

Public Law Project: Judicial Review Trends and Forecasts 2016
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Session 6:
Public law, public inquiries and public accountability
– using judicial review to investigate State failures

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1. This paper considers some of the obligations and powers under which the State comes to investigate deaths, incidents of serious harm and abuse, and other forms of wrongdoing. These obligations and powers can, in limited circumstances, be used in judicial review proceedings to challenge decisions of Government and other public authorities on whether to conduct an investigation, and, if so, what form of investigation is required. This is a very large topic so this paper aims to provide a summary of some of the main principles, including:
 - (1) What purposes do public investigations serve?
 - (2) When do duties to investigate arise under statute, the common law, the European Convention on Human Rights 1998 (“the Convention”) and international law?
 - (3) When a duty to investigate is triggered, what is required of the State to satisfy it?
 - (4) What grounds are available when seeking judicial review of a decision not to investigate, and what approach will a court take to such a challenge?

Duties and powers to investigate

Coroners

2. Coroners are under a statutory duty to investigate certain deaths occurring within their jurisdiction. Under section 1 of the Coroners and Justice Act 2009, a coroner

who is made aware that the body of a deceased person is within that coroner's area must conduct an investigation into the person's death if the coroner has reason to suspect that the deceased died a violent or unnatural death, the cause of death is unknown, or the deceased died while in custody or otherwise in state detention. Under section 1(7) a coroner can make "*whatever enquiries seem necessary*" in order to decide whether or not the duty to investigate arises. Under section 4 coroners are now under a duty to discontinue an investigation into a non-custody death where the coroner is satisfied that the death was a natural one, and there is no other cause for concern. The effect is that "natural causes" deaths (other than those relating to apparently natural causes deaths in custody) do not generally proceed to an inquest.

Public inquiries

3. Under section 1 of the Inquiries Act 2005 a Minister has a power to set up a public inquiry where it appears to him / her that particular events have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred. Section 1 confers a very broad discretion and the circumstances in which this discretion may be exercised are:

"...infinitely variable. A common theme, however, has been that the subject matter of the inquiry has exposed some possible failing in systems or services, and so has shaken public confidence in those systems or services, either locally or nationally... The history of inquiries suggests that ministers will call an inquiry only if there are special circumstances that require something beyond the normal investigative or regulatory procedures. For example, a problem might have very wide ranging implications, or responsibility for investigation might be spread across several different agencies. An inquiry has the advantage of being able to address the problem as a whole, to conduct an overarching investigation and identify areas for improvement in communications. Sometimes agreed procedures do already exist for joint investigations by different agencies, but inquiries have proved useful in the past when there have been difficulties in conducting a sufficient investigation through the agreed procedures" (Beer, *Public Inquiries*, at [2.03]-[2.04])

4. For a number of the reasons set out above, particularly the ability of a public inquiry to conduct an overarching investigation across a range of different agencies and learn lessons, a public inquiry may be particularly appropriate where "*evidence emerges from a death or number of deaths of [i.e. caused by] an administrative practice...defined [by Articles 2 and 3 case law] as 'an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to*

amount not merely to isolated incidents or exceptions but to a pattern or system”
(Thomas et al, *Inquests: A Practitioner’s Guide*, at [21.25]).

5. A number of inquiries under the 2005 Act were set up to examine deaths, abuse and serious ill-treatment arising from a system or pattern of wrongdoing and neglect, e.g. the Baha Mousa Inquiry into the death of an Iraqi man while in British Army custody in Basra, Iraq in September 2003; the Mid-Staffordshire NHS Foundation Trust Inquiry which followed concerns about standards of care at the Trust and a report published by the Healthcare Commission in March 2009; the Undercover Policing Inquiry into undercover operations since 1968, including allegations that social justice campaigners were systematically targeted.

Other statutory inquiries

6. Inquiries can be set up under section 14(2)(b) of the Health and Safety at Work Act 1974 (to investigate accidents, occurrences and situations that it is considered necessary to investigate for the purposes of the Act) and under section 20 of the Equality Act 2010 (which confers a power on the Equality and Human Rights Commission to conduct an investigation into compliance with equality legislation where it suspects that an unlawful act may have been committed).

Non-statutory inquiries

7. Numerous inquiries, reviews and panel investigations have been set up by Government outside the Inquiries Act 2005 regime. It has been suggested that these inquiries reflect the public interest (as opposed to legal) duty to investigate matters of public concern, particularly where it has direct or indirect responsibility.
8. Governments are often attracted to a non-statutory inquiry model because it provides greater procedural flexibility, the strict requirements of the 2005 Act and the 2006 Rules do not apply (including the requirement to sit in public), and there is a greater chance that the inquiry will be completed more quickly, with less involvement of lawyers and with a subsequent saving of costs.
9. The disadvantages of using a non-statutory inquiry include an inability to compel the production of documents or the attendance of witnesses, the consequent risk that such an inquiry may fail to discharge the investigative obligations imposed by

the Convention, and the risk that the inquiry's conclusions will be undermined by the non-disclosure of material to it, or that that will be a public perception (Beer, *Public Inquiries*, at [2.08]-[2.28]).

10. A number of recent, high-profile issues of considerable public interest have been investigated through non-statutory reviews and panel reports (e.g. the Harris Review into the self-inflicted deaths of 18-24 year olds in custody; the Ellison Review into allegations of Metropolitan Police corruption in the investigation into the death of Stephen Lawrence; the Hillsborough Independent Panel into the deaths of 96 football fans killed at Hillsborough Stadium in 1989 (the deaths were recently held to amount to an unlawful killing by an inquest jury); the panel investigation into the murder of Daniel Morgan, a private investigator who was killed in 1987 in circumstances in which police involvement and collusion is alleged).

Article 2 of the Convention

11. The State is required automatically to conduct an effective investigation into deaths following a police shooting or restraint, self-inflicted deaths in custody, deaths of military conscripts, and self-inflicted deaths in compulsory mental health detention (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [31], [50]; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, at [58]-[59], [61], [113]; *R (Smith) v Oxfordshire Deputy Coroner* [2011] 1 AC 1, at [84], [98]; *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), at [72]-[91]). An investigation is also required where there is an arguable breach by the State of the right to life, i.e. where the substantive obligations under Article 2 have 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 (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, at [3], [19]; *Savage v South Essex Partnership Trust* [2009] 1 AC 681, at [4]).
12. The case for an effective public investigation will be greater where an accumulation of identical or analogous breaches occur which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system (*Ireland v UK* (1979) 2 EHRR 25, at [159]; *France v Turkey* (1984) 6 EHRR 241, at [19]; *Aslakhanova v Russia* (App. No. 2944/06), at [217]; *R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at [192]).

13. The duty to investigate may be triggered where it is arguable that the State has breached its substantive obligations to protect life. There are a number of these substantive obligations.
14. The negative obligation requires that the use of lethal force must be “*no more than absolutely necessary*” for meeting the purposes under Article 2(2) (*McCann v UK* (1996) 21 EHRR 97, at [149]). This is judged by reference to the circumstances which the killer honestly believed to have occurred, but the court must take into account the reasonableness of that belief (*Da Silva v UK* (App. No. 5878/08)). The State must put in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use lethal or potentially lethal force, e.g. firearms or restraint. National law regulating the planning and conduct of operations where lethal force may be used must secure effective safeguards against arbitrariness, abuse of force, and even against avoidable accident (*Nachova v Bulgaria* (2006) 42 EHRR 43, at [93]-[102]). Operations that may include resort to lethal force must be planned and controlled to minimise, to the greatest extent possible, recourse to lethal force and the loss of human life. This includes the planning and execution of the operation *following* the use of force (*Finogenov v Russia* (App. Nos. 18299/03 and 27311/03), at [208], [237], [266]). Detailed and precise guidance will be necessary for the use of firearms, restraint and CS gas (*Nachova v Bulgaria* (2006) 42 EHRR 43; *Saoud v France* (App. No. 9375/02); *Tali v Estonia* (App. No. 66393/10)).
15. The State is under an obligation to put in place systems, precautions and procedures which will protect life (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [30]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, at [2]; *Öneryildiz v Turkey* (2005) 41 EHRR 20, at [73], [89]; *Smith v Ministry of Defence* [2014] AC 52, at [68]). For example, this has been held to include a duty to:
 - (1) Minimise opportunities for suicide of those in custody (*Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681, at [30]).
 - (2) Employ and train competent staff, vet staff appropriately, and adopt safe systems of work (*Savage v South Essex Partnership NHS Foundation Trust*

[2009] 1 AC 681, at [30], [45], [50], [97]; *Gorovenky and Bugara v Ukraine* (App. Nos. 36146/05 and 42418/05)).

- (3) Put in place training, instructions and equipment for State agents (*Kakoulli v Turkey* (2007) 45 EHRR 12, at [110]).
 - (4) Have in place systems which will detect and remedy individual failings (*Öneryildiz v Turkey* (2005) 41 EHRR 20, at [89]-[95]).
 - (5) Adopt measures and make regulations for the protection of patients' lives (*Cavelli v Italy* (App. No. 32967/96), at [49]; *Tarariyeva v Russia* (App. No. 4353/03), at [74]).
 - (6) Organise and coordinate healthcare services to minimise risks to life (*R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, at [69]-[70]; *Asiye Genç v Turkey* (App. No. 24109/07); *Fernandes v Portugal* (App. No. 56080/13), at [114]).
 - (7) Put systems in place to provide appropriate equipment to protect soldiers from the risk posed by the extreme temperatures (*R (Smith) v Oxfordshire Deputy Coroner* [2011] 1 AC 1).
16. The State is also under a duty to safeguard against risks to life posed by a range of dangerous activities, whether created by the State or not. Where the right to life may be at stake, the authorities are required to assess all the potential risks inherent in the relevant activity and 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, at [71]; *Kolyadenko v Russia* (2013) 56 EHRR 2, at [158], [166]; *Gorovenky and Bugara v Ukraine* (App. Nos. 36146/05 and 42418/05)). This obligation has been held to apply to a range of risks to public health, including a failure to provide masks to protect state employees from asbestos exposure¹ (*Brincat v Malta* (App. No. 60908/11), at [101]), a failure to provide information about the dangers of deep sea diving (*Vilnes v Norway* (App. No. 52806/09)), the dangers posed by 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)), the dangers inherent in a waste disposal site

(*Öneryildiz v Turkey* (2005) 41 EHRR 20), and flash floods (*Kolyadenko v Russia* (2013) 56 EHRR 2).

17. The State is under an operational obligation to take preventative measures to protect someone whose life is at real and immediate risk from a risk that is known (or should be known) to the authorities (*Osman v UK* (2000) 29 EHRR 245, at [115]-[116]). Whether preventative measures would have changed the outcome is irrelevant; the duty to investigate arises all the same (*Sarjantson v Chief Constable of Humberside* [2013] EWCA Civ 1252, at [26]-[29], [31]). A “real” risk is one that is “a substantial or significant risk and not a remote or fanciful one”. A risk of 5%-20% has been held to be “real”. An “immediate” risk to life is one that is “present and continuing” but not necessarily apparent just before death (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, at [38]-[40]). The operational obligation can arise where someone faces a risk to life from a third party, from self-harm or, in certain circumstances, from a life-threatening medical condition (*Osman v UK* (2000) 29 EHRR 245; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72; *Daniel v St George's Healthcare NHS Trust* [2016] 4 WLR 32, at [14]-[29]; *Fernandes v Portugal* (App. No. 56080/13)).
18. The UK is required to protect life and prevent serious harm to those affected by British agents abroad where the UK is carrying out public powers abroad and “the State through its agents exercises control and authority over an individual” (*Smith v Ministry of Defence* [2013] 3 WLR 69, at [46]). The UK’s Article 2 and 3 obligations can therefore extend to servicemen serving outside the UK’s territory (*Smith v Ministry of Defence* [2013] 3 WLR 69, at [55]) and to civilians detained or subjected to the use of force by British personnel (*Al-Skeini v UK* (2011) 53 EHRR 18).
19. The Court of Appeal has recently held that for Article 2 to apply extraterritorially, there must have been an element of control of the deceased prior to the use of force (*R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811, at [69]-[73]). The obligations under Article 3 can apply abroad where British troops are directly responsible for ill-treatment, where an individual is tortured or mistreated by another State under the UK’s instigation, or where UK hands a detainee to another State and has a sufficient level of involvement in subsequent mistreatment to amount to complicity (*R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811, at [106], [121]-[131], [134]-[138]).

20. In limited circumstances the duty to investigate under Article 2 (and 3¹) requires an investigation of historic deaths that occurred years or even decades ago. There are two types of case to consider: where the death occurred prior to 1966, when the right of individual petition to Strasbourg was first recognised in the UK (pre-ECHR cases); and where the death occurred prior to 1 October 2000, the date of the coming into force of the HRA 1998 (pre-HRA cases). The bulk of cases in which issues may arise will be pre-HRA cases.
21. In pre-ECHR cases, the investigative obligation will arise if (1) the lapse of time between the death and the critical date – 1966 – is reasonably short and does not exceed ten years (a “genuine connection”, and (2) relevant investigative acts or omissions occurred (or should have occurred) after the critical date, e.g. where there had been no full or public investigation prior to the critical date and compelling evidence had come to light after that date (*R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665, at [70]-[87]; *Janowiec v Russia* (2014) 58 EHRR 30, at [146]-[148]).
22. In pre-HRA cases (i.e. cases where the death(s) occurred between 1966 and 1 October 2000),
23. In pre-HRA cases, there is no obligation to conduct an inquiry into a death prior to the coming into force of the HRA or to re-open pre-HRA inquiries that did not comply with the procedural obligation, i.e. the HRA does not have retrospective effect (*Re McKerr* [2004] 1 WLR 807; *Re McCaughey* [2012] 1 AC 725; the Supreme Court in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665 did not revisit this question [97], [249]). This is subject to the following issues:
- (1) If the investigation into the pre-HRA death was started prior to October 2000 but had not concluded, the outstanding investigation post-HRA should comply with the procedural obligation (*Re McCaughey* [2012] 1 AC 725, at [89]; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for Defence* [2014] EWCA Civ 312, para 99). In *Re McCaughey* the coroner received the case papers in 1994, six years before the coming into force of the HRA. The Supreme Court held that there existed

¹ See *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB).

an outstanding investigation (the inquest) which had to be compliant with the procedural obligation.

- (2) The procedural obligation may be revived where, after October 2000, a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible, and which is sufficiently weighty to warrant a new round of proceedings (*Re McCaughey* [2012] 1 AC 725, at [56], [63]; *Brecknell v UK* (2008) 46 EHRR 42, at [71]; *Harrison v UK* (App. No. 44301/12)). The investigative measures required to satisfy the procedural obligation in these circumstances are flexible, will vary depending on the situation, and may be less rigorous than the full procedural obligation would require (*Brecknell v UK* (2008) 46 EHRR 42, at [71]).
- (3) There are some comments from members of the Supreme Court in *Re McCaughey* [2012] 1 AC 725 which arguably suggests that where the State initiates an investigation after October 2000 into a pre-HRA death, even if that initiation is not required by the procedural obligation, the new investigation can then be required to comply with the investigative obligation [50]-[51], [56], [61]-[62], [65], [76]-[77], [93]).
24. Finally, the obligation to investigate may also arise in limited cases where there is no arguable breach 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), at [52]-[54]; *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7, at [92]-[97]; *Menson v UK* (2003) 37 EHRR CD 220).

Article 3 of the Convention

25. Under Article 3 the duty to investigate arises where the State is provided with credible allegations that treatment in violation of Article 3 has taken place, including where the harm was caused by one private individual against another or by an agent of the State (*El Masri v Macedonia* (2013) 57 EHRR 25, at [186]; *Milanovic v Serbia* (2014) 58 EHRR 33, at [85]; *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, at [23]-[25], [36]-[37], [41]).

26. The substantive obligations under Article 3 largely mirror those under Article 2 (set out above):
- (1) A negative obligation to refrain from inflicting treatment or punishment that violates Article 3 (*Pretty v UK* (2002) 35 EHRR 1, at [50]).
 - (2) A systems obligation requiring the State to have in place adequate legislation and policies to prevent the occurrence of treatment violating Article 3 (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), at [223]; *R (C) v Secretary of State for Justice* [2009] QB 657).
 - (3) An operational obligation to take reasonable measures to protect individuals from real and immediate risks of Article 3 treatment of which the authorities know or ought to know (*Z v UK* (2001) 34 EHRR 97, at [73]; *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04); *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, at [23]; *Al Nashiri v Poland* (2015) 60 EHRR 16, at [509]).

Article 4 of the Convention

27. The duty to investigate under Article 4 arises where the authorities are provided with credible allegations of trafficking, domestic servitude and other forms of modern slavery (*OOO v Commissioner of Police for the Metropolis* [2011] HRLR 29; *Rantsev v Cyprus* (2010) 51 EHRR 1).

International law

28. Article 3(b) of UN General Assembly Resolution 60/147 (16 December 2005) on The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of Humanitarian Law provides that “*The obligation to ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: ... (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.*”

29. Under Articles 18 and 22, victims of gross violations of international human rights law and serious violations of international humanitarian law should be provided with full and effective reparation, which should include full and public disclosure of the truth and an official declaration as to what happened so as to restore the dignity of the victim(s) and their family members.
30. The Basic Principles were considered by the Supreme Court in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665. The appellants challenged the refusal to initiate an inquiry into an alleged massacre in Malaya of 24 unarmed people in 1948 by British troops. The court held that the Basic Principles did not create a free-standing duty under international law to investigate suspicious deaths and if it did, it could not apply decades after the deaths in circumstances where Parliament had expressly created a number of ways in which deaths are required to be and can be investigated.
31. In *Al-Saadoon v Secretary of State for Defence* [2015] 3 WLR 503 the court considered whether Article 12 of the UN Convention Against Torture (UNCAT) imposed a duty to investigate on the UK and / or whether the provisions of UNCAT had any impact on the existing investigative obligations under Articles 2 and 3 of the ECHR. The court concluded that UNCAT was not directly enforceable in UK law, was not a part of customary international law, and therefore was not part of the common law. It therefore did not trigger a freestanding obligation to investigate. Further, the duty to investigate under UNCAT added nothing to the arguable breach threshold that applies to trigger an investigation under Article 3 ECHR [266]-[279].
32. The European Convention on Action Against Trafficking in Human Beings (ECAT) provides for investigations into or prosecution of trafficking offences under the Convention. ECAT states that proceedings should not be reliant on a complaint from the victim, and requires that protection and support be given to victims and witnesses. ECAT can be used to interpret the investigative requirements of Article 4 of the Convention.

The purposes of public investigations

33. Case law suggests that public inquiries and investigations may serve a number of purposes, including: establishing the facts; ensuring accountability, identifying wrongdoing, blameworthy conduct and culpability; learning lessons; restoring public confidence in a public authority or the Government; providing an opportunity for catharsis, reconciliation and resolution; developing policy or legislation; and discharging investigative obligations derived from the Convention (Beer, *Public Inquiries*, at [1.01]-[1.10]).
34. It is generally not the purpose of public inquiries and investigations to determine civil or criminal liability, though there is no prohibition on fact-finding that points, even strongly, to such liability (e.g. section 2 of the Inquiries Act 2005; section 10(2) of the Coroners and Justice Act 2009).
35. Different forms of public investigation have different stated purposes.

Coronial investigations

36. The Broderick Committee (1967-1971) suggested that coroners' investigations served the following public interests: determine the medical cause of death; allay rumours of suspicion; draw attention to the existence of circumstances which, if unremedied, might lead to further deaths; advance medical knowledge; and preserve the legal interests of the deceased's family, heirs or other interested persons. This illustrates that the investigative purposes identified under Article 2 have long been recognised under domestic law.
37. The purposes of coronial investigations are now set out in section 5 Coroners and Justice Act 2009. Their investigations must ascertain: birth and death particulars; who the deceased was; and how, when and where the deceased came by his or her death, including in what circumstances the death occurred where this is necessary under Article 2 of the Convention. Coronial investigations also have a lesson-learning purpose under Paragraph 7, Schedule 7 Coroners and Justice Act 2009. Where a coroner's investigation gives rise to a concern of a future risk of death, the coroner must report this to the body that can take action if he / she is of the opinion that action should be taken to prevent future deaths. This duty can be triggered at the commencement of the investigation, prior to the inquest hearing,

and can relate to deaths in differing circumstances to the case in which the concern has arisen.

Public inquiries

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39. In a number of recent high-profile deaths, public inquiries have been used to meet the State's obligations under Article 2 by examining the circumstances of death where inquests could not take place. For example, the inquiries into the police shootings of Azelle Rodney and Anthony Grainger have been required because an inquest is not permitted to hear covertly obtained RIPA phone-tap evidence, while the inquiry into the assassination of Alexander Litvinenko was required as the inquest could not receive and publicly consider sensitive national security material protected by public interest immunity.
40. The MacPherson Inquiry into the racist murder of Stephen Lawrence was set up where the inquest alone could not examine the wider circumstances of his death, and where the public interest required greater investigation of systemic issues. The Harris Review was established to consider numerous self-inflicted deaths in custody which give rise to systemic concerns that could not be addressed by the individual inquests into each death.
41. Panel investigations may be set up not only to investigate a particular event, but also to manage the disclosure of documents surrounding that event. The Hillsborough Independent Panel was tasked with facilitating disclosure to the

families, then to the public, and providing a report on what the disclosure added to public understanding of the disaster.

Article 2 investigations

42. The Article 2 duty requires an investigation into all the facts surrounding the death which will ensure that the full circumstances are brought to light, culpable and discreditable conduct will be brought to public notice, result in the accountability and punishment of those at fault, allay rumour and suspicion of wrongdoing, and ensure that lessons are learned, dangerous practices are rectified and mistakes are corrected so that those who have lost their loved may at least have the satisfaction of knowing that lessons learned from the death may save the lives of others (*R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, at [11]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [31]; *Öneryildiz v Turkey* (2005) 41 EHRR 20, at [91]; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, at [29]).

Article 3 investigations

43. The purposes of an Article 3-compliant investigation include protecting individuals from serious ill-treatment, securing confidence in the rule of law in a democratic society, demonstrating that the State is not colluding with or consenting to criminality, guarding against impunity, and learning lessons and searching for improvements to prevent future incidents from occurring (*DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, at [43]-[44], [50], [59], [61]-[62]; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), at [212]; *Milanovic v Serbia* (2014) 58 EHRR 33, at [86]; *El Masri v Macedonia* (2013) 57 EHRR 25, at [192]; *R (Mousa) v Secretary of State for Defence* [2010] EWHC 3304, at [111]; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, at [57]-[60]; *Velev v Bulgaria* (App. No. 43531/08), at [50], [62]; *Menson v UK* (2003) 37 EHRR CD 220, at [229]).

The requirements of an investigation

Coroners

44. Where a coroner conducts a common law, non-Article 2 inquest, the investigation must be a full, fair and fearless examination of the facts, and its boundaries must not be set too narrowly, particularly where there is acute public concern regarding the death (*R v HM Coroner for North Humberside ex parte Jamieson* [1995] QB 1, at 26).
45. Coronial investigations are required to be conducted promptly (sections 1 and 18 Coroners and Justice Act 2009; Rule 18 Coroners (Inquests) Rules 2013) and in public, unless national security requires the exclusion of the public (Rule 11 Coroners (Inquests) Rules 2013). The statutory requirements for promptness and publicity are consistent with the Article 2 requirements.

Convention investigations

46. The investigation required by Article 2 should satisfy a number of requirements (see, in general: *Jordan v UK* (2001) 37 EHRR 52, at [105]-[109], [143]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [20], [32]; *R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at [148]; *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, at [22], [52]):
 - (1) The authorities must act of their own motion in initiating the investigation.
 - (2) The investigation must be independent. This means not only a lack of hierarchical or institutional connection but also practical independence (*Jordan v UK* (2001) 37 EHRR 52, at [106]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [20(7)]). Initial inquiries into a death may breach the Convention where they are carried out by an organisation implicated in the death (*Brecknell v UK* (2008) 46 EHRR 42, at [72]). In a number of cases a lack of investigative independence at the outset, including in the first few hours following a death, contributed to a breach of the right to life (*Ramashai v The Netherlands* (2008) 46 EHRR 43, at [339]; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, at [37], [42], [74]-[75],

[94]-[95]; *Jaloud v The Netherlands* (2015) 60 EHRR 29). However, some domestic cases suggest that immediate independence is not required, or can be remedied by later investigations (*R (Antoniou) v Central and North West London NHS Foundation Trust* [2013] EWHC 3055 (Admin); *R (AB) v Secretary of State for Defence* [2013] EWHC 3908 (Admin); *R (Morrison) v Independent Police Complaints Commission* [2009] EWHC 2989 (Admin)).

- (3) The investigation must lead to a determination of whether any force used was justified.
- (4) It must examine the immediate and wider circumstances of the death, including the instructions, training and supervision given to State agents, and the systemic defects or regulatory shortcomings that caused or contributed to the death (*R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at [148]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, at [30], [31], [36], [45]).
- (5) The investigation must be capable of identifying culpable and discreditable conduct and punishing those responsible, through criminal or disciplinary measures. While there is no right to have someone prosecuted, the State must not appear to collude in or tolerate breaches of the Convention and the European Court has repeatedly held that national authorities should not be prepared to allow life-endangering offences to go unpunished (*Mojsiejew v Poland* (App. No. 11818/02), at [53]; *Öneryildiz v Turkey* (2005) 41 EHRR 20, at [96]). Disciplinary action plays an important role in the vindication of a victim's Article 2 rights and may be required even where other investigations have taken place (*Vo v France* (2005) 40 EHRR 12, at [90]; *Velev v Bulgaria* (App. No. 43531/08), at [50], [62]; *Gafgen v Germany* (2011) 52 EHRR 1, at [125]; *R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin), at [52]). The requirement that the investigation be capable of punishing those responsible also arises under Article 3 (*El Masri v Macedonia* (2013) 57 EHRR 25, at [182]; *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, at [22], [52]).
- (6) Reasonable steps must be taken to secure all relevant evidence concerning the death and its circumstances, including eyewitness testimony, forensic evidence and an autopsy (*Jordan v UK* (2001) 37 EHRR 52, at [107];

Ramsahai v The Netherlands (2008) 46 EHRR 43, at [321]). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of the Article 2 requirement (*Tunc v Turkey* (App. No. 24014/05), at [174]; *Giuliani v Italy* (2012) 54 EHRR 10, at [301]). For example, allowing officers to confer following a fatal incident before giving their first account of events may contribute to a breach of the investigative obligation (*R (Delezuch) v Chief Constable of Leicestershire* [2014] EWCA Civ 1635; *Jaloud v The Netherlands* (2015) 60 EHRR 29, at [207]-[208], [227]). The expectation on the authorities is a high one as regards evidence-gathering. Even a relatively short delay in evidence collection, or difficulties 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, at [104]; *Al-Skeini v UK* (2011) 53 EHRR 18, at [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)).

- (7) The investigation must identify the steps needed for the rectification of dangerous practices and procedures.
- (8) It must be prompt. This is essential in order to maintain public confidence, prevent any appearance of collusion in or tolerance of unlawful acts, and to ensure that the amount and quality of evidence is not eroded (*Edwards v UK* (2002) 35 EHRR 19, at [72], [86]; *R (JL) v Secretary of State for the Home Department* [2009] 1 AC 588, at [74]).
- (9) The next of kin or victim must be involved to a sufficient extent. This may require public funding for them to be involved in the investigation, adequate advance disclosure, an opportunity to question witnesses or suggest lines of enquiry or questioning, and the ability to attend any hearings where relevant evidence is heard (*Edwards v UK* (2002) 35 EHRR 19, at [84]; *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, at [46]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 632, at [37], [46]; *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), at [68], [70]). Effective family involvement is also important to any consideration of catharsis and therapeutic exposure (*R (Chong Nyok Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2445 (Admin), at

[157]; *R (Mousa) v Secretary of State for Defence* [2013] EWHC 2941 (Admin), at [22]). However, there are limits to the requirement for effective participation. Full access to the investigation is not required, the authorities are not required to satisfy every request for a particular investigative measure, and the family are not required to be consulted or informed of every step (*Ramsahai v The Netherlands* (2008) 46 EHRR 43, at [347]-[349]; *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10, at [304]; *Brecknell v UK* (2008) 46 EHRR 42; *R (Mousa) v Secretary of State for Defence* [2013] EWHC 2941 (Admin), at [34]).

47. Similar minimum requirements apply to investigations into an incident of near-fatal self-harm in custody and into serious ill-treatment and abuse under Article 3 (*R (JL) v Secretary of State for Justice* [2009] 1 AC 588; *R (Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334, at [12]-[13]; *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, at [53]; *Al-Saadoon v Secretary of State for Defence* [2015] 3 WLR 503, at [278]).
48. A Convention-compliant investigation will not always be required to these standards in full, depending on the circumstances and severity of the case (*Tunc v Turkey* (App. No. 24014/05), at [176], [225]). Similarly, the Court of Appeal has held that a sliding scale applies; the energy, intensity and rigour required of the State's investigation varies depending on the nature and severity of the harm alleged to have taken place (*DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, at [43]-[46], [50], [59]-[62]). Under Article 3 the Court of Appeal has previously observed that satisfaction of the investigative obligation depends 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, at [44]).
49. Under Article 2 no one single State organisation is required to meet every investigative requirement. The entirety of the State's investigative apparatus is assessed in the round, including criminal and disciplinary proceedings, regulatory investigations, and any inquest into the death (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [47], [52]; *R (P) v Her Majesty's Coroner for the District of Avon* [2009] EWCA Civ 1367, at [33]; *R (Morrison) v Independent Police Complaints Commission* [2009] EWHC 2989 (Admin); *R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, at [58]; *R (AB) v Secretary of*

State for Defence [2013] EWHC 3908 (Admin), at [32]-[35]; *R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin), at [52]).

50. A similar approach applies under Article 3 (and, presumably, Article 4). The following investigative measures are relevant: criminal and disciplinary proceedings; internal, non-independent investigations; regulatory investigations (*DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, at [57]-[58]; *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), at [222]; *Allen v Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967, at [51]; *AM v Secretary of State for the Home Department* [2009] UKHRR 973, at [31]; *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, at [54]).
51. Civil proceedings may also be relevant under Article 3 (and 4) (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, at [55]; *Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin), at [16]; cf *AM v Secretary of State for the Home Department* [2009] UKHRR 973, at [33], [114]-[118]).

Challenging decisions not to investigate

52. Where a Minister or other public authority determines whether to hold an inquiry or direct an investigation, she must comply with conventional public law principles: the decision maker must act within her statutory powers and apply the correct legal tests; she must take account of relevant considerations and not place reliance on irrelevant ones; she must comply with her *Tameside* duty to ask the right questions, take reasonable steps to acquaint herself with the relevant information to answer them correctly, and provide answers to those questions (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014); she must comply with the requirements of procedural fairness, including hearing representations if that is required by statute or by the circumstances of the case; adequate reasons must be provided, explaining publicly why an inquiry will not take place in sufficient detail to reflect the gravity of the subject matter; and she must reach a rational conclusion that is reasonably open to her (a particularly high hurdle where the decision under challenge is a refusal to exercise the discretion under the Inquiries Act 2005 (see *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665), though not an insurmountable hurdle

(see *R (Litvinenko) v Secretary of State for the Home Department* [2014] HRLR 6)).

53. When seeking to challenge a decision on the basis of failure to take into account material considerations, the relevant test is whether a consideration has been omitted, which *had* account been taken of it, might have caused the decision maker to reach a different conclusion (*R v Parliamentary Commissioners for Administration ex parte Balchin* [1998] 1 PLR 1). Given that there will almost always be multiple reasons at play when refusing to set up a public inquiry, the requirement to show that a failure to take a matter into account was material to the decision will be particularly difficult.
54. Where a decision on whether to initiate an investigation engages and may breach Convention rights, the failure to act compliantly with the Convention is a ground of illegality to which a more anxious standard of review will be applied. The court should consider for itself what the Convention requires, paying appropriate deference to the decision maker's view.
55. Most recent challenges to decisions not to institute an inquiry have involved arguments on the extent of the investigative obligations under the Convention, including its extraterritorial application (*R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811); whether the Convention obligations have been or will be discharged by other means (e.g. inquests, criminal proceedings, civil proceedings), and if not, what form of investigation should discharge them (*R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin)); and whether the combined effect of domestic, Convention and other international obligations has converted the legal power under the Inquiries Act 2005 into a duty to investigate (*R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665).

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