated whether damages can be recovered for provable psychiatric harm suffered by a relative because of their loved one's death or injury.

128. The domestic courts determine awards of damages for violations of the ECHR based on the principles identified in the case law of the ECtHR (*Anufrijeva v London Borough of Southwark* [2004] QB 1124, paras 52-70; *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, paras 9, 19; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB), paras 17-41, 48 (which considers recent HRA damages decisions of the higher courts)):

(1) Damages generally play a less a less prominent role in actions based on breaches of the articles of the ECHR, than in actions based on breaches of private law obligations, e.g. negligence.

(2) An action alleging a violation of the ECHR is often more concerned to bring the infringement to an end, and compensation will be of secondary importance. Even where damages are required, the finding of a violation will be an important part of the claimant's remedy.

(3) An award of damages for a violation of the ECHR is discretionary, and does not arise as of right.

(4) In considering whether to award damages, there is a balance to be drawn between the interests of the victim and the public interest.

(5) The claimant should, insofar as this is possible, be placed in the same position as if his / her Convention rights had not been infringed. This applies to both pecuniary and non-pecuniary damages.

(6) Damages are less likely to be awarded for procedural violations than violations of substantive ECHR rights.

(7) The overall approach is an equitable one, with the court asking whether damages are "just and appropriate" and "necessary" taking into account all the circumstances of the case and the overall context. In some cases the finding of a violation will be sufficient to provide "just satisfaction" to the victim. Relevant factors include whether there is a causal link between the breach and the harm and whether the violation is of a type which should be reflected in a pecuniary award. Article 2 and 3 cases are of a type where a financial award will be necessary.

(8) Where damages are awarded, the domestic courts should look to comparable ECtHR awards, and the awards from the domestic courts should not be significantly more or less generous than the awards made by the ECtHR. Over time the domestic courts will develop their own body of HRA damages cases, reducing the need to look to the ECtHR awards.

(9) The seriousness, scale and manner of the violation are relevant factors, as are the moral damage sustained by the claimant, and the severity of the damage sustained.

(10) The conduct of the claimant is relevant.

(11) The conduct and culpability of the defendant is relevant including: whether the defendant has demonstrated any contrition and whether any apology has been provided; whether the violation was deliberate and / or in bad faith; whether the state has drawn the necessary lessons and whether there is a need to include a deterrent element in an award; whether there is a need to encourage others to bring claims against the state by increasing the award; and whether the violation was systemic or operational. The willingness of the state to learn lessons and conduct investigations is unlikely to result in a material reduction in damages.

(12) The degree of loss suffered by the claimant may also be informative.

(13) The fact that state agents had been disciplined in relation to the circumstances surrounding the violation is not relevant to damages.

(14) Exemplary or punitive damages are not part of damages awards under the HRA.

(15) At the end of the assessment process, the court should consider the "totality" of the award to ensure that the award is not divorced from the overall context.

129. Domestic awards to bereaved parents for violations of the substantive obligations under Article 2 have been between £5,000 and £10,000 per parent (*Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325, para 129; *Savage v South Essex Partnership NHS Trust* [2010] EWHC 865 (QB), para 97; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, paras 80-89). The Supreme Court in *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 85 provided guidance on the factors that the court will consider when determining awards:

> *…the closeness of the family link between the victim and the deceased, the nature of the breach and the seriousness of the non-pecuniary damage that the victim has suffered. Factors which will tend to place the amount of the award towards the upper end of the range are the existence of a particularly close family tie between the victim and the deceased; the fact that the breach is especially egregious; and the fact that the circumstances of the death and the authority's response to it have been particularly distressing to the victims. Conversely, factors which will tend to place the award towards the lower end of the range are the weakness of the family ties, the fact that the breach is towards the lower end of the scale of gravity and the fact that the circumstances of the death have not caused the utmost distress to the victims.*

130. Awards from the ECtHR for violations of the substantive obligations under Article 2 vary significantly and are often substantially higher than domestic awards. For example:

(1) *Dzhabrailov & Others v Russia* (App. No. 8620/09), 27 February 2014. A number of bereaved family members were awarded significant non-pecuniary damages for breaches of Articles 2, 3, 5 and 13 in cases involving unexplained disappearances following contact with security forces. In the Suleymanova case the four applicants (parents, wife and son of the deceased) were awarded a total of €180,000 in non-pecuniary damages. In the Chankayevy case the applicant parents of the deceased were awarded €120,000 in non-pecuniary damages.

(2) *Ketreb v France* (App. No. 38477/09), 19 July 2012. The two sisters of the deceased were awarded a total of €40,000 in non-pecuniary damages for a breach of the operational obligation where the deceased had died following a self-inflicted injury in state custody and the authorities had failed to provide appropriate care.

(3) *De Donder and De Clippel v Belgium* (App. No 8595/06), 6 December 2011. Each parent of the deceased was awarded €25,000 in non-pecuniary damages for a breach of the operational obligation where the deceased had died following a self-inflicted injury in state custody and the authorities had failed to provide appropriate care.

(4) *Alikaj v Italy* (App. No. 47357/08), 29 March 2011. Each parent was awarded €50,000 where the deceased had been shot and killed by the police.

(5) *Bektas and Ozlap v Turkey* (App. No. 10036/03), 20 July 2010. The wife of the deceased, who was shot and killed by the police, was awarded €60,000 for a violation of the negative obligation and the procedural obligation.

(6) *Kallis v Turkey* (2009) ECHR 1662, 27 October 2009. The deceased's parents were awarded €35,000 each for violations of the negative and procedural obligations in respect of their son.

131. Awards from the ECtHR for violations of the Article 2 procedural obligation alone may also be relevant in assessing the value of a private law claim:

(1) *Jaloud v Netherlands* (App. No. 47708/08). The applicant was awarded €25,000.

(2) *Al-Skeini v UK* (2011) 53 EHRR 18. £15,000 for each of the five applicants.

(3) *Dimitrova v Bulgaria* (App. No. 44862/04), 27 April 2011. €10,000 to each parent.

(4) *Silih v Slovenia* (2009) 49 EHRR 37. An award of €7,500 was made to the applicant.

(5) *Şemsi Önen v Turkey* (App. No. 22876/93), 14 May 2002. The applicants were awarded between €13,000 and €16,000 for a violation of the procedural obligation in relation to the deaths of their parents and brother.

(6) *Jordan v UK* (2003) 37 EHRR 2. The applicant was awarded £10,000.

(2) Violation of the deceased's rights under Articles 2 and 3

132. Neither the domestic courts nor the ECtHR have yet stated whether damages can be recovered for loss of the deceased's income, where this was not dependency income claimed by a relative as a "victim" of the Article 2 violation.

133. Domestic awards for the violation of the deceased's right to life have been around £10,000 for the distress and anguish suffered by the deceased (*Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325, para 129; *Savage v South Essex Partnership NHS Trust* [2010] EWHC 865 (QB), para 97). The value will depend on the extent of the pre-death anguish suffered by the deceased, including its duration and severity (*Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325, para 118).

134. Article 2 awards to the estate from the ECtHR vary more widely than domestic awards and higher awards have been made than in the domestic cases. For example:

(1) *Tas v Turkey* (App. No. 24396/94), 14 November 2000. The estate was awarded £20,000 in non-pecuniary damages for violations of Articles 2 (substantive), 5 and 13 in respect of the deceased. The deceased had disappeared while in the custody of the security forces and his fate remained unknown.

(2) *Akkoç v Turkey* (App. Nos. 22947/93 and 22948/93), 10 October 2000. The estate was awarded £15,000 for a violation of the operational obligation in relation to the deceased.

(3) Violation of victims' rights under Article 3

135. Damages for a violation of Article 3 are designed to compensate the victim for pecuniary and non-pecuniary damage not already covered by other claims. The existence of other claims is relevant to the assessment of damages under the HRA. Where the damage claimed under Article 3 overlaps entirely with another claim, the Article 3 finding may result in only declaratory relief. Conversely, where the damage claimed under Article 3 is different to that claimed in other claims, the claimant may still receive compensation under Article 3. It is relevant that a civil claim brought against

the perpetrator of the Article 3 treatment, who may be impecunious, will often be significantly undervalued (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB), paras 14, 55, 60-61, 63, 65). In *DSD*, the damages received from the perpetrator of the rape that the claimants had sustained did not compensate them for the damage (including psychological damage) caused by the failings in the police investigations into the claimants' allegations of rape (as distinct from the damage caused by the rapes themselves). The claimants therefore received compensation under Article 3 in addition to that already received from the perpetrator.

136. The Court in *DSD* considered at length the approach to damages for a violation of Articles 2 and 3 and the appropriate ranges for awards. The Court's comments will apply to damages awards under Articles 2 and 3. The Court set out a number of factors that may be relevant when deciding whether to make an award of non-pecuniary damages, and if so, how much to award (paras 68, 118, 124-127, 137-140):

(1) The size of the award often reflects the quality of the evidence provided on the harm suffered by the claimant. ECtHR cases indicate that where expert evidence establishes a recognised condition, awards are often markedly higher.

(2) Where modest sums are awarded by the ECtHR, this is often because modest sums have been claimed, rather than because the Court positively decided to make a modest award.

(3) All violations of Article 3 (and therefore Article 2) result in awards of damages. The greater the degree of culpability, the higher the damages award.

(4) Material contributory fault may lead to a reduction in damages, e.g. delay in notifying the police, failure to cooperate with the police.

(5) Courts should take into account evidence of comparable awards in domestic proceedings (including tortious awards).

(6) The effect of the failings on others. In *DSD* the failings resulted in the perpetrator continuing to rape and assault numerous other women (para 126), and in one case the rape suffered by the claimant would have been avoided had the failings not occurred (para 137).

(7) The range of awards made by the ECtHR for Article 3 violations resulting in psychological or mental harm is between €1,000 and €8,000 for a nominal award, €8,000 to €20,000 for a routine violation, and €20,000 to €100,000 for cases with aggravating features.

(8) Aggravating features could include: medical evidence of material psychological harm; mental harm amounting to a recognised medical condition; situations where the victim has also been the victim of physical harm or a crime caused in part by the state; the duration of the failings; the nature of the failings and whether they were operational and / or systemic; morally reprehensible conduct or bad faith by the state. This list indicates that damages can be awarded in the absence of medical evidence or a recognised medical condition; these factors simply aggravate the award.

137. ECtHR awards for violations of Article 3 vary significantly (see *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB), paras 68, 128 for a detailed summary of relevant ECtHR awards).

138. Domestic awards for violations of Article 3 are limited. Three reported decisions resulted in the following awards:

(1) £5,000 for generalised distress and frustration resulting from the failure by the police, for 12-15 months, to conduct an effective investigation into allegations of forced domestic servitude (*OOO v Commissioner of Police of the Metropolis* [2011] EWHC 1246 (QBD)).

(2) £5,000 for serious mental upset and considerable distress caused by the flaws in a police investigation into a serious sexual assault suffered by the claimant (*T v Chief Constable of Staffordshire Police* Birmingham County Court (18 January 2013) Unreported).

(3) £22,250 (£20,000 for harm, £2,250 for future treatment costs) and £19,000 (£17,000 for harm, £2,000) to two claimants who suffered psychiatric damage as a result of a particularly serious and lengthy failure by the police to investigate their allegations of rape and sexual assault (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB)).

10. TEST CASE ISSUES

139. A number of outstanding and potentially significant issues arise from the current state of the Article 2 and 3 case law:

(1) **Expansion of the categories of people owed the operational obligation**: Despite the significant statement of principle from the Supreme Court in *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, indicating a more expansionist approach to the reach of the operational obligation into non-custodial settings, this has not been followed by further first instance and appellate rulings identifying new categories of vulnerable people owed the operational obligation. Examples might include those subject to Community Treatment Orders, looked-after children, and vulnerable members of society subject to prosecution. As the Supreme Court stated in *Rabone*, "The jurisprudence of the operational duty is young. Its boundaries are still being explored by the ECtHR as new circumstances are presented to it for consideration. But it seems to me that the court has been tending to expand the categories of circumstances in which the operational duty will be found to exist." (para 25).

(2) **Under the operational obligation, how "immediate" must a "real and immediate risk" be for liability to arise**? The Supreme Court in *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 made clear that the risk in question does not need to be apparent just before death (para 40). Can a risk that is real and immediate at one time, e.g. when a perpetrator of domestic violence commits a violent act and is arrested and imprisoned, then be re-triggered at a later time, e.g. when that perpetrator is released from custody, even if no additional, express threats are made at the later point in time?

(3) **The relationship between the operational obligation and the common law duty of care in negligence**: The Supreme Court in *Michael v Chief Constable of South Wales* [2015] 2 WLR 343 was recently presented with an opportunity to develop the duty of care in negligence to include a duty owed by the police to people at risk of imminent, recognised harm from other private individuals, so as to reflect and achieve harmony with the operational obligation under Articles 2 and 3. The Supreme Court declined to expand the duty of care in this way (paras 117, 123-128). This is unlikely to be the last word on this subject.

(4) **General positive obligation**: There are a very limited number of domestic decisions on the scope and application of the general positive / systems obligation. The High Court's sweeping findings in *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB) (summarised at para 13) are noticeable, though the Court of Appeal took a more restrictive approach in *R (FI) v Secretary of State for the Home Department* [2014] EWCA Civ 1272 (para 41). There would appear to be scope for further domestic systems challenges.

(5) **Procedural obligation in historic violation cases**: Judgment from the Supreme Court is awaited in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for Defence*. If the Court follows the ECtHR decision in *Janowiec v Russia* (2014) 58 EHRR 30, allowing the procedural / investigative obligation to bite for allegations of historic deaths and ill-treatment, there will remain significant issues about what sorts of historic allegation cases will trigger the procedural obligation under domestic law.

(6) **Whether the procedural obligation requires the investigation to be independent from the outset**: *R (Antoniou) v Central and North West London NHS Foundation Trust* [2013] EWHC 3055 (Admin) (paras 75-79) indicates that the investigation does not need to be independent from the beginning where an Article 2 inquest will form part of the investigative process. Comments from the ECtHR in *Ramsahai v Netherlands* (2008) 46 EHRR 43 and from the House of Lords in *R (JL) v Secretary of State for Justice* [2009] 1 AC 588 suggest that the Article 2 procedural obligation does, in certain circumstances, require the investigation to be independent from the outset. Judgment from the Court of Appeal in *Antoniou* is awaited. *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB) (para 21) suggests that police investigations, and arguably Article 3 investigations, do need to be independent at the outset. Judgment from the Court of Appeal is awaited in *DSD*.

(7) **Procedural obligation** under Article 3: The investigative obligation formulated in *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB) relates on its facts to police investigations. How does the *DSD* investigative duty apply in the contexts of allegations of ill-treatment made to other public authorities?

(8) **Causation** test for breaches of the operational obligation: How does the Court of Appeal ruling in *Sarjantson v Chief Constable of Humberside* [2013] 3 WLR 1540 (paras 27-29), rejecting the relevance of causation to liability for a breach of the

operational obligation, interact with the approach to causation under the operational obligation set out in *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225 (para 138) and *Savage v South Essex Partnership NHS Trust* [2010] EWHC 865 (QB) (paras 82, 89), i.e. whether there was a real prospect or substantial chance of a different outcome? And if the *Van Colle* / *Savage* test remains, in what circumstances does the *Sarjantson* test apply?

(9) **Quantum**: The gulf between damages awards in the domestic cases compared with ECtHR awards remains a rarely litigated issue as cases settle. In light of the principles set out in *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), is there scope for a more aggressive approach from claimants to damages under Articles 2 and 3?

HEATHER WILLIAMS QC
JESSE NICHOLLS

DOUGHTY STREET CHAMBERS

23 June 2015